WORKING GROUP 2 OF THE "MIXED MODE" IMI/SI/CCA TASKFORCE[1]

3.4 GUIDING MEDIATORS SETTING THE STAGE FOR PROCEDURAL OPTIONS: FROM NEGOTIATION TO ADJUDICATION (PROCESS DESIGN FACILITATION)

3.4.1 INTRODUCTION

The core principles of the IMI/SI/CCA Taskforce recognize the need for multiple lanes on the highway to a resolution destination for the parties in order to maximize speed, minimize cost and take into consideration additional criteria (e.g., maintaining good relationships). Flexibility of process choice and sequencing are key to the ultimate goal. The final data from the Global Pound Conference in 2018 supports this approach and confirmed that disputants are seeking earlier, less costly methods of dispute resolution. If the parties are seeking to structure lane changing and issue sequencing into their individual process, they may need guidance, particularly when they are already in dispute. Who will provide assistance toward more purposeful design process that may sequence and separate certain substantive issues for different methods of dispute resolution? Who will examine what issues are presented and what process (e.g., mediation, expert evaluation or adjudication, such as arbitration or litigation) may best suit the parties' procedural needs? Who will suggest which processes might best address specific issues and in what sequence? Group 2 of the tri-partite Taskforce has focused on the use of a process facilitator, working as a mediator to help the disputants discuss and determine process design choices, as early as possible in the dispute resolution proceedings. This "Guiding Mediator" helps the partier to consider their procedural needs (e.g., budgets, time constraints, access to information, importance of preserving certain relationships, etc.) to help them design bespoke processes that can include adjudicative elements or evaluative aspects as well as facilitative or non-evaluatitve elements. The Guiding Mediator's investigation and recommendations can be maintained in confidence to encourage the frank exchange of needs and issues. As a person who can provide expert advice on process design (should the parties wish her to), the Guiding Mediator can propose or recommend procedural options or stages to serve as a bridge to a better overall process and outcome (e.g., by combining mediation of certain substantive issues, and arbitration of others). The role of the Guided Mediator is to help the disputants examine the overall process first, understanding the impacts that processes can have on fees, timing, outcomes, and their possible consequences, and to consider whether they have designed a process that best meets their needs. It does not mean assuming that a mediation of substantive issues is a first and immediate step, but rather that procedural needs and substantive outome needs are considered separately. The Guiding Mediator acts as a facilitative and non-adjudicative neutral early-on in the process to help the

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disputants and their advisors focus as early as possible on their procedural needs and options first, as a separate topic for consideration before seeking to understand and resolve substantive issues. Indeed, although the Guiding Mediator may ultimately mediate the substantive merits of the dispute as well, that should not be assumed to be the case from the beginning and the parties can examine all their settlement or adjudicative options first. The Guiding Mediator benefits from mediator privilege and can work confidentially, initiating dialogue to explore what an optimal dispute resolution process might look like and remain amicable, even if adjudicative elements are required. Are there any key issues the parties may first be concerned with regarding the process itself (e.g., its time, costs, impact on relationships, need for discovery, concerned stakeholders, etc.)? The Guiding Mediator can help the disputants to focus on this information upfront, and help them to explore and generate a range of procedural options to address these issues, which may be issue-specific, require a sequencing of issues and processes. Enabling the participants to focus their attention on such key issues upfront is already one of the major contributions of a "mixed mode" approach to dispute resolution, whether or not the most efficient process was used. Giving the parties more time to reach an amicable agreement on procedural options can itself optimize working relationships between all of the stakeholders involved, whether as between the disputants themselves or between their counsel.

Discussing procedural options and design issues first can help de-escalate a dispute, and lead to a better exchange of information. What is needed for constructive discussions? What are perceived as key issues? What is the sequence in which these issues could best be addressed (e.g., is it helpful to discuss causality separately and before quantum issues)? How should select participants, advisors, witnesses, experts and/or stakeholders be involved? The idea is to help the parties step back and evaluate the potential that a mixed mode process has to offer, and the possible benefits of combining a mediative approach with an adjudicative approach, working with binding or non-binding expert evaluations, assessments, or considerations of specific issues with the help of another neutral having relevant expertise. Engaging in design process issues in advance in this way may help the parties significantly reduce the costs and time to reaching a binding settlement, and improve the working relationship of the disputants as they jointly seek faster, cheaper and/or better outcomes. A process design Guiding Mediator may simply help the parties facilitate consideration and discussion of these topics, or – with the parties' consent -- (s)he may also advise and make recommendations regarding procedural options and the timing of different parts of the process, who to consider involving, why and when. The Guiding Mediator can also focus on any concerns about ultimate compliance or enforcement. The Guiding Mediator can also remain involved throughout the process, to help consistently review, update and reconsider the status of the mixed mode proceedings and any new procedural recommendations to be made iteratively, as the process evolves, without having any evaluative or adjudicative function. Depending on the style desired (e.g., facilitative, transformative or directive), the Guiding Mediator may also suggest bringing in other mediators to help resolve different substantive issues involved in the same dispute. The Guiding Mediator's role as a

process design coach and possible advisor to the parties collectively in such cases would enable all of the participants in the process to take stock of a broader range of considerations (e.g., initial reactions to evaluative feedback on dispositive issues and their impact on relationships), especially if evaluative or adjudicative neutrals need to be involved on certain topics. This approach can keep the process better "on track" throughout the journey taken by the participants. A final session (however labelled) could be scheduled at the end of the process to check whether there are any closing or implementation issues to be considered as well. Bringing in a Guiding Mediator at the outset is thus a first step to planning for an optimal process holistically, while also saving time and money.

3.4.2 METHODOLOGY

Working Group 2 began by using a questionnaire to consider procedural choices at the beginning holistically, with the help of a facilitative neutral. While the words "process facilitator" were originally used to describe the function of that neutral, the Working Group decided to adopt the term "Guiding Mediator" to reflect the confidentiality and ethical obligations that this neutral should be assumed to have upfront, as well as the privilege that should attach to her communications with the parties and her work product. This early mediative approach to actively design the dispute resolution process was also deemed as a way to help bring the parties to consider procedural issues as as group, and to first consider how their procedural choices might affect costs, deadlines, relationships and other consequences of deciding on only one type of dispute resolution process. It was also deemed a way to help facilitate discussions on how adjudicative or evaluative elements could be factored in without detrimental consequences (e.g., conflict escalation, the creation of coalitions or destroying good relationships). Based on the feedback to these questionnaires, it become apparent that there was a vast variety of practices in effect, although without any consistency in process or even nomenclature. While for some "mixed mode" processes the word "mediation" was seen to include "non-binding arbitration", for others the word "mediation" automatically precluded any evaluative input into that phase of the the mixed mode process. While it is common in some jurisdictions for mediators to start off on a purely facilitative basis early in mediations, and to become increasingly evaluative at certain stages or on certain topics, based on the mediator's assessment of what might be most helpful and when, seldom is another person brought in early on to reflect on how and when to bring in independent evaluative input on procedural issues – whether in a binding or non-binding capacity. There were anecdotal reports regarding co-mediations involving a facilitative and non-evaluative mediator (e.g., who is transformative) working together with a conciliator (who is evaluative, may consider the application of norms, and might engage in challenging reality testing based on these norms or likely outcomes). While they were reported to have almost 100% settlement ratings, and greater satisfaction for counsel, these were rare occurrences and often were not even viewed as mixed mode processes but as a variant on mediation. Even the controversial practice in some countries where a mediator is required to make a settlement proposal that can subsequently be reviewed in an adjudicative process (e.g.,

by a judge) with potential cost sanctions being applied against a party for having refused to accept that settlement proposal was not viewed as an adjudicative process within a mediation. Instead, respondents tended to see them as separate and sequential processes, as a mediation that was terminated before referring the dispute to an adjudicative neutral. While some feedback and attempted surveys showed that early mediation combined with the use of adjudicative experts existed, the responses were so varied, sparse and perceived as unique, that it was impossible to speak in terms of what was traditionally done or of possible "best practices" in such circumstances. Nevertheless, the results suggested a growing consensus from all stakeholders involved in dispute resolution that an early stage mediative approach that could focus on procedural matters first would have a positive impact on emerging conflicts, especially rapidly escalating ones, to consider whether, how, and when to bring in another neutral or a confidential expert evaluator (whether binding or non-binding). Focusing on such issues can be hugely beneficial not only on costs and accelerating the speed of settlements, but the outcomes as well. It can help to identify and address potential impediments to the resolution of disputes, and avoid or resolve them faster, at lesser cost and with better compliance. This can also significantly enhance the participants' sense of satisfaction with the process, even if the matter is ultimately resolved by adjudication (e.g., litigation or arbitration).

Much of the anecdotal feedback received came from dispute resolution neutrals and advisors active in the construction industry, where early mixed mode processes (e.g., partnering and Dispute Resolution Boards) already exist. The concept of separate mediators and adjudicative neutrals, however, had not been considered as a possible standard process to develop. Working Group 2 therefore started off by developing a model contractual clause for the appointment of a mediator as process facilitator using the title of "Guiding Mediator" after significant discussion as to how to label this person (**Appendix 1**). The group then focused its attention on the feedback received, and generated a checklist of issues that seemed to emerge from it. The purpose of this checklist was to generate a list of discussions points, grouped by category, to assist a Guiding Mediator to help design a bespoke mixed mode process and assess what factors might favor certain procedural choices, and when and how to suggest them (**Appendix 2**). Certain diagnostic tools already being used by some practitioners in the "guided choice" ADR movement[2] were also collected (see **Appendix 3**). Finally, the Working Group started working on a mindmap to illustrate what possible links might exist between certain factors in the checklist and their possible impact on process design choices (**Appendix 4**). These appendices are all still works in progress and are not intended as final recommendations or as containing a summary of "best practices". They are merely introduced as possible discussion points for early stage mediators, disputants and/or their advisors, who are seeking possible ways of combining evaluative or adjudicative elements early on in facilitated settlement discussions or mediation proceedings. They are topics that can be explored with the disputants and their advisors. This approach

[2] For information about this movement, see: https://gcdisputeresolution.com/

requires a different deliberative phase at the beginning of a dispute resolution process aimed at resolving the dispute as early as possible and tailoring the process to each dispute based on the parties' procedural needs and preferences.

3.4.3 TOOLS TO ASSIST IN MIXED MODE PROCESS DESIGN

While no clear rules or tools appear to exist at this stage, Working Group 2 began to think of diagnostic tools, design phases and personalities or cultural factors that may assist in designing bespoke mixed mode dispute resolution processes. They may also serve as a basis for online preparatory discussions with the parties, prior to a first joint meeting.

3.4.3.1 Diagnostics Tools for Process Design and Initiating Discussions

It is believed that a discussion based on the appendixes to this article or similar documents may help dispute resolution professionals, disputants and/or their advisors to discuss and consider a mixed mode process, regardless of whether they adopt any process design approach at all, or agree to hire a Guiding Mediator. Even in conventional mediation processes, many mediators do not approach the initial phases of a mediation by considering the needs for document exchange or other procedural issues before convening a first mediation meeting. They may often assume a sequential logic, that if this mediation does not resolve in a complete settlement, it will progress to litigation or arbitration, but moving on to such a next step is seldom discussed with the mediator herself. Would the parties signing a commercial contract wish to include a "Guided Mediator" clause for the appointment of a process facilitator focusing initially on process design issues?[3] Should they consider this as one process or a more traditional multi-step sequence of processes (e.g., Med-Arb)? If not in the contract, when and how might this discussion be initiated and timed to enhance the likelihood of an earlier and better outcome? The value of such an early discussion approach using such tools will hopefully be clear and save on time and costs merely by considering these questions and issues, even if it may involve spending additional time early on in a procedural mediative phase.

While the benefits are clear, there can be a high degree of nervousness created by asking parties to commit to such a process contractually upfront. Even the word "mediation" as a compulsory early step in a dispute resolution escalation clause evokes concern in some lawyers, especially if this is linked to early adjudication. Seen simply as a facilitated discussion, however, in which the disputants and their advisors can discuss whether, when and if so how to bring in mediative and adjudicative neutrals, however, feels much safer. Having a list of tentative documents, even if they are only suggestive or indicative of topics or criteria to take into consideration, was deemed to be a step forward. The annexes to this article are not to be considered to be actual diagnostic tools, but

[3] It should be noted that the Working Group received some cautionary initial feedback on the model clause provided in **Appendix 1**. Some lawyers and in-house counsel expressed hesitancy regarding their willingness to use such a clause in a contract, despite agreeing with this Guided Mediator approach in general. This was primarily due to a lack of familiarity with the concept of guided choice processes as a whole. The Working Group hopes that this topic will be taken up by leading ADR, In-House counsel and bar association organizations, for further discussion by their members.

documents to promote discussions to help facilitate discussions by the parties before committing to a given process. That is what the Working Group 2 has sought to provide. These concepts still need to be clarified and more experiences are needed. The suggestion of the possibilities considered in them can generate a broader discussion on the benefits of early dispute resolution process planning using mixed modes, making it permissible to consider combining mediation with binding or non-binding adjudicative processes, whether using the same or another neutral. It is hoped that the initial documents of this Working Group will be reviewed and improved upon and may lead to a better understanding of how process planning discussions may take place earlier, even as part of early settlement negotiations. They may also be considered later on in any traditional proceedings (and repeatedly in any process), as aids to generate faster, cheaper and/or better outcomes once dispositive substantive issues are better identified and understood. In either situation, the belief of Working Group 2 is that early consideration of ways of combining mediation with adjudicative processes should be considered more often. Process design at the earliest stage can also ensure the attendance of the right protagonists (e.g., stakeholders, witnesses or experts) at the right time, and involve key participants earlier. The process can be fashioned as a combination of steps in ways that will maximize the opportunities for success and better or preserved good relationships. Increased reporting of experiences with the use of such concepts or the appendices to this document may also generate greater confidence in raising such mixed processes more often in the future.

3.4.3.2 <u>The Process Design Phase</u>

It is important to be able to review any mixed mode process at any stage and to be able to re-adapt it to remain in accordance with the participants procedural needs. In the initial process design phase, the Guiding Mediator investigates and seeks to understand what dispositive elements of the dispute may benefit from adjudicative input. Knowing what dispositive elements may exist (e.g., whether a statute of limitations period has expired, or if a limitation of liability clause in a contract will be binding) may help the parties in their facilitated negotiations. Alternatively, if the norms with respect to such dispositive issues are unclear, and or if it is even unclear if there are any norms, the Guiding Mediator can clarify with the participants what norms they would like to generate, clarify or apply, and what findings (e.g., of fact or of law) may need to be determined with adjudicative input, within discerned budgets and timelines, without prejudicing other aspects of the dispute (e.g., relationships or involving other stakeholders). The investigation and diagnosis steps can thus be used by the Guiding Mediator to design the process in terms of a sequence of steps likely to result in an earlier and cheaper resolution of the dispute.

As the proceedings evolve, the parties' procedural needs or preferences may evolve. A skilled Guiding Mediator should be able to assist the participants to reconsider when and how to bring in adjudicative neutrals, possibly instructing them directly on behalf of the parties, and requesting an initial range of options or a zone of possible outcomes, which can help narrow the range of the negotiations, rather than a more precise amount or

recommendation. Because the Guiding Mediator seeks to establish an ongoing relationship with and between the parties that will result in greater trust in the process itself, rather than focusing only on the outcome, there may well be more flexibility by all of the participants in the hiring and instructions to be given to an adjudicative neutral, especially if the mandate is perceived as coming from the Guiding Mediator. Such a process is also more likely to succeed if it is raised and put into place before the parties commence formal negotiations on substantive issues, which may harden positions and make agreement more difficult to reach.

By generating an ongoing working relationship with the parties on procedural matters, the Guiding Mediator can identify and help to addresses any unexpected surprises in the process and remove extreme risks. Such an ongoing role will also be likely to render the parties less inclined to seek coalitions with the evaluative neutrals being brought in, if the Guiding Mediator will be the one instructing the adjudicative neutrals on terms that the participants and their advisors will have agreed to in advance. This can also avoid moving prematurely to substantive final settlement discussions, before the design of the process has been finalized and avoid disappointments and potential hostility in the course of the mediation itself.

The Guiding Mediator can also help towards the end of the process, before a final agreement has been reached, to consider various procedural options, such as whether to convert a settlement agreement into a consent award, or any other closing formalities or rituals that may have meaning to the disputants. Should the matter not settle fully, or only only partially, the Guiding Mediator can help to identify and discuss what impediments remained and how they could possibly be resolved. If the Guiding Mediator was able to observe all parts of the process, he may be able to help the parties reflect on alternative ways of handling those topics that the mediative or adjudicative neutrals who handled substantive issues were not able to resolve.

The draft tools contained in **Appendixes 1-4** of this paper are the Working Group's first list of working documents. They are intended not only for upfront "diagnostic" discussions, but also once the process has started and is evolving. Different parameters may have new saliences as the process evolves. Working Group 2 has considered as a next step to its work a series of role-play exercises around a group of sample disputes to explore the use of such tools and develop specific trainings for Guiding Mediators as cases evolve, which could significantly advance the potential uptake of this multi-phase approach to bespoke dispute resolution processes that are adapted to be optimal in each case. This remains something that Working Group 2 intends to continue working on.

It is too early to try and define any specific standards or rules of how Guiding Mediators should handle such cases. It is also premature at this stage to try to define what trainings should be offered. The very nature of mixed mode processes that are designed on a bespoke case-by-case basis may also defy any attempt to try and set or regulate any standards in cross-cultural and multi-modal way of resolving disputes in an increasingly international and technological world. The concept of a Code of Disclosure (as opposed

to a Code of Conduct) in this field is something worth exploring.[4] This document and its Appendices should thus be viewed not as "best practices" recommendations, but only as a step toward better development and exploration of process design with the use of a Guiding Mediator, whether before or after a mediator has been appointed, and generating an ability to communicate more clearly upfront with the parties what type of process they wish to have, and to give them true autonomy and informed consent over the process.

3.4.3.3 Personality and Cultural Factors in Designing Mixed Mode Processes

The use of a Guiding Mediator as a process designer is not common and optimal process design may require a better understanding of the personalities and cultural preferences of the key participants and their advisors, or their lawyers. The Guiding Mediator will need to be flexible regarding his/her views of mediation, when to initiate it, and whether or how it can be combined with adjudicative processes. The success of this approach will also depend on the willingness of the parties and their advisors to hire a procedural facilitator in the first place. It may also be a concern that a mediator who has been hired too early on may wish to mediate the entire matter and may not facilitate arbitration or litigation, should one of the parties prefer such a process. Some mediators are willing to be evaluative and to resolve everything in one day, and some lawyers expect a mediator to make a mediator's proposal at the end of "the day", rather than have several sessions or bring in another evaluative neutral. Some clients and/or their lawyers may not be willing to invest in the initial preparatory inquiries and meetings regarding what may be worth looking into more holistically, or hidden undercurrents that may be driving the dispute, and what dispositive issues could be identified, triaged and handled by another neutral or process. It may require changing some some advisors' cultural perceptions of mediators as being "non-binding arbitrators" with whom coalitions can be created, as well as the unwarranted concern of some trial lawyers that mediation means a willingness to compromise, which is for weak cases only. It may also require having to motivate in-house and external lawyers or other advisors to consider doing something they are unfamiliar with and might be perceived as risky, looking to the future in an innovative spirit, rather than past traditional approaches. They may also not know how to obtain necessary information without litigation and discovery. They may also prefer to get adjudicative input early on, to assess the strengths and weaknesses of the case, which can lead to early anchoring and overconfidence bias, making amicable discussions on process design more complex to raise. These variables may all require identifying the personalities and cultural contexts in which a mixed mode process is being discussed. Resistance to early use of a Guiding Mediator or combining evaluative or adjudicative processes with settlement discussions is only to be expected, due to many practitioners' lack of familiarity. Fortunately there are good tools that are also available in that field as a possible basis for discussion, such as personality profiles that can be obtained online

[4] For a discussion on the benefits of a Code of Disclosure as opposed to a Code of Conduct, see: https://imimediation.org/2020/07/09/7-keys-profession-create-a-universal-code-of-disclosure/.

using Artificial Intelligence software applications that claim to have high accuracy ratings[5], as well as software that has decades of data on cultural dimensions that can provide a useful basis for initial discussions with the participants for Guiding Mediators.[6] While the such software should not be relied on as containing any truths, or likelihoods of success, they can provide initial hypotheses to be discussed and tested, or as with the tools provided in **Appendixes 1-4**, merely as information upon which to start a conversation, which may help to create a heightened awareness of personality and cultural traits that may influence the compositions of the terms each participating may wish to send to a mixed mode process.

3.4.4 CONCLUSIONS

While the use of mixed modes is a relatively novel concept, the idea of bringing in a process facilitator in the form of a Guiding Mediator is not new, and there is increasing interest in bespoke dispute resolution processes, particularly by disputants, such as SMEs and multinationals seeking faster, cheaper and better ways of resolving disputes, and retaining good relationships. The benefits of such processes are primarily that that they add structure early on in dispute resolution proceedings. They help to: (1) identify and incorporate the parties procedural needs and interests into the process itself; (2) identify key topics or issues that may require adjudicative input, and how to handle them or address any impasses on key dispositive issues, and move between these topics; (3) create a better dynamic between the participants, taking into consideration personalities and cultural dimensions; and (4) provide ongoing support beyond the initial planning stages and can accompany the parties throughout the process. While this paper does not seek to provide recommendations or guidelines, it hopefully will initiate debate about how such processes may be embarked upon, and the standards of disclosure (as opposed to behaviour) that are likely to be universally required to ensure the participants' self-determination.

[5] See, for example, https://www.crystalknows.com/ which claims to have an average prediction accuracy rating of 80%.

[6] See, for examples, data on Geert Hofstede's 6 dimensions, which allows a comparative analysis of 4 countries at a time: https://www.hofstede-insights.com/product/compare-countries/.

Appendix 1:

DRAFT "GUIDED CHOICE" CLAUSE FOR A GUIDING MEDIATOR

*INTRODUCTION: The primary purpose of this possible clause is to encourage parties to retain a process facilitator as early as possible (which may even be before any dispute arises). It is proposed that the facilitator (referred to here as a "**Guiding Mediator**") should be granted the status of a mediator on procedural issues, to protect the confidentiality of the parties' communications, enabling them to explore with the Guiding Mediator the most appropriate[7] method and/or mixed mode of dispute resolution for assisting the parties to resolve any dispute. This clause provides for a default method of resolving disputes (mediation followed by arbitration) in case the use of a Guiding Mediator on process issues is not accepted or implemented. This default method is an optional provision, however, as litigation in the courts of a mutually acceptable jurisdiction may be preferable in some cases. The possibility of eliminating the default mediation and arbitration provisions provided in this clause should be considered in each case. Furthermore, although this clause has been drafted with institutional mediation and arbitration rules in mind, these proceedings could be ad hoc instead. Overall, this model clause should be viewed only as a possible starting point and modified in accordance with whatever is deemed most appropriate in each case. Please send all feedback regarding this clause to laura.kaster@gmail.com and to jlack@lawtech.ch.*

Possible Appropriate Dispute Resolution (ADR) clause for the appointment of a Guiding Mediator:

CLAUSE No. __: GUIDED DISPUTE RESOLUTION

a) Guided Mediation: Any disagreement or dispute between the parties arising out of or relating to this agreement, including its formation, related documents and any non-contractual claims, shall be resolved as quickly and efficiently as possible by mutual consent using the most appropriate form of dispute resolution available for that disagreement or dispute (e.g., negotiation, mediation, conciliation, litigation or arbitration) or a combination of such processes as agreed to by the parties. The parties [shall/may][8] jointly retain a neutral, independent and impartial mediator to focus initially on process issues (the "**Guiding Mediator**[9]"). The Guiding Mediator will help the parties to design an optimal process for achieving an early and mutually-

[7] "Appropriate" in this context includes a broad range of parameters that best address the parties' needs, taking into consideration such factors as cost, time, relationships, confidentiality, impact on stakeholders, enforceability, propensity of the conflict to escalate, reputational issues, etc.

[8] Whether the appointment of a Guiding Mediator should be compulsory or optional is something to be discussed in advance. It is recommended by some that there should be a clear commitment to do so (i.e., using "shall" instead of "may") as otherwise it may be difficult to get consensus on doing so once the dispute has arisen. For others, this should be identified as a possibility, but not an obligation, so that the clause (and concept) can be raised in the original contract.

[9] Rather than use the term "Process Facilitator", which may connote the sense of an additional process or cost, the Working Group recommends referring to this person as a "Guiding Mediator", to clarify that the role of this neutral may not only be to do process design, but that they can also assist in overcoming early impasse or acting as a mediator on substantive issues. Furthermore, the notion of this person as a mediator is likely to confer legal privilege or obligations of professional secrecy on communications with and the work product of such a person.

acceptable resolution. The optimal process should be efficient and cost-effective, taking into consideration relationships and commercial interests, as well as other important factors identified by the parties (e.g., enforceability, remedies, deadlines, etc.)[10] The Guiding Mediator shall maintain strict confidentiality regarding all aspects of the process, including any private conferences with parties and/or their attorneys. The Guiding Mediator may provide non-binding recommendations on process issues. The parties agree that any information they or their attorneys exchange or provide to the Guiding Mediator and/or other parties or stakeholders as part of this appropriate dispute resolution process will be treated as confidential and immune from discovery or disclosure.[11] The Guiding Mediator shall be granted mediation privilege and professional secrecy status as a mediator to ensure that all information exchanged or provided pursuant to this process shall be legally privileged and immune from disclosure or discovery to the extent possible under applicable laws. Once appointed, the Guiding Mediator may act as a mediator and/or arbitrator in any subsequent proceedings with the prior written consent of all the parties involved in those proceedings.[12] If a Guiding Mediator was not retained within [thirty (30)][13] days from the date of first request for the appointment of a Guiding Mediator by a party, or if no other process or ADR neutral has been agreed to or appointed by that date by mutual consent of all the parties involved in the dispute, the substantive matters in dispute shall be settled by mediation [in accordance with the rules of the [NAME OF INSTITUTION] in effect at that date].[14]

b) Arbitration: If the dispute is not fully resolved by [mediation] within [ninety (90)][15] days from the date a party first requested the appointment of the Guided Mediator or [sixty (60)] days from the appointment of the Guided Mediator as the substantive matters mediator or of another mediator as provided for above (whichever period is longer), any dispute arising out of or relating to this agreement or this dispute resolution clause, including the making, breach, termination or validity thereof, shall be finally resolved by binding [expedited][16] arbitration [by

[10] A list of factors to take into consideration when designing a dispute resolution process is available on IMI's website at https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/.

[11] It may be worth drafting a confidentiality agreement to this effect, including the inability for the Guiding Mediator to be summoned as a witness, especially if the seat of the proceedings does not automatically recognize mediation privilege.

[12] It is suggested that an additional waiver be signed by all of the disputants involved if the Guiding Mediator will also have a further role, especially if (s)he will act as an arbitrator. The issue of any influential information heard in caucuses should also be addressed. (Please consider only relying on such information if it has been disclosed with the disclosing party's consent.)

[13] It is suggested that clear deadlines be set by which the appointment of a Guiding Mediator should have occurred. This provision, however, is optional. The suggestion of thirty (30) days and sixty (60) days in this section is something for the parties to review and are only suggestions.

[14] The choice of the mediation (or other first process) being ad-hoc or institutional mediation is also something to be discussed and reviewed on a case-by-case basis.

[15] An adequate amount of time should be provided before initiating the second stage (in this case, arbitration).

[16] Certain institutions have specific provisions for expedited arbitration, which normally entail a sole arbitrator as well as reduced pleadings/hearings and a faster deadline for the issuing of an award.

a sole arbitrator], [in accordance with the rules of the [INSERT NAME OF INSTITUTION] in effect at that date][17], unless all of the parties agree in writing to another process.

c) Seat & Language of any Proceedings: The seat of any proceedings shall be [INSERT CITY NAME AND COUNTRY] although meetings may physically take place elsewhere or by Internet by mutual consent of the parties. The language of any proceedings shall be [INSERT LANGUAGE]. [Nothing in these provisions shall preclude a party from reasonably seeking emergency or injunctive relief before any court or arbitral tribunal of competent jurisdiction of its choice anywhere in the world].[18]

[17] Once again, the arbitration may be ad hoc or institutional. This is something for the parties to discuss and decide in each case. The parties and their counsel should also check the rules of any institutions used to verify they have complied with the requirements for the same person acting as mediator and arbitrator, if they have chosen to do so.

[18] This is an optional provision, and some ADR institutions already have provisions for this in their rules.

Appendix 2:

CHECKLIST OF ISSUES FOR GUIDED MEDIATION PROCESSES

The following points are suggested as a checklist of issues when seeking to design an Appropriate Dispute Resolution ("ADR") process where a Guiding Mediator may wish to include adjudicative elements to the process. They are not intended as a comprehensive or compulsory list, but only as an aid to a Guiding Mediator[19] or other guided process facilitator for discussion with the participants and their advisors (e.g., legal counsel) on how to involve adjudicative neutrals.[20] ***Please feel free to add any additional concepts/words you think should appear in this checklist, which could be useful for designing an ADR or Mixed Mode process, or for overcoming any impasses in a negotiation or dispute****. Please note that the numbering provided is only a suggestion to assist in grouping topics. It should not be given any particular importance. The checklist it is intended primarily for discussion purposes only, when seeking to design an appropriate process early on in a dispute. It is important to verify with the participants and their advisors what their experience and views are regarding different ADR processes, and whether they have any initial preferences.*

1. Process History

    1.1. Type of dispute (e.g., contractual, tortious, family, commercial, civil, investor-state, etc.)
    1.2. Duration of the process to date
    1.3. Past attempts to settle: Any prior negotiations? Mediations? Judicial settlement conferences? Other proceedings?
    1.4. Current stage of the dispute or parallel proceedings (e.g., negotiations, litigation or arbitration)?
    1.5. Attitudes, concerns and reactions to seeking early dispute resolution or the early intervention of a neutral?

2. Participant/Advisor information

    2.1. Who are the key stakeholders and potential participants involved in resolving the dispute?
    2.2. Are all participants who are needed for a settlement willing to participate in the process? If not, how can they be brought into the process?
    2.3. Would it be helpful for the participants (or their counsel) to initiate an adjudicative process (e.g., by serving but not filing or serving a claim) to bring other participants into the process, to support this process or for other reasons?
    2.4. How might participants use parallel adjudicative proceedings to be helpful to this process? (For example, by staying such proceedings and encouraging early non-adjudicative processes?)
    2.5. What are the participants' likely preferences or points of resistance to early process design?

[19] A Guided Mediator or guided process refers to the appointment of an independent and impartial neutral to help design customized mixed mode processes, where bespoke processes could be of assistance. For an example of a model clause for the selection of a Guided Mediator, see Working Group's 2 most recent proposal at: https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/#documents.

[20] The term "participants" is used in this document primarily to refer to the disputants. It is important to note that different nomenclatures may be appropriate in different situations, and that the words "partners" (with respect to jointly seeking a mutually acceptable dispute resolution process and outcome) or "parties" may be more appropriate in certain contexts. The term "advisors" is also used in this document to refer to professionals who may be advising one of the parties (e.g., legal counsel, process consultants, forensic experts or other advisors).

2.6. Size and structure of the participants (e.g., individuals, SMEs, small family-owned business, privately-owned corporations, publicly-owned or governmental entities, etc.)
2.7. Size and structure of participants' law firms or advisors (if any)
2.8. The participants' backgrounds (e.g., educational, professional, business, cultural)?
2.9. Who are the key decision-makers in each team (business and legal)?
2.10. Should non-participant stakeholders be involved (e.g., third party funders, insurers, impacted clients, community members, etc.)?
2.11. Familiarity with different types of ADR processes (e.g., mediation, conciliation or arbitration)?
2.12. Have the disputants and their respective advisors jointly considered all their alternatives fully (e.g., best, worst and reasonable alternatives, including from cost, time, outcome, risks and consequences perspectives)? Would they like a neutral to help in these assessments early on?
2.13. Language and communication issues?
2.14. The need for simplicity?
2.15. Views and preferences regarding information exchange and the need for accessing evidence?
2.16. Financial means of the participants (e.g., a disputant claiming insolvency/bankruptcy potential – collection issues)?
2.17. Decision-making structures or bodies of the participants
2.18. Presumed interests (e.g., business, reputational, etc.) of the disputants?
2.19. Power ratio as between the disputants?
2.20. Relational issues: Is a continuing relationship of any kind between the participants a possibility?
2.21. Emotional issues?
2.22. Social issues?
2.23. Are there unrelated business needs that a participant might meet for another participant?
2.24. Dynamics between decision makers?
2.25. Willingness of legal advisors to engage?
2.26. Process recommendation of participants and counselors?

3. <u>Financial & Third-Party information</u>

3.1. The estimated value or magnitude of the dispute?
3.2. Transactional costs?
3.3. Expected or budgeted cost of pending or default proceedings (e.g., litigation or arbitration)?
3.4. Insurance?
3.5. 3rd party financing?
3.6. Financial pressures from third parties/stakeholders?
3.7. Tax or regulatory issues (e.g., affecting the dispute or its outcome?)
3.8. The costs of bringing in experts to help resolve topics of impasse or issues of quantum/valuation?
3.9. Involvement of an ADR institution or additional neutrals?

4. <u>Timing</u>

4.1. Time constraints, deadlines and timing? (Are there concerns this process may be too soon/too late?)
4.2. Duration of intended ADR process(es)?
4.3. Desired outcome date?
4.4. Availabilities of key participants?
4.5. Timing logistics (e.g., use of Doodle polls)?

4.6. Should some issues be prioritized and addressed first?
4.7. Might it be helpful to bring in experts or other neutrals, and if so when?

5. Venue

5.1. Impact of venue and process on information exchange (e.g., entitlement to discovery)?
5.2. Impact on group dynamics (e.g., neutrality, business setting, hotel, big city, rural, off-site & team-building activities)?
5.3. Geographical constraints?
5.4. Special requirements
5.5. Confidentiality
5.6. Configuration of rooms and seating plans
5.7. Support (food, projectors, flipcharts, accommodation, etc.)

6. Constraints

6.1. Cost/budget constraints? (How do they relate to the value of the dispute?)
6.2. Legal constraints?
6.3. Past experience and/or knowledge of mixed mode processes and their tools?
6.4. Evidentiary constraints?
6.5. Geographical constraints?
6.6. Cultural constraints?
6.7. Religious constraints?
6.8. Psychological constraints?
6.9. Insurance constraints?
6.10. Stakeholder constraints?
6.11. Ability or inability of the participants to understand and engage with the process or its tools for any other reasons?

7. Social and Emotional factors

7.1. Propensity of dispute to escalate?
7.2. Degree of trust/distrust between the disputants?
7.3. Desires or concerns regarding possible ongoing or new future relationships?
7.4. Impact of process on cognitive, emotional and/or social factors?
7.5. Uncertainties and fears associated with a settlement or perceptions of weakness?
7.6. Group dynamics: one group, many groups, in-group, out-of-group, status issues, etc.?
7.7. Meals (joint or separate), breaks, and dietary issues?

8. Process design

8.1. Negotiation style (e.g., positional or interests-based)
8.2. Range of topics the participants are willing to discuss
8.3. Judicial or arbitral framework within which the dispute is occurring (e.g., access to adjudicative neutrals, recognition of non-judicial/ADR processes)?
8.4. Who wishes to participate?
8.5. Need for experts?
8.6. Number of participants?

8.7. Language issues?
8.8. The need for confidentiality/transparency of the process or any outcome, as well as any information exchanged or submitted, or communications from the neutral(s).
8.9. Need for ongoing progress reports or process communications by the neutral(s), and how they should be made and handled? (E.g., for considerations of momentum, confidentiality, expectations, action items, etc.)
8.10. Joint assessments of alternatives (BATNA/WATNA/RATNA/PATNA assessments)?
8.11. Need to identify values?
8.12. Need to identify interests?
8.13. Need to identify metrics?
8.14. Need to set a precedent/jurisprudence?
8.15. Are there any dispositive legal, factual or other issues that should be resolved in a focused manner?
8.16. Are there likely to be recurring disputes? Is this part of a bigger issue?
8.17. Need to identify new or more options?
8.18. Likely impact, timeline and complications of such a process (e.g., its enforceability or consequences)?
8.19. Need for information exchange before participants /insurers/experts/other key stakeholders can assess positions?
8.20. How to expedite exchange of needed information as opposed to any usual local "discovery"/ "disclosure" requirements? What if these needs are not obvious? Is a special master needed?

9. Outcome

9.1. The need for a (written) settlement agreement or terms sheet/heads of agreement?
9.2. The need for an award / adjudicative decision (whether reasoned or unreasoned)?
9.3. The need for a precedent
9.4. The need for possible future settlement processes (for the settlement or other future issues)
9.5. Closure and closing rituals
9.6. Enforceability of outcome (e.g., in other jurisdictions)?
9.7. Communication of outcome & confidentiality

10. Any other factors?

10.1. Please add your own thoughts to this checklist

What other variables/concepts/factors may be missing to this list? Please add your own ideas. Should some of the above categories be re-grouped? Would it be helpful to have different checklists for the participants and their advisors? Please send all feedback to laura.kaster@gmail.com and jlack@lawtech.ch.

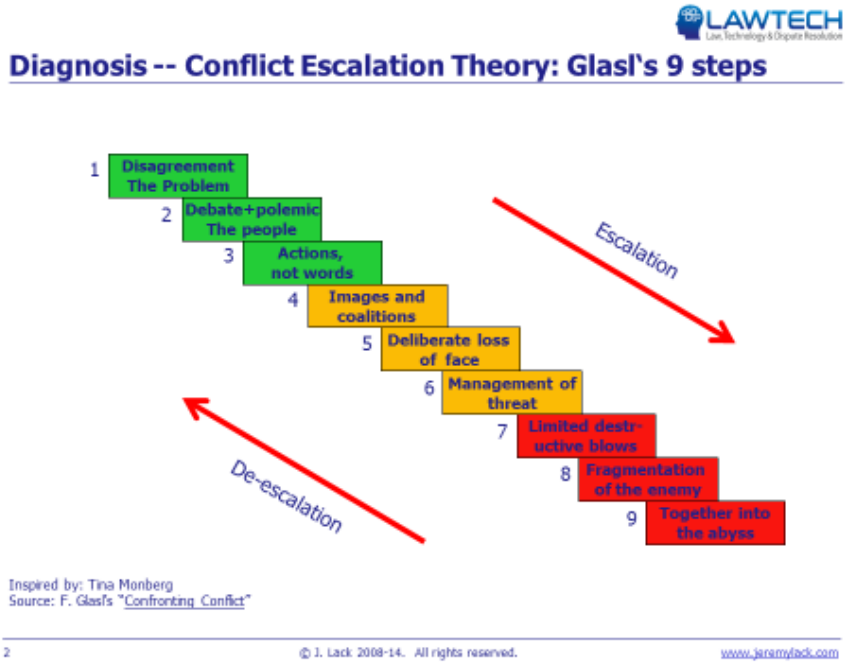
Appendix 3:

SIX PREPARATION EXERCISES PRIOR TO AN INNOVADR™ MIXED MODE PROCESS

Please fill out all the charts in this document, including those related to your partner(s), for a possible mixed mode process involving mediation and binding or non-binding adjudicative elements to the process. These exercises are intended to assist the partners in their thinking and doing perspective-taking exercises before deciding whether to try to mediate a dispute with the involvement of an adjudicative neutral.

I. EXERCISE No. 1: CURRENT SITUATION – ANALYSIS USING THE GLASL CONFLICT ESCALATION SCALE

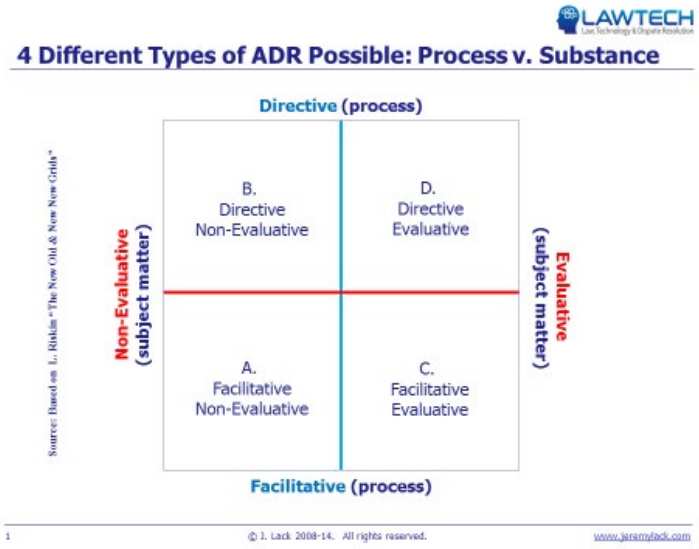
Using the image and the chart below, please try to assess where you and your partner(s) in this ADR process currently stand on this Glasl scale and then answer the questions at the bottom of this page.



Levels 1-9	Brief Description
1: Disagreement	Partners realise they disagree
2: Debate	Partners trying to convince-one-another
3: Action, not words	No point in speaking. Action is required
4: Coalitions	Seeking support/validation from others
5: Loss of face	Potential damage to image/reputation
6: Threat	Partner viewed as a threat to be stopped
7: Limited blows	Attempt to stop by controlled measures
8: Fragmentation	Loss of control due to partner/others
9: Into the abyss	Out of control: winning/destruction of others has become a goal in itself.

Question	PARTNER A (Insert a no. from 1-9)	PARTNER B (Insert a no. from 1-9)
1. Where do we currently locate ourselves?		
2. Where do we wish to be?		
3. Where are our partners currently located?		
4. Where do they wish to be?		

II. EXERCISE No. 2: APPROPRIATE DISPUTE RESOLUTION ("ADR") – TYPE OF ADR PROCESS WANTED (IF APPLICABLE)



Type of Process	Brief Description
A: Facilitative on Process & Non-Evaluative on Substance	The partners decide everything together: issues of process as well as substance. The neutral proposes ideas and alternatives on procedural issues (e.g., timing, prior submissions, agenda, use of caucuses, meals, etc.) but leaves it to the parties to choose, working together. He cannot impose anything. The neutral does not give an opinion or make any proposals on substantive issues. He helps the partners to exchange information and to brainstorm (by focusing on their interests rather than on their positions.) He can suggest techniques for addressing relational and/or social issues as well as assist the partners in generating their own criteria and obtaining external information that can help them overcome impasses (e.g., experts).
B: Directive on Process & Non-Evaluative on Substance	The neutral is responsible for procedural matters (e.g., timing, prior submissions, agenda, use of caucuses, meals etc.) but does not give opinions or make proposals on substantive issues. He helps the partners to exchange information and to brainstorm but does not make any proposals regarding a settlement. He can take initiative regarding procedural decisions or regarding ways of addressing social and relational issues as well as ways of seeking external information to assist the parties in overcoming impasses (e.g., appointing experts and determining the scope of their mandate.) He can help the parties to generate their own norms but does not advise on final solutions or provide a proposal on how the matter could be settled.
C: Facilitative on Process & Evaluative on Substance	The neutral does not control the process but can propose ideas and alternatives to the partners on procedural issues for them to decide (e.g., timing, prior submissions, use of caucuses, agenda, etc.) The neutral is expected, however, to form his/her own views of the matter, and to generate, educate and help the partners in applying possible norms (e.g., findings of fact and applicable laws). He helps the parties to identify dispositive issues and to exchange information relevant to these norms (e.g., on positions and assists in "reality-checking"). He helps the partners to find missing information and can suggest ways of resolving keys issues. He can evaluate the strengths and weaknesses of each partner's positions and, when appropriate, provide his own opinion on the merits and/or give non-binding proposals regarding possible ways of settling the dispute.
D: Directive on Process & Evaluative on Substance.	The neutral directs all issues of process (e.g., timing, prior submissions, agenda, use of caucuses, meals etc.) as well as the topics to be discussed. He can set, educate and advocate norms by which the dispute can be resolved. The neutral forms his/her own views of the matter, and can apply norms (e.g., findings of fact and applicable laws) to help the partners to understand the strengths and weaknesses of their files, and exchange relevant information. He can do "reality-checking" and help the partners to understand what their alternatives to a negotiated agreement may look like (e.g., best case or worst-case scenarios). He will identify dispositive issues and propose ways of resolving them. The neutral is expected to provide his opinion (in caucus or in joint session) and to ultimately give a settlement proposal if the parties do not reach an agreement. The neutral's proposal is usually non-binding but can become binding if the parties agree to accept it as a way to resolve any final issues that are preventing them from reaching a settlement.

Question	PARTNER A (from A-D)	PARTNER B (from A-D)
1. Where do we wish to start this ADR process?		
2. Where do our partners wish to start this ADR process?		
3. Where should the neutral(s) start this ADR process?		

III. EXERCISE No. 3: SEPARATING THE PARTNERS' INTERESTS FROM THEIR POSITIONS

A. PARTNER A's Positions and Interests

PARTNER A's Positions	PARTNER A's Interests

B. PARTNER B's Positions and Interests

PARTNER B's Positions	PARTNER B's Interests

IV. EXERCISE No. 4: LIST & COMPARE BOTH PARTNERS' INTERESTS, CONCERNS, NEEDS AND MOTIVES ("ICNMs")

Take the partners' interests from Exercise No. III above. Add to them their underlying concerns, needs and motives ("ICNMs") looking to the present and the future.

PARTNER A's ICNMs	PARTNER B's ICNMs

V. EXERCISE No. 5: SUMMARY OF THE PARTNERS' ALTERNATIVES TO A NEGOTIATED AGREEMENT

What happens if the partners do not reach an agreement? What are the alternatives? Do a separate BATNA, WATNA and PATNA analysis (see definitions in the right-hand column) for each partner. When completing rows (iv) ("Consequences & impact on ICNMs"), consider how well rows (i)-(iii) would meet both partners' ICNMs looking to the future.

DEFINITIONS

1. "**BATNA**" = Best Alternative to a Negotiated Agreement (e.g., "this partner wins on all points")
2. "**WATNA**" = Worst Alternative to a Negotiated Agreement (e.g., "this partner loses on all points")
3. "**RATNA**" = Reasonable Alternative to a Negotiated Agreement (e.g., "what a 3rd party -- a judge or tribunal --might reasonably award or decide for each partner taking a conservative approach.)"

		PARTNER A's Alternatives	PARTNER B's Alternatives
1. BATNAs	(i) Time		
	(ii) Cost		
	(iii) Outcome/Award		
	(iv) Consequences & impact on ICNMs		
2. WATNAs	(i) Time		
	(ii) Cost		
	(iii) Outcome/Award		
	(v) Consequences & impact on ICNMs		
3. RATNAs	(i) Time		
	(ii) Cost		
	(iii) Outcome/Award		
	(vi) Consequences & impact on ICNMs		

VI. EXERCISE No. 6: THE PARTNERS' "SWOT" ANALYSES

A. PARTNER A's SWOT Analysis

	Positive	Negative
Internal	STRENGTHS	WEAKNESSES
External	OPPORTUNITIES	THREATS

B. PARTNER B's SWOT Analysis

	Positive	Negative
Internal	**STRENGTHS**	**WEAKNESSES**
External	**OPPORTUNITIES**	**THREATS**

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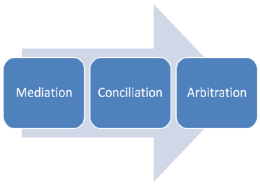
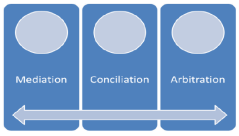
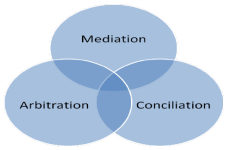
Process Design & Combining Processes



Sequential
- Med-Arb
- Arb-Med
- Windows
- Arb-Med-Con-Med-Arb
- Consent awards



Parallel
- Med//Arb
- Carve-outs
- Shadow mediation
- Partnering



Integrated
- MEDALOA
- Dispute Boards
- Combined Neutrals
- ??? (3 question marks)

Factors
- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

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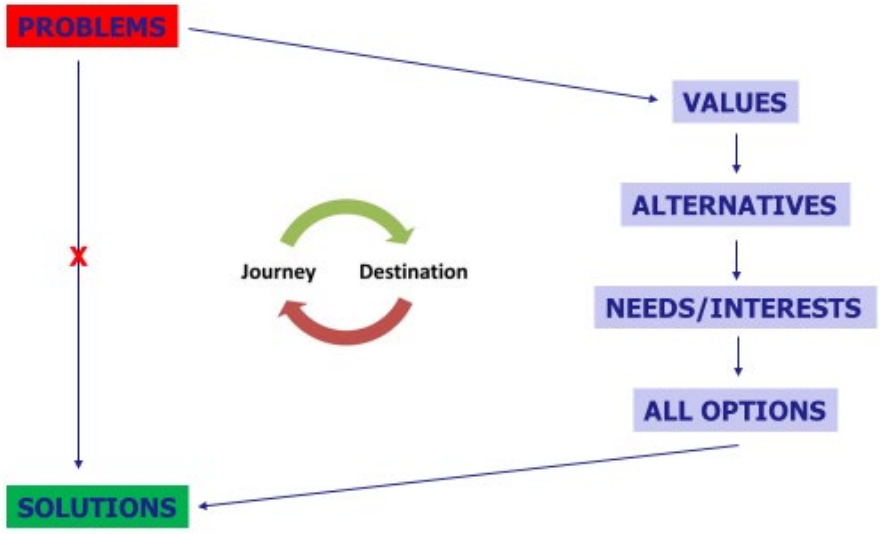
A process for optimal discussions and outcomes



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Appendix 4:

MINDMAP OF POTENTIAL PROCESS DESIGN ISSUES LINKED TO DIAGNOSTIC CRITERIA

See: https://mm.tt/1383683202?t=Kl2cRqO8zO