

CCA / IMI / Straus Institute
International Task Force on Mixed Mode Dispute Resolution¹
Memo on the Task Force and Project
April 5, 2016

Project Background: The Need for Collective Investigation and Deliberation

Today as never before, opportunities and challenges are presented to business planners by trends toward globalization and the expansion of international commerce as well as our growing experience with varied, often-complex processes for the management and resolution of conflict. These complexities are reinforced by differences in culture and legal systems.

Given present trends, there is a critical and growing need for dialogue and deliberation among practitioners and thinkers from different cultures and legal systems regarding the management and resolution of conflict in both public and private spheres.

For these reasons, the International Task Force on Mixed Mode Dispute Resolution (Task Force) has been charged with examining and understanding the many different kinds of dispute resolution scenarios that involve the interplay between public and private adjudication (litigation, arbitration) and processes aimed at facilitating agreement of some kind. This varied spectrum of complex situations, described in more detail below, we will refer to collectively as “Mixed Mode Scenarios.”

Mixed Mode Scenarios

These Mixed Mode Scenarios are becoming increasingly important to the resolution of commercial disputes both internationally and domestically, and are often perceived and approached in very different ways by different cultures and legal systems. These scenarios include:

1. Situations in which people who are charged with helping to facilitate settlement (mediators, conciliators, etc.) “mix modes” by:
 - a) using nonbinding evaluation as a means of encouraging settlement;
 - b) helping parties to design a dispute resolution process, or “setting the stage” for adjudication (e.g., “Guided Choice”); or
 - c) shifting from the role of mediator to that of adjudicator (as in “med-arb”).

2. Situations in which adjudicators (judges or arbitrators) “mix modes” by:
 - a) facilitating discussions and possible agreements on scheduling, discovery and other procedural matters;
 - b) helping “set the stage” for settlement through management of the prehearing process, making decisions on information exchange, ruling on dispositive motions, etc.;
 - c) rendering consent awards based on settlement agreements; or
 - d) shifting from the role of adjudicator to that of mediator on substantive issues (sometimes referred to under the heading “arb-med”).

¹ A joint initiative of the College of Commercial Arbitrators (**CCA**), the International Mediation Institute (**IMI**) and the Straus Institute for Dispute Resolution, Pepperdine Law School (**Straus Institute**).

3. Situations involving the interplay between mediators/facilitators and adjudicators (including, for example, sequential use of mediation and arbitration, simultaneous mediation and arbitration, and integrated “team” approaches).
4. Relational platforms such as “project partnering” (used in some government contracts and construction contracts) in which third parties facilitate better communication and mutual trust at the beginning of (and perhaps during) the contractual relationship, thereby helping to manage conflict.

Task Force Mission

The Task Force’s efforts are intended to:

- promote understanding of and share expertise on Mixed Mode Scenarios across diverse groups and cultures;
- promote partnering among diverse organizations focused on the management and resolution of conflict;
- expand the use of dispute resolution processes tailored to conflict, including measures that manage, resolve and reduce potential escalation of conflicts; and
- facilitate research, investigations and discussions regarding the management and resolution of disputes, and foster educational initiatives regarding best practices.

Task Force Strategy: A Two-Phase Plan

In investigating the special challenges and opportunities presented by the Mixed Mode Scenarios, the Task Force intends to undertake a two-phase process, as follows:

1. Phase 1 (tentatively planned to be completed by March, 2017): an investigative/descriptive aspect in which the standards and practices relating to Mixed Mode Scenarios in different countries and regions are explored in detail, compared and contrasted; and
2. Phase 2 (tentatively planned to be completed by the end of 2017 or early 2018): a complementary effort to develop best practices and other informational tools for the guidance of dispute resolution professionals and legal practitioners, courts, legislators and standard-makers.

Practically speaking, this means exploring and investigating, from various cultural and legal standpoints, the responses (both in current reality and as a matter of best practice) to questions, some examples of which follow:

- What are the dynamics of and appropriate uses of nonbinding or advisory evaluation in promoting settlement?
- In what ways may facilitators help parties tailor better dispute resolution processes, such as mediators “setting the stage” for arbitration?
- Since recent studies show settlement is becoming more likely during the course of commercial arbitration, should arbitrators be more deliberate about helping to set the stage for potential settlement? If so, what are appropriate ways in which this might be done?
- Under what circumstances, if any, might it be appropriate for a mediator to become an arbitrator or judge, or an arbitrator or judge to become a mediator, during the course of resolving a dispute?
- What is the proper protocol for arbitrators to follow when parties ask them to convert a settlement agreement into an arbitration award?

- In what ways, if any, might mediators and adjudicators appropriately communicate in the course of resolving disputes?
- What combinations of settlement-oriented and adjudicative processes are most appropriate in the real-time management of conflict in ongoing relationships?

These questions are of growing global significance in the management of conflict.

Final Products of the Task Force

The ultimate products of the Task Force, deliverable in mid-2018, will include:

1. An extensive written report providing:
 - a) Working definitions of a wide variety of dispute resolution and conflict management approaches in use around the globe;
 - b) In-depth treatment of current approaches to the variety of Mixed Mode Scenarios, comparing and contrasting approaches developed in different cultures and legal systems; and
 - c) Best practices or guidelines aimed at practitioners, dispute resolution professionals, business users and others.
2. Educational materials and multi-media presentations to augment the written product, available online or usable in academic or professional programs.

The final report and best practices/guidelines will be completed under the co-editorship of Professor Tom Stipanowich and Edna Sussman.

Administering the Task Force

Executive Committee

The Executive Committee of the Task Force has primary responsibility for coordinating and overseeing this effort. The members of the Executive Committee, comprised of designees of the sponsoring organizations, include:

- Jeremy Lack – Quadrant Chambers, UK and Switzerland
- Deborah Masucci – Chair, Board of Directors, International Mediation Institute, U.S.A.
- Prof. Moti Mironi –Haifa University, Law Faculty, Israel
- Kathleen Paisley – Ambos NBGO, Belgium
- Thomas J. Stipanowich - Academic Director, Straus Institute for Dispute Resolution, William H. Webster Chair in Dispute Resolution, and Professor of Law, USA
- Edna Sussman – President, College of Commercial Arbitrators , USA

Straus Team

In support of the work of the Task Force, a team of graduate students, most of whom are obtaining LL.M.s in international commercial arbitration, are undertaking in-depth research under the auspices of the Straus Institute. They are working to develop white papers that examine standards and practices regarding Mixed Mode Scenarios in their countries of origin (including Argentina, Australia, Belgium, Bolivia, Brazil, China, Egypt, Greece, India and Iran), or other countries. The team is being supervised by

Prof. Stipanowich with the help of Straus Research Fellow Karinya Verghese, an experienced attorney from Australia who completed her LL.M in 2015, who has been instrumental in coordinating the efforts of the Executive Committee with the Straus Team. They are supported by research assistant Marcio Vasconcellos, an experienced attorney from Brazil, and three other research assistants, two of whom are experienced attorneys from China and Bolivia.

It is also anticipated that the Straus Institute will be in a position to develop and administer empirical surveys on the subjects addressed by the Task Force.

Timetable / Your Involvement

The tentative timetable for the Task Force is as follows:

Phase 1	
Assemble information on current standards and practices (white papers, surveys)	Spring and Summer 2016
Initial International Task Force Summit, Pepperdine University, Malibu, CA	September 23-24, 2016
Refine information on current standards and practices	October, 2016-March, 2017
Phase 2	
Develop draft guidelines, best practices	First half of 2017
Second International Task Force Summit London, England(?)	Late Spring or Summer, 2017
Refine guidelines, best practices	Fall, 2017
Present final products (International Summit / Conference?)	Spring, 2018

It is our sincere hope that you, along with a number of other leading experts from around the world, will assist us in this important endeavor. As a member of this distinguished panel of experts, we hope that you will:

1. ***Respond to an initial Task Force Member Survey*** by providing written responses to a series of questions regarding your experience with and observations on Mixed Mode Scenarios.
2. ***Join us for the initial International Task Force Summit*** at the Pepperdine campus in Malibu, CA on 23-24 September 2016. The workshop is intended to summarize and facilitate a dialogue regarding the range of current standards and practices associated with various Mixed Mode Scenarios; there will be an emphasis on comparing and contrasting the approaches developed within different cultures and legal systems. It is our hope that time will permit at least brief consideration of the development of best practices.

3. ***Provide requested input or feedback*** in the preparation of summaries of current practices and the eventual development and refinement of best practices or guidelines aimed at practitioners, dispute resolution professionals, business users and others. We hope you will be able to participate in a second Summit in 2017, not yet scheduled.