

MED-ARB: AN ARGUMENT FOR FAVORING *EX PARTE* COMMUNICATIONS IN THE MEDIATION PHASE

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*"[Med-arb] proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution."**

I. INTRODUCTION

Combining mediation with arbitration, a practice as old as ancient Greece, is a dispute resolution design process that has been drawing increasing attention in recent years. Users are consistently calling for providers to offer services that result in more expeditious resolution at lower cost. For example, in a survey conducted in January of 2013 by the International Mediation Institute (IMI), 75% of the users responded that arbitration providers should actively encourage parties to an arbitration proceeding to use mediation to settle their disputes.¹ Providers are keenly aware of these user demands and all are focused on providing solutions. The AAA and ICDR have for many years had their case managers suggest mediation at the inception of the case and periodically throughout the arbitration as the IMI survey suggests. The ICC in the Appendix to its 2011 rules amendment provided that "where agreed by the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute,"² a provision similar to that found in the institutional rules of several other providers. A closer examination of med-arb and arb-med is accordingly timely.

The traditional arb-med and med-arb process modalities include: (1) Med-arb: if an impasse in the negotiations cannot be overcome the mediator serves as the arbitrator; (2) Arb-med or

* *Bowden v. Weickert*, No. S-02-017, 2003-Ohio-3223, 2003 WL 21419175, at *6, ¶ 34 (Ohio App. 6 Dist. June 20, 2003).

¹ International Mediation Institute, IMI International Corporate Users ADR Survey, Jan.-Mar. 2013.

² ICC Arbitration and ADR Rules, Appendix IV - Case Management Techniques, Section (h)(ii).

arb-med-arb: the appointed arbitrator attempts to mediate (or conciliate) the case but if a settlement is not achieved returns to the role as arbitrator;³ (3) Co-med-arb: the mediator and the arbitrator hear the parties' presentations together, but the mediator then proceeds to attempt to settle the dispute without the arbitrator, who is only called back in to enter a consent award or to serve as an arbitrator if the mediation fails; (4) MEDALOA (Mediation and Last Offer Arbitration): if the mediation fails, the mediator (now arbitrator) is presented with a proposed ruling by both parties and must decide between the two as in a baseball arbitration; (5) High-low: if the mediation fails the mediator now serving as an arbitrator must decide within the range of the final offers by the parties. Many variations of these combinations can be employed depending on the needs of the parties.

The subject of this article is the use, with the informed consent of the parties, of the same individual as both mediator and arbitrator, a mixing of roles that has drawn both supporters and critics. On larger cases the expenditure of time that must be incurred by counsel and clients for educating two neutrals, the mediator and the arbitrator, may well be appropriate and acceptable. However, when in lower value cases time and cost savings are an important objective, employing the same neutral for both roles can be the right choice. In my view, cases with a dollar value of up to \$5 million, a number within the range of many international commercial disputes, could fall into this category, as the cumulative costs by all parties of pursuing an adjudicatory resolution are often disproportional to the amount at which settlement could be achieved.

Further, the focus in this article is on an unrushed mediation close to the commencement of the dispute as distinguished from attempts by an arbitrator to serve as a facilitator of a settlement after receiving the pre-hearing submissions or at the conclusion of the hearing before an award is rendered. Such arbitrator settlement attempts late in the process tend to focus largely on an analysis of the merits of the claims with the tribunal delivering its

³ In much of the literature on the subject "arb-med" is limited to a process in which a full arbitration hearing is held, the arbitrator drafts the award but seals it and keeps it from the parties. The arbitrator then attempts to mediate the dispute. If the mediation fails the award is issued. In this article, arb-med is used in reference to any process in which the neutral is appointed as an arbitrator before the mediation.

preliminary views or, depending on the tradition, tend to be largely restricted to the role of a messenger conveying settlement terms proposed by the parties. Neither of these techniques allows for the exploration and development of the parties' interests which may be most important to fostering a settlement. Moreover, such attempts are at a juncture of the proceeding when the great bulk of the time and expense associated with the arbitration has already been expended.

II. CASE STUDIES

My own interest in med-arb and arb-med processes started years ago, initially as an academic interest. It is an intriguing, multi-faceted subject and has been discussed extensively.⁴ However, in the last year my interest grew beyond the academic as I found the flexibility of the process immensely useful to enabling the parties to achieve the resolution they needed. The three situations I encountered in the past year in which a combination of mediation and arbitration were involved are instructive as a backdrop to a review of the most salient process issue with respect to med-arb and arb-med: should *ex parte* communications be allowed in the mediation phase?

Case #1. A mediation, under the aegis of an arbitral institution, was commenced to resolve a U.S. court litigation in which the plaintiff charged the defendant, its former manufacturing sourcing agent in China, with producing products that infringed on its intellectual property rights and with exporting those products from China to its customers in the United States. The defendant denied the charges. It became apparent during the preliminary call with counsel to organize the mediation that there could be no successful mediation without an arbitral award that could be enforced in China. A mediation settlement agreement, just another contract, would simply not suffice. Since it appears that an arbitrator cannot be appointed if there is no longer a dispute under the law of many jurisdictions, the process had to be modified so that an award could be issued if the mediation were successful.⁵

⁴ See, e.g., Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, in *ADR IN BUSINESS* (Arnold Ingen-Housz ed., 2010), and sources cited therein.

⁵ See *id.* note 4, for a discussion of the enforceability of mediation settlement agreements and the need to have the arbitrator appointed before the dispute is resolved if a consent award is to be enforceable under the New York Convention.

I suggested that the parties consider changing the process to an arb-med-arb and begin by appointing me as the arbitrator before the mediation so that if the dispute were resolved in the mediation, I could enter the consent award. The parties accepted the suggestion. I drafted a carefully phrased informed consent form for execution by the parties. In light of the manner in which this process arose, I suggested and provided that the parties had unfettered discretion to require the appointment of a different arbitrator if the matter did not resolve in the mediation. Following a two-day mediation, the dispute was settled and a consent award was available which could be enforced under the New York Convention and so protects the plaintiff in China.

Case #2. An ex-employee was charged by his prior employer with stealing a sophisticated, web-based platform that provides information essential to an industry group. The ex-employee denied the allegation and claimed that he had independently developed a similar business with his own algorithms and web-based platform. Following a lengthy negotiation session lasting late into the night, the parties agreed that the ex-employee would remove from his web platform any pages that were “confusingly similar” to those of his ex-employer and that the ex-employee would be blocked for a period of one year from approaching 100 of his ex-employer’s customers. I agreed that I would continue as the decision maker to compare the web platforms delivered to me on a confidential basis, identify any that were confusingly similar and direct the employee as to any changes required. I also agreed to be the keeper of the confidential list of 100 customers for verification by the ex-employee. This case presented a situation in which the mediation was only capable of being successfully concluded by having the mediator act as a decision maker on the final issues.

Case # 3. The contract, a California contract where this kind of provision is quite frequently utilized, specifically provided for mediation and for the mediator to continue and serve as the arbitrator if the case did not settle in mediation. The contract left it to the mediator’s discretion to decide if he or she would continue as the arbitrator for the case if it did not settle in the mediation phase. The claim was by the attorney in a qui tam case for attorney’s fees asserted to be owed by the relator. I was particularly sensitive to considering how the process should be designed because pursuant to the contract terms I could serve as the arbitrator. Ultimately I did not find myself doing anything differently because of this potential additional role, although I did

ask the parties to sign a consent form with respect to this mixed process, even though it was called for in their contract. As the day progressed, we met in joint sessions, we met in caucuses separately, each party presented its view of the facts, argued the law, vented their frustration, and allowed me to explore their interests and test their legal and factual conclusions. With some follow up after the mediation session, the case settled.

III. *EX PARTE* COMMUNICATIONS

In the abundant literature on med-arb and arb-med, there are those who take the position that arbitration and mediation should not be mixed because mixing the two taints both processes. Others support mixing the processes but suggest various strictures to protect against perceived difficulties raised by combining the two.

The most troublesome issue discussed with respect to a mixed arb-med and med-arb process is the concern that if the mediation phase is conducted with *ex parte* communications, *i.e.*, caucus sessions by the mediator with only one party or only one side of the dispute at a time, due process and natural justice issues are implicated. The parties will not know what has been said to the mediator/arbitrator and the arbitrator may be influenced in making the decision by information that may be false and/or prejudicial as to which the opposing party is not informed or given an opportunity to respond.

In order to address this concern about a combined mediation and arbitration process, it has been suggested that there be no caucus sessions and thus no *ex parte* communications in the course of the mediation where the same neutral may serve as an arbitrator.⁶ Indeed, although the Centre for Effective Dispute Resolution (CEDR) Commission on Settlement in International Arbitration recommended that *ex parte* communications by the neutral be allowed as long as such practice would not render the award unenforceable and offered guidance for the conduct of such communications.⁷ CEDR's Rules for the Facilitation of

⁶ See, *e.g.*, Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, ARB. INT'L (2009).

⁷ Centre for Effective Dispute Resolution, Commission on Settlement in International Arbitration, *Final Report of the Commission* (Nov. 9, 2009), available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf.

Settlement in International Arbitration provide that the arbitrator shall not meet separately with the parties or obtain information that is not shared with the other parties.⁸

This approach is certainly the safer course, but is it the right answer? There are practitioners who believe that all mediations should be conducted only in joint session and that this is the best way to ensure party self-determination.⁹ However, that view is disputed by many mediators. Some arbitral institutions have adopted the opposite position and not only is the arbitrator encouraged to attempt to conciliate the dispute but the arbitrator is expressly permitted to engage in *ex parte* communications with the parties. In my view in commercial, business-to-business, cases (rather than disputes such as family, community, or other disputes where personal issues are dominant) there is often significant utility to having the opportunity to speak separately with the parties to explore all aspects of the mediation and that foregoing this opportunity would impinge upon the efficacy of the mediation.

Accordingly, the question that must be answered is whether the conduct of *ex parte* sessions exposes the parties to a significant risk to their detriment that the mediator now sitting as an arbitrator will have heard and will be influenced by discussions to which they were not privy. I consider this question from the perspective of the three principal elements that are discussed with parties in a mediation as the underpinning for consideration of possible settlement terms: the facts, the law, and the parties' interests.

In none of the three med-arb cases discussed above in which I was involved did the parties share any facts related to the merits of the dispute that they were not willing to share with the other party. In fact, in my experience, in virtually all mediations, when the parties are asked if the facts they described from their perspective can be shared with the other party, they welcome the opportunity. There would be no point to the mediation process if the parties were to withhold facts that they believed to be useful

⁸ Centre for Effective Dispute Resolution, Rules for the Facilitation of Settlement in International Arbitration, art. 5.2 (Nov. 2009), *available at* http://www.cedr.com/about_us/arbitration_commission/Rules.pdf.

⁹ *See, e.g.*, GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008).

to them. It is only on rare occasions that parties choose to withhold facts material to the merits of the dispute, generally in the belief that to present those facts at a later juncture – perhaps sprung on a witness at a deposition or in cross examination at a hearing – would be more advantageous strategically, even though they recognize this approach can doom the mediation. Thus, the concern that there will be facts material to the merits of the controversy asserted in an *ex parte* context with no opportunity to rebut is, in fact, a relatively rare occurrence.

Similarly, in none of the three med-arb cases in which I was involved in the last year did the parties share any legal arguments with me that they were not willing to share with the other party. Again, in practice, this is typical as in virtually all mediations the parties present their legal arguments as forcefully as possible to the opposing parties so as to persuade them as to the merits of the case and to drive the settlement terms to their settlement zone. There is little reason to be concerned that the mediator/arbitrator will hear legal arguments that the opposing party will not have an opportunity to rebut.

However, with respect to the parties' "interests," facts unrelated to the merits of the case but highly relevant to why a party might want to settle the dispute and how the party values the claim, a different mindset prevails. Those are not shared, at least not initially, and often not at all. Part of the mediator's job is to explore those interests, assist in identifying additional interests and help the parties decide if sharing those interests would advance their settlement objectives. The exploration of these interests, facts extraneous to the merits of the case, can be the most significant factors in driving settlement.

There are certain interests which are common to all disputes. A settlement, especially if achieved early in the process, presents the benefit of a more expeditious and less costly resolution, reduced imposition on the parties' time and, significantly, the preservation of control over the outcome. Additional interests can vary tremendously. While occasionally it is a continuing business relationship, an area of mutual interest that is easy to develop, many cases do not have such a motivator for settlement. However, a myriad other concerns can be crucial to the settlement posture. For example, there are other similar disputes on the horizon which could be impacted and must be considered; one party is in the midst of trying to sell the company and must resolve the dispute in order to complete the sale; there are

reputational risks to continuing with the dispute; the respondent is in troubled financial circumstances and simply cannot pay; the claimant has an interest in a speedy cash recovery to invest in a new product; the central witness is no longer employed by the company and may not be a friendly witness; there is an interest in resolving the dispute within the existing fiscal cycle or the next fiscal cycle; there is a reluctance to call necessary third party witnesses; the business relationship between the parties is absolutely crucial to one of the parties. The interests that may surface are as infinite as the circumstances of the cases.

However, rarely do those interests relate directly to an evaluation of the merits of the case. While they are of great significance in helping the parties assess the benefits of a settlement, if the mediation fails, they are generally not relevant to any decision to be made by the arbitrator on the merits. Thus, the interests expressed to the neutral on an *ex parte* basis are generally not material to the merits of the dispute.

Given this conclusion – that it is rare for anything to be disclosed that bears directly on the merits of the dispute that is not shared with all parties, even where *ex parte* communications are allowed – it would seem that rather than barring such communications in all cases because of the risk that it might be a problem in a few, a better solution would be to allow the parties to design their own process in the med-arb agreement.

The parties can follow the Hong Kong model in which the arbitrator can mediate but if the case does not settle in mediation the arbitrator “must disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.”¹⁰ Or the parties can adopt the Chinese model, which prohibits the use in the arbitration of any opinion, view or statement from the mediation.¹¹ If the parties want to maintain even more control, the med-arb agreement can provide that any party can choose to opt out of the med-arb commitment and

¹⁰ Hong Kong Arbitration Ordinance, (2011) Cap 609, § 69. (H.K.).

¹¹ CIETAC Arbitration Rules, art. 45(9) (May 2012), available at <http://cn.cietac.org/rules/rules.pdf>; see also Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why it works in China*, 25(4) J. INT’L ARB. 479, 490 (2008).

require the appointment of another neutral to serve as the arbitrator if the mediation fails.¹²

It is the unique ability of the parties to design their own process that is the special advantage of pursuing dispute resolution outside the courts. Med-arb and arb-med is an area in which this freedom to craft the process provides an avenue for realizing user objectives of reducing time and cost.

IV. A FEW CAUTIONARY NOTES

Mixing the arbitration and mediation process is not without its risks and care must be taken to select an appropriate neutral, make sure that the parties are fully informed and execute a detailed written consent, and that counsel conduct a careful review of the law both in the seat of the arbitration and in the jurisdictions where enforcement might be sought.

A. *The right neutral*

Arbitration and mediation are two completely different dispute resolution modalities. In arbitration the arbitrator is charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case, and analyzing the facts and the law based on the evidence to arrive at the ultimate award. The

¹² Although it should be noted that while allowing this opt-out increases party self-determination and reduces the arguably coercive impact of mediating with the prospective arbitrator, it may also reduce the chances of a successful mediation outcome. Studies support the notion that a settlement is more likely to be achieved if the same neutral serves as both the mediator and the arbitrator in a med-arb process. Where the mediator was to serve as the arbitrator disputants were found to be more conciliatory and made more new proposals and trended towards more concession making. Neil B. McGillicuddy, Gary L. Welton & Dean G. Pruitt, *Third-party Intervention: A Field Experiment Comparing Three Different Models*, 53(1) J. PERSONALITY & SOC. PSYCHOL. 104-12 (1987); accord Dean G. Pruitt, *Process and Outcome in Community Mediation*, NEGOT. J. (Oct. 1995) (in same neutral med-arb, as compared to different neutral med-arb and a straight mediation, the process went “more smoothly” and the parties offered more “creative problem solving”). These results also counter the argument against med-arb that the med-arb mediation process will not be effective because the parties will be less forthcoming with the neutral and will be inclined to use the session to persuade the neutral they are right in preparation for the arbitration phase. While there may be some truth to that assertion, these studies demonstrate that this effect is trumped by countervailing motivations, likely a desire not to lose control of the outcome.

mediator is charged with working with the parties to design a process likely to lead to a settlement, review the parties' interests, delve into their motivations, explore the strengths and weaknesses of the parties' respective legal and factual positions, assist in developing workable solutions, and help parties overcome psychological barriers to settlement. In short, the mediator's role requires use of many of the skills of a psychologist, while the arbitrator's role requires use of many of the skills of a judge.

The trainings offered for each discipline bear little resemblance to one another. For example, a good deal of attention is devoted in arbitration training to how to run an efficient process and manage panel dynamics while in mediation training significant attention is devoted to what to do if the parties are at an impasse. The successful mediator and successful arbitrator utilize a completely different skill set in each role. Not every arbitrator is qualified to be a good mediator and not every mediator is qualified to be a good arbitrator. In selecting the neutral, it is important to consider the qualifications of the neutral for each role and to select someone with a strong reputation for integrity who the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of mediator and arbitrator.

B. *Informed consent*

As discussed below, informed consent is essential to the process if any award that has to be rendered is to be enforced. The informed consent form should be in writing, executed by the parties and by their counsel, and consideration should be given to including provisions which accomplish the following:

- Describe the process with some specificity;
- Discuss that the process cannot proceed as a hybrid of mediation and arbitration without consent;
- Waive the right to move to vacate or oppose confirmation or to challenge the arbitrator based on service as both mediator and arbitrator;
- Describe whether there will be *ex parte* communications and if so waive the right to move to vacate or oppose confirmation or to challenge the arbitrator based on *ex parte* communications;

- Describe how information obtained from *ex parte* communications is to be handled – Will it be disclosed? Will the neutral ignore it?;
- Acknowledge that information received *ex parte* may be false and/or may influence the neutral, perhaps unconsciously;
- Confirm that the clients discussed the process and the special issues it raises with their attorneys;
- Confirm that there is no liability for the neutral for acting in the mixed roles;
- Determine whether or not the parties each have discretion to require a different neutral if the matter does not settle in the mediation phase;
- Confirm that the neutral can step down if he or she no longer feels impartial;
- Sign off by the attorneys confirming that they have discussed the unusual aspects of the med-arb process with their clients;
- Confirmation by the parties that they are fully informed and wish to proceed with this process design.

The parties should be made aware that the neutral may be influenced, whether consciously or unconsciously, by the interests and other matters that were discussed with the neutral during the mediation phase. Study after study has established that the mind's unconscious impacts decision-making.¹³ While many other aspects of the *ex parte* discussions may influence the neutral in decision making, perhaps the gravest concern in this regard is the effect of the psychological phenomenon known as the “anchoring” phenomenon. This known phenomenon leads to decisions which are influenced by numbers that have been presented even though those numbers are not rationally related to the decision to be made.¹⁴ Settlement discussions in a mediation, even if ultimately unsuccessful, generally lead to an exchange of numbers or other terms that demonstrate that the claimant is willing to take less, sometimes significantly less, than the amount of damages demanded. It can be argued that those exchanges will influence the

¹³ See, e.g., Chris Guthrie, Jeffrey J. Raclinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV 1 (2007). While those studies relate to judges, they are equally relevant to decision making by arbitrators.

¹⁴ *Id.*

arbitrator, if the arbitrator determines that there is liability, with respect to the determination of the quantum of damages.

This is a valid concern, but an arbitrator cognizant of the influence of the “anchoring” phenomenon would take special care to assess the damages presentations offered in the arbitration and to make an assessment of damages based only on that evidence without regard to the settlement numbers. This issue raises questions similar to the occasional instances in which settlement negotiation evidence creeps into an arbitration hearing, and in my view does not have any impact on the final award.

C. *Enforceability*

A critical concern is, of course, enforceability. Every new twist in the process design creates another opportunity for post award attack. In the U.S., although no high court has yet ruled on these issues, lower courts in several states have had the opportunity to address med-arb. Those courts have endorsed the ability of the parties to design a med-arb process, including permitting *ex parte* communications that are not disclosed in the arbitration phase.¹⁵ As one court stated, “[Med-arb] proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution.”¹⁶ However, the courts’ decisions all hinge on informed consent. That consent has to be done properly to be effective if there is a later challenge.

Which other jurisdictions would similarly accept what is in essence a waiver of due process if *ex parte* communications are held is open to question. For example, some would argue that the U.K. Human Rights Act of 1998 should be viewed as precluding a waiver of procedural fairness.¹⁷ The recent decision of the court in Hong Kong in *Gao Haiyan v. Keeneye Holdings Ltd.*¹⁸ is the first case that dealt with the enforcement of a med-arb award under the New

¹⁵ See discussion and cases cited in Edna Sussman, *Developing an Effective Med-arb/Arb-med Process*, 2(1) N.Y. DISP. RES. LAW. (2009).

¹⁶ *Bowden v. Weickert*, No. S-02-017, 2003-Ohio-3223, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003).

¹⁷ For a compendium of articles about med-arb and arb-med from jurisdictions around the world, see generally Sussman, *supra* note 15.

¹⁸ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D. 627 (C.A.) (Hon Tang VP, Fok JA & Sakhrani J.).

York Convention. This award was challenged because there had been *ex parte* settlement talks by a member of the tribunal with one of the parties. It suggests an analysis the courts can adopt to enforce foreign arbitration awards even if they present med-arb facts that might not be consistent with local requirements.

In *Gao Haiyan* an arbitration was held in mainland China. Following the hearing, the tribunal suggested that the parties settle and enlisted the Secretary-General of the institutional provider in China to assist them in settling the case. One of the arbitrators met with one party's shareholder and the Secretary-General over an expensive dinner. A recommendation was made as to the settlement payment to be made. The settlement suggestion was ultimately refused and a second arbitration hearing was held at which no complaint was lodged about the meeting with the arbitrator. The final award was challenged in the court in the Chinese seat on the ground that the tribunal showed favoritism and malpractice. The Chinese court rejected these arguments, finding that the events at the dinner amounted to mediation, which was permitted under the Chinese institutional arbitration rules that governed, and it enforced the award.

In the enforcement of the award in Hong Kong, the Hong Kong Court of Appeals reversed the Hong Kong lower court's refusal to enforce the award on public policy grounds, and enforced the award. In doing so the Hong Kong Court of Appeals stated that "whether that [conduct] would give rise to an apprehension of apparent bias, may depend also on understanding of how mediation is normally conducted in the place where it was conducted." The court gave weight to the decision of the mainland China court which had refused to set aside the award. Thus, the Hong Kong appellate court deferred to what would be acceptable where the award was issued and did not look to its own public policy in determining enforcement.

V. CONCLUSION

With the user drum beat demanding faster and cheaper dispute resolution mechanisms, same neutral med-arb and arb-med-arb is a process that may serve parties well in appropriate circumstances. Most cases do settle in mediation, and settlement rates in a med-arb context should be even higher than in a traditional mediation. Arbitrators are beginning to recognize the possibilities such a process affords and the historical reluctance to engage in such a

mixed process is dissipating. In a survey I conducted recently of 400 arbitrators I asked “Would you be willing to mediate a case in which you were sitting as an arbitrator if the parties gave you informed consent?” 51.6% replied yes. But to lead to successful outcomes for the parties, med-arb and arb-med must be utilized after careful consideration and an informed agreement by the parties to the precise nature of the process design coupled with a review of the pertinent law in the relevant jurisdictions.



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