

CHAPTER 3.0

DRAFT REPORT OF WORKING GROUP 3

PRACTICE GUIDELINES FOR MEDIATORS USE OF NON-BINDING EVALUATIONS AND SETTLEMENT PROPOSALS

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3.1 Introduction

3.1.1 *Mixed modes dispute resolution processes.* In a globalised world where actors in international commerce require creative approaches to the resolution of conflicts, the relationship between non-adjudicative modes of dispute resolution (such as mediation and conciliation) and adjudicative process (such as arbitration, adjudication and litigation) is ever-evolving.

Neutrals tasked with helping to resolve a dispute (either as arbitrator, judge, or mediator) may deviate from a hard split between non-adjudicative and adjudicative processes and instead opt to 'mix modes' and apply elements of both: for example, an arbitrator might be inclined to prod the parties towards settlement, or a mediator may provide the parties with their assessment of the merits of their cases. The mixing by a neutral of different modes (adjudicative and non-adjudicative) of dispute resolution is collectively referred to as mixed mode dispute resolution.¹

Mixed mode approaches are an increasingly important feature of commercial dispute resolution and, as a result of the internationalisation of global trade (and, by corollary, international disputes), stakeholders are likely to encounter parties and neutrals whose approaches are different from what they are used to. Whether (and, if so, which) forms of 'mixed mode dispute resolution' are palatable to the parties may vary greatly depending on their legal tradition, local custom, culture, or personal preferences.

Whereas mixing of processes by neutrals may lead to friction when parties have different expectations from a method of dispute resolution or diverging opinions on what is 'appropriate' behaviour by the neutral, mixing modes also has the potential

¹ For a full background on the Task Force's formation and aims, and a discussion of various forms of mixed mode dispute resolution, see Thomas J. Stipanowich Thomas & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases* (2017) 40 Fordham International Law Journal, p. 839, Pepperdine University Legal Studies Research Paper No. 2017/4. Available at SSRN: <<https://ssrn.com/abstract=2920785>>.

of benefitting the quality of dispute resolution through the increased availability to parties of diverse and bespoke mechanisms to resolve their disputes.

Aiming to reap the benefits of mixed mode dispute resolution whilst limiting the potential for any friction or misunderstandings, 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 of Dispute Resolution, Pepperdine Law School (“Straus Institute”). The Task Force brings together more than sixty dispute resolution professionals from around the world who, as members of one of six different working groups focussing on specific topics, engage in dialogue to promote understanding of varied practices on different kinds of mixed mode dispute resolution.

3.1.2 *Mandate of Working Group 3.* The present report (the "Report") is produced by Working Group 3 of the Task Force ("**WG3**"), mandated with exploring the topic of mediators using non-binding evaluations and making settlement proposals'. Mediators employing such techniques might express their assessment of the strength of a party's case, predict the outcome of any arbitration or litigation that might follow the mediation, or at the parties' request, make an outright suggestion of how the parties could settle the dispute. This Report analyses potential issues that may arise as a result of these approaches and makes recommendations on how mediators could employ these techniques.

3.1.3 *Appendices.* Attached to this Report are the following documents:

Appendix 1: Existing Provisions on Definitions and Role of Mediators/Conciliators Giving Non-Binding Evaluations and Making Settlement Proposals;

Appendix 2: WG3's Table on the Range of Facilitative and Evaluative Techniques Used by Mediators and Conciliators

Appendix 3: WG3's Checklist of Elements to Consider When Making Evaluations

Appendix 4: List of WG3 Members.

3.2 Objectives and Executive Summary

3.2.1 *Mission and objectives.* As part of its inquiry into mixed mode scenarios, the Task Force has been charged with examining and seeking to develop model standards and criteria applicable to mixed mode dispute resolution. This mandate involves exploring and investigating practices from various cultural and legal standpoints, taking into account current experience and best practices.

WG3 is aware of the different approaches to the use of evaluative methods by mediators globally and has leveraged the diverse background of its members² to consider the issue from a broad cultural and geographical perspective. WG3's members were requested not only to look backwards to their past experiences, but also to focus on future best practices, identifying any tips or procedures that may assist when seeking to use a process of mixed mode dispute resolution in the future.

WG3 aimed to create guidelines regarding evaluative mediation for mediators to use and consider prior to making evaluations. WG3 considered that any output should be sensitive to possible differences in the interpretation of key concepts and has therefore identified and defined these in the Report. The Report also considers the impact of culture and training on the perception of the role of the mediator and the desirability of the mediator making non-binding evaluations or settlement proposals.

3.2.2 *Recommendations.* The Report concludes by making the following recommendations

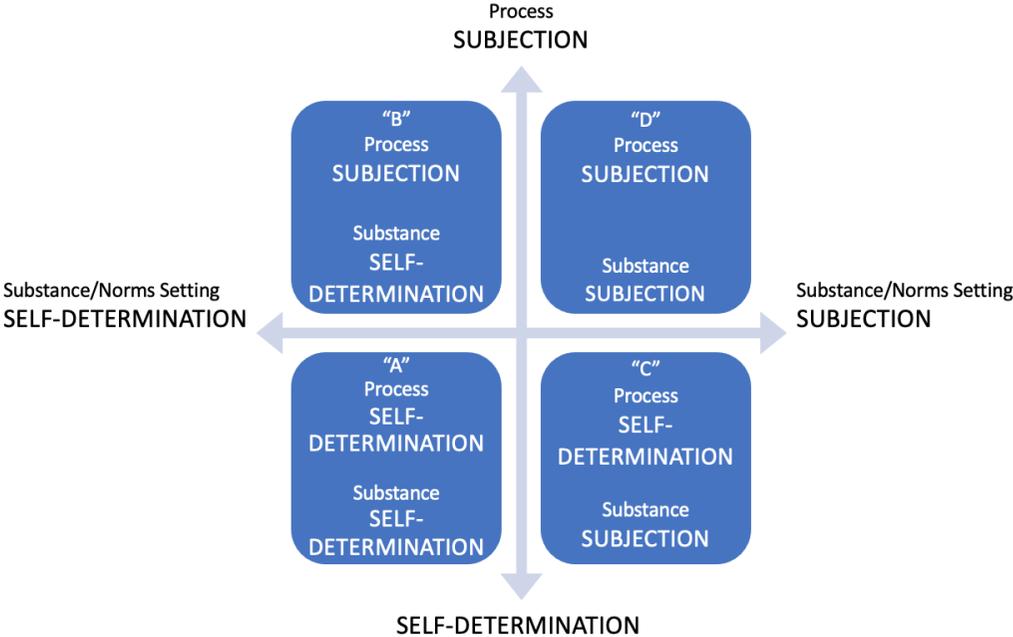
Recommendation 1: Using WG3's "Grid Regarding Party Autonomy in Mediation and Conciliation Process" for Process Design

² Set out in Appendix 4.

In considering mediators' use of non-binding evaluations and settlement proposals, WG3 suggests a shift in focus from mediators' orientations to the effects of mediators' techniques on party autonomy regarding substance and process.

WG3 recommends using an adapted version of Riskin's New New Grid to anchor party autonomy in mediation (Figure 4, reproduced below). WG3's Grid Regarding Party Autonomy in Mediation and Conciliation Process can be a useful tool for a third-party neutral to help the parties decide the degree of self-determination that they can retain regarding norms setting and the substance of the dispute, as well as the process (more details see Section 3.6).

Figure 4. Working Group 3's Grid Regarding Party Autonomy in Mediation and Conciliation Process



Recommendation 2: Adapting Neutrals’ Techniques to Parties’ Process Choices Regarding Process and Substance Autonomy

WG3 provides a taxonomy, based on WG3’s “Grid Regarding Party Autonomy in Mediation and Conciliation Process”, of a range of evaluations that have been found to be used by neutrals across various cultures and sectors (reproduced below and in Appendix 2). On the vertical axis, this table illustrates six different types of evaluations (questions, educating, generating and enunciating rules and norms, assessments and opinions, developing proposals, predictions, pressing or persuading). The horizontal axis shows examples of techniques that can be used depending on the degree of self-determination that parties retain regarding the substance and the process. This taxonomy serves as a guide for the mediator to locate his or her interventions and understand their impact in terms of party autonomy regarding the process or the substance of the dispute. It also shows how a mediator can adapt his or her techniques depending upon the choices that parties have made during the process design phase (more details see Section 3.6).

WG3’s Table on the Range of Facilitative and Evaluative Techniques Used by Mediators and Conciliators

Range of techniques	A. Process and substance self-determination	B. Process subjection and substance self-determination	C. Process self-determination and substance subjection	D. Process and substance subjection
1. Questions	<ul style="list-style-type: none"> -Probing to understand the disputants’ procedural needs and substantive interests -Open-ended questions and eliciting techniques 	<ul style="list-style-type: none"> -Challenging disputants to generate new ideas, posing problems to be solved 	<ul style="list-style-type: none"> -Helping the parties to find missing information -Close-ended, suggestive and leading questions -Playing devil’s advocate -Making enquiries and investigations 	<ul style="list-style-type: none"> -Close-ended, suggestive and leading questions -Playing devil’s advocate -Making enquiries and investigations

<p>2. Educating, generating and enunciating rules and norms</p>	<ul style="list-style-type: none"> -Suggesting techniques for addressing relational and/or social issues -Assisting the parties in generating their own criteria 	<ul style="list-style-type: none"> -Helping the parties to generate their own norms -May take initiatives regarding ways of addressing social and relational issues -Establishes rules and guidelines determining the process (submissions, time, venue, caucuses, deadlines, etc.) -Encouraging the parties to consider the fairness and justice of issues being discussed 	<ul style="list-style-type: none"> -Advising on objective parameters and norms (e.g. applicable law or other norms such as financial, industrial, technical, etc.) -Helping the parties in applying possible norms (e.g., finding of facts and applicable laws) -Supplying missing information, data, examples and patterns to parties 	<ul style="list-style-type: none"> -Neutral can set, educate and advocate norms by which the dispute can be resolved -Advising on objective parameters and norms (e.g. applicable law or other norms such as financial, industrial, technical, etc.) -Helping the parties in applying possible norms (e.g., finding of facts and applicable laws) -Supplying missing information, data, examples and patterns to parties -Determining the process (time, venue, submissions, caucuses, etc.)
<p>3. Assessments and opinions</p>	<ul style="list-style-type: none"> -Does not give opinions on substantive issues -Assisting the parties to obtaining external information that can help them overcome impasses (e.g., experts) 	<ul style="list-style-type: none"> -Does not give opinions on substantive issues or advise on final solutions -Approaching each party in caucuses and asking them to expose their risks -May take initiatives regarding ways of seeking external information to assist the parties in overcoming impasses (e.g., appointing experts and determining the scope of their 	<ul style="list-style-type: none"> -Neutral is expected to form his own views of the matter -Neutral can evaluate the strengths and weaknesses of each parties' positions 	<ul style="list-style-type: none"> -Neutral forms his own views of the matter, and can apply norms (e.g. finding of facts and applicable laws) to help the parties to understand the strengths and weaknesses of their cases and exchange relevant information -Neutral is expected to provide his opinion (in caucus or in joint session)

		mandate) or suggest an alternative method of resolution		
4. Developing proposals	<ul style="list-style-type: none"> -Does not make any proposals on substantive issues -Helping the parties to exchange information and to brainstorm (by focusing on their interests rather than on their positions) 	<ul style="list-style-type: none"> -Does not make any proposals on substantive issues -Leading the parties into problem-solving (e.g., challenging the parties to generate new ideas, posing problems to be solved, asking hypothetical questions, having the parties prioritize issues or making clarifications, etc.) 	<ul style="list-style-type: none"> -Suggesting ways of resolving key issues and requesting disputants' reaction to those ideas -Giving non-binding proposals -Setting binding "floors and ceilings" 	<ul style="list-style-type: none"> -Identifying dispositive issues and suggesting ways of resolving them -Ultimately making a (non-binding) settlement proposal if the parties do not reach an agreement -Shaping a settlement within a defined ZOPE -Ultimate making binding or non-binding evaluations as to the ZOPE
5. Predictions	Does not make predictions	<ul style="list-style-type: none"> - Assisting the parties to analyze their alternatives to a negotiated settlement - Asking the parties' counsel to make an assessment or advise them about the likely outcome of tactics 	<ul style="list-style-type: none"> -When appropriate, providing neutral's own opinion on the merits -Predictions of possible impact on interests of not settling -Using of probability trees and other analytic tools -Predictions of possible outcomes if a case is adjudicated in court or arbitration 	<ul style="list-style-type: none"> -Providing neutral's own opinion on the merits -Predictions of possible impact on interests of not settling -Predictions of possible outcomes if a case is adjudicated in court or arbitration

<p>6. Pressing or persuading</p>	<p>Does not use pressing or persuading techniques</p>	<ul style="list-style-type: none"> -Directly encouraging the parties to move forward with the process -Helping the parties jointly perceive new collaborative goals -Urging the parties to talk -Levering influence of third parties by having an audience present at the mediation 	<ul style="list-style-type: none"> -Helping the parties to identify dispositive issues and to exchange information relevant to these norms -Reality-checking with the aim to soften intransigent disputants or their advisors to facilitate reaching a compromise -Appealing to the disputants' habits, doubts, emotions and desire for reward 	<ul style="list-style-type: none"> -Robust reality testing regarding the parties' BATNA and WATNA on key parameters and benchmarks -Providing a sound reason for settling -Urging the parties to focus on specific dispositive issues -Urging parties to make concessions or reach agreement -Making threats to end mediation and move to arbitration -Mentioning arbitration -Urging the parties to settle -Urging the parties to accept the neutral's proposal
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Recommendation 3: Using WG3's Checklist of Elements to Consider When Making Evaluations

Mediators and conciliators should work together with the parties and go through a number of elements with the parties and the neutrals to consider the opportunity of using evaluations. For that purpose, WG3 provides a checklist of elements to consider when making evaluations (see Appendix 3).

3.2.3 *Purposes of recommendations.* The recommendations are addressed at the mediator and are intended to achieve the following purposes:

- To facilitate process design between neutrals and the parties;
- To provide further clarity about mediation interventions;
- To encourage parties' informed consent; and
- To increase the credibility of mediation.

3.3 Definition of Key Concepts

Mediators using non-binding evaluations and making settlement proposals is one of the most common forms of mixed mode practice,³ and often not considered as such. This is also an area where there appears to be considerable difference due to cultural impact and ethical considerations. Because perspectives on mediation and mediator practices vary greatly in different jurisdictions, there have been considerable discussions and debates regarding mediators' employment of evaluative methods and even the proper meaning of "mediation vs. conciliation,"" as well "evaluation." It is thus important to clarify the definition of a few key concepts.

3.3.1 *Mediation.* *Mediation* definitions vary significantly from one another. WG3 proposes a definition which encompasses a diversity of mediation practices.

Mediation is the intervention into a dispute or negotiation by an impartial third party to assist disputing parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.⁴

Several elements commonly found in other definitions of mediation have been voluntarily omitted. For example, some definitions emphasize the fact that parties in mediation must reach their own solutions.⁵ However, in some cultures, for example

³ Christopher To, *Facilitative Versus Evaluative Mediation*, (2018) 20 (2) Asian Dispute Review 81 at 81.

⁴ This definition is drawn from: Christopher Moore, *The Mediation Process*, p. 14; Hal Abramson, *Mediation Representation*, p. 17.

⁵ Christopher Moore, *The Mediation Process*, p. 14;

in Italy,⁶ in France⁷ and in the United States,⁸ it is not uncommon for a mediator to put forth a settlement proposal for the parties to consider, revise or accept as is.⁹ Some mediation definitions state that the mediator shall be a neutral person,¹⁰ however, WG3 found that this is not always the case. For example, in a conflict between Jews and Palestinians conducted by an American conciliator, the conciliator must be impartial as he or she should not favor the views of one party over that of the other, but he or she is often not neutral as he or she might be mandated by his country to facilitate a peacemaking agreement between the two conflicting nations.¹¹ In such a case, the conciliator's mission is to help the parties find an agreement, which differs from other types of mediation where the mediator should refrain from influencing parties in reaching agreement.¹² The absence of neutrality of the mediator might also be found in other cultural contexts, such as in the Middle East or in Asia, where the mediator might be a morally authoritative person whose mandate is to restore harmony.¹³

⁶ Legislative Decree 28/2010 § 1 (Italy). Italy's legislation defines mediation as: "an activity carried out by an impartial third party and designed to assist two or more parties in the search for an amicable agreement for the settlement of a dispute, even with the formulation of a proposal for resolution of the dispute.

⁷ Schonewille

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¹⁰ Christopher Moore *The Mediation Process* at p. 14; local rules of the US District Court for the Northern District of California; California Evidence Code § 1115 a) (United States, California);

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¹² See e.g. Brazil's *Civil Procedure Code* complements the definition with this outline of the mediator's role:

"The mediator is a neutral and impartial third party that helps the communication of parties. It is recommended for cases where there is some sort of relationship between parts (either personal or commercial relation). Mediators should restrain from influencing parties in closing deals."¹²

¹³ For e.g. France – Adeline Audrerire

3.3.2 *Conciliation*. While some jurisdictions maintain a distinction between mediation and conciliation,¹⁴ the two concepts are often used interchangeably in many jurisdictions and contexts (see Section B below).

At the international public law level, there is a stronger consensus regarding the meaning of conciliation. Notably, the Institut de Droit International adopted in 1961 a resolution titled *La conciliation internationale*¹⁵ defining conciliation as a dispute resolution method in which a commission constituted by the parties examines the dispute and “attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.”¹⁶ Perhaps the most in-depth review of international conciliation was undertaken by author Jean-Pierre Cot in his book *International Conciliation*, that lays out the following definition, which notably emphasizes the autonomy of the parties as well as the directive role of the conciliator: the “intervention 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.”¹⁷ In the context of commercial dispute resolution, the following definition of conciliation may be used:

¹⁴ For example, in Brazil conciliation usually means a process in which the neutral examines the legal arguments of both parties rather than underlying commercial, personal or other interests. In Brazilian court cases where conciliation is used, the conciliator is the judge ruling on the case or a member of the court staff, *ie* the neutral is *not* chosen by the parties, unlike mediation. In India, conciliation may mean the same thing as evaluative mediation where the neutral can go beyond facilitation and make suggestions on the merits of the dispute. In other places and contexts, “conciliation” may also mean that the parties have no say in the choice of the neutral, and/or that the neutral may hold the power to ultimately impose a decision if the parties do not reach agreement. See Switzerland.

¹⁵ INSTITUT DE DROIT INTERNATIONAL, LA CONCILIATION INTERNATIONALE (1961), https://www.idi-iiil.org/app/uploads/2017/06/1961_salz_02_fr.pdf.

¹⁶ INSTITUT DE DROIT INTERNATIONAL, LA CONCILIATION INTERNATIONALE art. 1 (1961), https://www.idi-iiil.org/app/uploads/2017/06/1961_salz_02_fr.pdf. The document also includes a set of rules, which do not differ substantially from those proposed by UN instruments. A guide relative to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* also pinpoints elements specific to conciliation, such as the “active and directive role” taken by the third party during the process. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL parties’ cases or of possible outcomes in adjudications, or offer the parties a proposal for settlement of the dispute. CHILD ABDUCTION: MEDIATION (2012), <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf>.

¹⁷ JEAN-PIERRE COT, INTERNATIONAL CONCILIATION (1968) (trans. Myers 1972).

Conciliation is the intervention in the settlement of a dispute by an impartial third party, appointed by the parties out of their free consent, to attempt to persuade them to arrive at an agreement, by way of mutual discussion and dialogue, by offering some form of evaluation of parties' cases or of possible outcomes in adjudication, or offer the parties a proposal for settlement of the dispute.¹⁸

3.3.3 *Use of “mediation” and “conciliation” interchangeably.* UNCITRAL Model Law on International Commercial Conciliation (2002) defined conciliation as “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their.”¹⁹ The conciliator was also granted with the authority to make proposals for a settlement of the dispute.²⁰ In 2018, UNCITRAL amended the 2002 Model Law to replace it for the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*.²¹ The amended Model Law used the same definition for mediation²² as the one used to define conciliation in the 2002 Model Law, and the mediator is granted the same powers²³ as those that were given to the conciliator. The Commission decided to use the term mediation instead of conciliation to adapt to the “actual and practical use of the terms” and “with the expectation that this change will facilitate the promotion and heighten

¹⁸ This definition of conciliation reflects a broadly shared view among several jurisdictions and corresponds to the concept of conciliation embraced at the international level. See e.g. 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, 352-53 (Arnold Ingen-Housz ed., 2010); JEAN-PIERRE COT, *INTERNATIONAL CONCILIATION* 9 (R. Myers trans., Europa Publications, 1972).

Appropriate Dispute Resolution, supra note 12, at 352-53, in which the author describes the

¹⁹ UNCITRAL Model Law on International Commercial Conciliation (2002), Article 1(3).

²⁰ UNCITRAL Model Law on International Commercial Conciliation (2002), Article 6(4).

²¹ See UNCITRAL document A/CN.9/987 of 2019.

²² UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, Article 1(3).

²³ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, Article 7(4).

the visibility of the Model Law.”²⁴ Nevertheless, it reiterates that the terms “mediation” and “conciliation” are interchangeable and the change in terminology “does not have any substantive or conceptual implications.”²⁵

WG3 follows this movement and therefore recommends a broad definition of mediation, which can encompass both what is exclusively defined as mediation or conciliation in different jurisdictions (see Section 3.3.1 above).

3.3.4 *Lessons from the mediation and conciliation terminology debates.* WG3 found that there are nevertheless important lessons to be drawn from the mediation and conciliation terminology debates. There exists a large spectrum of mediation interventions, which can affect the dynamic of the process, parties’ cooperation, parties self-determination or even the fairness of the process. The spectrum of mediation interventions should hence be clearly defined so that counselors and mediators can assist the parties in making informed choice.

3.3.4 *Evaluation v. Facilitation.* This working group focuses on one aspect of a mediator’s behavior, the extent to which, in helping parties settle their dispute, the mediator tended to “evaluate,” meaning to assess the strengths and weaknesses of a legal position or to predict outcomes in court. In contrast, “facilitate” means mediators only assisted the parties’ negotiations without evaluating. Each of these terms also represented a continuum.²⁶ Evaluation can range from behavior that is principally informative to directive. Facilitation can range from reality test the parties to simply keeping order while parties discuss whatever they wish.²⁷

It should be noted that these definitions are not meant to be applied rigidly, as they represent a continuum, rather than a static point, as illustrated by **Leonard Riskin’s Old Grid**. The old “grid” consists of two intersecting continuums, one represented

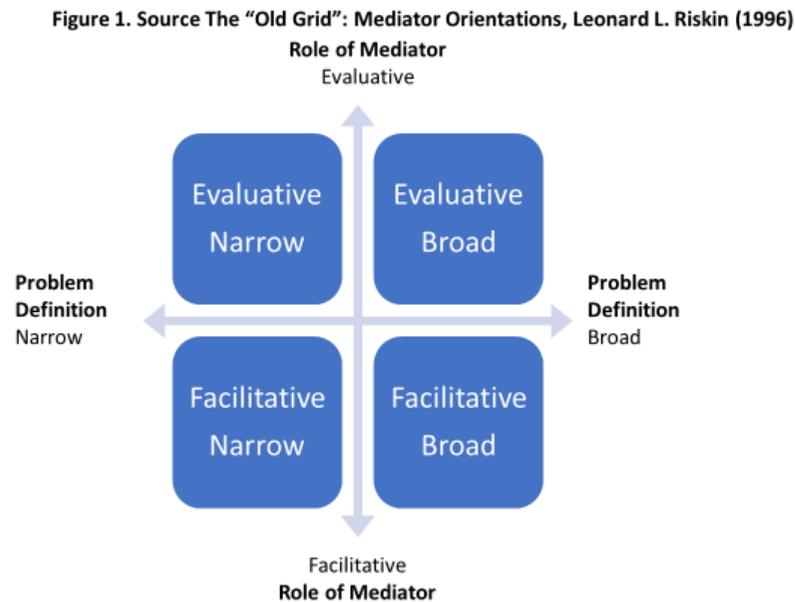
²⁴ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, Article 1(1), note 2.

²⁵ *Ibid.*

²⁶ Leonard Riskin, “Decision-making in Mediation: The New Old Grid and the New New Grid System”, 79 *Notre Dame Law Review* 1 (2003), p. 10.

²⁷ See *ibid.*, pp. 12-13.

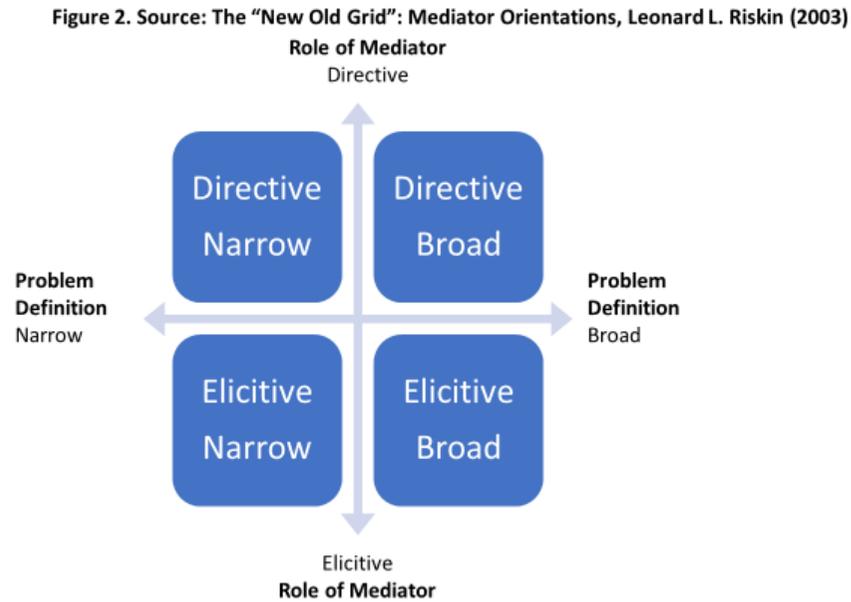
the mediator’s notion of the mediator’s role; the concepts of “facilitative” and “evaluative” provided its anchors (Figure 1). The other dealt with the mediator’s customary approach to problem-definition and it ran from “narrow” to “broad.”²⁸



3.3.5 *Directive v. Elicitive*. “Directive” refers to the extent to which the mediator *directs* the mediation process, or the participants, toward a particular procedure or perspective or outcome. “Elicitive” refers to the extent to which the mediator *elicits* the parties’

²⁸ Leonard Riskin, “Decision-making in Mediation: The New Old Grid and the New New Grid System”, 79 *Notre Dame Law Review* 1 (2003), p. 3.

perspectives and preferences and then tries to honor or accommodate them. Leonard Riskin’s “New Old Grid” of mediator orientations used the terms “directive” and “elicitive” to anchor the role-of-the-mediator continuum (Figure 2).²⁹



3.3.6 *Substantive and Procedural Decision-making.* Leonard Riskin’s “New New Grid” focuses on the range of potential decisions in and about mediation and the extent to which the parties and mediator influence these decisions. It identifies three types of

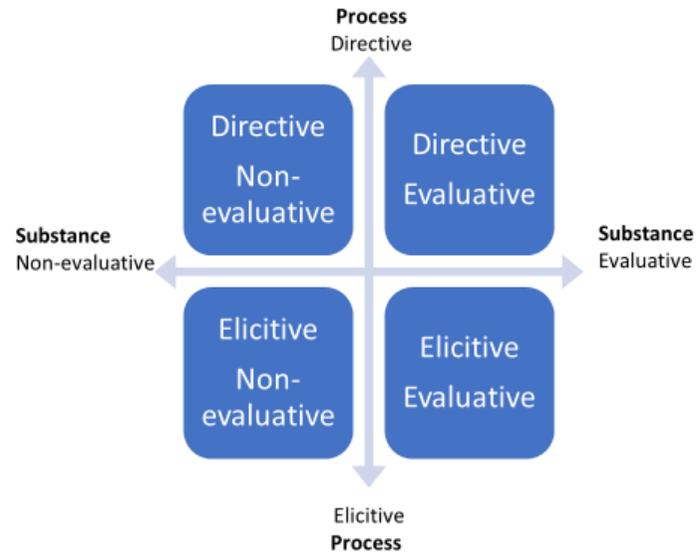
²⁹ Leonard Riskin, “Decision-making in Mediation: The New Old Grid and the New New Grid System”, 79 *Notre Dame Law Review* 1 (2003), pp. 30-31.

decisions: substantive decision-making, procedural decision-making and meta-procedural decision-making.³⁰ Substantive decision-making concerns the definition of the problem and the elements that gave rise to it that will be the subject of mediation. Procedural decision-making refers to the procedures employed to reach or address the substantive issues. Meta-procedural decision-making takes place upstream of the mediation process and focuses on deciding how procedural decisions will be made throughout the mediation. Meta-procedural decision-making is covered by Working Group 2 (about Neutrals Facilitating Tailored Process Design). Figure 3 represents an illustration of Riskin's New New Grid, however, integrating only substantive and procedural decision-making, the vertical axis represents the mediator's orientations towards the process; the concepts of "directive" and "elicitive" provides its anchors. The other deals with the mediator's orientations to the substance of the disputes, and it runs from non-evaluative to evaluative.³¹ WG3's recommendations draw, with some adaptations, on Leonard Riskin's New New Grid concerning substantive and procedural decision-making.

³⁰ Leonard Riskin, "Decision-making in Mediation: The New Old Grid and the New New Grid System", 79 *Notre Dame Law Review* 1 (2003), pp. 34-45.

³¹ Lack 2008 1-4. .See: 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, 353-57 (Arnold Ingen-Housz ed., 2010). This grid was also analysed in the introductory chapter "*Mediation in the European Union and Abroad: 60 States Divided by a Common Word?*" in the book *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* written by Manon Schonewille (Editor) & Fred Schonewille (Editor), ISBN-13: 978-9462361119, Chapter 2, p. 19 at pp. 25-33, which also lists some of the Pros and Cons for mediation in each Quadrant. See: http://lawtech.ch/wp-content/uploads/2016/03/Chapter-Schonewille-Lack-from-The-variegated-landscape-of-mediation_vier...pdf.

Figure 3. Source: The “New New Grid”: Mediator Orientations, Leonard L. Riskin (2003)



3.4 Perceptions of Mediators Based on Local Cultural Trends

WG3 identified differences in general perceptions of mediators and their roles based on local cultural trends.³²

³² Stipanowich & Fraser, *supra* note 1, p. 878-879.

3.4.1 *China*. In mainland China, the differences between mediation (non-evaluative) and conciliation (evaluative), and even to an extent arbitration, are blurred.³³ The process is also generally quite informal. Mediation in China is historically often used in conjunction with another process (such as arbitration or litigation) and less so as a standalone mechanism (though noting that the use of stand-alone mediation has increased somewhat in recent times).³⁴ The neutral is considered more of a problem solver than as acting in a specific role (e.g. evaluator, facilitator, decision-maker, etc.). Parties expect the neutral to help them resolve their disputes, by the most appropriate means. Therefore, it is quite common for the neutral to cross the lines between facilitation and evaluation. While there often seems to be an evaluative element, mediators are also very cautious not to give direct opinion on the merits to avoid appearance of bias.³⁵ Indeed, it is very common for Chinese arbitrators to act as mediators (often referred to as Med-Arb or Arb-Med), provided both parties consent to it.³⁶ Empirical research shows that 88.9% of the respondents considered that it is appropriate for the arbitrators to facilitate settlement.³⁷ 80.6% of the respondents considered that both evaluative and facilitative elements are involved when arbitrators engage in settlement activities.³⁸

3.4.2 *United Kingdom*. In the United Kingdom, while there are no standard rules on the mediator's role, training and practice seem to favour facilitative rather than evaluative model. Mediators are generally not inclined to give an outright assessment of the case to avoid an appearance of bias. However, mediators will often 'reality check' the parties' cases (e.g. by testing the evidence, asking follow-up questions, etc.) in a way that subtly shows parties the strengths and weaknesses of their case. They might feel somewhat more comfortable to push their views in a caucus than in a joint session.

³³ See Fan Kun, 2013, 'Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms', *Harvard Negotiation Law Review*, vol. 18, pp. 171 – 219; Fan Kun, 2013, *Arbitration in China: A Legal and Cultural Analysis*, Bloomsbury Publishing, pp. 155-158.

³⁴ See Fan Kun, 2013, *Arbitration in China: A Legal and Cultural Analysis*, Bloomsbury Publishing, pp. 159-164.

³⁵ See Fan Kun, 2014, 'An Empirical Study of Arbitrators Acting as Mediators in China', *Cardozo Journal of Conflict Resolution*, vol. 15, pp. 777 – 811.

³⁶ This topic is thoroughly addressed in Working Group 5's report: "Switching Hats" Single-Neutral Med-Arb, Arb-Medi and Arb-Med-Arb.

³⁷ FAN KUN, 'An Empirical Study of Arbitrators Acting as Mediators in China', 15 *Cardozo Journal of Conflict Resolution* 777 (2014) pp. 777 – 811.

³⁸ *Ibid*, pp. 796

- 3.4.3 *Singapore and Hong Kong.* In Singapore and Hong Kong, even though they are both ethnically majority-Chinese and share a common cultural heritage with China (mainland), they have very different legal systems. Influenced by the legal trainings following common law procedures and practices, the perceptions and attitudes towards dispute resolution practices is also very similar to that in the United Kingdom. In Singapore, the role of mediator is generally perceived as a facilitator only and parties do not expect mediators to make an evaluation. Mediators also tend not to offer any opinion beyond facilitation of settlement. Mediators occasionally offer a limited type of evaluation through questioning, but they are very cautious not to offer any formal type of opinion on the merits of the case. Similarly, facilitative mediation is the most common type of mediation used in Hong Kong. It should be noted that since late 2015, the Department of Justice and the Intellectual Property Department of the Hong Kong Government have been promoting the use of evaluative mediation when the nature of the disputes calls for an evaluation of the issues involved, such as cases involving disputes over IP rights as well as cases involving complex or technical issues.³⁹
- 3.4.4 *United States.* In the United States, it is common for mediators to make non-binding evaluations, but they usually ask the parties' preference first. While some mediators prefer to do evaluation after exhausting all attempts for negotiations, the parties may prefer to have an evaluation from the start of the proceeding. It is therefore important to ask the preference of the parties at the beginning of the proceeding. When making evaluations, mediators take effort to ensure preserving neutrality and fairness towards both parties. Mediators often feel more comfortable to give evaluations in a private caucus than in a joint session, so as to avoid impressions of partiality or tipping the parties' negotiations. Mediators who have given settlement evaluations in open caucus have in fact been heavily criticized by the parties for this. Upon request from the parties, mediators will often accept to make a settlement proposal, however some mediators will not continue the mediation process if their proposal is not accepted as their appearance of impartiality might be impaired moving forwards in the process.
- 3.4.5 *Brazil.* In Brazil, mediation is a relatively new phenomenon since 1990s, when there has been a great demand for family mediation in the country. In 2015, the Mediation Law and the New Civil Procedure Code came into force. Commercial

³⁹ Secretary of Justice, Mr. Rimsky Yuen SC's speech at IP Mediation Workshop: An Evaluative Approach, 23 May 2015, available at https://www.doj.gov.hk/mobile/eng/public/pr/20150523_pr.html (last accessed 18 January 2020).

mediation gained even more strength owing to the legal certainty brought by the law. Mediation is generally viewed as facilitative/elicitive. There are clear norms related to confidentiality, deadlines and enforcement of agreements. In private, “extra-judicial” mediations,⁴⁰ parties often have a pre-mediation meeting at the chamber when they meet with case administrative people, not the mediator. During the meeting, parties can get an expectation about what mediation is, how it works and the way mediation is conducted from the case manager. Some chambers’ rules provide that mediators can only do facilitation (and not evaluations).

3.4.6 *Switzerland.* In Switzerland, there is a clear difference between conciliation and mediation. The Swiss Code of Civil Procedure (CPC) Part 2, Title 1 (Arts. 197 – 212) and Title 2 (Arts. 213 – 218), define conciliation and mediation respectively as separate and distinct processes. *Mediation* is considered primarily a facilitative process that can be provided by any independent, impartial and neutral mediator that focuses on the parties’ perceptions, needs, interests and concerns, and where no norms need to be applied, whereas *conciliation* is a norms-based process where the neutral may offer his or her opinions, and where the neutral is either a judge, arbitrator or some other expert who knows and understands the norms to be applied, and who can provide evaluative feedback based on their application. The distinction is summarized as follows in the Swiss Chambers’ Arbitration Institution (SCAI)’s most recent Rules of Mediation, issued in 2019: “*Mediation is a method of dispute resolution whereby the parties attempt to reach an amicable settlement of their dispute or avoid future conflicts with the assistance of a neutral third party, the mediator. The mediator facilitates the exchange of information and perspectives between the parties and encourages them to explore solutions that meet their needs and interests. Unless specifically requested by the parties, the mediator does not give his or her own views (as would an expert), and abstains from making proposals (as would a conciliator)*” (Emphasis added).⁴¹

⁴⁰ The Brazilian Mediation Law 13.140/2015 distinguishes between so-called “judicial mediations” of court cases where the mediators and process are wholly controlled by the courts, and “extra-judicial mediations” involving private ADR institutions/chambers and mediators outside the court system.

⁴¹ The SCAI Swiss Rules of Mediation 2019, page 3. See: <https://www.swissarbitration.org/Mediation/Mediation-rules>.

- 3.4.7 *Norway*. In Norway, both the mediation (*Rettsmekling*) and the conciliation (*Utenrettslig Mekling*) processes share characteristics with conciliation as the third-party may put forward solutions and assess the strengths and weaknesses of the parties' arguments. *Utenrettslig Mekling* gives the conciliator a more active role, where he or she may act more directly and in an evaluative manner, whereas in *Rettsmekling*, the mediator should act carefully in evaluating the parties' cases or putting forth proposed solutions.⁴²
- 3.4.8 *Japan*. In Japan, conciliation and mediation are distinguished in practice but not in the law. A dictionary developed by law experts illustrates the existing differences in terminology by making a distinction between *assen* (mediation) and *chôtei*, where the third-party advocates for a compromise agreement in a more active manner.⁴³ In this country, there also exists a civil conciliation procedure, which is a court-annexed formal process where a conciliation committee hears the parties and proposes a settlement.⁴⁴
- 3.4.9 *Germany*. In Germany, *Schlichtung* is a process different from mediation that is notably used to settle consumer disputes within a specific sector industry sector.⁴⁵ In the rules applicable to German banks, for example, the third party (the *Schlichter*) renders

⁴² Anneken Kari Sperr, *Mediation in Norway: "Faster, Cheaper and more Friendly,"* in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* at 1140-1141 (2013).

⁴³ Harald Baum, *Mediation in Japan: Development, Forms, Regulation and Practice of Out-of-Court Dispute Resolution*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 1033-1034 (2013).

⁴⁴ Harald Baum, *Mediation in Japan: Development, Forms, Regulation and Practice of Out-of-Court Dispute Resolution*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 1059-1060 (2013).

⁴⁵ Peter Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 524 (2013).

a decision that is binding only on the bank.⁴⁶ Such procedures are generally not regarded as mediation in the sense of widely accepted definition.⁴⁷ However, the English terms of mediation or conciliation are commonly used interchangeably.⁴⁸

3.4.10 *Portugal*. In Portugal, mediation is distinguished from conciliation (*conciliação*), which is governed by statute in the fields of civil procedure or insolvency law, notably.⁴⁹ Conciliation is more oriented towards a solution to an individual dispute and the impartial third party takes a more active roles in suggesting solutions, sometimes holding judicatory powers.⁵⁰

3.5 Process Goals or Values

3.5.1 *Process goals or values*. In its earlier work, the Task Force identified a list of process goals or value that serve as criteria for shaping processes for the resolution of commercial disputes.⁵¹ The following three process goals are particularly relevant for the object of study of WG3 concerning mediators using non-binding evaluations and making settlement proposals: party autonomy (i.e. party control over the process and outcome), fair process and competent neutrals.

⁴⁶ Peter Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 524 (2013).

⁴⁷ Peter Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 524 (2013).

⁴⁸ Peter Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 524 (2013).

⁴⁹ Jan Peter Schmidt, *Mediation in Portugal: Growing Up in a Sheltered Home*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 812 (2013).

⁵⁰ Jan Peter Schmidt, *Mediation in Portugal: Growing Up in a Sheltered Home*, in KLAUS J. HOPT & FELIX STEFFEK (EDS.), *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 812 (2013).

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3.5.2 *Party autonomy regarding substance and process.* WG3 considers that party autonomy or self-determination should provide guidance for reflecting upon mediator's use of non-binding evaluations and settlement proposals.⁵² In simple terms, self-determination can be defined as the "act of participants coming to informed, voluntary and uncoerced decisions."⁵³ Applying these ideas to mediation signifies that the parties' self-governance and individual autonomy is preserved, in the sense that they can voluntarily decide the outcome of their dispute, therefore giving them ownership of the conflict.⁵⁴ WG3 recommends using an adapted version of Riskin's New New Grid to anchor party autonomy in mediation. It consists of two intersecting continuums, the horizontal axis represents party autonomy towards the substance or, more specifically, norms setting; the concepts of "self-determination" and "subjection" provides its anchors. The other deals with party autonomy regarding the process, and it runs from "self-determination" and "subjection" (see Figure 4). WG3 suggests a shift in focus from mediator's orientations to the effects of mediator's techniques on party autonomy regarding substance and process. When mediators use non-binding evaluations or make settlement proposals, they exercise a norm setting role⁵⁵ which affects, to a varying degree, the substance or the outcome of the dispute. Hence, parties subject themselves to the norm setting authority of the mediator. When norm setting is reserved to the parties, the mediator helps them identify the norms (whether legal, ethical, industrial, etc.) that will be used to arrive at the outcome. In such cases, parties retain full self-determination regarding norm setting and the substance or outcome of the dispute.

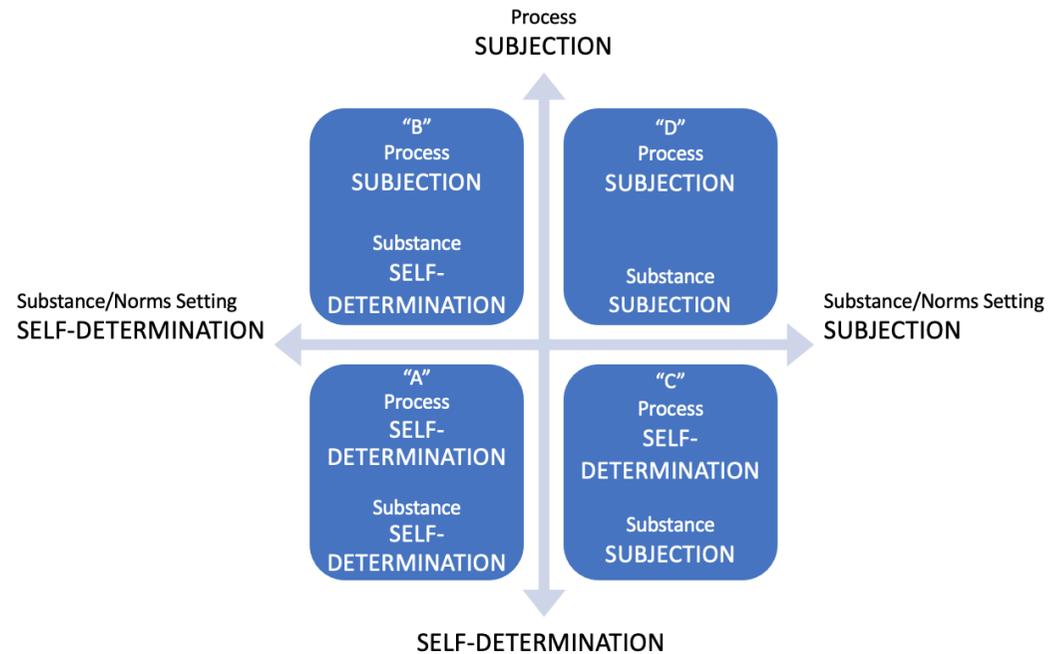
⁵² See Shahla Ali, 2018, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice*, Edward Elgar for general finding supporting the link between judicial support for party autonomy and longitudinal advancement in efficiency and perceptions of justice.

⁵³ ACR Ethics Principles (ACR 2010); Model Standards of Conduct for Mediators, Standard I (ABA & AAA 2005).

⁵⁴ Jacqueline Nolan-Haley, Self-Determination in International Mediation: Some Preliminary Reflections, 7 *CARDOZO J. CONFLICT RESOL.* 277-278 (2006).

⁵⁵ Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011).

Figure 4. Working Group 3's Grid Regarding Party Autonomy in Mediation and Conciliation Process



Note. Adapted from Véronique Fraser & Sèdjro Hountohotegbè, Process and Substance Self-Determination or Subjection: A New Frame of Reference for Defining Mediators' and Conciliators' Interventions (GPRD Research Paper No. 2020/1) (on file with authors); Jeremy Lack, Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties, in *ADR IN BUSINESS: PRACTICE AND ISSUES*

- 3.5.3 *Procedural and substantive fairness.* Both the use and the non-use of non-binding evaluations and settlement proposals might affect a party's perception of process fairness. On the one hand, the mediator's appearance of impartiality might be affected in cases where he or she renders some evaluations of the parties' case or put forth proposals when the parties did not expect it was a mediator's role to do so. On the other hand, the parties might have expectations that the neutral is the "guardian of fairness," and that he or she will make evaluations to guide the parties toward a fair settlement. Considering that there is a vast array of definitions and practices of mediation and conciliation across different jurisdictions and practitioners, parties might agree to include a mediation or a conciliation clause in their contract without having the same understanding of the process. The mediator must therefore clearly define and explain the process at the onset of mediation. Parties can also specify what mediation or conciliation means in their dispute resolution clause.
- 3.5.4 *Balancing fairness and self-determination.* The mediator's choice of subjecting the disputants to a specific procedure, to bring forward his opinions on the merits of the case, or on the other hand, to let the parties themselves generate norms and solutions undoubtedly depends on the mediator orientation, as described by Riskin. However, while the choice of orientation depends on the preference of the mediator regarding, the use of techniques belonging on a specific quarter of the spectrum illustrated in Figure 4 is essentially justified by the preservation of one of two principles crucial to mediation: equity and self-determination. The notion of these two poles is discussed at length in the literature on mediation ethics, that notably identify party autonomy, procedural fairness and substantive fairness as the "three pillars for ethics in mediation."⁵⁶ Indeed, the mediator generally tries to balance both equity and self-determination by conducting the mediation in a manner adequate to the context of the dispute. Author Waldman distinguishes three models of application of the social norms during a mediation: the norm-generating approach, the norm-educating approach and the norm advocating approach.
- 3.5.5 *Norm-generating approach.* Under the norm-generating approach, the only norms that apply are those that the parties identify and adopt. The neutral is not burdened about the fairness of the solution, as the substantive outcome matters less than party

⁵⁶ Manon Schonewille & Jeremy Lack, *Mediation in the European Union and Abroad: 60 States Divided by a Common Word?*, in MANON SCHONEWILLE & FRED SCHONEWILLE (EDS.), *THE VARIEGATED LANDSCAPE OF MEDIATION* 40 (2014).

autonomy and the preservation of the parties' relationships.⁵⁷ A good example of such a dispute would be a conflict between two commercial partners that possess equal bargaining power. In this case, preserving the relationship might be paramount, and the substantive agreement can be seen more as a means than an end. Self-determination is hence given significantly more consideration than equity.

3.5.6 *Norm-educating approach.* In the norm-educating approach, social norms play a crucial role in guiding the parties towards "self-determining" outcomes. To make fully-informed decisions, parties need to know the applicable law to their dispute, their alternatives to settlement, and norms others than legal rules that might also be relevant (e.g. technical, financial, industrial, tax-related, etc.).⁵⁸ For Waldman, the norm-educating model is most appropriate where two conditions are met: (1) there are clear social norms applicable on the matter and they serve a protective function; and (2) the parties' interest in settling the dispute privately and out of court outweighs the public societal goal that would be achieved through the judiciary system.⁵⁹ Such approach could be privileged, for example, for cases involving labour, family or consumer issues.

3.5.7 *Norm-advocating approach.* In the norm-advocating approach, the mediator's role goes beyond that of educating the parties about the existence of social norms applicable to their situation. Instead, the mediator must ensure that the norms are reflected or incorporated into the parties' agreement.⁶⁰ According to Waldman, this mediation model is designed for situations where the parties' dispute implicates important societal concerns or public policy matters that outweigh the parties' interests in finding their own idiosyncratic solution.⁶¹ This might be the case of disputes concerning environmental matters and natural resources, bioethics, human rights or involving disadvantaged groups of society.⁶²

⁵⁷ ELLEN A. WALDMAN & CHARLES POU, *MEDIATION ETHICS: CASES AND COMMENTARIES*, 128 (2011).

⁵⁸ ELLEN A. WALDMAN & CHARLES POU, *MEDIATION ETHICS: CASES AND COMMENTARIES*, 127 (2011).

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⁶⁰ Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 *HASTINGS L. J.* 745 (1997).

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3.5.8 *Competence of neutrals.* Different training and skills are required to perform non-binding evaluations and purely facilitating a dispute. Evaluations require acute knowledge of the subject matter of the dispute, whereas facilitation involves maieutic abilities. For that reason, in selecting the neutral, the parties should have in mind the type of interventions that they expect from him or for her. For example, if the parties mandate the neutral to act evaluatively, form his or her opinion about the substantive aspects of the dispute and put forth proposal for settlement, they should consider hire an expert, whether a formal judge, an experienced lawyer, a senior manager, an engineer, etc., who could lead the parties toward a zone of possible agreement that would reflect the result of adjudication. If the dispute has cross-cultural components, the parties might instead seek a neutral who has experienced in cross-cultural dispute resolution or who is familiar with the cultures involved, and bring in another expert who has extended knowledge regarding the local applicable laws and technical norms (see e.g. Section 3.6 regarding Co-Mediation by Mediation and Expert). In a dispute involving underlying emotional, cultural, social or relational issues, the parties may seek a neutral with a psychological background or who is skilled at dealing with these issues.

3.6 Range of Possible Evaluations by Mediator and Conciliators

3.6.1 *Range of possible evaluations.* WG3's Grid Regarding Party Autonomy in Mediation and Conciliation Process (Figure 4 above) can be a useful tool for a third-party neutral to help the parties decide the degree of self-determination that they can retain regarding norms setting and the substance of the dispute, as well as the process.

- .1 *Substantive decision-making* concerns making decisions about the norms that will help define and resolve the dispute.
- .2 *Procedural decision-making* refers to a broad range of decisions that will affect the process, such as decisions concerning pre-mediating/pre-conciliation submissions, attendance and participation, procedure during mediation, expressing or not

the agreement in writing, procedures for defining the problem(s) to be resolved for developing options, presenting proposals, making evaluations, reaching agreement, etc.⁶³

When a mediator uses techniques of Quadrant A (process and substance self-determination), he or she lets the parties arrive to a solution using the process of their choices and focuses almost exclusively on facilitating communications based on substantive interests, a role that can be assimilated to a facilitative style of mediation. Interventions under Quadrant B (process subjection and substance self-determination) preserve the parties' self-determination over the substance, but grants authority to the mediator to control the procedural aspect of the process, establish and propose process rules. Quadrants C (process self-determination and substance subjection) and D (process and substance subjection) share several elements, in the sense that these techniques impact self-determination of the parties regarding substantive aspects of the dispute, notably the agreement itself. A mediator choosing to use this approach is expected to bring in his own opinion of the case as well as external norms in the process. According to this model, Quadrants C and D are really similar regarding the techniques they comprise of, but what distinguishes them is the degree of directiveness that the neutral will adopt to manage the process. Under C, the parties retain control over the process, whereas in D, the neutral takes an active and leadership role to get the parties to an agreement.

The following describe the four quadrants of mediator and conciliator interventions based on the degree of self-determination regarding the substance and the process that the parties retain.⁶⁴ WG3 distinguishes between six categories of interventions, most which can be found in all four quadrants: (1) questions, (2) educating, generating and enunciating rules and norms, (3)

⁶³ This list is in large part drawn from Leonard Riskin, "Decision-making in Mediation: The New Old Grid and the New New Grid System",⁷⁹ *Notre Dame Law Review* 1 (2003), pp. 35-37.

⁶⁴ This section is heavily drawn on the work of Jeremy Lack regarding the spectrum of hybrid techniques used in non-adjudicative processes. See 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, 353-357 (Arnold Ingen-Housz ed., Kluwer Law International, 2011); Manon Schonewille & Jeremy Lack, *Mediation in the European Union and Abroad: 60 States Divided by a Common Word? in The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, 19, 25-33 (Manon Schonewille & Fred Schonewille, ed., Eleven International Publishing, 2014).

assessments and opinions, (4) developing proposals, (5) predictions, and (6) pressing or persuading (see the vertical axis of the table in Appendix 2).

- 3.6.1 *Quadrant A - Process and substance self-determination.* Under Quadrant A, the parties retain full control over the process and the substance, and the neutral adopts a facilitative role. The mediator helps the parties to engage in dialogue, clarify their views, define the issues in dispute, identify their needs and interests, explore solutions and reach, if possible, a mutually satisfactory agreement. The neutral may use a variety of questioning, probing and facilitation strategies to understand the parties' procedural needs and substantive interests regarding budgets, deadlines, possible impacts on relationships, need for input regarding norms. The neutral carefully avoid intentionally steering the discussion, so he or she uses open-ended questions and eliciting techniques.

Due to the fact that the parties maintain full degree of self-determination over the substance, the neutral's role is limited regarding educating, generating and enunciating rules and norms. He or she attempts to assist the parties in generating their own criteria and refrains from making recommendations. The neutral abstains to provide opinions on substantive issues and outcome predictions. If parties need evaluations or external evaluations, the neutral will instead assist the parties to seek the opinion of an expert. The neutral also withholds on making proposals on substantive issues, he or she instead helps the parties brainstorm and generate options by focusing on their interests. The neutral avoid using any pressing or persuading techniques, emphasizing the parties' own responsibility in understanding each other's position, making decisions, and deciding on the best options.

- 3.6.2 *Quadrant B – Process subjection and substance self-determination.* Under Quadrant B, the parties retain full control over the substance of the dispute as was the case in Quadrant A, and the neutral focuses on helping find solutions on the basis of their separate and common interests. What differs, however, is the degree of active interventions from the neutral regarding the process. The neutral can take a more directive role on procedural matters and may decide on procedural issues. He or she explains what mediation is, what it is not, and how he or she understands his or her role. He or she establishes rules and guidelines determining how the mediation will proceed, set the duration of the mediation sessions, as well as the frequency to which they will be held. The neutral can decide on the types of written submissions or documents that will be exchange prior to

attending mediation. During the session, the mediator might direct the parties (as opposed to their counsel) to make certain presentations, he or she can insist on the parties' focusing on their subjective interests rather than on their positions, and decide when to hold caucuses and so on. She or she may inform the parties on the deadlines or even impose them on the parties. The neutral might even suggest an alternative method of resolution that he or she deems superior to the one chosen by the parties, for example such as a hybrid process to add an evaluative component to the process.⁶⁵

While the neutral under Quadrant B refrains from making assessments, evaluative feedbacks or proposals on substantive issues, he or she plays an active role to help the parties generating their own norms that will be applicable to the dispute. The neutral can lead the parties into problem-solving by for example challenging the parties to generate new ideas, posing problems to be solved, asking hypothetical questions aiming at provoking specific thoughts in the parties, asking the parties to participate in paraphrasing or other exercises to better understand the other's position, having the parties prioritize issues or making clarifications or statements about the point of view himself or herself. The neutral may also approach each side in caucuses and ask them to expose their risks, analyse their alternatives to a negotiated settlement and ask the parties' counsel to make an assessment or advise them about the likely outcome of tactics. In joint session, he or she can encourage the parties to consider the fairness and justice of issues being discussed, take some initiatives regarding ways of addressing social and relational issues, such as soliciting third parties for specific information that they have at their disposal, using fact-finding mechanism, obtaining from elders or authoritative figures some suggestions regarding the dispute or have experts educate the parties about their legal rights and recourses. He or she may take initiatives regarding ways of seeking external information to assist the parties in overcoming impasses, such as by appointing experts and determining the scope of their mandate.

The neutral might use subtle techniques that have the effects of pressing or persuading the parties to work together towards the resolution of the dispute. He or she may directly encourage the parties to move forward with the process if it promises to reach closure, help the parties jointly perceive new collaborative goals, urge the parties to talk, leverage influence of third parties by

⁶⁵ Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 355; Schonewille & Lack p. 28.

having an audience present at the mediation or even use an opening prayer to remind the participants that there are greater powers and goals.

3.6.3 *Quadrant C - Process self-determination and substance subjection.* Under Quadrant C the neutral is mandated to help the parties find solutions and reach agreement, which may take into account the parties' subjective interests, but he or she is also expected to act evaluatively.⁶⁶ This can take the form of advising on objective parameters and norms, such as the applicable law or other norms such as financial, industrial, technical, tax-related, social, etc., or predicting the result of an adjudicative outcome (court, arbitration or others).

As part as his or her evaluative orientation, it is common for the neutral under Quadrant C to use closed-ended, suggestive or leading questions, to directly confront or question the parties or to play the devil's advocate. The neutral can make directive statements to steer the discussion, make the enquiries and investigations he or she deems necessary or even supply missing information, data, examples and patterns to the parties.

The neutral can also set, educate, generate and advocate norms by which the dispute can be resolved. For example, the neutral can educate the parties on how they should think or act, point out a specific moral obligation, ask the parties to put in practice principles such as respect or forgiveness and acknowledge their wrongdoing and put forth objective criteria against which options can be measured. The neutral may insist on reasonable initial offers and demands.

Predictions are common under Quadrant C. Predictions can be made on the possible impact on interests if the parties do not settle or on the possible outcomes if the dispute is adjudicated in court or arbitration. To that effect, the neutral sometimes uses probability or decision trees or other analytic tools. Neutrals might also use pressing or persuading techniques. These can take

⁶⁶ Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 356; Schonewille & Lack p. 29.

the form of reality-checking aiming to soften intransigent disputants or their advisors to facilitate reaching a compromise or appealing to the disputants' habits, doubts, emotions and desire for reward.

While the neutral takes a directive role regarding the substance, the parties retain full self-determination regarding the process. The parties can decide on the time, venue, written submissions or other items necessary to be performed in preparation to the mediation or conciliation process. The neutral may, however, make recommendations on the procedural aspects with the consent of the parties.

In some cultures, the neutral's moral authority towards the parties is more important, and the scope of the techniques that he or she may employ to get the parties to reach an agreement is more extensive. The neutral can put significant pressure on the parties in order to persuade them to make or refrain from making certain decisions. The range of available techniques include threatening the parties, and pressing hard and directly for the parties to change their mind. The neutral can use "carrot-and-stick" measures, promise and offer rewards, or making a personal contribution to the settlement. He or she may appeal to the parties' obligations towards their families or communities, chastise the parties and their representatives, shame them, withdraw from the mediation or threaten to do so. Using a more indirect approach, the mediator can convince representatives about certain ideas, leverage third parties, for example by having a third party assume or claim authorship of ideas, using deception tactics to introduce doubt and uncertainty, and leverage his or her relationship with the disputants.

While the neutral takes an evaluative approach regarding the substance, parties control the process under Quadrant C. The neutral therefore invites the parties to discuss their procedural preferences as to the duration of the sessions, their timing, written submissions, whether or not caucuses will be used, when and how evaluations or proposals will be made, etc.⁶⁷

3.6.4 *Quadrant D - Process and substance subjection.* Interventions under Quadrant D resembles those of an adjudicative process, which can be known under the names of conciliation in some cultures and at the public international level, adjudication, non-

⁶⁷ Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 356; Schonewille & Lack p. 29.

binding arbitration, etc. The parties hire the neutral, often an expert in law or in the technical aspects of the dispute, to find a solution, and they grant him or her the control over the process and the substance.⁶⁸

The range of interventions that a neutral may make regarding the substantive issues is similar to that under Quadrant C. It is expected that the neutral will form his or her views about the dispute. What distinguishes Quadrant D is the neutral's control over the process. Under Quadrant D, the neutral is often mandated to reach cost-effective outcomes and apply legal or technical norms. For that reason, the neutral will determine the process (time, venue, caucuses, written submissions, etc.) and he or she will use time and procedural issues to help moving the parties towards a settlement that usually would fall within the range of what a court or a tribunal would adjudicate.

The neutral is also likely to do some robust reality testing regarding the parties' best and worst alternatives to a negotiated agreement, focus on key parameters and benchmarks and shape a settlement within a defined zone of possible agreement. The neutral might urge parties to focus on specific dispositive issues, make concessions or reach agreement, use timing to influence the process (making threats to end mediation and move to arbitration), mention arbitration, urge the parties to settle, urge the parties to accept the neutral's proposal, threaten the parties, press hard and directly for the parties to change their mind, frame the information exchange to push for decisions or control the information being exchanged. Most of these techniques are often done in caucuses.

If after a set period of time (for example one or two days), the parties have not reached an agreement, neutral is likely to put forth proposals as to possible solutions or outcomes, and he or she may go as far as to make binding or non-binding evaluations as to the range within which the parties could reach an agreement.⁶⁹

⁶⁸ Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 356.

⁶⁹ Schonewille & Lack p. 30-31; Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 356.

3.6.4 *Flexible approach to mediation.* The distinction between the four quadrants serve to facilitate process design for parties and neutrals, and highlight the degree of self-determination that the parties may retain under each quadrant regarding the process and substance. However, it should be noted that the quadrants do not reflect rigid stand-alone processes. Instead, it is common for mediation to begin in Quadrant A with a facilitative approach, and transition to a more evaluative process in Quadrants C or D if the parties reach an impasse.⁷⁰ On the other hand, a mediation may begin in Quadrant D because the parties are seeking a time and cost-efficient outcome, but might eventually move to Quadrants A or B as the parties and the neutral realize that there are some important emotional, relational or social issues that need to be dealt with to arrive to solution. It is also possible to hold various processes in parallel in different quadrants, choosing carefully which issues to resolve in the specific quadrants. For example, while pursuing the mediation process in Quadrant A or B, the parties might find it useful to delegate some precise technical or legal issues to an expert acting under Quadrant C or D (see Section 3.9).⁷¹

3.7 Object of Evaluations

3.7.1 *Purposes of evaluations.* There is often evaluative elements to complex commercial cases. Using evaluative elements adds the following objectives to mediation: : (i) providing information; (ii) providing advice; (iii) predicting outcomes; and (iv) providing possible solutions.⁷² Evaluations can provide information regarding the applicable laws or norms, technical standards applicable or even acceptable or ethical or social norms in a particular context. In complex cases, the parties may wish to have advice or predictions regarding the possible outcome of an adjudicative process in order to agree on a possible zone of agreement. In certain situations, the parties reach an impasse and they expect the neutral to put forth a proposal for settlement which may take into account a variety of factors, including legal, equity, social, ethical, relational, etc.

⁷⁰ Riskin 2003 p. 13-17.

⁷¹ Lack, *Appropriate Dispute Resolution (ADR) – The Spectrum of Hybrid Techniques Available to the Parties* (2010) p. 355.

⁷² KENNETH ROBERTS, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 *Loyola University Chicago Law Journal*, 210 (2007).

3.7.2 *Object of evaluations.* Evaluations can be provided to respond to a variety of needs, including the need for legal norms or analyses, industrial norms or analyses, financial norms or analyses, technical norms or analyses, procedural norms or analyses, and tax-related norms or analyses norms or analyses, the need for implementation or feasibility assessments, the need for causal assessments, the need for assessment of alternatives (BATNAs/WATNAs/PATNAs/RATNAs), and the need for social norms. Suggesting possible outcomes and consequences, settlement possibilities, and appropriate bargaining ranges are all designed to help align the parties, to help them to have self-prediction of the case and bring them closer to settlement.⁷³

3.8 Elements to Consider When Deciding to Make Evaluations

3.8.1 *Pros of evaluations.* The main advantages of using evaluations in mediation is that it can help the parties obtain additional information, better understand their legal rights, and reevaluate their positions. Mediator can offer parties a “reality check” through honest assessments that can often bring the parties closer to a resolution, especially in complex cases.⁷⁴ In the case where the mediator is an experienced and respected professional, the parties might be inclined to defer to the mediator’s expertise.

3.8.2 *Cons of evaluations.* One major concern about using evaluative components in mediation is that it threatens the neutrality of the mediator due to the fact that he or she reveals his or her thoughts on the issues in disputes. Moreover, evaluations can sometimes result in agreeing with one of the party, and disagreeing with the other. When a party disagrees with the unfavorable opinion, the party is likely to withdraw from the mediation, believing that the neutral has “sided” with the other party. The party which the neutral agrees with may also get locked into an unacceptable position.⁷⁵ This may cause a party to lose trust in

⁷³ Id. 204.

⁷⁴ Id. 197.

⁷⁵ LELA P. LOVE, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Florida State University Law Review, 945-946 (1997).

the mediator or the entire mediation process, and stop negotiations altogether. Another concern is that the process will run from collaborative to adversarial. Thus, parties may only reveal favorable information because they know they are being evaluated.⁷⁶

3.8.3 *Maintaining neutrality in evaluative mediation.* Despite such concerns, it is possible to maintain neutrality in evaluative mediation. Providing advice in an accepted and conventional manner is the mediator's role, which can serve as a reality check for the parties. Indeed, the parties may have greater confidence on the neutrality of the mediator when he or she deals with the issues in an open and direct way, using evaluation as a tool of mediation. Even if the mediator points to the weakness of a party's arguments, it may still be helpful for a party to reassess the probability of success, and the risks and costs of failing to settle.⁷⁷ The value of evaluative mediation lies in the mediator's ability to apply his or her expertise and help the parties reevaluate their claims and thus come closer to an agreement.

3.8.4 *Elements to consider when using evaluations.* In deciding whether to make evaluations, the mediators should work together with the parties, considering the advantages and disadvantages of evaluative mediation, and take into account the specific characteristics of the dispute, the disputants' backgrounds and resources (e.g., time, money, vulnerabilities, susceptibilities, access to legal advice, etc.), past and future relationships, and context of the dispute (such as previous attempts to settlement, stakeholder visibility and pressures). Evaluative mediation may be particularly appropriate for certain types of disputes. For instance, given IP disputes frequently involve complex legal and technical issues, impartial expert evaluation through an advisory approach can be of assistance to the parties.⁷⁸ Evaluation focuses on the underlying substance and cause of a dispute. Depending on the disputants' background and resources, whether the evaluative techniques may have the potential for negative effects on the parties' relationship, or risk of coalition-building or of an increasingly adversarial process is another factor to consider. The subject-matter knowledge of the neutral may also be necessary in order to ask appropriate questions, guide the

⁷⁶ ROBERTS (2007).

⁷⁷ Id.

⁷⁸ In Hong Kong, while the majority of mediation conducted are facilitative mediation, evaluative mediation is considered particularly beneficial for resolving IP disputes. See "Assessing the Suitability of Evaluative Mediation to Resolve IP Disputes", Welcome Remarks by Mr Rimsky Yuen, SC, Secretary for Justice at Mediation Week Seminar on 11 May 2016, <https://www.doj.gov.hk/mediatefirst/doc/en/sj20160513e.pdf>.

parties in a reasonable direction, and help the parties realistically reevaluate their claims. Subject matter expertise is particularly beneficial when the subject area of the dispute is highly complicated or unique (see WG3's Checklist in Appendix 3)⁷⁹ By selecting a particular mediator, such as a judge or a neutral with a certain expertise, the parties may already expect some form of evaluative behavior.

3.8.5 *Obtaining informed consent.* If evaluation will be used in mediation, the possibility of the mediator making evaluative statements or settlement proposal should be discussed with the parties and obtain their informed consent. Further elements need to be considered in evaluative mediation:

- .1 *When should the parties' informed consent be sought?* Should the consent be sought at the outset of mediation? Or should consent be sought only after initial pre-caucuses or in joint discussions, following a first impasse, at the request of one or more of the party/ies, their advisors or a provider? Does the mediator need to explain the possible consequences of using evaluative feedback, such as the risk of coalition-building and/or conflict escalation?
- .2 *Should a non-binding evaluation or settlement proposal be made in joint session or first tested in caucus?* Would a non-binding valuation or proposal made in a joint session create perception of bias? If it is first made during the caucus, what approach should be used with one party or both/all parties when arranging to bring them back into joint session? Should a waiver or partial waiver be obtained from the parties about the confidentiality in caucus?
- .3 *Should the neutral provide an opinion about whether to be evaluative her/himself or to bring in an expert?* If another neutral is brought into the proceeding, should that neutral be an expert to the mediator or a co-mediator?
- .4 *How to organize and receive feedback to procedural proposals?* Should the feedback be made anonymously? Should the feedback be made only by consensus without knowing who was opposed or why?

⁷⁹ ROBERTS (2007).

3.8.6 *Choice of experts.* The parties can consider using multiple experts. They may bring experts with different expertise, for example, legal, technical or relational expertise. For a cross-cultural dispute, it might be useful to have experts coming from different areas of the world either common or different from that of the parties, and with knowledge of the cultures involved. It is possible to design the process so as some expert will assist in joint session, and other will intervene in caucuses with each party respectively. It is also possible considering creating a panel of expertise

3.9 Co-Mediation by Mediator (Non-Evaluative) and Expert (Evaluative)

3.9.1 *Co-mediation between a non-evaluative mediator and an expert.* WG3 examined the particular scenario of co-mediation between a non-evaluative mediator and an expert who renders evaluations. This process incorporates the advantages of evaluative mediation, while minimizing its disadvantages (see discussion in Section 3.8 above).

3.9.2 *Role of the non-evaluative mediator.* In the co-mediation model, the non-evaluative mediator can remain facilitative throughout this process, focus on the parties' interests and problem-solving, help manage their relationship, and assist them in arriving at their own solutions and settlement agreement without fearing to impair his or her appearance of neutrality or the parties' trust.

3.9.3. *Role of the expert evaluative mediator.* The expert evaluative mediator can play an effective role in rendering punctual evaluations on certain issues or on the dispute as a whole, offering advice on the merits of the case, providing technical information and suggesting solutions for resolving the dispute or a settlement proposal.

3.9.4 *Guidelines for co-mediation by a non-evaluative mediator and an expert.* WG3 proposes the following guidelines for Co-mediation by a Non-Evaluative Mediator and an Expert:

1. In the case of a co-mediation by a mediator and an expert, the mediator and the expert should be appointed jointly by the parties and their advisors or by an ADR Institution. The expert can also be appointed by the mediator.

2. The mediator is responsible for facilitating the process. The mediator shall abstain from rendering any evaluations or making proposals. He or she can use the range of techniques of Quadrants A and B. The expert attends and observes all joint sessions. He can render evaluations and make proposals as reflected in Quadrants C and D (see Appendix 2 for a list of techniques that can be used under each quadrant).
3. The expert should not participate in the caucuses held separately between the mediator and a party.
4. The expert can make evaluations or settlement proposal(s) to a party separately in caucus or to both parties in joint session. The mediator should not be present when the expert renders evaluations or make proposals. Such evaluations or proposals can be made:
 - a) Upon the request of one or both parties
 - b) Upon the suggestion of the mediator
 - c) Upon the suggestion of the expert
5. Both parties shall consent to the use of evaluations or settlement proposals at all stages of the mediation process where they are used.
6. The evaluations and the proposals can concern one or many issues of the dispute or they can concern the dispute as a whole.
7. The evaluations and the proposals shall be non-binding, unless the parties agree otherwise.

3.10 Conclusion

Extensive literature has been written on the use of evaluations in mediation, which scholars and practitioners either positioning themselves as in favor or against it. WG3 recognizes that evaluations can be particularly useful in a broad range of situations in a mediation or a conciliation process. What matters is for the parties to make an informed consent about the process, what it entails, as well as its advantages and disadvantages. Thinking ahead about the process will allow the parties to make better decision for neutral selection, process design and negotiating strategies.

This report painted a portrait of the diversity of mediation and conciliation approaches that exist across the world to highlight that there can be different meanings behind these terms and emphasize the need for the parties to clarify mutually the dispute resolution process they seek to pursue.

WG3 aimed to provide useful guidelines for parties and practitioners when using evaluations. Parties and neutrals should be aware that evaluations can have an impact on process goals and values, such as the party autonomy regarding the substance and the process, the procedural and substantive fairness of the process, as well as the competence of the neutrals. WG3 put forth tools that neutral can use to assist the parties in process design and making informed consent regarding the use of evaluations, such as WG3's Grid Regarding Party Autonomy in Mediation (Figure 4), the WG3's Table on the Range of Facilitative and Evaluative Techniques Used by Mediators and Conciliators (Appendix 2) and WG3's Checklist of Elements to Consider When Making Evaluations (Appendix 3).

It is expected that this report will stimulate further dialogue regarding the use of evaluations and proposals in mediation. With a common frame of reference as a basis of discussion, WG3 hope to continue gathering practical experiences and scholaristic thoughts regarding these subject matters.

APPENDIX 1

Existing Provisions on Definitions and Role of Mediators/Conciliators Giving Non-Binding Evaluations and Making Settlement Proposals

Organization /Country	Relevant Provisions	Definition of Mediation	Definition of Conciliation	Role of Mediator	Giving non-binding Evaluations	Making Settlement Proposals
UNCITRAL	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), 2018 ⁸⁰	For the purposes of this Law, “mediation” means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute. (Art. 1(3))	In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In amending the Model Law, UNCITRAL decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This	1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted. 2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and	NA	The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute. (Art. 7(4))

⁸⁰ http://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_II.pdf (last accessed 18 January 2020).

			change in terminology does not have any substantive or conceptual implications. (fn 2)	the need for a speedy settlement of the dispute. 3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case. (Art. 7)		
UN	United Nations Convention on International Settlement Agreements Resulting from Mediation ⁸¹	“Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute. (Article 3)	NA	NA	NA	NA
UNCITRAL	UNCITRAL Conciliation Rules (1980)	NA	Definition not provided.	(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable	NA	The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the

⁸¹ https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (last accessed 18 January 2020).

				<p>settlement of their dispute.</p> <p>(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.</p> <p>(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute. (Art. 7)</p>		<p>dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor. (Art. 7 (4))</p>
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WIPO	WIPO Mediation Rules (2020) ⁸²	Definition not provided	NA	The mediator shall promote the settlement of the issues in dispute between the parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the parties (Art. 14)	NA	NA
Switzerland	Swiss Code of Civil Procedure ⁸³	The Code does not define what mediation is. It does provide, however, that mediation is “independent of Court proceedings” (Art. 216 para. 1 CCP). If the parties to legal proceedings jointly so request, mediation takes place instead of conciliation. (Art. 213 CCP).	Judicial conciliation (i.e. conciliation made by the Judiciary) has precedence over mediation. As a general rule, legal proceedings cannot be undertaken without a prior conciliation attempt before a conciliation authority (Art. 197 CCP).	Conciliators: evaluative Mediators: facilitative	Conciliators can; while mediators are generally not supposed to give evaluation.	Conciliators: Yes Mediators: NA
Brazil	Mediation Act (Federal Law No. 13140/2015) Civil Procedure Code (Federal Law No. 13105/2015)	Mediation is the “technical activity exercised by an independent third party without decision making power, who, upon being chosen or accepted by the parties, assists and encourages them to identify	Conciliation is recommended for cases in which there is no prior or meaningful relationship between parties, such as consumer law. It is accepted that	Facilitative	Not common	Sometimes

⁸² <https://www.wipo.int/amc/en/mediation/rules/#14a> (last accessed 18 January 2020).

⁸³ <https://www.admin.ch/opc/fr/classified-compilation/20061121/index.html> (last accessed 18 January 2020).

		<p>or develop mutually agreed solutions to a dispute.”. (Mediation Act, Article 1)</p> <p>The mediator is a neutral and impartial third party that helps the communication of parties. It is recommended for cases where there is some sort of relationship between parts (either personal or commercial relation). Mediators should restrain from influencing parties in closing deals. (Civil Procedure Code) ⁸⁴</p>	<p>conciliators adopt a more proactive attitude, encouraging deals. (Civil Procedure Code)</p>			
China	People’s Mediation Law	<p>There is no general definition of mediation in China.</p> <p>The People’s Mediation Law defines the people’s mediation as “the activities of the people’s mediation committee in facilitating the parties concerned to reach a</p>	Used interchangeably with mediation	Facilitative and Evaluative	People’s Mediation Law mentioned possibility of “persuasion, giving guidance and other methods on the basis of equality in negotiation...”	Yes, if mediators find the gap between the two parties is close.

⁸⁴ See Andrea Maia, “Mediation in Brazil”, September 2019, available at <https://gettingthedealthrough.com/area/54/jurisdiction/6/mediation-brazil/> (last accessed 18 January 2020).

		mediation agreement voluntarily through persuasion, giving guidance and other methods on the basis of equality in negotiation and resolving the disputes among the people”. (article 2)			In practice, evaluation is common, although mediators are cautious not to give direct opinion on the merits.	
Hong Kong	Hong Kong Mediation Ordinance (Chapter 620) ⁸⁵	Mediation is “a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following— a) identify the issues in dispute; b) explore and generate options; c) communicate with one another; d) reach an agreement regarding the resolution of the whole, or part, of the dispute.”	Conciliation defined in other sections are not applicable under the Mediation Ordinance (ie. Sections 6, 16 and 25 of the Labour Tribunal Ordinance; section 39 of the Apprenticeship Ordinance; Part 2 of the Labour Relations Ordinance; sections 4 and 14 of the Minor Employment Claims Adjudication Board Ordinance; sections 64 and 84 of the Sex Discrimination Ordinance and section 8 of the Sex Discrimination	The ‘facilitative’ style of mediation is most commonly used in Hong Kong. The Mediation Ordinance alludes to this style and defines the mediator’s role as one ‘without adjudicating a dispute or any aspect of it’. The Hong Kong authorities have been promoting ‘evaluative mediation’ as one of the methods for resolving IP disputes as an alternative to ‘facilitative mediation’.	Uncommon	Sometimes

⁸⁵ <https://www.hkiac.org/mediation/ordinance> (last accessed 18 January 2020).

			(Investigation and Conciliation) Rules; sections 62 and 80 of the Disability Discrimination Ordinance and section 8 of the Disability Discrimination (Investigation and Conciliation) Rules; sections 44 and 62 of the Family Status Discrimination Ordinance and section 8 of the Family Status Discrimination (Investigation and Conciliation) Rules; sections 59 and 78 of the Race Discrimination Ordinance and section 8 of the Race Discrimination (Investigation and Conciliation) Rules.			
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Singapore	Singapore Mediation Act ⁸⁶	<p>In this Act, “mediation” means a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:</p> <ul style="list-style-type: none"> a) identify the issues in dispute; b) explore and generate options; c) communicate with one another; d) reach an agreement regarding the resolution of the whole, or part, of the dispute. 	The Act excludes certain mediation or conciliation proceedings under specific sections, indicating conciliation is a separate process. No definition is provided.	Facilitative	Uncommon	Sometimes
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⁸⁶ <https://sso.agc.gov.sg/Act/MA2017> (last accessed 18 January 2020).

South Africa	Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18 Mar 2014	'mediation' means the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. (§ 2)		'mediator' means a person selected by parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2), to mediate a dispute between the parties (§ 2)		
Italy	Legislative Decree 28/2010	Mediation is an activity carried out by an impartial third party and designed to assist two or more parties in the search for an amicable agreement for the settlement of a dispute, even with the formulation of a proposal for resolution of the dispute. (§ 1)		Mediator: is the person or persons who, individually or jointly, exercise the mediation activity without any power to make judgements or decisions binding on the recipients of the mediation service itself. (§ 1)		

France	Ordinance of 16 November 2011 (Decree No. 2011-1540)	Mediation under the present chapter refers to any structured process, however named or referred to, whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a third party, the mediator, chosen by them, or designated by the judge seized of the dispute, with the parties' consent. (§ 21)				
Canada (Quebec)	Code of Civil Procedure, CQLR c C-25.01			The mediator helps the parties to engage in dialogue, clarify their views, define the issues in dispute, identify their needs and interests, explore solutions and reach, if possible, a mutually satisfactory agreement. The parties may ask the mediator to develop with them a proposal to prevent or resolve the dispute. (§ 605)		

Canada (Ontario)	Commercial Mediation Act, 2010, SO 2010, c 16, Sch 3	“mediation” means a collaborative process in which, (a) the parties to a commercial dispute agree to request a neutral person, referred to as a mediator, to assist them in their attempt to reach a settlement in their dispute, and (b) the mediator does not have authority to impose a solution to the dispute on the parties. (§ 3)				
California	California Evidence Code	“Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. (§ 1115 a)		“Mediator” means a neutral person who conducts a mediation. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation. (§ 1115 b)		

APPENDIX 2

WG3’s Table on the Range of Facilitative and Evaluative Techniques Used by Mediators and Conciliators⁸⁷

Range of techniques	A. Process and substance self-determination	B. Process subjection and substance self-determination	C. Process self-determination and substance subjection	D. Process and substance subjection
1. Questions	<ul style="list-style-type: none"> -Probing to understand the disputants’ procedural needs and substantive interests -Open-ended questions and eliciting techniques 	<ul style="list-style-type: none"> -Challenging disputants to generate new ideas, posing problems to be solved 	<ul style="list-style-type: none"> -Helping the parties to find missing information -Close-ended, suggestive and leading questions -Playing devil’s advocate -Making enquiries and investigations 	<ul style="list-style-type: none"> -Close-ended, suggestive and leading questions -Playing devil’s advocate -Making enquiries and investigations
2. Educating, generating and	<ul style="list-style-type: none"> -Suggesting techniques for addressing relational and/or social issues 	<ul style="list-style-type: none"> -Helping the parties to generate their own norms 	<ul style="list-style-type: none"> -Advising on objective parameters and norms (e.g. applicable law or other 	<ul style="list-style-type: none"> -Neutral can set, educate and advocate norms by which the dispute can be resolved

⁸⁷ This table is adapted from 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, 353-57 (Arnold Ingen-Housz ed., Kluwer Law International, 2011); Manon Schonewille & Jeremy Lack, *Mediation in the European Union and Abroad: 60 States Divided by a Common Word?* in *THE VARIEGATED LANDSCAPE OF MEDIATION: A COMPARATIVE STUDY OF MEDIATION REGULATION AND PRACTICES IN EUROPE AND THE WORLD*, 19, 25-33 (Manon Schonewille & Fred Schonewille, ed., Eleven International Publishing, 2014); Véronique Fraser & Sèdjro Hountohotegbè, *Process and Substance Self-Determination or Subjection: A New Frame of Reference for Defining Mediators’ and Conciliators’ Interventions* (GPRD Research Paper No. 2020/1) (on file with authors).

<p>enunciating rules and norms</p>	<p>-Assisting the parties in generating their own criteria</p>	<p>-May take initiatives regarding ways of addressing social and relational issues</p> <p>-Establishes rules and guidelines determining the process (submissions, time, venue, caucuses, deadlines, etc.)</p> <p>-Encouraging the parties to consider the fairness and justice of issues being discussed</p>	<p>norms such as financial, industrial, technical, etc.)</p> <p>-Helping the parties in applying possible norms (e.g., finding of facts and applicable laws)</p> <p>-Supplying missing information, data, examples and patterns to parties</p>	<p>-Advising on objective parameters and norms (e.g. applicable law or other norms such as financial, industrial, technical, etc.)</p> <p>-Helping the parties in applying possible norms (e.g., finding of facts and applicable laws)</p> <p>-Supplying missing information, data, examples and patterns to parties</p> <p>-Determining the process (time, venue, submissions, caucuses, etc.)</p>
<p>3. Assessments and opinions</p>	<p>-Does not give opinions on substantive issues</p> <p>-Assisting the parties to obtaining external information that can help them overcome impasses (e.g., experts)</p>	<p>-Does not give opinions on substantive issues or advise on final solutions</p> <p>-Approaching each party in caucuses and asking them to expose their risks</p> <p>-May take initiatives regarding ways of seeking external information to assist the parties in overcoming impasses (e.g., appointing experts and determining the scope of their mandate) or suggest an alternative method of resolution</p>	<p>-Neutral is expected to form his own views of the matter</p> <p>-Neutral can evaluate the strengths and weaknesses of each parties' positions</p>	<p>-Neutral forms his own views of the matter, and can apply norms (e.g. finding of facts and applicable laws) to help the parties to understand the strengths and weaknesses of their cases and exchange relevant information</p> <p>-Neutral is expected to provide his opinion (in caucus or in joint session)</p>

<p>4. Developing proposals</p>	<ul style="list-style-type: none"> -Does not make any proposals on substantive issues -Helping the parties to exchange information and to brainstorm (by focusing on their interests rather than on their positions) 	<ul style="list-style-type: none"> -Does not make any proposals on substantive issues -Leading the parties into problem-solving (e.g., challenging the parties to generate new ideas, posing problems to be solved, asking hypothetical questions, having the parties prioritize issues or making clarifications, etc.) 	<ul style="list-style-type: none"> -Suggesting ways of resolving key issues and requesting disputants' reaction to those ideas -Giving non-binding proposals -Setting binding "floors and ceilings" 	<ul style="list-style-type: none"> -Identifying dispositive issues and suggesting ways of resolving them -Ultimately making a (non-binding) settlement proposal if the parties do not reach an agreement -Shaping a settlement within a defined ZOPE -Ultimate making binding or non-binding evaluations as to the ZOPE
<p>5. Predictions</p>	<p>Does not make predictions</p>	<ul style="list-style-type: none"> - Assisting the parties to analyze their alternatives to a negotiated settlement - Asking the parties' counsel to make an assessment or advise them about the likely outcome of tactics 	<ul style="list-style-type: none"> -When appropriate, providing neutral's own opinion on the merits -Predictions of possible impact on interests of not settling -Using of probability trees and other analytic tools -Predictions of possible outcomes if a case is adjudicated in court or arbitration 	<ul style="list-style-type: none"> -Providing neutral's own opinion on the merits -Predictions of possible impact on interests of not settling -Predictions of possible outcomes if a case is adjudicated in court or arbitration
<p>6. Pressing or persuading</p>	<p>Does not use pressing or persuading techniques</p>	<p>-Directly encouraging the parties to move forward with the process</p>	<p>-Helping the parties to identify dispositive issues and to exchange information relevant to these norms</p>	<p>-Robust reality testing regarding the parties' BATNA and WATNA on key parameters and benchmarks</p>

		<ul style="list-style-type: none"> -Helping the parties jointly perceive new collaborative goals -Urging the parties to talk -Levering influence of third parties by having an audience present at the mediation 	<ul style="list-style-type: none"> -Reality-checking with the aim to soften intransigent disputants or their advisors to facilitate reaching a compromise -Appealing to the disputants' habits, doubts, emotions and desire for reward 	<ul style="list-style-type: none"> -Providing a sound reason for settling -Urging the parties to focus on specific dispositive issues -Urging parties to make concessions or reach agreement -Making threats to end mediation and move to arbitration -Mentioning arbitration -Urging the parties to settle -Urging the parties to accept the neutral's proposal
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APPENDIX 3

WG3's Checklist of Elements to Consider When Making Evaluations

The following elements should be considered when deciding to make evaluations:

- What are the type and characteristics of the dispute (e.g. construction, IP, IT, family, partnership, labor, etc.)?
- What are the parties' backgrounds and resources (e.g., time, money, vulnerabilities, susceptibilities, access to legal advice, etc.)?
- What are the parties' past and future relationships (e.g. families, partners, etc.)? Can the evaluative technique have the potential for negative effects on parties' perceptions and relationships?
- Are the parties represented by counsels?
- What are the parties' cultural preferences?
- Are there potential impacts on stakeholders?
- What are the parties process goals and values (e.g. budgetary or time constraints, self-determination, etc.) and possible mental models?
- Is there a risk of coalition-building or of an increasingly adversarial process?
- What is the context of the dispute (e.g. previous attempts to settle, stakeholder, visibility and pressures)?
- Are there some face-keeping/protection measures to consider?

- Will the impartiality of the third-party neutral be compromised?
- Timing of obtaining parties' informed consent (e.g., should it be assumed to be a possibility from the very beginning, or only after initial pre-caucuses or in joint discussions, following a first impasse, at the request of one or more of the party/ies, their advisors or a provider? Does the mediator need to explain the possible consequences of using evaluative feedback, e.g., possibly risk of coalition-building and/or conflict escalation?)
- Should the neutral provide an opinion about whether to be evaluative her/himself or to bring in an expert? Should this be as an expert to the mediator or as a co-neutral?
- How to organize and receive feedback to procedural proposals? (Anonymously? Only by consensus without knowing who was opposed or why?)
- Should a non-binding evaluation or proposal be made in joint session or first tested in caucuses? If the latter, what approach should be used with one party or both/all parties when arranging to bring them back into joint session? Can they assume they heard the same thing? Waiver (or partial waiver) of confidentiality in caucus?
- Does the third-party hold the subject-matter competence to formulate an assessment or make a settlement proposal?

APPENDIX 4

Working Group 3 Members (in Alphabetic Order)

Name	Location	Affiliation	Position
Kenny Aina	Nigeria	Aina Blankson, LP	Partner
Shahla Ali	Hong Kong	University of Hong Kong	Associate Professor & Deputy Director
Sverre Blandhol	Norway	University of Oslo	Professor of Law
Vivian Gu	China	Dowway & Partner Law Firm	Lawyer
Howard Herman	USA	UC Hastings	Adjunct Professor of Law
Sèdjro Hountohotegbè	Canada, France, Benin, Burkina Faso	University of Sherbrooke	Professor of Law
Christopher Lau	Singapore	Maxwell Chambers	Senior Counsel and Chartered Arbitrator
Paul E. Mason	USA and Brazil	Paul E Mason	International Counsel, Arbitrator and Mediator
Joseph Tirado	UK	Garrigues	Partner and Co-Head of International Arbitration and ADR
Jawad Sarwana	Pakistan	IBA mediation committee	Co-Chair
Jeremy Lack	Switzerland	LawTech	Principal
Rima Fawaz El-Hussein	Lebanon	Frontiers Ruwad Association	
Manon Schonewille	Netherlands	ABC Foundation	President