

APPENDIX C

The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases

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A. The Need for International Practice Guidelines for Commercial Dispute Resolution

Today as never before, opportunities and challenges are presented to business planners by trends toward globalization and the expansion of international commerce as well as our growing experience with varied, often multifaceted processes for the management and resolution of conflict. These complexities are reinforced by differences in culture and legal systems. Given present trends, there is a critical and growing need for dialogue and deliberation among practitioners and thinkers from different cultures and legal systems regarding the management and resolution of conflict in both public and private spheres and the roles of third party interveners (which for the sake of convenience we will refer to throughout this paper as “neutrals”³).

As mediation and other settlement-oriented intervention strategies have come into broader use in commercial dispute resolution, different views have emerged regarding the nature and purpose of some of these processes as a result of both individual choice and apparent cultural or systemic factors.⁴ For example, a recent study of commercial mediators from different parts of the world suggests that while mediators frequently have different perspectives and employ different “default practices,” some different trends or tendencies are observable from region to region.⁵ These

³ The term “neutral” is often used as a term of convenience to describe mediators, arbitrators and other third parties in the resolution of disputes, *see, e.g. Neutral*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999). Its wide use may be attributed primarily to prevailing norms and standards that establish requirements or aspirations of even-handedness, impartiality and independence for mediators and arbitrators, *see, e.g. IMI CODE OF PROCEDURAL CONDUCT* § 2.2 (IMI); *IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB. Part 1* (2014); *MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II* (ABA & AAA 2005); *CODE OF ETHICS FOR ARB. IN COMM. DISP., Canon I* (AAA 2004). However, particularly in U.S. tradition, there are situations in which the agreement of the parties or surrounding circumstances make it permissible for third party interveners to be predisposed toward a party or perhaps even take an advocacy role as arbitrator. *See* Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT’L ARB. 297, 368-74 (2014), available at SSRN: <http://ssrn.com/abstract=2519084> (discussing perceptions and practices regarding roles of party-appointed arbitrators on tripartite panels in U.S. domestic arbitration and in international arbitration). Moreover, our growing understanding of neurophysiology reinforces the view that human beings bring a variety of cognitive biases to the resolution of disputes, and cannot ever be perceived as completely “neutral.” [Cites]

⁴ Thomas J. Stipanowich, *The International Evolution of Mediation: A Call for Deliberation and Dialogue*, 46 VUWLR 1191, 1202-1226 (2015), available at SSRN: <http://ssrn.com/abstract=2712457>; Tai-Heng Cheng, *Reflections on Culture in Med-Arb*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 421, 424-26 (2009); Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT’L ARB. 479 (2008).

⁵ Stipanowich, *The International Evolution of Mediation*, *supra* note 4, at 1202-26 (2015) (discussing data from International Academy of Mediators / Straus Institute Survey of Mediator Practices and Perceptions).

realities, underpinned by cultural and legal traditions⁶, contribute to difficulties in mutual understanding, at the most basic level, of concepts such as “mediation” and “conciliation.”⁷

B. Challenges Associated with Complex Dispute Resolution: “Mixed Mode” Scenarios

The potential for divergent perspectives or practices is enhanced when dispute resolution processes are mixed or matched. A varied spectrum of complex situations, which may be described collectively as “mixed mode scenarios,” includes several kinds of interplay between arbitration (or public adjudication), evaluation and mediation or other processes aimed at facilitating an agreement of some kind.⁸ Mixed mode approaches are an increasingly important feature of the landscape of commercial dispute resolution both internationally and domestically,⁹ but they are sometimes viewed from dramatically different perspectives by those of different cultures and legal systems.¹⁰ Thus, a lawyer, arbitrator or mediator from the United States and counterparts from China, Germany or Brazil may respond in very different ways to questions that are of growing import in our increasingly global society, including the following:

- *In what circumstances, if ever, should mediators engage in forms of non-binding evaluation, or make proposals for the resolution of disputes in the course of promoting settlement?*
- *In what ways might neutrals appropriately help parties tailor better dispute resolution processes, as, for example, where mediators help “set the stage” for arbitration?*
- *Since, according to some recent data, settlement appears is becoming increasingly likely during the course of commercial arbitration,¹¹ should arbitrators be more deliberate about helping to set the stage for potential settlement? If so, what are appropriate methods of accomplishing this goal?*

⁶ See, e.g. Kaufmann-Kohler & Kun, *Integrating Mediation into Arbitration*, *supra* note 4, at 479-82; Michael McIlwrath & Henri Alvarez, *Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives*, in *International Commercial Arbitration Practice: 21st Century Perspectives* 2-1, 2-4 (Horacio A. Grigera Naon & Paul E. Mason eds., 2015); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* U. OF ILL. L. REV. 1, 1-20 (2010); CRAIG STORTI, FIGURING OUT FOREIGNERS-A PRACTICAL GUIDE 5 (1999); Nabil N. Antaki, “Muslims’ and Arabs’ Practice of ADR,” 2 N.Y. DISP. RESOL. LAW. 113 (2009).

⁷ See, e.g. *Conciliation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); Adeline Audrerie, *Médiation et conciliation: quelle distinction en matière juridique? Contribution à l’étude des modes alternatifs de règlement des conflits en droit social [Mediation and Conciliation: What Distinction in the Legal Sphere?]* (2015) (unpublished Master 2 thesis in law, Université Toulouse 1 Capitole), at 124-27, online: <http://docplayer.fr/19572879-Mediation-et-conciliation-quelle-distinction-en-matiere-juridique.html> (last visited Oct. 11, 2016) (advancing the legal distinction of the concepts of mediation and conciliation in France are blurred by confusion created by positive law codification and literature).

⁸ See *infra* Section I.

⁹ Renate Dendorfer & Jeremy Lack, *The Interaction Between Arbitration and Mediation: Vision vs. Reality*, DISP. RESOL. INT’L 73 (June 2007).

¹⁰ See *supra* note 6.

¹¹ Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 YEARBOOK ON ARBITRATION AND MEDIATION 1, 16-19 (2014) (discussing results of 2013 survey of experienced U.S. arbitrators), available at SSRN: <http://ssrn.com/abstract=2461839>

- *Under what circumstances, if any, might it be appropriate for a mediator to “switch hats” and become an arbitrator or judge, or an arbitrator or judge to become a mediator, during the course of resolving a dispute?*
- *What is the proper protocol for arbitrators or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award?*
- *In what ways, if any, might mediators and other “non-adjudicative neutrals”¹² and adjudicative neutrals appropriately communicate in the course of resolving disputes, whether sequential, parallel or integrated?*

With such questions in mind, the International Task Force on Mixed Mode Dispute Resolution (Task Force) was established as a joint initiative of the International Mediation Institute (IMI) the College of Commercial Arbitrators (CCA), and the Straus Institute for Dispute Resolution, Pepperdine Law School (Straus Institute).¹³ The Task Force brings together more than sixty scholars, lawyers and dispute resolution professionals from countries around the world to engage in dialogue and mutual exploration to promote understanding and appreciation of our varied practices and perspectives regarding many different kinds of complex commercial dispute resolution scenarios, including:

- Situations in which non-adjudicative neutrals who are charged with helping to facilitate settlement (for example, mediators) “mix modes” by:
 - not only facilitating interest-based bargaining, but also using some form of nonbinding evaluation as a means of encouraging settlement;
 - helping parties to design a dispute resolution process, or “setting the stage” for a tailored dispute resolution process that may ultimately be adjudicative or non-adjudicative or a combination of the two; or even
 - “switching hats” by shifting from the role of mediator to that of adjudicator (as in “med-arb”).

¹² See *infra* text accompanying notes 94-115.

¹³ *Joint International Task Force on Mixed Mode Dispute Resolution*, IMI INTERNATIONAL MEDIATION INSTITUTE, available at <https://imimediation.org/imi-mixed-mode-mediation-task-force> (last visited Jan. 13, 2017) (Note, the correct name of the Task Force is as stated in this article). The Executive Committee of the Task Force has primary responsibility for coordinating and overseeing this effort. The members of the Executive Committee, comprised of designees of the sponsoring organizations, include: Jeremy Lack, a member of IMI’s Independent Standards Commission, Switzerland and UK; Deborah Masucci, Chair, Board of Directors, International Mediation Institute; Prof. Moti Mironi, Haifa University, Law Faculty, Israel; Kathleen Paisley, Ambos NBGO, Belgium and UK; Thomas J. Stipanowich, Academic Director, Straus Institute for Dispute Resolution, William H. Webster Chair in Dispute Resolution, and Professor of Law, Pepperdine University, USA; and Edna Sussman, President, College of Commercial Arbitrators (2015-16). In support of the work of the Task Force, the Straus Institute is developing white papers on some related subjects under the supervision of Prof. Stipanowich and Prof. Veronique Fraser, Sherbrooke University Faculty of Law, Quebec, Canada with valuable contributions by Straus Research Fellow Karinya Verghese, an experienced attorney from Australia who completed her LL.M in 2015 and a team of graduate students, most of whom are obtaining LL.Ms in international commercial arbitration. The first meeting of the Task Force was conducted at Pepperdine University in September, 2016. See *generally* Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution Inaugural Summit (Pepperdine University, September 23-24, 2016).

- Situations in which adjudicators (arbitrators or judges) “mix modes” by:
 - facilitating discussions and possible agreements on scheduling, discovery and other procedural matters;
 - helping “set the stage” for settlement through management of the prehearing process, making decisions on information exchange, ruling on dispositive motions, and the like; promoting use of mediation; and offering preliminary views on a case or presenting proposals for settlement;
 - rendering consent awards based on settlement agreements; or
 - “switching hats” by shifting from the role of adjudicator to that of mediator on substantive issues (sometimes referred to under the heading “arb-med”).
- Scenarios involving the interplay between non-adjudicative neutrals (e.g., mediators/conciliators/facilitators) and adjudicators (arbitrators and judges) including, for example, sequential use of mediation and arbitration, simultaneous (parallel) mediation and arbitration, and integrated “team” approaches, as well as the use of independent experts.
- Relational platforms such as “project partnering” (used in government, construction, technology and other significant long-term contracts) in which third parties facilitate better communication and mutual trust at the beginning of (and perhaps during) the contractual relationship, thereby helping to manage conflict and promote more effective use of adjudicative and non-adjudicative processes.

The Task Force’s efforts to facilitate research, investigations and discussions regarding the management and resolution of business disputes in different settings and cultures may contribute to the development of useful practice guidelines, form agreements and educational tools to advance mutual understanding and improve the management and resolution of commercial disputes around the world.

In Part I of this paper, we will provide a novel overview of the spectrum of scenarios that might be advantageously examined collectively for the first time under the rubric of “mixed modes.” In Part II we will offer a blueprint for more systematically examining and comparing our varied practices and perspectives to these scenarios in light of disputes resolution process goals; culture, legal tradition and other factors. Part III will explore the development of guidelines and other materials to facilitate more informed and effective international practice.

I. COMMON SCENARIOS INVOLVING MIXED MODE PROCESSES

A variety of processes might be characterized as involving a “mixing of modes.”¹⁴ However, the notion of attempting to systematically group together and analyze such processes is a new one.¹⁵ Our discussion will focus on scenarios falling into six general categories. (We also allude to a possible seventh category comprising “relational platforms.”) These six Mixed Mode Scenarios are discussed in the following pages.

Throughout this discussion, considerable emphasis is placed on arbitration; it should be understood, however, that (at least in some jurisdictions) many of our observations and reflections regarding arbitration and arbitrators may apply in some degree (and perhaps with equal force) to other forms of adjudication, including court litigation and administrative procedures.

A. SCENARIO 1: Mediators Using Nonbinding Evaluation or Mediator Proposals as a Means of Encouraging Settlement

One of the most common forms of mixed mode practice occurs when mediators or conciliators engage in forms of evaluation *in addition to* using non-evaluative techniques and approaches.¹⁶ In the United States and some other jurisdictions, for example, mediators not only facilitate discussions of parties’ interests and concerns in order to promote settlement, but also feel free to offer predictions of likely results if the matter goes to trial or arbitration, or provide assessments of the strengths or merits of parties’ factual or legal arguments.¹⁷ Some mediators may also offer their own proposals for the resolution of the dispute. In other cultures and legal systems, however, case evaluations and neutral proposals are viewed as beyond the province of mediators; they are instead often viewed as the domain of “conciliation” processes.¹⁸

¹⁴ Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES*, VOL. II, 339 (Arnold Ingen-Housz ed., 2010) (“It can thus be seen that ADR, if seen as a collection of Appropriate Dispute Resolution tools, can be used sequentially, in parallel or in combination, to create a broad range of hybrid processes. The type of process used should depend on the parties’ circumstances and needs.” at 371).

¹⁵ The present grouping was foreshadowed by Stipanowich & Ulrich, *Commercial Arbitration and Settlement*, *supra* note 11, at 1. The term “mixed mode” and the spectrum of scenarios was first offered in Professor Stipanowich’s presentation entitled “Arbitration and Settlement: Can We Develop Principled Approaches to Mixed Mode Processes?,” College of Commercial Arbitrators Annual Meeting, New York, NY, Oct. 24, 2015 (categorizing groups of scenarios similar to those now used by the Task Force).

¹⁶ See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 111, 112 (1994); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7 (1996).

¹⁷ Riskin, *Mediator Orientations, Strategies and Techniques*, *supra* note 16, at 111-12; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, *DISP. RES. MAG.* 4 (Winter 2016) (summarizing some data from survey of members of the International Academy of Mediators regarding practices in mediation), available at SSRN: <https://ssrn.com/abstract=2759982>.

¹⁸ This reflects a broadly shared view among several jurisdictions (such as Italy, Switzerland and Thailand) and corresponds to the concept of conciliation embraced at the international level, *see, e.g.* Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, *Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective*, *MEDIATE.COM*, (Aug. 2004), online: <http://www.mediate.com/articles/sgubinia2.cfm> (last visited Jan. 7, 2017); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 352-53; Robert Virasin, *Arbitration, Mediation, and Conciliation in Thailand* (Apr. 10, 2015), online [© 2017 Thomas J. Stipanowich & Veronique Fraser. All rights reserved.](http://www.siam-</p></div><div data-bbox=)

Because perspectives on mediation and mediator practices vary greatly, there has been considerable discussion and debate regarding employment of evaluative methods, whether any process involving evaluation should fall within the definition of mediation,¹⁹ and even what constitutes “evaluation.”²⁰ As mediation practice develops around the globe, these issues become ever more compelling subjects for deliberation and debate.

B. SCENARIO 2: Mediators “Setting the Stage” for Adjudication and Other Dispute Resolution Options

Although discussions of the roles of mediators often focus on the resolution of substantive disputes, many experienced mediators bring their skills to bear on process management—not just in regards to the mediation process, but also with respect to alternative process options that may be necessary or appropriate steps in the final resolution of disputes.²¹ In this way, mediators sometimes help “set the stage” for adjudication of a dispute by working with parties to tailor procedures for arbitration or litigation.²²

This may take a variety of forms. Where mediation fails to resolve some or all of the issues in dispute, for example, a mediator is sometimes able to facilitate agreement on appropriate arbitration procedures or assist parties in selection of the arbitrator/s.²³ In other situations, parties

legal.com/thailand-law/arbitration-mediation-and-conciliation-in-thailand/ (last visited Jan. 7, 2017); *Guidance Notes for Customers: Conciliation*, CEDR (2015) at 1, online: <https://www.cedr.com/idrs/documents/151029172414-conciliation-guidance-notes-for-consumers.pdf> (last visited Jan. 7, 2017); JEAN-PIERRE COT, *INTERNATIONAL CONCILIATION* 9 (R. Myers trans., Europa Publications, 1972).

¹⁹ For some early and differing perspectives from the U.S., see Kimberlee K. Kovach & Lela P. Love, “*Evaluative Mediation Is An Oxymoron*,” 14 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 31 (1996); L. Randolph. Lowry, *To Evaluate or Not. That is Not the Question!*, (2000) 38 *FAMILY AND CONCILIATION COURTS REVIEW* 48, 48-61 (2000); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 *MARQ. L. REV.* 155, 155-70 (1998). For an example of this debate through a comparison of the processes of early neutral evaluation and mediation, see Wayne Brazil, *Early Neutral Evaluation or Mediation - When Might ENE Delivery More Value*, 14 *DISP. RESOL. MAG.* 10 (2007). For general considerations regarding the use of different approaches in mediation—whether directive or facilitative, non-evaluative or evaluative—and the consequence of moving from one approach to another on the mediation process, see Jeremy Lack, *A Mindful Approach to Evaluative Mediation*, 3 *TJDSCHRIFT CONFLICTANTERING* 18, 21 and figure 1 (2014); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 353-57.

²⁰ At the inaugural summit of the Task Force on Mixed Modes Dispute Resolution, a group discussion highlighted a spectrum of kinds of activity by a mediator that could be considered to fall within rubric of “evaluation”, from (1) forms of questioning (including non-leading questions, leading questions, “devil’s advocacy” questions, and pointed questions) to (2) comments on substantive aspects of a dispute to (3) evaluations (to an individual party in caucus) of the strength of their case or its chances in adjudication). Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution, Inaugural Summit, September 23-24, 2016, Pepperdine University, p. 9.

²¹ Paul M. Lurie & Jeremy Lack, *Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement*, 8(2) *DISPUTE RESOLUTION INTERNATIONAL* (2014); *COMMERCIAL ARBITRATION AT ITS BEST. SUCCESSFUL STRATEGIES FOR BUSINESS USERS* Section 1.8 (Thomas J. Stipanowich & Peter H. Kaskell, eds, 2001)

²² See *COMMERCIAL ARBITRATION AT ITS BEST*, *supra* note 21 (discussing possible roles for mediators in facilitating arbitration procedures).

²³ Author Tom Stipanowich recounted a pertinent personal experience at the inaugural Mixed Mode Task Force Summit:

Tom acted as standing mediator on a construction project, facilitating weekly or bi-weekly discussions about emerging issues from a date mid-way through construction to the end of the project. He was able to help the parties prevent issues turn into legal disputes and keep the project

retain mediators for the sole purpose of facilitating the tailoring of an appropriate dispute resolution process. An example of the latter approach is “Guided Choice.”²⁴ These scenarios are most likely to occur where mediators facilitate arbitration procedures.²⁵ However, there may also be instances in which an individual may be empowered to facilitate and promote the exploration of settlement in the course of managing a case headed for trial in court.²⁶

C. SCENARIO 3: “Switching Hats”: Mediators Shifting to the Role of Arbitrator; Arbitrators Shifting to the Role of Mediator or Conciliator

Of all of the forms of mixed mode processes, none have stirred more debate than those in which

on track. However, the foundation for a major delay claim had been established before Tom’s appointment. Tom approached counsel and asked if he might be able to help resolve the claim. The parties were far apart, but agreed to have Tom help them create an arbitration procedure to resolve the matter. (There was no arbitration provision in the contract and neither party was enthusiastic about an institutionally-administered arbitration.) Each side had very different preferences for arbitrators, and they ended up with a three-member panel in which each party picked a wing arbitrator. But the approach was novel because Tom helped them find arbitrators based on what they wanted, but, after discussing the matter with the parties, Tom made the approaches to the potential arbitrators so the latter did not know who picked them. This “screened” approach has been incorporated as an option in the CPR Non-administrated Arbitration Rules.

Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution Inaugural Summit (Pepperdine University, September 23-24, 2016). See CPR NON-ADMINISTERED ARBITRATION RULES § 5.4 (CPR 2007)

²⁴ Guided Choice is a mediation process in which a mediator is appointed to initially focus on process issues to help the parties identify and address proactively potential impediments to settlement. Mediation confidentiality is a powerful tool to help the parties safely explore ways of setting up a cheaper, faster and better process to explore and address those impediments. Although this person works essentially as a mediator, in Guided Choice the mediator does not focus initially on settling the case. Instead, the mediator works with the parties to first facilitate a discussion on procedural and potential impasse issues, and help them analyse the causes of the dispute and determine their information needs for settlement.

Lurie & Lack, *Guided Choice Dispute Resolution Processes*, *supra* note 21, at 168.

The Guided Choice system recognizes that not all disputes can be settled without some formal or informal information exchange process. [...] Under Guided Choice, when it is apparent that information is necessary for position change, but not voluntarily available to break impasse, the Guided choice mediator facilitates the customization of arbitration, litigation or dispute review board processes focused on the impasse issues, which require more information – or even decisions.

Paul M. Lurie, *Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes*, 9 CONSTR. L. INT’L 18, 19 (Mar. 2014).

²⁵ U.S. neutral Laura Kaster offered the following example at the inaugural Mixed Mode Task Force Summit:

Laura applied a Guided Choice process in a court-mandated mediation involving the sale of an orthodontic practice. The parties were a professor at dental school and a student. There were allegations that the business had been fraudulently evaluated, and the purchaser was misled in the belief that she was buying a valuable practice but instead ended up facing significant claims from patients. Using the Guided Choice process, Laura was able to help the parties establish a novel process arrangement to deal with patient claims: it was agreed that a knowledgeable practitioner would both parties trusted would evaluate claims and determine what amount should be paid [by the seller to the buyer] for its satisfaction up to a ceiling amount.

Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution Inaugural Summit (Pepperdine University, September 23-24, 2016).

²⁶ In some U.S. court systems, for example, magistrates or special masters have played these roles as a part of their responsibilities for case management. Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO STATE J. ON DISP. RES. 303, 324-28 (1998), available at SSRN: <https://ssrn.com/abstract=2015805>.

neutrals who are assisting parties in a settlement-oriented process shift roles and become adjudicators, or vice-versa.²⁷ Perceptions of these approaches (which are closely related to, and overlap to some extent with, situations in which arbitrators “conciliate” (Scenario 4.3 below), are heavily influenced by culture and legal tradition.²⁸ However, the subject has attained enhanced

²⁷ See Stipanowich & Ulrich, *Commercial Arbitration and Settlement*, *supra* note 11, at 14-15, 25-28. On the differences that exist between conciliation in Asia and in the West, see Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 641-42 (1995); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 J. LONDON COURT INT'L ARB. 187, 190 (2009). See also Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 YEARBOOK ON ARBITRATION AND MEDIATION 219, 224-30 (2013) (for a summary of the practical difficulties of the med-arb process); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, Sections 20-22 and 29-30 (discussing concerns associated with a mediator playing the role of an arbitrator in the same dispute and vice-versa); Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, in ADR in BUSINESS. PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES, VOL. II 381,384-87 (Arnold Ingen-Housz ed., 2011) (discussing issues and solution when the same neutral act as both mediator and arbitrator); Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015) (arguing that the process of med-arb has the effect of compromising key principles of both mediation and arbitration, including mediator neutrality, party self-determination, arbitrator impartiality, due process right to equal treatment and confrontation, as well as enforceability of the arbitral award); Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 81; Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutral*, 65 DISPUTE RESOLUTION JOURNAL 52 (2010) (for a detailed figure comparing the characteristics of arbitration and mediation, including remarks regarding their compatibility according to several different criteria); Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J. INT'L ARB. 541, 545-47 (2011) (raising the question as to whether the same very person should act as both mediator and arbitrator); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 373 (discussing main concerns related to the same neutral switching hat from mediator to arbitrator); Kristen M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR LAW REV. 317, 332-37 (2011) (for a general discussion on the risk that the neutral may impermissibly based the arbitral decision on confidential or privileged learned during mediation).

²⁸ Shahla F. Ali, *The Arbitrator's Perspective: Cultural Issues in International Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY Perspectives § 6.01-6.08 (Horacio A. Grigera Naon & Paul E. Mason eds., 2010); Bernd Ehle, *The Arbitrator as a Settlement Facilitator in Walking A Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do*, in RECENT DEVELOPMENTS AND TRENDS 79, 79 (Olivier Caprasse et al. eds., 2010), the author explains:

Based on varying practices and traditions in diverse legal cultures, the perceived role of the arbitrator ranges from absolute approval to unconditional rejection of the arbitrator's encouragement of settlement negotiations. In general, while most civil law legal systems have traditionally considered it a primary duty of judges and arbitrators to promote settlement, their common law counterparts have not been allowed to be actively involved in settlement facilitation, or at least have not dared to actively contribute to the amicable settlement of the dispute out of fear of being perceived as impartial if the settlement efforts fail.

Kaufmann-Kohler & Kun, *Integrating Mediation into Arbitration*, *supra* note 4, at 491, stating:

For the Chinese, the problem of caucusing is much less serious in practice than it is in theory, as they believe that the parties are not likely to reveal to the mediator damaging facts during the mediation phase that the mediation/arbitrator could not have found out from the record. . . . The Chinese believe that if the judge are trusted to be capable of disregarding inadmissible evidence when they make the adjudication, there should be no reason to doubt those well-trained arbitrators in their ability to remain impartial despite the information obtained during mediation.

Kaufmann-Kohler, *When Arbitrators Facilitate Settlement*, *supra* note 27, at 190; Michael E. Schneider, *Combining Arbitration with Conciliation*, ICCA Congress Series 8, International Arbitration Conference, 58 (Seoul, Oct.10-12, 1996), http://www.lalive.ch/data/publications/mes_combining_arbitration_with_conciliation.pdf (last visited Jan. 13, 2017). For a review of the psychological factors inherent to the international arbitration process, see Sophie Nappert & Dieter Flader, *A Psychological Perspective on the Facilitation of Settlement in International Arbitration – Examining the CEDR Rules*, 2 J. INT'L DISP. SETTLEMENT 459, 460-62 (2011), stating:

importance in recent years, as reflected in recent changes to *UNCITRAL Notes on Organizing Arbitral Proceedings*.²⁹

Sometimes, a mediator charged with facilitating the settlement of disputes shifts to the role of adjudicator. For example, where mediation is unsuccessful in resolving some or all disputes, mediators sometimes “switch hats” and take on the role of arbitrator in order to render a binding decision—a process often referred to as “med-arb.”³⁰ Such procedures include variants such as mediation followed by last-offer arbitration (sometimes referred to by the initialism “MEDALOA”), in which the discretion of the mediator-turned-arbitrator is limited to adopting one or the other of the parties’ final offers in his/her award.³¹

In other cases, an adjudicator shifts to the role of mediator (a scenario sometimes designated by the acronym “arb-med”) or the role of conciliator.³² For example, in some arbitration proceedings

The final report of the 2009 Rules of the Centre for Effective Dispute Resolution (CEDR) for the Facilitation of Settlement in International Arbitration notes that the “sharp difference in attitude between those arbitrators willing to act as settlement facilitators, and those reluctant to take on such a role [is linked] to cultural factors and background, namely according to whether the arbitrator hails from a common law or a civil law background.” . . . [The Commission] starts from the premise that differences in views regarding the role of settlement facilitator by arbitrators appear rooted in cultural factors and (in psychological parlance) related to the different social values and value-based attitudes held by arbitrators from different backgrounds.” (footnote omitted).

²⁹ On 7 July 2016, the UNCITRAL Commission adopted a revised and updated version of the UNCITRAL Notes on Organizing Arbitral Proceedings. The Notes are non-binding but aim to flag procedural issues typically associated with arbitral proceedings. 2016 UNCITRAL NOTES ON ORGANIZING ARB. PROC. para. 72 (UNCITRAL 2016, pre-release publication), provides:

. . . Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations.

Facilitating the settlement of the dispute is a case management technique recognized by the ICC that can be used by the arbitral tribunal (and the parties) for controlling time and cost, see ICC RULES OF ARB. App. IV para. h(ii) (ICC 2012), stating:

h(ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Earlier, the London based mediation institution CEDR developed procedures for the facilitation of settlement in the context of arbitration. CEDR RULES FOR THE FACILITATION OF SETTLEMENT IN INT’L ARB. PROC. art. 5, paras. 1.3 and 1.4 (CEDR 2009), the procedures state:

1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:

. . .

1.3. where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation.

1.4. where requested by the Parties’ in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.

³⁰ Stipanowich & Ulrich, *Commercial Arbitration and Settlement*, *supra* note 11, at 8-10.

³¹ COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at Section 20-24 (describing the process of MEDALOA and explaining its potential advantages and concerns); Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 76, 82, 92-94 (for an analysis of the implications, advantages, and disadvantages of “MEDALOA”).

³² Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 358. For an analysis of the implications, advantages, and disadvantages of “arb-med”, see COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at Section 29-30; Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 87-88.

arrangements may be made for the arbitrator to switch hats and act as a mediator or conciliator in order to try to help the parties attain an amicable settlement of disputes.³³ If settlement is not thereby achieved, the neutral may in some cases be authorized to resume the arbitral role (essentially, “arb-med-arb”).³⁴ In one form of arb-med, however, the arbitrator does not shift to the role of mediator until after hearings are concluded and an award is written but not yet published or disclosed to the parties.³⁵

In some situations, the possibility of the neutral shifting roles is agreed to by participants, or understood as a matter of practice or procedure, before the neutral is engaged.³⁶ Sometimes the approach is enshrined in well-established procedural rules, such as the Chinese practice of “conciliation within arbitration” as defined by the rules of official arbitration commissions such as the China International Economic and Trade Arbitration Commission (CIETAC)³⁷ and the Beijing Arbitration Commission (BAC)³⁸—a process sometimes referred to as “arb-med.”³⁹ Moreover, German arbitrators sometimes engage in what some might describe as forms of conciliation.⁴⁰ In practice, however, a Chinese arbitrator-conciliator (or arbitrator-mediator) may function

³³ MICHAEL MICILWRATH & JOHN SAVAGE, *INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL Guide* 186 (2010) (describing a practice developed by international arbitrator and mediator Mercedes Tarazón, which consists in asking the parties at the outset of arbitration to empower her to suggest mediation if she believes settlement might be possible). See also David W. Plant, *Draft Protocols for Arbitrators Who Participate in Settlement Discussion* (Draft of Feb. 2000) as cited in *COMMERCIAL ARBITRATION AT ITS BEST*, *supra* note 21, at Section 20-24 (offering a set of guidelines for parties considering having an arbitrator switch to the role of a mediator).

³⁴ Singapore International Arbitration Center (SIAC) and Singapore International Mediation Center (SIMC) provide for a Arb-Med-Arb clause that parties may include in their contract, which can be found in *The Singapore Arb-Med-Arb Clause*, SIAC, <http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause> (last visited Sept. 2, 2016). See also Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 360 (for a description of the arb-med-arb procedure); Gracious Timothy, *The Downside of Arb-Med-Arb Procedures*, *MEDIATE.COM*, (Aug. 2015), <http://www.mediate.com/articles/TimothyG2.cfm> (for a critique of arb-med-arb).

³⁵ Michael Leathes, formerly head of intellectual property for British-American Tobacco and a leading proponent of mediation, employed this approach and widely touted the experience. See Michael Leathes et al., *Einstein's Lesson in Mediation*, *MANAGING IP* 24 (July-Aug. 2006). For a general description of the procedure, see also MICHAEL MICILWRATH & JOHN SAVAGE, *INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL Guide* 186 (2010); Alan L. Limbury, *Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?*, Expanded version of Paper delivered at the second Chartered Institute of Arbitrators Mediation Symposium, (London, Oct. 29, 2009) at 6, http://www.cedr.com/about_us/arbitration_commission/Hybrids.pdf (last visited Jan. 13, 2017).

³⁶ Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, *DISP. RES. J.* 25, 30 (May/July 2005).

³⁷ CIETAC ARB. RULES art. 47 (CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE /CHINA CHAMBER OF INT'L COMM. 2014).

³⁸ BAC ARB. RULES art. 42 (BEIJING ARB. COMMISSION 2014).

³⁹ Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 *CARDOZO J. CONFLICT RESOL.* 777, 778 (2014). For an analysis of the implications, advantages, and disadvantages of “arb-med,” see Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 87-88.

⁴⁰ DIS ARBITRATION RULES §32.1 (GERMAN INSTITUTION OF ARB. 1998), which states:

32.1 At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.

Such practice is described by Professor Hilmar Raeschke Kessler an experienced German arbitrator in Hilmar Raeschke Kessler, *The Arbitrator as Settlement Facilitator*, 21 *ARB. INT'L* 523, 534-36 (2005). It is also consistent with judges acting as conciliator as provided for in *GERMAN ZIVILPROZESSORDNUNG* §278(2) (2005). Moreover, it has been reported that there is a longstanding tradition of German judges facilitating settlement as it can be traced back in *JINGER REICHSABSCHIED*, § 110 (1654), which text was integrated in Section 278 of the German Code of Civil Procedure, see Kaufmann-Kohler, *When Arbitrators Facilitate Settlement*, *supra* note 27, at 190 n.6.

somewhat differently from a German counterpart.⁴¹

In other situations, a “change of hats” is requested by one or both parties⁴² or proposed by the third party neutral during the course of dispute resolution.⁴³

As reflected above, attitudes toward an outright shifting of roles are heavily colored by the cultural traditions of participants. In China, for example, long-standing emphasis on the stability and harmony of the society and on deference to authority have underpinned the practice of conciliation by arbitrators or judges,⁴⁴ and in Germany, there is a long tradition of adjudicators engaging in settlement-oriented activities.⁴⁵ In the United States, however, heavy emphasis on individualism, personal autonomy and related concerns about assent, self-determination and procedural due process leads many attorneys and neutrals to avoid situations in which neutrals switch roles during the course of resolving a dispute,⁴⁶ or in which arbitrators focus on settlement-oriented activities.⁴⁷

⁴¹ Arbitration law and the rules of leading Chinese institutions sponsoring private arbitration provide that arbitrators may try to conciliate the dispute at some point in the arbitration process prior to rendering a decision on the merits, see Article 51 of Arbitration Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China on August 31, 1994), online: The National People's Congress of the People's Republic of China http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm (last visited Jan. 13, 2016); BAC ARB. RULES art. 42 (BEIJING ARB. COMMISSION 2014); CIETAC ARB. RULES art. 47 (CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE /CHINA CHAMBER OF INT'L COMM. 2014). For a description of the practice of arb-med in China, see Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, *supra* note 39; Weixia Gu, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31 UCLA PACIFIC BASIN L. J. 97 (2014).

⁴² See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at Section 22-24 (proposing "Guidelines for situations where parties desire a mediator to assume the role of arbitrator"). But see IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARB. § 4(d) (IBA 2014) (4(d): ". . . Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. . . . In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.).

⁴³ Many commentators have reported a common practice of Chinese arbitrators of systematically asking the parties whether they would like assistance in settling the dispute, see, e.g. Kaufmann-Kohler & Kun, *Integrating Mediation into Arbitration*, *supra* note 4, at 487; Michael Hwang, *The Role of §1q Arbitrators as Settlement Facilitators – Commentary*, in ALBERT JAN VAN DEN BERG, ed, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, 571 (Kluwer Law International, 2005); Johannes Trappe, *Conciliation in the Far East*, 5 ARB. INT'L 173, 176 *et seq.* (1989); Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, *supra* note 40, at 525.

⁴⁴ Wang Wenyong, *The Role of Conciliation in Resolving Disputes: A PRC Perspective*, 20 OHIO ST. J. ON DISP. RESOL. 421, 441 (2005) quoting WANG SHENGCHANG, ZHONGCAI YU TIAOJIE XIANGJEHE DE LILUN YU SHIWU [THE THEORY AND PRACTICE OF COMBINING ARBITRATION WITH CONCILIATION] 103-11(2001); Bobby Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304, 307-12 (2000); Kaufmann-Kohler & Kun, *Integrating Mediation into Arbitration*, *supra* note 4, at 480-81; Carlos de Vera, *Arbitration Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. OF ASIAN L. 150, 162-68 (2004).

⁴⁵ See *infra* note 54 and text accompanying text.

⁴⁶ Deason, *Combinations of Mediation and Arbitration with the Same Neutral*, *supra* note 27 at 228-29; Blankley, *Keeping a Secret From Yourself?*, *supra* note 27, at 332-37; Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, *supra* note 27, at 177-78; Carlos de Vera, *Arbitration Harmony*, *supra* note 44, at 185, 192-194; Antaki, "Muslims' and Arabs' Practice of ADR," *supra* note 6, at 113; M. Scott Donahey, *Seeking Harmony - Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?* DISP. RESOL. J. 74, 76-77 (Apr. 1995).

⁴⁷ Stipanowich & Ulrich, *Commercial Arbitration and Settlement*, *supra* note 11, at 16-28, (discussing perspectives and practices of experienced U.S. arbitrators regarding settlement-oriented activities).

Even in the U.S., however, parties may in specific circumstances still embrace the opportunity for neutrals to wear multiple hats. There is evidence that many neutrals have been given opportunities to employ such approaches, and they often have accepted the challenge.⁴⁸

D. SCENARIO 4: Arbitrators Setting the Stage for Settlement

It is generally understood that, within the bounds of the parties' agreement arbitrators have a good deal of authority respecting the handling of procedural matters in arbitration.⁴⁹ A recent study of experienced arbitrators surfaced a good deal of information regarding the role of arbitrators in facilitating (or, as some arbitrators indicated, "mediating") discussions between counsel in the course of helping to "flesh out" the agreement of the parties respecting arbitration procedures.⁵⁰ In the event no agreement can be reached on a particular issue, arbitrators typically resolve the issue by making a decision.⁵¹

The precise dynamics of arbitrators' management of procedural matters might be better understood; in particular, there are important questions surrounding the roles of arbitrators (or judges) in helping to set the stage for settlement through negotiation or mediation. Such activity may take a variety of forms. Arbitrators and other adjudicators are sometimes able to enhance the possibility of settlement by making decisions on discovery/information exchange issues, or by

⁴⁸ Those 59 Survey respondents who indicated they were at least "sometimes" concerned with the informal settlement of cases before them were asked about their experiences changing roles or playing multiple roles (that is, as both an arbitrator and mediator) in a particular case. Of those 59 individuals, just under half (45.8%) indicated that they had "sometimes" mediated a dispute in which they had been appointed an arbitrator . . . " (at 464)

The respondent sub-group was also asked, "Have you served as both a mediator and arbitrator with respect to the same dispute, where during arbitration, the parties asked you to switch to the role of an arbitrator?" More than nine-tenths of the group (25 of 27, or 92.6%) answered, "Yes." In response to the further question, "Have you served as both a mediator and an arbitrator with respect to the same dispute, where the parties agreed beforehand to have you first mediate and then arbitrate, if necessary?" two-thirds of the group (18 of 27, or 66.7%) responded affirmatively. Thus, there is support for the notion that despite conventional concerns among U.S. advocates and arbitrators respecting neutrals wearing multiple hats, quite a few arbitrators have experience with forms of single neutral med-arb." (at 465)

Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 396, 464-65 (2014), available at SSRN: <https://ssrn.com/abstract=2519196>. See also Donahey, *Seeking Harmony*, *supra* note 46, at 77 ("[T]he traditional Western view is changing, largely due to the influence of Asian cultures.").

⁴⁹ NIGEL BLACKABY, ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION—STUDENT VERSION Ch. 6 (6th ed. 2015); III IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW Ch. 32 (1995). See, e.g. INT'L ARB. RULES art. 20 and 32 (ICDR 2014); BAC ARB. RULES art. 2(3) (BEIJING ARB. COMMISSION 2014); CIETAC ARB. RULES art. 35 (CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE /CHINA CHAMBER OF INT'L COMM. 2014); ICC RULES OF ARB. Art. 22 (ICC 2012); LCIA ARB. RULES art. 14.4-14.5 (LCIA 2014); UNCITRAL ARB. RULES art. 17.1 (UNCITRAL 2010, as revised in 2013).

⁵⁰ Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 444-52 (reporting the results of a survey indicating that experienced U.S. arbitrators frequently engaged in various pre-management activities in order to set the stage for settlement).

⁵¹ Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 350 (2014), available at SSRN: <http://ssrn.com/abstract=2519084>

ruling on motions which dispose of some aspect(s) of the dispute.⁵² Moreover, adjudicators sometimes advance the use of mediation by working with the parties to arrange "mediation windows" in the adjudication timetable.⁵³ Others may go so far as to suggest, encourage or even order mediation or some other non-adjudicative procedure to promote settlement.⁵⁴ Finally, adjudicators in some jurisdictions have been known to encourage settlement by offering parties preliminary views on issues in dispute or issuing preliminary findings of fact or conclusions of law.⁵⁵ However, many arbitrators view their role strictly as a matter of preparing a case for adjudication, and regard settlement as a collateral prospect.⁵⁶ The role of arbitrators in setting the

⁵² Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, 444-51.

⁵³ Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 359-60; Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 89-91. Such possibility is sometimes provided for in arbitration rules, *see, e.g.* AAA COMM. ARB. RULES & MED. PROC. r-8 (AAA 2013).

⁵⁴ In the United States, there is a general understanding that the arbitrators can go as far as encouraging the use of mediation, but to order mediation would fall beyond the scope of their ethical obligations, *see, e.g.* CODE OF ETHICS FOR ARB. IN COMM. DISP. Canon IV.F (AAA/ABA 2004) (Canon IV(F): "Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties."). For a discussion on this subject, *see* Ehle, *The Arbitrator as a Settlement Facilitator in Walking A Thin Line*, *supra* note 28, at 84-85; Daniele Favalli & Max K. Hasenclever, *The Role of Arbitrators in Settlement Proceedings*, 23 MEALEY'S INTERNATIONAL ARBITRATION REPORT 1, 3 (July 2008).

⁵⁵ Such practice has been reported to exist in Germany, *see supra* note 39 and accompanying text. The possibility for an arbitrator to offer preliminary views about the parties' dispute is explicitly provided for in CEDR RULES FOR THE FACILITATION OF SETTLEMENT IN INT'L ARB. PROC. art. 5.1 (CEDR, 2009):

Art. 5.1: Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute:

- 1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;
- 1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration.

It has been reported that VIAC is currently working on drafting new rules on early neutral evaluation, *see Revision of the VIAC Conciliation Rules*, VIAC (Sept. 14, 2016, 9:00 AM), <http://www.viac.eu/en/photo-gallery/image.raw?type=img&id=79> (last visited Jan. 13, 2017). The acceptability of such practice differs among common law and civil law jurisdictions, *see* Ehle, *The Arbitrator as a Settlement Facilitator in Walking A Thin Line*, *supra* note 28, at 80-84, stating:

In certain civil law countries, the parties and their lawyers clearly expect that the arbitrator will at some stage in the procedure – *ex officio* – express a preliminary but clear view on the merits of the case and explicitly encourage an amicable settlement. . . . The common law approach differs from the civil law approach in that even the arbitrator's preliminary views of the merits of the case create discomfort. If the settlement attempt fails, the parties may consider that the arbitrator was unduly influenced by this prior assessment. (footnote omitted).

Those in favor of such practice argue that it allows the parties to be given indications about the arbitrator's view and give the parties the opportunity to adapt their argument and strategy accordingly, *see* Michael E. Schneider, *Combining Arbitration with Conciliation*, ICCA Congress Series 8, International Arbitration Conference (Seoul, Oct.10-12, 1996) 61, http://www.lalive.ch/data/publications/mes_combining_arbitration_with_conciliation.pdf (last visited Jan. 13, 2017); Favalli & Hasenclever, *The Role of Arbitrators in Settlement Proceedings*, *supra* note 54, at 2-3.

⁵⁶ Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 459-60, stating:

Survey participants were also asked, 'How often, if ever, are you concerned with informal settlement of the cases before you as an arbitrator?' . . . [M]ore than half of participants responded, 'Never.' . . . For some or all of the foregoing reasons [not transcribed here], many experienced commercial

stage for settlement has been a focus of discussion only recently, and is ripe for thoughtful deliberation and debate. Specific scenarios involving arbitrators include the following:

SCENARIO 4.1: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Handling Key Procedural Issue(s)

Responses to a recent survey of experienced U.S. arbitrators indicate that generally speaking, arbitrators are perceiving increased levels of settlement in the cases they arbitrate in recent years.⁵⁷ Moreover, many arbitrators see a connection between their process management activities, particularly at the pre-hearing stage, and the possible settlement of the underlying dispute.⁵⁸ Arbitrators regularly work with parties to identify and address important issues to be decided including key discovery issues and dispositive motions; some arbitrators perceive that the way they address these issues sometimes plays a role in settling a case, while others do not.⁵⁹

SCENARIO 4.2: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Promoting Use of Mediation

In jurisdictions where mediation is an established element of the dispute resolution landscape, arbitrators often include mediation on the agenda for a preliminary hearing or prehearing conference.⁶⁰ The resulting timetable for the arbitration process may include one or more

arbitrators are reticent about the arbitral role in settlement. However, the Survey results also indicate that many arbitrators tend to recognize and actively embrace opportunities to promote settlement of arbitrated cases through their management of the arbitration process.

⁵⁷ Stipanowich & Ulrich, *Commercial Arbitration and Settlement*, *supra* note 11, at 16-19; Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 458:

The majority of respondents indicated that higher proportions of their caseloads settled pre-hearing during the last five years than prior to that time. This trend is indicated both by a relative decrease in respondents reporting lower proportions of their caseloads as having settled (*e.g.*, fewer respondents reporting that “31% to 40%,” or less, of their caseload settled pre-hearing) and by a relative increase in respondents reporting higher proportions of their caseloads having settled (*e.g.*, more respondents reporting that “41% to 50%” and “[m]ore than 50%” of their caseloads settled pre-hearing).

The Survey also asked respondents, “Roughly what percentage of cases in which you were an arbitrator settled at any time prior to award?” Chart PP [not reproduced] shows results comparing respondent estimates of settlement rates for the past five years with their estimates of settlement rates for earlier years.

⁵⁸ Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 458:

Each of the 59 respondents who reported concerning themselves with informal settlement at least “sometimes” were asked to estimate the frequency with which they engage in particular behaviors that may increase the likelihood of informal settlement. As reported in Table 7 [not reproduced], the large majority of this group indicated that their management of the pre-hearing process, summary disposition of issues, and rulings on discovery matters prompt settlement in at least some cases. Indeed, nearly one-fourth of respondents (23.7%) indicated that their summary disposition of issues prompts informal settlement in about half or more of their cases, and more than a quarter (25.4%) responded that their management of pre-hearing processes plays an important role in pre-hearing settlements in about half or more of their cases.

⁵⁹ Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 445-51, 459-61.

⁶⁰ See *supra* text accompanying notes 53-4.

windows for mediation. Some arbitrators may go so far as to encourage or order parties to mediate the dispute, although others regard such activity as inappropriate.⁶¹

SCENARIO 4.3: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Issuing Preliminary Views, Etc.

Is it ever appropriate for arbitrators to offer parties preliminary views on issues in dispute, including information regarding what additional proof the arbitrator believes might be necessary for parties to establish their case, in order to help stimulate settlement? Should they ever issue preliminary findings of fact and conclusions of law with the same end in mind, or even offer proposals for settlement? As discussed above, culture and legal tradition may play an important role in determining how neutrals and counsel answer these questions,⁶² much the same way that they affect perceptions of neutrals switching roles in med-arb.⁶³

Although the final report of a commission convened by the Centre for Effective Dispute Resolution (CEDR) offered affirmative support for such activities,⁶⁴ there are indications that arbitrators in some jurisdictions, including the U.S, may be extremely reluctant to take such steps.⁶⁵

E. SCENARIO 5: Arbitrators Rendering Decision Based on a Settlement Agreement (Consent Awards)

Arbitrators sometimes encounter requests from parties that have reached a negotiated settlement agreement to incorporate or convert the terms of their settlement into an arbitral award—a consent award.⁶⁶ This step may afford parties the opportunity to avail themselves of the enforcement

⁶¹ Paragraph 72 of UNCITRAL's recently revised 2016 Notes on Organizing Arbitral Proceedings now recognized that it may be appropriate, in some circumstances, for the arbitral tribunal to raise the possibility of a settlement between the parties. 2016 UNCITRAL NOTES ON ORGANIZING ARB. PROC. para. 72 (UNCITRAL 2016, pre-release publication). See also *supra* note 36 and accompanying text.

⁶² See *supra* note 54 and accompanying text. Favalli & Hasenclever, *The Role of Arbitrators in Settlement Proceedings*, *supra* note 54, at 2, stating:

The arbitration practices in England and the U.S. have never given much consideration to the role of the arbitral tribunal in regard to settlements. On the contrary, the possibility of the arbitral tribunal's involvement was excluded. [...] In other jurisdictions, such as Germany or Switzerland, the arbitrator's involvement in settlement proceedings is a common practice. (footnote omitted).

⁶³ See *supra* note 27 and accompanying text.

⁶⁴ See *supra* note 54 and accompanying text. For a critique of the rules provided by the Centre for Effective Dispute Resolution (CEDR) based on a psychological perspective, see Nappert & Flader, *A Psychological Perspective on the Facilitation of Settlement in International Arbitration*, *supra* note 28.

⁶⁵ Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 359 (“Some civil law arbitrators will hold a meeting at some stage of the process to provide preliminary views, or to provide a draft or oral version of the tribunal’s award in order to promote the opportunity of a final settlement before issuing its award. This process is relatively unknown, however, in most common law jurisdictions and may even be frowned upon by common law arbitrators as an improper form of “appeal before verdict” or “risking exposure of a subsequent award to possible attack for bias, depending on when the preliminary views were given.” at 359).

⁶⁶ The possibility of consent award is explicitly provided for in a number of international arbitration rules, see, e.g. ICC RULES OF ARB. art. 32 (ICC 2012); ADMINISTERED ARB. RULES art. 36.1 (HKIA 2013); INT'L ARB. RULES art. 32.1 (ICDR 2014); LCIA ARB. RULES art. 26.9 (LCIA 2014); ARB. RULES OF THE SING.INT'L ARB. CTR., art. 28.8 (SIAC 2013); Arb. RULES OF THE ARB. INST. OF THE STOCKHOLM CHAMBER OF COMM. 39.1 (SCC 2010); UNCITRAL MODEL L ON INT'L COMM. ARB. art.30 (UNCITRAL 1985, with amendment as adopted in 2006); VIENNA INT'L ARB.

mechanisms under arbitration law.⁶⁷ However, depending on the circumstances, such arrangements may raise questions of enforceability⁶⁸ and even public policy.⁶⁹

F. SCENARIO 6: Other Kinds of Interaction between Evaluation, Mediation, Arbitration or Litigation

When multiple discrete dispute resolution processes, each involving separate neutrals, are being employed in the course of resolving a particular dispute, what special opportunities and concerns come into play? Much depends on the nature of the processes, roles the neutrals play, the relative timing of their activities, and their level of interaction.

Scenario 6.1: Interplay Between Mediation and Arbitration or Litigation

Similarly, it is appropriate to consider the potential interplay between mediation and arbitration, and the level of interaction between mediators and arbitrators. Where mediation is an accepted element of commercial dispute resolution, mediation may precede arbitration or

CTR. RULES OF ARB. art.38 (VIAC 2013). For a detailed analysis of the concept of consent award, see Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 BROOK. J. INT'L L. 827 (2015).

⁶⁷ The greatest appeal of consent awards is their potential for enforceability under the 1958 New York Convention, which allows cross-border enforcement of arbitration awards, i.e. the recognition and enforcement of awards made in other contracting states in the state where recognition and enforcement sought, see New York Convention on Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38. Settlement agreements, on the other hand, are simple contracts between the parties to a dispute (or an arbitration procedure), and therefore, do not benefit from cross-border enforcement and recognition under international law. For a general discussion concerning the avenues of enforcement of mediated settlement agreements, see: Edna Sussman, *Combinations and Permutations of Arbitration and Mediation*, *supra* note 27, at 391-98.

⁶⁸ The issue of the enforceability of a consent award remains unclear in international arbitration, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3021 (2d ed. 2014); Kryvoi & Davydenko, *Consent Awards in International Arbitration*, *supra* note 66, at 850:

The New York Convention neither defines the term “arbitral award” nor mentions consent awards. This silence raises the question of whether consent awards qualify as arbitral awards under the Convention. The answer to this question may depend on whether a consent award is a genuine arbitral award, or whether it remains merely a contract.

See also Giacomo Marchisio, *A Comparative Analysis of Consent Awards: Accepting Their Reality*, 32 ARBITRATION INT'L 331 (2016) (discussing the enforceability of consent awards in light of a comparative study of French and English law).

⁶⁹ Kryvoi & Davydenko, *Consent Awards in International Arbitration*, *supra* note 66, at 856:

Nearly all arbitration rules allow a tribunal to decline recording a settlement agreement as a consent award only if a tribunal has a good reason to believe that arbitration or the settlement agreement is used for an improper cause. For instance, such improper cause can consist of an abuse of one's rights, money laundering, bribery, financing terrorism, and breaches of competition law or covering other illegal activities. (footnotes omitted)

[I]n order to determine whether the settlement agreement serves an improper purpose and should not be recorded as a consent award, a tribunal needs to consider public policy, the law of the seat of arbitration, the substantive law of the transaction and perhaps the law of the jurisdiction in which enforcement is likely to be sought.

Id. at 860. See also Marchisio, *A Comparative Analysis of Consent Awards*, *supra* note 68, at 334-35 (discussing the concerns that consent awards may be used for facilitating tax deductions or money laundering through the creation of a fictitious dispute designed to create a payment obligation).

take place during the course of arbitration proceedings.⁷⁰ In some cases, special arrangements are made to coordinate the activities of mediators and arbitrators.⁷¹ Again, questions abound.

Where mediation is an accepted element of commercial dispute resolution, mediation may precede arbitration or litigation or take place during the course of arbitration proceedings or litigation. Where mediations take place in parallel to ongoing litigation or arbitration, conventional wisdom in some countries is that what happens in mediation (and sometimes the very fact of mediation) isn't disclosed to judges or arbitrators.⁷² Furthermore, interactions between mediators and judges or arbitrators, if any, should be subject to parties' express consent.⁷³ Nevertheless, it is appropriate to consider the potential interplay between mediation and litigation/arbitration, and the appropriate level of interaction between mediators and judges/arbitrators. What historical examples are there? What kinds of interactions might be appropriate? Can such interactions contribute to better and/or more cost-effective resolutions of particular disputes?

SCENARIO 6.2: Interplay between Nonbinding Evaluation and Mediation, Arbitration or Litigation

Parties also sometimes agree to a nonbinding evaluation of some kind in order to promote settlement of disputes between parties; examples of such approaches include: advisory appraisal, advisory expert determination, advisory/nonbinding arbitration, early neutral

⁷⁰ The Centre for Mediation and Arbitration of Paris (CMAP) makes available a set of rules, referred to as "Simultaneous Med-Arb Rules" specially tailored specifically to a process where mediation takes place simultaneously with arbitration during a period of three months, except otherwise agreed by the parties, see RÈGLEMENT DE MED-ARB SIMULTANÉS art. 8.1 and 9 (CMAP 2007) [as translated in Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 363-65]:

Article 9: "The mediation and arbitration take place independently of one-another. The Centre does not allow the mediator to know the name(s) of the arbitrator(s) and vice versa. The mediator and the arbitrator(s) are forbidden to discuss the matter between themselves should they happen to know one-another.

In addition to simultaneous mediation and arbitration, parallel processes can take a variety of forms, such as "carve-outs" and "shadow mediation", *see* Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 363-65. *See also* Michael E. Schneider, Combining Arbitration with Conciliation, ICCA Congress Series 8, International Arbitration Conference (Seoul, Oct.10-12, 1996) 71-77, http://www.lalive.ch/data/publications/mes_combining_arbitration_with_conciliation.pdf (last visited Jan. 13, 2017) (recommending steps to follow for a simultaneous mediation and arbitration process).

⁷¹ This is notably the case of a process that has been referred to as "shadow mediation."

[The shadow mediator] may follow and advise on what is happening in another process and possibly also make procedural suggestions that may help the parties and the neutrals in the other process. An example of this is a shadow mediator monitoring arbitration proceedings, receiving a copy of all the pleadings and possibly auditing the hearings with the tribunal. The shadow mediator (with the consent of the parties and the other neutrals) may even speak to the tribunal or actively participate in the arbitration process.

Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 364-65: *see also* Dendorfer & Lack, *The Interaction Between Arbitration and Mediation*, *supra* note 9, at 91-92.

⁷² *See, e.g.* RÈGLEMENT DE MED-ARB SIMULTANÉS art. 9 (CMAP 2007); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 363-64.

⁷³ In appropriate cases, long-time mediator Jonathan Marks arranges for the parties to have an agreed protocol for limited communication with the court respecting mediation proceedings. Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution Inaugural Summit (Pepperdine University, September 23-24, 2016).

evaluation and mini-trial.⁷⁴ In such situations it is appropriate to consider what relationship, if any, such activities have, or should have, to discrete efforts to mediate or to arbitrate the same matter, or to ongoing litigation of the matter, including what level of interplay, if any, is appropriate between the respective processes or the neutrals.⁷⁵

G. Special Considerations Involving Relational Platforms

Finally, there are approaches that place special emphasis on addressing conflict in the course of commercial relationships—that is, in “real time”—and may even promote greater trust and respect among business partners or co-venturers.⁷⁶ Much more needs to be understood about the operation and potential benefits of these relational platforms, including opportunities to use these mechanisms to tailor other appropriate dispute resolution approaches.⁷⁷

Standing Neutrals

Standing neutrals or neutral panels are sometimes employed on construction projects. The appointment of a “standing” dispute resolution professional to mediate issues as they arise during the course of a construction project has proven valuable in keeping the job on track and helping to limit the number of claims that must be subjected to more formal and expensive dispute resolution procedures.⁷⁸ Standing dispute boards frequently offer advisory decisions

⁷⁴ Although third parties are sometimes retained by a single party for the purpose of providing a confidential evaluation to that party in the course of preparing for dispute resolution, our focus here is on nonbinding evaluations provided to both/all parties. See, e.g. Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 461-62 (reporting the results of a survey with experienced U.S arbitrators regarding their experience with non-binding or advisory arbitration, as well as early neutral evaluation, case assessment); Thomas J. Stipanowich & Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 43-44 (2013) (summarizing the findings of survey with Fortune 1,000 corporate counsels in 2011 indicating a newfound reliance on early neutral evaluation and early case assessment process, with respectively 36 and 66 percent of respondents indicating having had recent experience respectively with such processes), available at SSRN: <https://ssrn.com/abstract=2221471>; JAY FOLBERG, DWIGHT GOLANN, THOMAS J. STIPANOWICH & LISA KLOPPENBERG, *RESOLVING DISPUTES: THEORY, PRACTICE & LAW* (2d ed. 2010) (discussing National Advertising Division of the Council of Better Business Bureaus’ non-binding evaluation and court-connected arbitration processes); Brazil, *Early Neutral Evaluation or Mediation*, *supra* note 19 (for a general description of the process of early neutral evaluation).

⁷⁵ Eric Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons From Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1171 and 1201-06 (2006) (The author, a mediator with extensive experience, argues that big cases present huge challenges and that their resolution and management “require a re-examination of the roles played by neutrals – judges and mediators.” He raises questions and presents possible avenues of development to replace traditional models, “requiring a passive and detached judge and a non-evaluative mediation”, by “a more expansive and flexible paradigm.”); Green Eric & Jonathan B. Marks, “Mediating Microsoft”, *Boston Globe* (15 November 2001) A23, Section Op-Ed (describing Microsoft’s settlements with the Department of Justice and with at least 9 states due to the decision of the Judge to suspend litigation and order settlement negotiations); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 369-73 (for a discussion of a process referred to as Combined Neutrals, which is not used frequently, and general considerations regarding future development of hybrid processes).

⁷⁶ Thomas J. Stipanowich, ‘Real Time’ Strategies for Relational Conflict, 3 INT’L BAR ASS’N 6 (2007), available at SSRN: <https://ssrn.com/abstract=1980792>.

⁷⁷ See generally Stipanowich, *The International Evolution of Mediation*, *supra* note 4, at 1233-43.

⁷⁸ NICHOLAS GOULD, CLAIRE KING AND PHILIP BRITTON, *MEDIATING CONSTRUCTION DISPUTES: AN EVALUATION OF EXISTING PRACTICE* 14-16 (Centre of Construction Law & Dispute Resolution, King’s College London, 2010) (discussing the use of various models of standing neutrals in construction projects, such as “independent intervener”

on current controversies affecting major infrastructure projects.⁷⁹

Construction projects also furnished a setting for other approaches aimed at proactive management of conflict within commercial relationships. “Project partnering”, a concept borrowed from the manufacturing and distribution sectors and pioneered by the U.S. Army Corps of Engineers, was designed to encourage collaboration and team work by deliberate early efforts to create an atmosphere of trust and cooperation on projects.⁸⁰ Facilitated partnering workshops were commonly conducted shortly after contract signing and attended by owner representatives and key members of the design and construction team. The aim was stronger individual bonds, better understanding of each other's objectives and expectations, and non-adversarial approaches for resolving problems on the job.⁸¹ There were also indications that partnering might be useful in other kinds of long-term commercial relationships.⁸² However, partnering usage has not expanded beyond its early roots.⁸³

Another exemplary relational conflict management platform was a customized program with tight time frames for jobsite decision-making and handling of claims, and a flexible, dynamic dispute resolution system centered upon the figure of a Dispute Resolution Advisor (DRA), a construction expert with dispute resolution skills who would remain throughout the project. The DRA first met with job participants to explain and build support for a cooperative approach to problem solving. Thereafter, the DRA made monthly visits to the site to monitor the status

or “dispute resolution adviser”); James P. Groton, *The Standing Neutral: A ‘Real Time’ Resolution Procedure that also Can Prevent Disputes*, 27 ALTERNATIVES 177 (Dec. 2009).

⁷⁹ The ICC has developed specific rules surrounding the use of dispute boards, *see* DISP. BOARD RULES (ICC 2015). For a description of the dispute boards dynamic, *see* Stipanowich, *The Multi-Door Contract*, *supra* note 26, at 358-64; Thomas J. Stipanowich, *Managing Construction Conflicts: Unfinished Revolution, Continuing Evolution*, 34 CONSTRUCTION LAWYER 13 / Pepperdine University Legal Studies Research Paper No. 2014/22, at 3-4, 7-8, available at SSRN: <http://ssrn.com/abstract=2484598>; MEDIATING CONSTRUCTION DISPUTES, *supra* note 78, at 18-21; Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 368-69. *See also* Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 125-26, 131-86 (1996) (discussing results of industry-wide survey on conflict management and dispute resolution processes), available at SSRN: <https://ssrn.com/abstract=2060438>.

⁸⁰ ADAM K. BULT, ET AL, *NAVIGANT CONSTRUCTION FORUM, DELIVERING DISPUTE FREE CONSTRUCTION PROJECTS: PART III – ALTERNATIVE DISPUTE RESOLUTION* 7-10 (June 2014); Charles R. Schroer, *Corps of Engineer’s Perspective on Partnering in The Use of Partnering in the Facilities Design Process* 3, 3 (National Academy Press, Washington, 1994).

⁸¹ Stipanowich, *Managing Construction Conflicts*, *supra* note 79, at 3-4, 6-7; ADAM K. BULT ET AL, *NAVIGANT CONSTRUCTION FORUM, DELIVERING DISPUTE FREE CONSTRUCTION PROJECTS: PART III ALTERNATIVE DISPUTE RESOLUTION* 9 (June 2014); Lack, *Appropriate Dispute Resolution*, *supra* note 14, at 365-66. Partnering is principally used in United-States, United-Kingdom, The Netherlands, and in Switzerland, *see* Clive Seddon, *Partnering: The UK Experience*, 1 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 73 (1999); Geert Dewulf & Anna Kadefors, *Trust Development in Partnering Contracts*, in *Working Paper Proceedings*, Engineering Project Organizations Conference, South Lake Tahoe 1, 1 (Nov. 4-7, 2010).

⁸² Stipanowich, *The International Evolution of Mediation*, *supra* note 4, at 1237, 1233-43; Catherine Régis, *The Future of Conflict Resolution in the Context of the Adoption of New Technologies in the Field of Health*, 47 Ottawa Law Review 5, 16-28 (2016) [in French] (for a discussion of the potential benefits of using partnering in the healthcare industry in Québec, Canada).

⁸³ Partnering has been used principally in the construction and engineering sectors, *see* Erik Eriksson, Brian Atkin & TorBjörn Nilsson, *Overcoming Barriers to Partnering through Cooperative Procurement Procedures*, 16 EVIDENCE-BASED COMPLEMENTARY & ALTERNATIVE MED. 598 (2009).

of the job and facilitate discussions regarding emerging issues. If negotiation failed, the DRA could make arrangements for mediation, mini-trial or expert fact-finding.⁸⁴ Although the DRA model has apparently not been widely replicated, many of its benefits may be achieved through the use of an approach like Guided Choice.⁸⁵

II. PHASE ONE: DEVELOPING A TEMPLATE FOR IDENTIFYING AND UNDERSTANDING VARIATIONS IN MIXED MODE COMMERCIAL DISPUTE RESOLUTION

In Part I of this article we identified a range of situations that might be termed mixed mode scenarios in light of the fact that they all involve one or more dispute resolution neutrals engaged in a mix of activities. Most of these entail some kind of effort to facilitate mutual agreement on substantive or process issues in the course of arbitration or litigation. These situations are increasingly visible in domestic and international commercial dispute resolution, but they have inspired highly varied, often conflicting perspectives and practices in different regions and legal systems. These realities inspired the creation of the International Task Force on Mixed Mode Dispute Resolution, for which this white paper was prepared.

In this Part, we propose an analytical construct for achieving an unprecedented appreciation not only of very differing practices and perspectives respecting mixed mode approaches in different countries and regions, but also the process goals and cultural values and dimensions that underpin them. These descriptive and analytical aspects are to be addressed in Phase One of the Task Force's efforts. Once that signal task is accomplished, the Task Force will hopefully be equipped—in Phase Two—to consider the development of more effective guidance for the employment of mixed mode approaches in international commercial settings.

A. Developing “Basic Building Blocks” to Promote Mutual Understanding and Facilitate Analysis of Our Varying Approaches to Mixed Mode Processes

1. A Basic Taxonomy of Dispute Resolution Processes

As noted previously, a primary international barrier to mutual understanding with regard to dispute resolution has to do with the difficulty of agreeing on basic terminology. There is no commonly accepted glossary of terms identifying conflict resolution processes, and a variety of descriptors are employed with various degrees of precision, masking areas of fundamental divergence. The most notorious example of the latter involves the confusion surrounding use of the terms “conciliation” and “mediation.” Both terms refer to processes involving a third-party neutral who engages in activities aimed at helping to promote settlement but who does not render a legally binding decision. However, although the terms are sometimes used synonymously, they are also

⁸⁴ Stipanowich, *The International Evolution of Mediation*, *supra* note 4, at 1238-39; Stipanowich, *The Multi-Door Contract*, *supra* note 26, at 387-89 (1998); *MEDIATING CONSTRUCTION DISPUTES*, *supra* note 78, at 14-16.

⁸⁵ See *supra* note 24 and accompanying text.

frequently perceived as distinct practices involving different activities—perceptions sometimes reflected in positive law.⁸⁶

To some extent, these areas of divergence are produced by different legal traditions and various national, professional, industry and organizational cultures—subjects touched upon above.⁸⁷ Whatever their origin, differences in the language we use to describe different ways third parties intervene in conflict stand in the way of understanding each other. For that reason, we need to develop a common dispute resolution language or taxonomy that systematically captures the spectrum of dispute resolution processes and serves as a foundation for discussion. Agreement on basic terms is, among other things, a critical first step to deconstructing and understand our perspectives and practices regarding mixed mode processes.

For the purpose of this study, then, an initial step was to develop a basic taxonomy of dispute resolution processes, including key terms and definitions.⁸⁸ As indicated in the chart on the following page, the two basic groupings are *adjudicative processes*, which include arbitration and court litigation, and *non-adjudicative processes*, which include a wide range of *non-binding evaluative processes* (e.g., advisory appraisal, advisory expert determination, advisory/non-binding arbitration, conciliation, evaluative mediation, dispute boards, early neutral evaluation, mini-trial) and *non-evaluative processes* (e.g., non-evaluative forms of mediation). (As explained above, moreover, some mediators “mix modes” and engage in both non-evaluative and evaluative activities during the course of attempting to assist parties reach informal resolution of disputes.⁸⁹)

The following terms and definitions are intended to provide a basis for mutual discussions regarding important practice issues. Some of the definitions overlap and some definitions take account of differences in practice among jurisdictions, programs, or personal practices. It is expected that they will be further refined during the course of the Task Force’s work.

A Taxonomy of Basic Dispute Resolution Terms

Third party neutral: An individual who assists parties in resolving issues in dispute (e.g. mediator, conciliator, fact-finder, arbitrators, etc.) The term “neutral” reflects the normal expectation that the third party will act independently and impartially.⁹⁰

⁸⁶ See *infra* the definition of the term “conciliation”, under non-adjudicative processes.

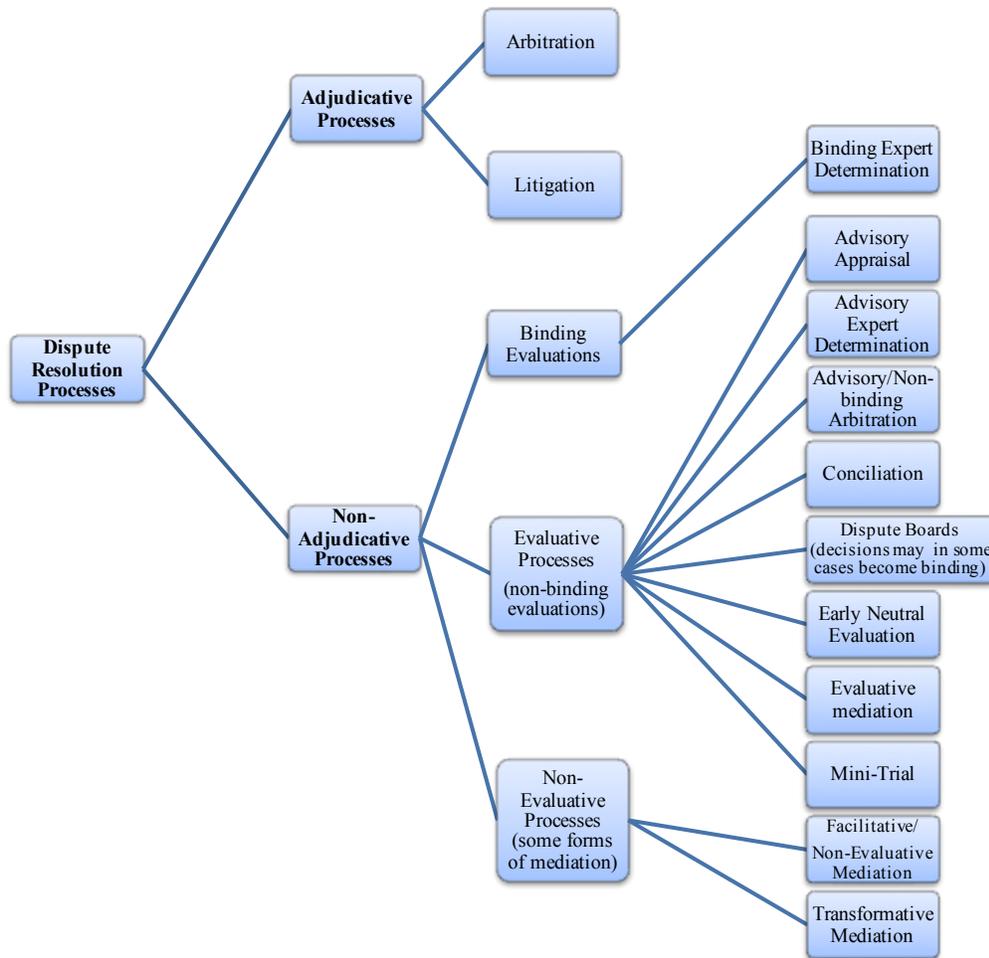
⁸⁷ See *supra* notes 17-8 and accompanying text.

⁸⁸ The authors thank Jeremy Lack for his contributions to the development of the taxonomy depicted in Chart A.

⁸⁹ See *supra* text accompanying notes 17-8, Section I.C., text accompanying notes 54, 62-5.

⁹⁰ *Neutral*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999). These golden standards are found across the board in all codes of ethics of mediators or arbitrators in Western societies, see e.g. IMI CODE OF PROCEDURAL CONDUCT § 2.2 (IMI); IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB. Part 1 (2014); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (ABA & AAA 2005); CODE OF ETHICS FOR ARB. IN COMM. DISP., Canon I (AAA 2004).

CHART A. BASIC TAXONOMY OF DISPUTE RESOLUTION PROCESSES



Adjudicative Processes

Adjudicative processes refer to dispute resolution processes leading to a binding decision in arbitration or in court.⁹¹

Arbitration (binding arbitration): A process in which the parties to a dispute present arguments and evidence to a third party neutral or a panel of neutrals (the arbitrator/s) who make/s a determination (the award). Commercial arbitration agreements typically provide for the arbitral award to be binding and enforceable in court.⁹² In this survey, the term

⁹¹ *Adjudicative Processes*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

⁹² *Arbitration*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); *What You Need to Know About Alternative Dispute Resolution*, ABA SECTION OF DISPUTE RESOLUTION (2006) at 1, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017); *Arbitration*, CPR, online: <https://www.cpradr.org/dispute-resolution-services/services-offered/arbitration> (last visited Jan. 7, 2017). For one extended discussion regarding the practice of commercial arbitration, see COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS: A REPORT OF THE CPR COMMISSION ON THE FUTURE OF ARBITRATION (Thomas J. Stipanowich & Peter Kaskell, eds., 2001). For a discussion of legal issues surrounding the

“arbitration” is intended to refer to “binding arbitration” unless otherwise noted.

Litigation: The process of bringing a dispute to court for resolution.⁹³

Non-Adjudicative Processes

Binding Evaluations: Binding evaluations involve an assessment by an independent third party with specific expertise of a disputed issue that is binding on the parties.

Binding expert determination: A process that is extensively used for international commercial disputes in a variety of sectors in order to provide a contractually final and binding decision on technical issues, such as accounting, gas pricing, engineering, and the like. (Some processes involving binding determinations by experts may be treated as binding arbitration under applicable law.⁹⁴)

Evaluative Processes (Processes involving non-binding evaluation): Non-adjudicative (nonbinding) evaluative processes involve an advisory assessment by a third party neutral of the likely outcome of a dispute being adjudicated, the merits of the case, and/or the value of an asset or claim.⁹⁵ They include the following assortment of processes, which may overlap in concept:

Advisory appraisal: A process in which a third party neutral offers advice on the valuation of assets and/or property in dispute between the parties.⁹⁶ “Case appraisal,” on the other hand, is often understood to mean a process in which a third party neutral investigates the dispute and provides advice on possible and desirable outcomes and the means by which these may be achieved.⁹⁷

Advisory expert determination: A process in which a third party neutral with relevant expertise makes a non-binding decision on a specific (often technical) issue in dispute.

Advisory / Nonbinding arbitration: A type of arbitration in which the arbitrator makes a decision regarding issues in dispute, which decision does not constitute a

definition and scope of “arbitration” under U.S. law, see Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law in the Changing Landscape of Dispute Resolution*, 8 NEV. LAW REV. 101 (2007) (Published in the UNLV Symposium on the Future of the Federal Arbitration Act).

⁹³ *Litigation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

⁹⁴ Decisions by appraisers may or may not be enforced as arbitration awards by courts, depending on the circumstances. See Thomas J. Stipanowich, *Contract and Conflict Management*, in Symposium on Contract Law and Scholarship, 2001 WIS. L. REV. 831, 859-60.

⁹⁵ Although third parties are sometimes retained by a single party for the purpose of providing a confidential evaluation to that party in the course of preparation for dispute resolution, the focus of this study is uniquely on nonbinding evaluations provided to both/all parties.

⁹⁶ Compare note 94 (referring to binding appraisal processes).

⁹⁷ *Case Evaluation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); ABA Section of Dispute Resolution, *What You Need to Know About Alternative Dispute Resolution* (2006) at 2, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017).

binding or legally enforceable award.⁹⁸ The "award" is in effect an advisory opinion.⁹⁹

Conciliation: A process in which the third party neutral, while facilitating settlement negotiations between disputing parties, offers some form of evaluation of parties' "cases" or of possible outcomes in adjudication, or offers the parties a proposal for settlement of the dispute.¹⁰⁰ Conciliation may be understood as

⁹⁸ For a discussion of the treatment of non-binding arbitration under U.S. arbitration law, see Stipanowich, *Arbitration Penumbra*, *supra* note 92, at 448-56.

⁹⁹ For a similar definition, see *Advisory Arbitration*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); *Nonbinding Arbitration*, *ibid*; ABA Section of Dispute Resolution, *What You Need to Know About Alternative Dispute Resolution* (2006) at 1, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017); Stipanowich, *Beyond Arbitration*, *supra* note 79, at 87-88. See also Stipanowich, *Arbitration Penumbra*, *supra* note 92, at 448-56.

¹⁰⁰ This definition reflects a broadly shared view among several jurisdictions and corresponds to the concept of conciliation embraced at the international level. See e.g. Lack, *Appropriate Dispute Resolution*, *supra*, note 14, at 352-53, in which the author describes the distinction between the processes of mediation and conciliation from a Swiss perspective:

[M]ediation is a non-evaluative process in which no coalition is being sought with the neutral, whereas in conciliation, the neutral's subject matter expertise is typically being sought to set norms or make proposals in a somewhat evaluative manner [...]. Conciliation is thus a process that can be procedurally facilitative, but that is substantively evaluative, because possible outcomes are identified and resolved by means of objective norms and criteria. In mediation, there is no ZOPA [Zone of Possible Agreement] and the neutral should refrain from making proposals.

Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, *Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective* (Aug. 2004), online: <http://www.mediate.com/articles/sgubinia2.cfm> (last visited Jan. 7, 2017), which describes the concept of conciliation as found in Italy:

Conciliation tries to individualize the optimal solution and direct parties toward a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators.

Robert Virasin, *Arbitration, Mediation, and Conciliation in Thailand* (Apr. 10, 2015), online <http://www.siam-legal.com/thailand-law/arbitration-mediation-and-conciliation-in-thailand/> (last visited Jan. 7, 2017), description the process of conciliation in Thailand as follows:

Conciliation is different from mediation. In mediation, the mediator is a neutral third party. While in conciliation, the conciliator is an active party in the discussion to bring the parties to an agreement. In contrast to just listening and being empathetic, a conciliator is generally an expert in the field and will actively discuss the issue with each party. The conciliator attempts to bring the parties from the issue of what they "want" to what will probably happen if the dispute is placed in front of the court. The conciliation procedure is outlined in Section 22 of the Labor Protection Act.

JEAN-PIERRE COT, *INTERNATIONAL CONCILIATION* 9 (R. Myers trans., Europa Publications, 1972), which defines the process of conciliation as understood as the international level:

[I]ntervention in the settlement of an international dispute by a body having no political authority of its own, but enjoying the confidence of the parties to the dispute and entrusted with the task of investigating every aspect of the dispute and of proposing a solution which is not binding on the parties.

CEDR, *Guidance Notes for Customers: Conciliation* (2015) at 1, online: <https://www.cedr.com/idrs/documents/151029172414-conciliation-guidance-notes-for-consumers.pdf> (last visited Jan. 7, 2017), stating:

functionally equivalent to a kind of early neutral evaluation or “evaluative mediation,” discussed below under “*Evaluative mediation.*”

In some places, conciliation may be employed as a general synonym for mediation, including non-evaluative as well as evaluative mediation processes, but distinctions usually emerge on careful examination.¹⁰¹ For example, in France, it has been observed that the legal distinction between the concepts of mediation and conciliation is unclear due to a confusion created by positive law codification and literature. In practice, however, mediation is generally understood as a process taking place in multidisciplinary fields (such as psychology, philosophy medicine and law) where the mediator is focused on reestablishing communications between the parties, finding a solution and reestablishing the parties’ relationship. On the other hand, conciliation is a term used exclusively in the legal field, wherein the neutral is either a judge or a legal practitioner who assists the parties to resolve their legal dispute.¹⁰² Similarly, in Brazil¹⁰³, as well as in Canada¹⁰⁴, the concepts of “conciliation” and “mediation” are understood as synonyms, with the important distinction that the term “conciliation” is generally reserved for the function of the judge (the conciliator judge) who assists the parties in reaching a negotiated solution, a process also referred to as “settlement conference” in the Canadian context.¹⁰⁵

Dispute boards: Dispute boards are used to provide a relatively quick and efficient method for resolving disputes on construction and other large, long-term projects. There are two main forms of dispute boards, Dispute review boards (DRB) and Dispute adjudication boards (DAB). Dispute boards are most often employed on large public infrastructure projects and other sophisticated long-term projects and may consist of a single person, or a panel of three or five members (often with relevant expertise in the type or project/industry). The individual or panel is appointed at the commencement of a project before any disputes arise, permitting

Conciliation is an informal process for settling disputes through direct negotiations. A conciliator contacts the parties directly, usually by telephone, to attempt to encourage a negotiated settlement between them. The conciliator allows the parties to reach their own resolution to a dispute, although the conciliator has the power to recommend (but not impose) a particular solution in the event that the parties are unable to reach one themselves.

¹⁰¹ *Conciliation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

¹⁰² Audrerie, *Médiation et conciliation*, *supra* note 7, at 124-27.

¹⁰³ JOSÉ, CAHALI, *CURSO DE ARBITRAGEM, MEDIAÇÃO, CONCILIAÇÃO* 40 (Editora dos Tribunais, 3d. ed., 2013).

¹⁰⁴ Jean-François Roberge, *Typologie de l'intervention en conciliation judiciaire chez les juges canadiens siégeant en première instance et ses impacts sur le système judiciaire, le droit et la justice Étude de la perception des juges canadiens [Judicial Settlement Typology of Canadian Judges Sitting in First Instance and its Impacts on the Judiciary System]* (2007) (unpublished Doctoral Thesis in law, University of Laval / University of Sherbrooke) at 2-3, online: www.theses.ulaval.ca/2007/24199/24199.pdf (last visited Oct. 11., 2016).

¹⁰⁵ *Id.* By way of contrast, one U.S. source defines the term conciliation as a more “passive, less structured form of intervention than mediation”, where the conciliator encourages the parties to reach an agreement on their own and may act as a “go-between” to facilitate communication *Conciliation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

the board to become familiar with project personnel, technical aspects and progress. When disputes arise, the panel hears presentations from the parties. This process is informal and typically does not involve legal arguments and witness examinations. Following its inquiry into a dispute, the panel deliberates and produces a decision complete with supporting rationale.¹⁰⁶ DRBs typically produce decisions that are treated as nonbinding recommendations or proposals.¹⁰⁷ DAB decisions are typically preliminarily binding on the parties, subject to the right of either party to “appeal” the matter to determination by a court or arbitration tribunal.¹⁰⁸

Early neutral evaluation: A non-binding process usually conducted early in litigation (before much discovery has taken place) in which a third party neutral (the evaluator) conducts a session with the parties and counsel to hear both sides of the case and offers a non-binding assessment of the case. If the parties so agree or the applicable rules so provide, the evaluator may also help with case planning by helping to clarify arguments and issues, and may even mediate settlement discussions.¹⁰⁹

Evaluative mediation: A process in which a third party neutral (the mediator) uses a directive approach to move the parties toward settlement.¹¹⁰ To achieve this aim, the mediator may adopt a variety of techniques, such as urging the parties to accept settlement, proposing or developing an agreement for the parties to accept, predicting adjudication outcome or the impact of not settling in terms of parties’ interests, assessing the strengths and weaknesses of the parties’ respective legal case or evaluating parties’ options in light of their interests.¹¹¹ Several techniques

¹⁰⁶ For more detailed information about dispute boards, see: RANDY HAFFER & CPR CONSTRUCTION ADVISORY COMMITTEE DISPUTE RESOLUTION BOARD SUBCOMMITTEE, DISPUTE REVIEW BOARDS AND OTHER STANDING NEUTRALS. ACHIEVING “REAL TIME” RESOLUTION AND PREVENTION OF DISPUTES, CPR Dispute Prevention Briefing (CPR, 2010); GWYN OWEN, DISPUTE BOARDS: PROCEDURES AND PRACTICE (2007); CYRIL CHERN, CHERN ON DISPUTE BOARDS (2d. ed. 2011).

¹⁰⁷ Stipanowich, *Beyond Arbitration*, *supra* note 79, at 126; *Dispute Review Board (DRB)*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

¹⁰⁸ See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, DISPUTE BOARD RULES, Article 5 Dispute Adjudication Board (Effective Oct. 1, 2015).

¹⁰⁹ For similar definitions, see: *Early Neutral Evaluation (ENE)*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); *What You Need to Know About Alternative Dispute Resolution*, ABA SECTION OF DISPUTE RESOLUTION (2006) at 2, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017); CPR, *Early Neutral Evaluation*, online: <https://www.cpradr.org/dispute-resolution-services/services-offered/early-neutral-evaluation> (last visited Jan. 7, 2017); Stipanowich, *Beyond Arbitration*, *supra* note 79, at 126, citing ABA FORUM ON THE CONSTRUCTION INDUSTRY, 1994 SURVEY ON ALTERNATIVE DISPUTE RESOLUTION (1994). For a detailed description of the process, see WAYNE DOUGLAS BRAZIL, EARLY NEUTRAL EVALUATION (ABA Book Publishing, 2012);

¹¹⁰ Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30-33 (2003).

¹¹¹ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24-35 (1996); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, *supra* note 16, at 112; *Mediation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); ABA Section of Dispute Resolution, *What You Need to Know About Alternative Dispute Resolution* (2006) at 3, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017).

used in evaluative mediation converge with what is understood as “*Conciliation*” as described in this taxonomy.

Mini-trial: A settlement process in which the parties present tightly summarized versions of their respective cases to a panel comprised of principals of each party who have authority to negotiate a settlement of the dispute and a third party neutral. After the parties have presented their best case, the panel convenes and tries to settle the matter. In some cases the third party neutral offers an advisory evaluation of the dispute.¹¹²

Non-evaluative Processes: Non-evaluative processes include forms of mediation that do not involve nonbinding evaluation.

Non-evaluative mediation (sometimes referred to as “facilitative mediation”): A process in which a third party neutral (the mediator) assists disputing parties by facilitating settlement negotiations and, perhaps, improving the parties’ relationship or ability to communicate. In this form of mediation, sometimes also referred to as “facilitative mediation”, the mediator elicit the parties’ stories, their sense of meaning and their solutions.¹¹³ He may use reality-testing techniques to help the parties understand their interests or the strengths and weaknesses of their legal case, assist them to evaluate proposals, generate options that respond to their interests or develop and exchange proposals.¹¹⁴ One form of non-evaluative mediation, sometimes referred to as “transformative mediation,” aims to empower parties to more effectively communicate in order to resolve disputes and improve their relationship.¹¹⁵

2. Identifying goals and values that underpin practices and perspectives on commercial dispute resolution processes

The first objective of the Task Force is to fill the many gaps in our knowledge and understanding of the range of current approaches and attitudes toward mixed mode practices. Forming a coherent and meaningful picture of the “crazy quilt” of practices and perspectives regarding mixed mode

¹¹² For similar definitions, see: *Mini-trial*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999); *What You Need to Know About Alternative Dispute Resolution*, ABA SECTION OF DISPUTE RESOLUTION (2006) at 3, online: <http://courtdr.org/library/view.php?ID=3319> (last visited Jan. 7., 2017); CPR, *Services Offered: “Mini Trials,”* online: <https://www.cpradr.org/dispute-resolution-services/services-offered>, (last visited Jan. 7, 2017); ABA FORUM ON THE CONSTRUCTION INDUSTRY, SURVEY ON ALTERNATIVE DISPUTE RESOLUTION (1990-91). For additional information on the process, see: *John H. Wilkinson, A Primer on Minitrials*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK (John H. Wilkinson ed., 1990).

¹¹³ Riskin, *Decisionmaking in Mediation*, *supra* note 110, at 30-33.

¹¹⁴ *Id.*

¹¹⁵ *Transformative Mediation*, DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999). For a detailed description of the transformative approach in mediation, see: ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION : THE TRANSFORMATIVE APPROACH TO CONFLICT (Jossey-Bass, 2005); JOSEPH P. FOLGER, ROBERT A. BARUCH BUSH & DOROTHY J. DELLA NOCE, TRANSFORMATIVE MEDIATION: A SOURCEBOOK – RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS (Association for Conflict Resolution and Institute for the Study of Conflict Transformation, 2010).

dispute resolution processes requires a systematic approach: a detailed assessment of the character of mixed mode practice in the international sphere and in a representative range of countries. We must take account not only of the international spectrum of published norms and observed practices, but also dig deeper, to underlying motivations and their root causes—be they the manifestations of longstanding national or regional cultural traditions¹¹⁶ and legal cultures¹¹⁷, industry¹¹⁸ or organizational¹¹⁹ cultures, or creative adaptations to specific circumstances.¹²⁰

In order to “deconstruct” present dispute resolution practices and provide a basis for comparison among divergent approaches, we will focus on the process goals and values that underlie these practices. In the four decades since the advent of the Quiet Revolution in dispute resolution, the growing use of mediation and other intervention strategies aimed at informal resolution of disputes and the dramatic expansion of consensual binding arbitration offered commercial parties a wide range of process choices.¹²¹ Moreover fundamentally, these developments provided opportunities to more effectively address the various aims, priorities and agendas parties bring to the table. We have become accustomed, therefore, to speak of processes in terms of how they serve, or may be

¹¹⁶ Culture is acquired through the process of socialization and underpins shared values, norms, customs, ideologies and roles within the members of a group. It can have a considerable conscious or unconscious impact on the parties’ motivations in conflict resolution and their attitudes toward neutrals’ practices. For more information on the sources of culture from an anthropologist and sociologist perspective, see George Peter Murdock, *The Cross Cultural Survey*, 5 AM. SOC. REV. 361 (1940); RUTH BENEDICT, PATTERNS OF CULTURE 34 (1934); Edward Sapir, *Conceptual Categories in Primitive Languages*, 74 SCIENCE 578 (1951); JOHN A. CLAUSEN, ed, SOCIALIZATION AND SOCIETY 5 (1968). For the impact of culture on conflict resolution, see *supra* note 27 and accompanying text.

¹¹⁷ The legal profession exercises far-reaching influence on dispute resolution processes, which are often controlled by lawyers actively involved in negotiating contracts with dispute resolution clauses and in post-dispute counseling and advocacy, see Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration*, *supra* note 51, at 313-14. Moreover, neutrals’ and lawyers’ perceptions about their role in dispute resolution is largely influenced by the professional culture and the legal system from which they belong, see Michael McIlwrath & Henri Alvarez, *Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives*, in *International Commercial Arbitration Practice: 21st Century Perspectives* 2-1, 2-4 (Horacio A. Grigera Naon & Paul E. Mason eds., 2015).

¹¹⁸ Industry has had a leading influence on the development of dispute resolutions processes. The construction industry has been on the cutting edge of conflict management practices, including partnering, standing neutrals and dispute boards. See *supra* text accompanying notes 76-85.

¹¹⁹ Organizations’ preferences regarding dispute resolution processes may be influenced by a number of factors, including the specific circumstances surrounding the business’ activities, the national macro-culture(s) with which it is affiliated through its geographical location, as well as the nationality and preferences of its head management executives and/or employees, the company’s industry or line in business, its conflict history and orientation toward risk-taking, etc. See Thomas J. Stipanowich & Veronique Fraser, “*Mixing Modes*” in *International Commercial Dispute Resolution: Forms of Interplay between Mediation, Arbitration and Evaluation, and the Impact of Culture, Legal Tradition and Choice* (article in progress).

¹²⁰ Dispute resolution processes can be tailored to fit the specific parties’ needs, their relationships, and the nature of and the circumstances surrounding a conflict, see Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration*, *supra* note 51, at 348-59; Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* (Symposium Keynote Presentation), 7 DEPAUL BUS. & COMM. L.J. 383 (2009).

¹²¹ See, e.g., Stipanowich, *Reflections on the State and Future of Commercial Arbitration*, *supra* note 51, at 308-321; Thomas J. Stipanowich, *Arbitration and Choice*, *supra* note 120.

designed to serve, various goals or values.¹²² A list of process goals or values that serve as criteria for shaping processes for the resolution of commercial disputes might include the following:

- a) Party control over the process and outcome (informed decision-making and consent; self-determination; flexible / dynamic / tailored process);
- b) Independent and impartial neutral;
- c) Competent and/or authoritative neutrals (neutrals with necessary skills, experience, authority, respect);
- d) Fair process and outcome;
- e) Cost-effective / efficient / “proportional” process and outcome;
- f) Avoidance of adjudication; promotion of a negotiated outcome;
- g) Confidentiality
- h) Finality; enforceability of outcome
- i) Maintaining or improving relationship; reconciliation
- j) Maintaining community or societal stability and harmony.¹²³

In a separate article, we will explore the ways in which the priorities assigned to different process goals and values by national cultures and legal traditions, as well as industries and organizations, factor into parties’ practices and perspectives in dispute resolution.¹²⁴

B. Exploring the Landscape: Developing Profiles of International Practice and Representative National Cultures / Legal Systems

Although much has been written on various mixed mode approaches, the bulk of published treatments and guidance tend to reflect the values and preferences of particular national cultures or legal traditions.¹²⁵ Therefore, the most critical element of Phase I is the examination of norms, practices and perceptions within exemplary countries around the world, laying the groundwork for

¹²² See, e.g., Lack, *Appropriate Dispute Resolution*, *supra*, note 14, at 339. The author provides, at page 372, a “check-list of factors that can be taken into account when designing such combined processes” (figure 17-17 entitled “Process Design: Combining ADR Options”). Jean François Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in ARNOLD INGEN-HOUSZ, ed, *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES*, VOL. II, 13 (2010); Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* *supra* note 121.

¹²³ The list includes many of the process goals and criteria discussed at the inaugural Summit of the International Task Force on Mixed Mode Dispute Resolution, September 23-24, 2017. Other process goals discussed at the Summit included: “transparent process”; “inclusive process” (including all stakeholders whose interests are affected); “legitimate outcome”; “predictable outcome”; and “feasible outcome” (potential to create clear obligation). The authors elected not to include these in the present discuss either because they overlapped with other listed goals or because they were not as likely to be among the priorities for parties to commercial disputes.

¹²⁴ Thomas J. Stipanowich & Veronique Fraser, “*Mixing Modes*” in *International Commercial Dispute Resolution: Forms of Interplay between Mediation, Arbitration and Evaluation, and the Impact of Culture, Legal Tradition and Choice* (article in progress).

¹²⁵ Although the CEDR Commission was an important step forward in addressing roles arbitrators might play in the settlement of related disputes, portions of the Commission’s findings were reflective of practice in countries such as Germany, Switzerland and Austria, but would raise concerns among practitioners in some other countries. See Stipanowich, *Commercial Arbitration and Settlement*, *supra* note 11, at 14-15.

an eventual comparison of variations in practice and the different process goals and values that underlie these variances.

A range of countries with different traditions and legal systems may be selected as exemplars for comparison of practices and perspectives regarding specific mixed mode scenarios. The investigation would develop relevant information from each country in several key categories:

- *Published norms and standards* would include pertinent provisions of statutes/civil codes and case law; public and private institutional procedures affecting commercial disputes, and ethical standards.¹²⁶
- *Practices and perspectives*, a considerably more elusive category of information, must be garnered from a variety of sources including published materials offering comparisons of mediation practice in different countries¹²⁷ and input from experienced individual lawyers, neutrals or practice-oriented scholars.
- *Underlying motivations and values*. Efforts should be made to identify the interests, goals and values that inspired the use of particular mixed mode approaches. To restate the point, although in some cases these drivers may be the product of deliberate choices made by parties in particular circumstances, they are most likely to reflect preferences and priorities associated with national or regional cultures and legal traditions, or industry or organizational cultures. In looking at particular practices, and the extent to which, within a given legal system, use of a mixed mode approach may be the product of active choice at the time of contracting or after disputes arise, as opposed to a “default” process determined by, or strongly encouraged (or discouraged or prohibited) by, legal traditions and cultural influences.

C. Challenges for Phase One

First, as stated above, there is the challenge of learning about and “capturing” experiences with private dispute resolution. It is one thing to capture published norms, but another to explore the broader realm of practice and the motivations and agendas that underlie mixed mode approaches in a particular legal and cultural milieu. Moreover, many such experiences are cloaked in secrecy, or remain undocumented in any level of detail.

Second, surveys with specific questions designed to ferret out perspectives and practices can become very cumbersome, especially given the scope of this initiative and the wide range of mixed

¹²⁶ Relevant sources to consult early in the investigation may be country-specific summaries available through Kluwer and Catherine Rogers’ book on ethics standards for international arbitration and Manon Schonewille and Fred Schnoewille’s book on mediation regulation and practices across the world. See CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014); MANON SCHONEWILLE & FRED SCHONEWILLE, EDs., THE VARIEGATED LANDSCAPE OF MEDIATION. A COMPARATIVE STUDY OF MEDIATION REGULATION AND PRACTICES IN EUROPE AND THE WORLD (Eleven International Publishing, 2014).

¹²⁷ THE VARIEGATED LANDSCAPE OF MEDIATION, *supra* note 126; NADJA ALEXANDER, ED., GLOBAL TRENDS IN MEDIATION (Kluwer Law International 2d.ed., 2006).

mode practice. Moreover, surfacing reasonably detailed information about pertinent experience has proven difficult, apparently because, for all of the talk about mixed mode approaches, most people have little or no experience with some of the scenarios. A preliminary survey of Task Force members revealed a relatively high degree of interest in and a strong acknowledgement of the practical significance of mixed mode approaches. However, even within this group of individuals selected on the basis of their experience as legal advocates, dispute resolution professionals and/or scholars, the level of actual experience with mixed mode approaches was surprisingly low.¹²⁸ Therefore, although considerable effort was devoted to drafting detailed templates for extensive surveys of members of leading institutions, the nuggets of useful data are likely to be mere needles in a haystack.

A more promising alternative to a highly detailed survey instrument may be to reach out widely to stakeholder groups¹²⁹ and use open-ended questions to invite input on specific scenarios regarding which individuals have relevant experience and/or perspectives. This might be done by means of an interactive platform like Google Docs. Respondents providing comments might be prompted to address a series of more targeted follow-up queries, and might also be asked if they would be willing to provide further information if asked.

Third, input should be sought from all of the stakeholder groups represented on the Task Force (namely, dispute resolution professionals, legal advocates and corporate counsel, and scholars) as well as business users.) Based on recent experience, dispute resolution professionals are likely to be the most accessible, along with legal advocates. However, individuals in each of these groups may have personal agendas that are different from those of the business parties with whom they interact.¹³⁰ Moreover, there may be a degree of interest bias in reporting positive personal dispute resolution experiences.¹³¹ Unfortunately, based on our experience, corporate in-house counsels tend to be less willing to participate in empirical studies, and business clients with any level of knowledge and interest in dispute resolution are extremely difficult to identify and engage.

Finally, personal interviews or facilitated discussions are other sources of potentially useful information regarding mixed mode approaches. These might be designed as facilitated, videotaped

¹²⁸ *International Task Force on Mixed Modes Dispute Resolution Preliminary Survey* (July-Sept. 2016) [unpublished] (on-file with authors).

¹²⁹ Task Force members suggested employing listservs, blogs (such as the Wolters Kluwer blog), and the websites of, or outreach through, leading international and national dispute resolution institutions (including IMI and the Global Pound Conference (GPC) series; International Academy of Mediators; International Bar Association; Corporate Counsel International Arbitration Group (CCIAG); Chartered Institute of Arbitrators; College of Commercial Arbitrators; American Bar Association (ABA) Section on Dispute Resolution; Maryland Mediation & Conflict Resolution Office (MACRO); Straus Institute for Dispute Resolution; Resolution Systems Institute (RSI (Chicago)); Dispute Resolution Institute (D.R.I. (Carbondale)); Singapore International Mediation Academy), and other interested organizations (such as, for example, Association of Corporate Counsel (A.C.C.); International Judicial College, Claims & Litigation Management Alliance (CLM); United States Council for International Business, The Business Roundtable, Society of Construction Lawyers; ABA Forum on the Construction Industry, American College of Construction Lawyers; ABA Tort Trial and Insurance Practice Section ABA Section on Business Law).

¹³⁰ Stipanowich & Ulrich, *Arbitration in Evolution*, *supra* note 48, at 399-400.

¹³¹ *Id.*

conversations of small groups of interested invitees (who have perhaps been pre-screened using the procedure above) from specific countries or regions.

III. PHASE TWO: DEVELOPING INTERNATIONAL GUIDANCE FOR MORE EFFECTIVE MIXED MODE PRACTICE

The ultimate goal of the International Task Force on Mixed Mode Dispute Resolution is to provide *practical tools* to help business users and counsel make the most effective use of mixed mode processes, and avoid common pitfalls and problems. The intent is to create user-friendly guidance in several forms or formats, ranging from a relatively short and succinct statement of very basic, concrete, and persuasive insights to more extensive supporting commentary, including treatment of subjects touched upon in this article.

A. Preliminary Considerations

Our abiding self-admonition is first, to do no harm. Because the current initiative was motivated in part by encouraging more effective use of the autonomy that parties in dispute resolution enjoy in tailoring processes to needs and circumstances, and because in many places mediation and mixed mode practice are still in the early stages of evolution, it is critical that impediments to choice be avoided as much as possible.¹³² To the extent possible, the emphasis should be not on hard and fast rules or limitations, but signposts and templates that promote good decisions by users and counsel.

Another priority of the Task Force is to pay deliberate attention to and seek to accommodate fundamental cultural differences in the guidance we develop. For this reason, it is important to surface cultural biases and ensure that our product is not driven to an inappropriate degree by a particular set of cultural preferences.¹³³

Finally, our intent is to produce international guidelines that are authoritative. For this reason, a number of organizations and widely diverse group of experienced practitioners and scholars from all over the world have been assembled. In the coming months, additional organizations and individuals may be enlisted in order to further strengthen the bona fides of the Task Force.

B. Guidelines for Practice

Following on comparative analysis of and reflections on the materials assembled in Phase One, the Task Force will establish a set of guidelines for practice for each of the mixed mode scenarios within the scope of our initiative. Step-by-step, straightforward guidance should be offered for the

¹³² The concerns associated with rulemaking in a complex environment in which dispute resolution practice is still in the early stages of evolution may be appreciated by examining the recently-passed Brazilian mediation law, which establishes a number of limitations on mediation process that many practitioners might consider unnecessary or unwise. See Stipanowich, *The International Evolution of Mediation*, at 1208-1209.

¹³³ See *supra* note 125 and accompanying text.

negotiation and drafting of appropriate contract provisions, and, separately, for post-dispute arrangements or issues that arise in the course of dispute resolution. The intent will be to provide practical responses to address key questions, including: (1) *What approaches may be broadly acceptable or even preferable, regardless of the cultural backgrounds and interests of parties?* (2) *How do cultural preferences, legal traditions or other factors that place priorities on different goals and values in dispute resolution affect what process choices are permissible/appropriate or preferable?*

Given the fact that several groups of stakeholders play active roles in the drafting of dispute resolution provisions and post-dispute discussions regarding process, it is appropriate to provide guidance aimed at each of these groups: neutrals, business users and counsel, legal advocates, and institutions that sponsor or administer dispute resolution services.¹³⁴ The guidelines will be presented first in short and succinct statements that set forth clear practical steps. They will be accompanied by an in-depth commentary supporting each element of the guidelines. Supporting materials will include the products of Phase One, including (a) the basic taxonomy of dispute resolution approaches, with clarifying definitions; (b) treatment of the relationships between mixed mode approaches and different process goals and values; and (c) summaries of, and comparisons between, practices and perspectives in different representative countries, with appropriate emphasis on the role of culture and legal tradition.

C. Forms and Procedures

In order to put the guidelines into practice addition, the Task Force will also develop exemplary templates, including suggested formats for contractual dispute resolution provisions or guidance in the form of a “clause generator.” These will be accompanied by suggested mixed mode procedures adaptable for use with leading institutional mediation and/or arbitration procedures.

D. Training and education

The products of the Mixed Mode Task Force will be readily adaptable for academic courses or training programs. It is possible these may form the basis of credentialing by sponsoring institutions.

E. Other Possible Results

At the inaugural Summit, Task Force members discussed a number of other possible outcomes of the initiative. These include international ethical standards addressing mixed mode scenarios, a database of arbitrators and institutions with experience in or resources focused on mixed mode practice, and collected summaries of experiences of different kinds with mixed mode scenarios.

¹³⁴ The COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (Thomas J. Stipanowich et al, eds. 2010) offer a model for parallel guidelines aimed at different stakeholders.

CONCLUSION

The launching of the International Task Force on Mixed Mode Dispute Resolution in 2016 demonstrated the impetus for encouraging further examination of an international dialogue to enhance our understanding of perceptions and practices involving a mixing of modes in dispute resolution. More than sixty experienced lawyers, scholars and dispute resolution professionals from six continents are now participating in the Task Force, nearly all of these individuals responded to a preliminary survey last summer; fully two-thirds gathered for the inaugural Summit of the Task Force in September, 2016. The active engagement of this group of experts will lead to the systematic collection of information about existing norms, standards, practices and perspectives regarding mixed modes, and the development of new analytic tools to create a platform for the comparison of approaches on the basis of underlying process goals and values associated with national culture and legal tradition, industry and organizational culture. The hoped-for result will be guidelines to assist dispute resolution professionals and users in the use of mixed modes, as well as information to strengthen active choice making in dispute resolution.