

International Task Force on
Mixed Mode Dispute Resolution
Inaugural Summit

September 23-24, 2016
Villa Graziadio Conference Center, Pepperdine University
Malibu, CA

Hosted by
The Straus Institute for Dispute Resolution,
Pepperdine University School of Law

With the support of
Task Force Co-Sponsors
The International Mediation Institute (IMI)
and
The College of Commercial Arbitrators (CCA)

Assisted by a grant from
The American Arbitration Association /
International Center for Dispute Resolution
Foundation

Introduction: About the Task Force and the Summit

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 and the roles of third party interveners who assist with that process (which for the sake of convenience we will refer to as “neutrals”¹).

The International Task Force on Mixed Mode Dispute Resolution (Task Force), 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) was established for the purpose of examining and promoting understanding of the many different kinds of dispute resolution scenarios that involve the interplay among some or all of the following processes: mediation, evaluation and private or public adjudication (arbitration, litigation). This varied spectrum of complex situations, described in more detail below, we will refer to collectively as “Mixed Mode Scenarios.”

These mixed mode scenarios, described and discussed in the pages below, 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.

The Task Force’s efforts are intended to promote understanding of and share expertise on Mixed Mode Scenarios across diverse groups and cultures by highlighting and analyzing common scenarios involving interplay between different processes; encourage partnering among diverse organizations focused on the management and resolution of conflict; expand the use of dispute

¹ The term “neutral” is often used as a term of convenience to describe mediators, arbitrators and other third parties in the resolution of disputes. *See, e.g. Neutral*, in *DICTIONARY OF CONFLICT RESOLUTION* (Douglas H. Yarn ed. 1999). Its wide use may be attributed primarily to prevailing norms and standards that establish requirements or aspirations of even-handedness, impartiality and independence for mediators and arbitrators. *See, e.g. IMI CODE OF PROFESSIONAL CONDUCT* § 2.2 (IMI); *IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB.* Part 1 (2014); *MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, Standard II (ABA & AAA, 2005); *CODE OF ETHICS FOR ARB. IN COMM. DISP.*, Canon I (AAA, 2004). However, there are situations in which the agreement of the parties or surrounding circumstances make it permissible for third party interveners to be predisposed toward a party or perhaps even be close affiliated. *See* Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 *AM. REV. INT’L ARB.* 297, 368-74 (2014), available at <http://ssrn.com/abstract=2519084> (discussing perceptions and practices of party-appointed arbitrators on tripartite panels in US domestic arbitration and in international arbitration).

Moreover, our growing understanding of neurophysiology reinforces the view that human beings bring a variety of cognitive biases to the resolution of disputes, and cannot ever be perceived as completely “neutral.”

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. 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 non-binding or non-adjudicative processes (including non-evaluative facilitation as well as non-binding evaluation or advisory opinions) in promoting settlement?
- In what ways may neutrals help parties tailor more effective dispute resolution processes, such as mediators “setting the stage” for arbitration and vice versa?
- Since recent studies show settlement is becoming increasingly 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 or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award?
- In what ways, if any, might non-adjudicative neutrals and adjudicative neutrals appropriately communicate in the course of resolving particular disputes, whether sequential, parallel or integrated?
- What combinations of non-adjudicative 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.

On September 23 and 24, 2016, members of the Task Force gathered at Pepperdine University for an initial Summit aimed at inaugurating the work of the Task Force to promote mutual understanding of mixed mode processes by sharing stories, conducting facilitated discussions, and setting the stage for the continuation of the Task Force initiative by establishing Working Groups focused on specific mixed mode scenarios.

Mixed Mode Summit Day 1 – September 23, 2016

Introduction of Summit Participants

[Please see Appendix A for the complete list of Summit participants.]

The first day of the Summit began with an introductory presentation in which Tom Stipanowich and Veronique Fraser presented a short summary of six categories of “mixed mode” approaches and a seventh category of intervention strategies aimed at maintaining or managing conflict within long-term commercial relationships.

The bulk of Day One was devoted to discussion of each of six specific mixed mode scenarios. In each case, discussion began with a sharing of stories—a recounting of specific experiences with a particular kind of scenario and highlighting potential benefits or areas of concern. The sharing of stories was followed by facilitated group discussions regarding each scenario.

Brief Overview of Six Mixed Mode Scenarios (Tom Stipanowich and Veronique Fraser)

Tom and Veronique provided a short description of each of the six scenarios within the scope of the present initiative. Brief summaries of each scenario are provided below.

[Please see Appendix B for a pre-Summit White Paper summarizing the Mixed Mode Scenarios.]

Scenario 1:

“Mediators using Nonbinding Evaluation as a Means of Encouraging Settlement”

One of the most common forms of mixed mode practice occurs when mediators or conciliators engage in forms of evaluation in addition to using non-evaluative techniques and approaches. In the United States and some other jurisdictions, for example, mediators sometimes offer predictions of likely results if the matter goes to trial or arbitration, or provide assessments of the strengths or merits of parties’ factual or legal arguments. They may also offer proposals for the resolution of the dispute—an activity that is also commonly associated with conciliation.

Because perspectives on mediation and mediator practices vary greatly, there has been considerable discussion and debate regarding mediators’ employment of evaluative methods and even the proper meaning of “evaluation.” As mediation practice develops around the globe, these issues become ever more compelling subjects for deliberation and debate. As some of the experiences below suggest, different cultures and legal systems understand the role(s) of mediators in different ways. For example, in some countries, mediation is viewed essentially as facilitated interest-based negotiation, and is distinguished from forms of case evaluation, which is sometimes viewed as the province of “conciliators.” In the U.S. and some other countries,

however, mediators tend to employ a wide spectrum of strategies and tactics, both facilitative and evaluative, and with varying focus (underlying interests and drivers, case evaluation, etc.). Moreover, as will be made evident in the discussion of Scenario 3 below, in China, mediation (which is also sometimes referred to as “conciliation”) is frequently performed by judges or arbitrators (with the permission of the parties) in the course of their efforts to resolve disputes.

Shared Stories on Scenario 1: (Deborah Masucci, Moderator)

Mark Morril: Mark served a strongly evaluative role in a mediation regarding a dispute over the very public failure of a transaction processing system. East and West Coast celebrity lawyers were involved, leading to significant distortions in team dynamics and impediments to communication. The discussion became increasingly removed from the law (as the lawyers were “freight trains barreling through the law”), and despite strong incentives for settlement on both sides, the matter seemed likely to go to trial with potentially huge damages against the defendant or an embarrassing loss for the plaintiff. Mark intuited that the lawyers were not able to convey to their clients the necessary message, and asked the lawyers if he might speak to the parties. On both sides, the principals were willing to step aside from their celebrity lawyer and working senior lawyer to hear from Mark one-on-one and the lawyers agreed to the communications. It turned out that the parties were willing to take reasonable guidance, but needed some objective assurance that they were at the right number in order to get their respective constituencies on board. Mark was able to accomplish this by a highly evaluative approach and gaining the trust of the participants.

Jonathan Marks: What is it that the mediator is being engaged to do? Jonathan deals with this question in the mediation agreement, which provides a ground rule that engagement may include both facilitative and evaluative elements (at the mediator’s discretion). Defining the mediator’s engagement at beginning is important because it sets the scene. Mediators should push back on parties when they want the mediator to evaluate too early.

Jim Groton: Jim was engaged in a pre-dispute process which required evaluative mediation followed by arbitration. A hotel chain and a developer entered into a risky venture involving design and construction of a luxury hotel and condos on a fixed time schedule. Parties appointed two standing neutrals, one an arbitrator and one a mediator (Jim). If parties disagreed for more than a day on design and construction issues, within 5 days they had to hold an evaluative, “fast track” mediation lasting no more than one day. (If necessary, a binding arbitration hearing in baseball arbitration format would be conducted within 20 days.) A final decision could not be delayed longer than 28 days. There was a webcam set up to monitor what was going on on-site and the mediator was able to keep up-to-date. No dispute ever reached mediation or arbitration, perhaps because people knew they were being observed.

Jane Player: Jane arranged an “in-life mediation” between a Swiss pharmaceutical company and a US company. The parties were to call Jane as issues arose. There have been no calls as yet; Jane credits the concept that “if you know you have to go before a headmaster, then parties are more likely resolve it themselves (“prophylactic effect.”)

Ellen Deason: Ellen participated as counsel in a mini-trial process between parties in a long-term relationship (pipeline operator and the State of Alaska). The dispute concerned rates for shipping oil through Alaskan pipeline. Corrosion had been discovered and the fix was expensive. The matter went before an administrative law judge (“ALJ”); there were lots of technical and legal issues. The ALJ encouraged the parties to settle and find an appropriate process by setting an aggressive timeline. It took a long time to negotiate ground rules. The format of process involved both parties making presentations and then mediating. If parties requested, the mediator was to write and deliver an opinion on the case. The mediator was a retired federal judge, and the prestige of neutral was important to parties. The representatives reached an agreement in the mediation phase but, out of curiosity, asked for the opinion. The latter favored the State of Alaska and the oil company became disillusioned by the process and lost confidence in the mediator. Moreover, the Governor rejected the mediated agreement on the basis that it was politically unacceptable. The parties finally came up with a collaborative process and eventually settled on terms similar to mediated agreement; the deal was approved by a new governor. In retrospect, it was not clear that the timing of the neutral’s opinion was optimal.

Paul Mason: What do we mean by “evaluation”? It means different things in different situations and in different cultures. When Paul is in caucus with parties and there is an impasse, he asks parties whether they are interested in hearing a case evaluation along the lines of what an independent arbitrator might conclude (meaning a critical review of points that do not look as good parties think they do). At some point, moreover, he may ask the parties if they would like him to offer suggestions for approaches to resolving the dispute. He usually waits for the lawyers to give their OK. If they are, he may be able to suggest something they haven’t thought of already.

Sukhsimranjit Singh: Two years ago, three brothers hired five lawyers (two with two lawyers each) to resolve disputes over jointly-owned blueberry farms. Sukhsimran was engaged as mediator, but it became clear through discussions that the parties did not understand the concept of mediation and also there were important cultural issues such as face-saving and honor involved. Sukhsimran eventually found it necessary to bring in an elder from their community to provide information and guidance regarding the concept of mediation and make sure the parties understood that it was not about adjudication and, moreover, that the mediator could be trusted.

Instructions for Facilitated Group Discussion:
Objectives and Priorities in Conflict Resolution as a Backdrop for Mixed Mode Practice
(Moti Mironi)

Our modern focus on dispute resolution has brought attention to the various goals or values that underlie and prompt the use of particular dispute resolution processes. Appreciating the process goals/priorities that parties bring to the table, through conscious choice or as a result of cultural

preferences or other factors, is a critical step in understanding our varied approaches to mixed mode processes.²

Comprehensive list of process goals or criteria for selecting processes:

Process Criteria

- Party-controlled process
- Fair process
- Flexible / dynamic process
- Confidential process
- Inclusive process: possibility to include all stakeholders whose interests are affected
- Transparent process
- Efficient, cost-effective process
- Expeditious process
- Enhancing or promoting the likelihood of a negotiated outcome
-

Neutral Criteria

- Competent and/or authoritative neutrals, i.e. neutrals with necessary skills and experience
- Independent and impartial neutrals

Outcome Criteria

- Fair outcome
- Legitimate outcome
- Clear rights and obligations
- Final, enforceable solution
- Creative solutions
- Feasible, practical solution
- Predictable outcome
- Maintaining or improving relationship
- Maintaining societal stability and harmony within the community

Facilitated Discussion Groups for Scenario 1

Scenario 1 Discussion Group A - Sukhsimranjit Singh (Facilitator)

[Notes from discussion groups were captured at various levels of specificity; most are reflections of summary notes made on pads during the discussions. Commenters are not identified, in accordance with understandings among participants at the Summit.]

- What do we mean by “evaluation”?
- What does it take to be an evaluative mediator? What kind of preparation?
- Does the mediator need to be an expert or well-versed in order to “evaluate”?

² For an extensive discussion of process goals and mixed mode processes, see Thomas J. Stipanowich & Veronique Fraser, *Developing International Practice Guidance for Participants in Mixed Mode Dispute Resolution Processes*, *FORDHAM INTERNATIONAL LAW JOURNAL* (Symposium Issue) (forthcoming 2017).

- Issue of process choice vs. perceived partiality/impartiality
- Evaluating interests, or positions?
- Context matters:
 - Power
 - History
 - Relationship /norms
- Whose dispute is it?
 - Matter of perspective?
 - Sales pitch?
- Whose process is this?
 - Mediator?
 - Parties?
 - Lawyers?
- Regional differences:
 - California – more emphasis on caucus
 - Other – it depends
 - Regional culture vs. mediator
- Lawyer control
 - Evaluation itself is different with perception
 - Lawyers' agendas – monetary focus vs. emotions, interests?
 - Lawyer used as a mediation tool: establish trust and reputation
 - Effective use of lawyers (coach them!) and parties (coach them!)
 - How do you do it? Communication / Personality / Style (all need trust)

Process: being heard vis-à-vis mixed mode

- Influence of mediator?
- Depends on the goals of the parties
- Sometimes parties do not know what they need or what they want until they get there
- Parties also do not know what is available to them, what are the choices?
- Parties self-determination means being informed
- Evaluation can be not only on legal issues, but also on parties' interests and behaviors. Mediators can also evaluate the possible outcomes (options or alternatives) as to whether they will meet the parties' interests.
- Influence of culture on principles such as what it means "being heard". For some parties, after talking for 2 hours, parties still did not feel they had been heard.
- Impact of evaluative mediation: mediation becomes the central part and parties need to convince the mediator.
- Parties should know in advance mediators' styles [and potential scope of evaluation] prior to selection

- Avoid parties' manipulation of the mediator
- Clients see neutrals differently if they switch hats
- Involve big process questions
- You need to be well-versed to be credible as a med-evaluator
- Med-evaluator should ask permission to caucus with the parties

Dynamic of switching to evaluation in mediation

- We start in a win-win process, then we switch to evaluation
- How do we communicate our role?
- What happens when you have a relational situation?
- Dynamic has changed
- Management and timing
- Mediation in India is known as "compromised" - it shows that you are not a fighter.
- Med-arb is prohibited in Brazil, but Brazil allows arbitrator to conciliate.

Scenario 1 Discussion Group B - Ellen Deason (Facilitator)

Attendees: Jim Groton, Vivian Gu, Cary Ichter, Jonathan Marks, Joyce Ndegemo (student), Jane Player, Nancy Vanderlip, Karinya Verghese (notes)

*Important to know expectations of parties. Some want party control over process but also want evaluation. As counsel, need to manage parties' expectations. What does party control mean?

Q: Do you think parties know what "evaluation" will be?

*"Nine out of 10 times after evaluation, I'm done. If you call it the way you see it. Cold shower/hot shower."

*In caucus, you often have reality test – different from evaluation.

*Mediator interventions – contain varying levels of evaluation

*"Sliding scale of evaluation" – goes up closer to midnight

*Joke that mediator "facilitative until 4.30pm"

*I'm not sure that all mediators end with evaluation.

*In my experience, need to use evaluation to advance settlement.

*Most informed participants would expect these questions (Note: This is perhaps an Anglo-American perspective.).

***Spectrum of Evaluation: From least to most direct**

1. Questions:

Non-leading

Leading

Devil's advocacy

Pointed

2. Comments on sub-aspect witness etc.

3. Evaluation to one party

4. Formal Prediction

*Preparation is key – get “buy in.” Permission – asking permission – so lawyer is not embarrassed.

*Pathology associated with dispute. Try to learn enough about what the dispute is about. What are barriers to settlement? Design process – involving pre-session work. Use attorneys as partners.

*Psychology and preparation are becoming more and more important.

*As general counsel, I want an evaluation because often the other lawyer has oversold the case to the other side. I need mediator to speak to client to tell them weaknesses of case.

*General expectations – non-leading questions: to gather information. Devil’s advocate: to run case. Evaluation: to add sanity.

*I want the mediator to set me straight.

*If I could settle this case without giving you any indication of what I think, then I would. Also emphasizing need to keep relationship with lawyer.

*I received a best-case evaluation of \$50,000 from a mediator. I walked out and got a judgment for \$750,000. Need to be careful of evaluations.

*Different strata of evaluation for different issues. Would not move to formal prediction ever.

*In joint opening session where other side has been “oversold” the case, she has seen the other side say, “I didn’t know any of that” (after the opening statement).

*Lawyers are notoriously terrible at predicting cases – producing very bad evaluations of cases. Can you say that as the mediator?

*Significant impact of saying, “look at your former negotiating partner.” Take time to look at this person that you haven’t seen in a long time.

*How can you do a formal prediction without sounding biased?

*Let the other side pick the mediator. Good way to combat bias.

*Even better if you offer to pay for mediator that the other side picks. Also, it would be good if you could move courthouse steps further upstream – because only 1% end up in court.

*Let’s have the discussion earlier, while motion for summary judgment is pending.

*Mediators are never going to know everything about the case. Use dynamics: here’s why it’s possible, here’s why it’s not.

*Give good background to litigation.

*Success rate of mediation is very high in China. First, arbitrator then shift to mediator. Evaluation relates to how to deal with the case. Parties watch the reaction of the neutral.

Sometimes they will give an evaluation and parties accept it. Different levels of evaluation: “I would rule in this way.” Lawyers don’t like it though because they have less party control.

*“I have not yet reached any conclusion, but it’s difficult to ignore X, Y, Z so I would rule this way on this and that way on that...” “It seems to me on balance that you should be talking in this area...” Is this what happens in China?

*Yes. In caucus, we put pressure on one side.

*As a mediator, if I think side A is being more reasonable then I am likely to side with them. Those who are convincingly reasonable get an advantage over an unreasonable party.

*Always want an opening – “give me a reason to be on your side.” Consider the impact of style.

*Sometimes opening statement can influence desire to come together at mediation.

*Consider distinction between influencing vs. manipulating.

Scenario 2: **Mediators “Setting the Stage” for Adjudication and other Dispute Resolution Options**

Although discussions of the roles of mediators and other neutrals often focus on the resolution of substantive disputes, many experienced mediators bring their skills to bear on process management—not just in regard to the mediation process, but also with respect to alternative approaches that may be necessary or appropriate steps in the final resolution of disputes. In this way, mediators sometimes help “set the stage” for adjudication of a dispute by working with parties to tailor procedures for arbitration or litigation. This may take a variety of forms. Where mediation fails to resolve some or all of the issues in dispute, for example, a mediator is sometimes able to facilitate agreement on appropriate arbitration procedures or assist parties in selection of the arbitrator/s. In other situations, parties retain mediators for the sole purpose of facilitating the tailoring of an appropriate dispute resolution process. An example of the latter approach is “Guided Choice.”

Shared Stories on Scenario 2 (Veronique Fraser, Moderator)

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

Jonathan Marks: Jonathan provided a concrete example of the use of tailored arbitration to break an impasse in a case he was initially hired to mediate. When impasse loomed, Jonathan shifted from attempting to move the parties towards a settlement to mediating the arbitration process, providing neutral expert input on those procedures, and handling some administrative details.

The case involved a plaintiff suing its insurer and broker and a two-day mediation in the shadow of fully filed summary judgment motions. In plaintiff's view, both defendants were at fault; the plaintiff did not care who assumed responsibility for the claimed amount as long as someone paid. At the beginning of the mediation, the plaintiff demanded \$15m. The defendants negotiated with each other and with the mediator regarding who was to pay what. Jonathan explained that sometimes it makes sense for both defendants to jointly put a figure on table, such as a \$1m counteroffer on a \$15m claim. However, if it takes too long to chip away at the gap between the parties, the plaintiff may get frustrated. The mediator needs to focus on the defendants to get enough money to keep things moving. In this case, the defendants dug their heels in and got to a place where they could not raise enough money to get a settlement. (Assuming, for example, that a certain number seems like a reasonable settlement, how do we get there?)

At impasse, the insured was sending clear signals to the mediator that a \$7m deal could work. The insurer offered to put up 50% of \$6m, and the broker offered 20% of the same figure, but both sides were firm they had no more movement. The mediator worked with the broker and insurer to get them to agree to a total \$7 million contribution in order to end the dispute with the plaintiff. Ultimately, they agreed to each contribute 50%/50% of \$7 million, without prejudice, subject to their agreeing on an allocation process if the plaintiff agreed to take \$7 million. The mediator floated various arbitration options for resolving the allocation issue. The parties reacted positively but could not agree on details of the arbitration (lawyer vs. judge arbitrator, number of arbitrators, location of hearings, written submissions vs. oral hearings; nature of decision).

The mediator then sent out a "stalking horse" single text arbitrator protocol and invited the parties to think about how it might be satisfactorily modified. Meanwhile, negotiations continued on the claims. Although it took time and multiple telephonic interactions with each of the plaintiff, the insurer and the broker, the mediator was able to get a binding settlement agreement signed to resolve the Plaintiff's claim for \$7 million and a separate arbitration agreement signed to allow the insurer and broker to resolve their allocation dispute. The mediator effectively acted as administrator of arbitration and help select arbitrators and arrange other aspects of the arbitration process, but then turned over the matter to the arbitrators for resolution. The mediator did not talk to the arbitrators during the arbitration process. There came a point when one of the arbitrators had to be replaced after four months, at which point there was "substantive water under the bridge." In these circumstances, contact was made on an *ad hoc* basis to get the arbitrator replaced. (It should be noted that in this case, there was no prior agreement between the parties regarding arbitration, so the mediator was not intruding into the realm of a chosen institutional provider.)

Tom Stipanowich: As a mediator, Tom has sometimes discussed procedural options as a technique for bridging impasse and keeping the conversation going. This usually occurs in caucus discussions. On a few occasions, both parties have expressed an interest in a particular procedural options and Tom has been able to assist in facilitating agreement on an arbitration process. For example, Tom was mediating a case involving insurance coverage associated with a mine disaster that had been stuck in federal court for a decade. The parties were tired and wanted a resolution. Tom was able to make substantial headway on dollars, but the parties were at loggerheads late in the afternoon. Tom raised with each party the possibility of teeing up a final offer arbitration to resolve the matter, and both parties expressed interest in the idea. Tom then put the parties together to discuss the idea, and they came back with a request that Tom be the arbitrator. After Tom and the parties discussed the practical and legal concerns, the parties conferred again and confirmed their intent to have Tom arbitrate. Tom agreed and helped them set up a process, and within two weeks the matter was finally resolved.

A second example involved Tom acted as standing mediator on a construction project, facilitating weekly or bi-weekly discussions about emerging issues from a date mid-way through construction to the end of the project. He was able to help the parties to prevent issues from turning into legal disputes and keep the project on track. However, the foundation for a major delay claim had been established before Tom's appointment. Tom approached counsel and asked if he might be able to help resolve the claim. The parties were far apart, but agreed to have Tom help them create an arbitration procedure to resolve the matter. (There was no arbitration provision in the contract and neither was enthusiastic about an institutionally-administered arbitration.) Each side had very different preferences for arbitrators, and they ended up with a three-member panel in which each party picked a wing arbitrator. But the approach was novel because Tom helped them find arbitrators based on what they wanted, but, after discussing the matter with the parties, Tom made the approaches to the potential arbitrators so the latter did not know who picked them. This "screened" approach has been incorporated as an option in the CPR Non-administrated Arbitration Rules.

John Sherrill: John gave an example of a scenario involving a dispute over the construction of an airport in which the mediator helped set the stage for adjudication. Sherrill represented one of the parties. During a two-day mediation early in the litigation, the parties asked the mediator for an in-depth evaluation on both procedural and substantive issues, taking advantage of a specific provision in the mediator's retention agreement. Although the parties recognized that such an evaluation would probably be the mediator's "final shot," meaning that the mediator would no longer be in a position to serve as neutral in the case, the parties employed his evaluation as blueprint to enter into discovery to get it resolved. The judge co-operated with the parties by not enforcing standard fast-tracked discovery procedures. The case was settled. One of the lessons of the case, according to John, was that if you ask a mediator for an evaluation of the case, you should also seek procedural advice as to what is needed to go forward. This can be very help at an early stage in the litigation process. John now seeks to act in a dual capacity as a neutral: as a special master for discovery purposes, and a mediator as well.

Scenario 2 Discussion Group – Deborah Masucci and Jackie Nolan Haley (Facilitators)

Pre-process issues

- Develop trust by establishing a relationship
- Styles of parties
- Who should attend mediation
- Agreement to mediate
 - Should specifically mention mediator may address process elements
- Do a lot of the work before we sit down – process
- Note: Take care to consider how this jives with the process function of the institution, if any
- Are we talking Guided Choice, which may be incorporated as a component of, for example, AAA procedures, or a regular mediation process?
- Is mediation the right process for "Guided Choice"?
- If using the mediation process to design a mixed mode process then need to jibe the process and end product with party expectations
 - Who brings up the process points – mediator, parties, both? And when?
 - Going into process issues may help keep people talking and they go back to substance/impasse
 - Result might include dispute resolution clause in settlement agreement
 - Result might include real-time approaches like dispute board
- This all sounds good but does an arbitration administrator go too far by suggesting or requiring alternative or complimentary dispute resolution processes like mediation?
- Isn't the arbitrator better suited to do this?
- Be careful not to become lawyer for the parties
- Isn't suggesting a set of rules enough?
- In the process of Guided Choice or process-oriented mediation, all the options should be well explained.
- But remember benefit of keeping them talking
- But is this enough to justify ethical risks or liability risks?
- Important to make sure the parties understand the process
- According to French case law, the consequence of commencing an arbitration in disregard of a mandatory mediation clause is the non admissibility of the claim See *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, Paris Court of appeal, 04 March 2004, *Rev. Arb.* 2005.143; Cass. Mixte, 14 February 2003, *Les cahiers de l'arbitrage / Paris J. of Int'l Arb.*, vol. II, p. 197.
- Ethical duty to be in the right process with the right person before signing the mediation agreement
- Timeline – setting the stage – when? Establish a time line before the mediation session begins and not during the mediation process

- Note that in final offer (baseball) arbitration, or bracketed (high-low) arbitration, parties may not want arbitrator to know the amounts of the final offers or high-low numbers.
- Doesn't need to be in mediation agreement
- More rounded
- Will arbitrator feel more restrained by recently negotiated arbitration agreement that has just been entered into pursuant to mediation? E.g. preliminary issue – you think the claim is a loser – what to do? Do you suggest the case has settlement possibilities? Or do you proceed to make a decision taking the resolution out of the hands of the parties?
- What role does a mediator have in dealing with 20- year-old mediation agreement?
- Conclusion:
 - In favor of mediator facilitating the parties setting the stage
 - But what boundaries?
 - Goal is to help parties reach agreement, which may be agreement to future process
 - Assisting parties:
 - Should mediators be giving instructions to arbitrators
 - Concerns about ethical or legal issues
 - Different countries, different perspectives
 - What about where the dispute has already been adjudicated either in court or through arbitration?
- Four possible scenarios:
 1. When we begin the mediation
 2. In the middle of mediation at impasse – bifurcate the proceeding and send an issue to be arbitrated. Once that issue is resolved through arbitration, then the remainder of the case can settle
 3. Settlement agreement crafting
 4. Re-crafting arbitration agreement

Scenario 3:

“Changing Hats”: Mediators Shifting to the Role of Arbitrator, or Arbitrators Shifting to the Role of Mediator or Conciliator

Of all of the forms of mixed mode processes, none have stirred more debate than those in which neutrals who are assisting parties in a settlement oriented process shift roles and become adjudicators, or vice versa. Perceptions of these approaches, moreover, are heavily colored by cultural traditions.

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

In other cases, an arbitrator (or judge) shifts to the role of mediator (a scenario sometimes designated by the acronym “arb-med”) or “conciliator.” (The terms “mediator” and “conciliator” are sometimes used (or translated) interchangeably, but in some cases refer to different activities.) For example, in some arbitration proceedings arrangements may be made for the arbitrator to switch hats and act as a mediator or conciliator in order to try to help the parties attain an amicable settlement of disputes; if mediation or conciliation fails to produce a full resolution, the neutral may in some cases be authorized to resume the arbitral role (a process sometimes referred to as “arb-med-arb”). In one form of arb-med, the arbitrator does not shift to the role of mediator until after hearings are concluded and an award is written but not yet published or disclosed to the parties.

In some situations, the possibility of the neutral shifting roles is agreed to by participants before the neutral is engaged. Sometimes the approach is enshrined in well-established procedural rules, such as the Chinese practice of “conciliation within arbitration” as defined by the rules of official arbitration commissions such as CIETAC and BAC. In other situations, a “change of hats” is requested by one or both parties or proposed by the third party neutral during the course of dispute resolution.

Attitudes toward an outright shifting of roles are heavily colored by the cultural traditions of participants. In China, for example, longstanding emphasis on the stability and harmony of the society and on deference to authority have underpinned the practice of conciliation by arbitrators or judges. In jurisdictions such as the U.S., on the other hand, heavy emphasis on individualism, and personal autonomy and related concerns about assent, self-determination and procedural due process lead many attorneys and neutrals to forgo the use of med-arb or arb-med-arb. Even in the U.S., however, there is evidence that many neutrals have been given opportunities to employ such approaches, and they often accept the challenge.

Shared Stories re Scenario 3: (Moti Mironi, Moderator)

Shahla Ali: [Based on submitted paper, Shahla F. Ali, "Example of Scenario 3: Neutrals Changing Hats - The Legal Framework for Med-Arb Developments in China: Recent Cases."]

Article 51(1) of the PRC arbitration law provides that an arbitrator may at any time attempt to conciliate with consent of parties. It is estimated that 20-30% of disputes in greater China are resolved through arbitration-conciliation process. The benefits of this procedure include:

- flexibility;
- forward-looking;
- non-legal possibilities;
- congruence with traditional values (cultural):
 - harmony
 - moderation/good person values
 - avoid litigation at all costs
- easier to enforce when parties have autonomy.

Article 47 (9) of the CIETAC Arbitration Rules states that the opinions, views or statements shared by any parties in the process of mediation cannot be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, which may help to mitigate potential adverse consequences of med-arb. However, some are concerned about whether such a practice is feasible in reality. Such concern is highlighted by the Hong Kong case *Gao Haiyan v Keeneye Holdings Ltd* in 2011, in which one of the arbitrators and the General Secretary of the Xi'an Arbitration Commission acted as mediators in the arbitration proceeding. That is to say, they adopted a kind of med-arb procedure. In that case, mediation failed and the arbitral tribunal resumed arbitration proceedings and rendered an award that was much lower than the proposed settlement amount put forward during the mediation. The enforceability of the arbitral award was challenged on the basis that the arbitrators acted with bias to penalize the losing party with an adverse judgment for their failure to cooperate in resolving the dispute through mediation. Although the Hong Kong Court of Appeal finally allowed the enforcement of the arbitral award, this case indicates some of the inherent challenges associated with procedures in which individuals serve as mediators and then arbitrators.

Dawn Chen: Dawn was involved in the resolution of three disputes. She had been appointed arbitrator in one dispute over the rules of the Beijing Arbitration Commission. After conducting arbitrating hearings, she asked the parties (who had an ongoing relationship) whether mediation might be appropriate. The parties agreed, and Dawn helped them arrive at a settlement. The parties then advised that they had two other disputes that were due to be heard in court, and it was agreed that Dawn would also attempt to settle those disputes. With her help, settlement was reached in those cases as well.

Dawn indicated that in such circumstances a mediator sometimes acts as an evaluator, sometimes not. Mediators need to incorporate a lot of techniques – a combination of different skills.

Sometimes the participation of third party experts is called for, although, they are very expensive. Dawn says that it is important to provide the parties with an opportunity to mediate in caucus. No record is maintained of the mediation process, unlike arbitration.

Xinbo Liu: Xinbo Liu also spoke of med-arb-med in China. He noted that experienced arbitrators have ability to understand issues. Mediation can be undertaken at any stage during arbitration. If mediation is unsuccessful, arbitration will continue. Arbitrators can try mediation several times throughout process. Arbitrators can get more information during the mediation, helping them to know the dispute better. As mediators, arbitrators may issue preliminary findings of fact, conclusions of law as part of the settlement process.

Tom Stipanowich: Tom started mediating in the early 1990s, even before mediation was well established as a regular element of the pre-trial and pre-arbitration-hearing process in certain regions of the United States. In those early days, on a number of occasions in which he was appointed as an arbitrator, he would discover that parties had not taken the opportunity to negotiate in advance of the hearing. On several occasions he agreed to leave the room while the parties discussed the dispute between themselves, and on at least two occasions they made progress and asked if he could help them by mediating. On both occasions, after a discussion with the parties about the potential legal and practical issues associated with being a mediator as well as an arbitrator, he agreed to act as mediator with the parties' written consent. In both cases he was able to successfully mediate the disputes without caucusing with the parties (thus avoiding concerns about ex parte discussions should Tom have ended up arbitrating). The parties' agreements, both of which contemplated some elements of future performance, were both converted into arbitration awards.

In another, more recent case, Tom was an arbitrator in a case involving the split-up of a closely held corporation. The owners had asked that the arbitration be bifurcated, with hearings regarding valuation preceding hearings regarding a dispute over alleged breaches of contract. During the course of the first set of hearings, the parties approached Tom and said they were making progress toward a negotiated settlement, and wondered if he could assist by mediating. After a mutual discussion of the pros and cons of this approach and the signing of appropriate waiver language, Tom did mediate. Again, however, everything was done with all parties present. The settlement was converted into a consent award on valuation. Some months later, Tom arbitrated the other, remaining issues.

Tom has never had bad experiences in the few cases where he has personally "switched hats" as a neutral, perhaps because he has tried to take great care in managing such process. But he was once called in privately to advise one of the parties on a matter involving a very large and complex case in Texas in which an arbitrator's desire to "change hats" created serious problems. The multi-party contract included an arbitration clause that called for the arbitrator to be appointed by a court if the parties could not agree, and when a dispute arose among the parties it was necessary to apply to a judge to appoint the arbitrator. The appointee had apparently never arbitrated, but was a highly successful mediator. From early on in the arbitration proceedings, he

urged the parties to allow him to let me switch to the role of mediator and resolve the case through settlement. Tom was called in by one of the parties to discuss the resulting dilemma; the party was very reluctant to allow the arbitrator to mediate, but were afraid that if they did not agree to let him do so they would offend him and hurt their chances for a favorable result in arbitration. They eventually agreed to mediate. Tom was of the view that the arbitrator's actions were ethically improper and undermined party autonomy.

Merril Hirsh: Merril had an experience involving a proposed arrangement to mediate after the conclusion of arbitration hearings. The idea was that the parties would agree to engage in arbitration hearings, after which the arbitrator would place the arbitration award in a sealed envelope. The parties, too, would submit final offers in sealed envelopes, after which they would engage in mediation with the arbitrator as mediator. If mediation failed to produce an agreement, the parties would open the envelopes at 5:00 p.m. and whichever party had a number closest to the arbitration award would prevail. One of the parties (having previously expressed great confidence in its case) ended up coming up with more flexible offers that led to a resolution rather than risk this process. The proposal succeeded in putting pressure to be reasonable in bargaining.

Moti Mironi: Moti played three different roles—mediator, conciliator, and arbitrator—in regards to a commercial dispute between an Israeli company who was an exclusive licensor for hearing aids company located in Vienna. The parties had a long-standing relationship. The Viennese company went through a series of mergers, which meant frequent changes in policies and negative consequences for the long term business relationship. The Israeli company failed to understand and implement the new and ever-changing marketing programs. The Viennese company said the Israeli company was playing games and severed the relationship. The Israeli filed a claim for compensation and injunctive relief since the Viennese company had stopped delivering spare parts that the Israeli company needed for its clients holding warranty contracts.

The court referred the dispute to Moti as mediator. It was agreed that the mediation would be conducted over two days in Tel Aviv. The Viennese company sent its VP Legal to represent it in the mediation. During the first day of mediation the parties arrived at what seemed to be an excellent value-creating solution. However, the Viennese company's representative could not commit because he was not sufficiently familiar with the business. (The circumstances demonstrates the importance of having the right people at the table.)

The process continued to a second day, at which point Moti switched hats to act as a conciliator. In this role he felt free to be evaluative and give proposals. At noon, the parties appeared to be an impasse. Moti suggested they consider final offer arbitration as a way of resolving the issues that were still open. The parties agreed and submitted their final offers. With the two sealed envelopes in hand Moti explained the advantages of open final offer arbitration in which the parties get to see the final offers and have opportunity to negotiate a settlement. The parties agreed to try. After 25 minutes of negotiation, the parties asked Moti (now as arbitrator) to make a decision to resolve the dispute. Moti did and the parties were very satisfied with the flexibility

effectiveness and finality of the process. For all it was the first experience with final offer arbitration.

Only Moti felt frustrated because it was clear that what was decided in the arbitration was not the best solution for both parties [see his article]. Sometime later he ran into one of the lawyers who told Moti that one year later, the parties decided to implement the deal that had been discussed during the first day of the mediation and resumed their business relationships under a new model.

Edna Sussman: Edna was involved in case in which she was appointed as the arbitrator which evolved into an arb-med-arb process relating to a dispute between a Chinese party investor in a tech startup and a U.S. party. The Chinese party claimant wanted a recommendation from me as the arbitrator as to the resolution. As he said, he might not like the results but he would accept it no matter what the recommendation was. That this might be the approach at the arbitration hearing was anticipated and an informed consent was executed by the parties before the arbitration hearing started. The morning was spent hot tubbing the fact witnesses and the afternoon was spent going back and forth between the parties on an ex parte basis. The parties accepted the recommendation and a consent award was then entered on the basis of the agreed result.

In another case relating to a dispute between a firm and an ex-employee over the alleged theft of financial advisory algorithms for hedge funds an agreement on the process for resolution was reached at the mediation, but it was necessary for a neutral person to review the ex-employee's by-subscription-only digital platform to see where it infringed on his former employer's digital platform. This was unusual in the sense that I served, not exactly as an arbitrator, because all communications after the mediation were ex parte because the parties did not want to share their digital platforms with one another, but I did review the platforms and direct such changes as were required and confirmed to the former employer that directions for changes had been given and executed. It was the only way to get that matter resolved. Again informed consent was delivered by the parties.

In another case the matter came in as a mediation between a Canadian and US party, which involved manufacturing activities in China and thus required enforcement in China. Because of the need for enforcement in China I recommended we enter into an arb-med-arb process so that if resolution were reached, it could be entered in the form of a consent award, and so be enforceable. Because I had made the suggestion the informed consent to the process provided that either party could elect to have someone else serve as the arbitrator if the matter did not settle. However, the matter did settle and a consent award was entered based on the agreement reached.

In another case arb-med-arb, Edna agreed to mediate a case in which she had been appointed as the arbitrator concerning a dispute over the termination of a member of a partnership. Edna successfully mediated the dispute on the basis of numbers and never got into the merits with the

parties. Under the circumstances, she would have been OK had she needed to move on to the arbitration stage.

Edna has also seen some contracts that specifically provide for an arb-med-arb process, especially in contracts coming from California. Under those contracts only the arbitrator can withdraw if not comfortable proceeding to the arbitration phase, something that is required in any case, by ethical obligations. The parties must accept same neutral as the mediator and the arbitrator pursuant to their contract. Be careful of public policy issues in potential enforcing jurisdictions if conducting ex parte sessions in the mediation phase- see e.g. Keeneye case in Hong Kong which ultimately upheld after reversal an award issued in China where such discussions took place. .

Kathleen Paisley: Kathleen was an advocate in a complex dispute between two major technology companies. Although the procedure devised by one of the arbitrators to resolve the technology issues was promoted as a success, Kathleen indicated that her own perception is that the parties ultimately settled the dispute because the time and costs of the complex, multi-step procedure were too much to be borne; the parties sought to stop the bleed and the loss of time. Kathleen believes that the parties may have felt better served by a straightforward AAA arbitration process, which is what they originally agreed to. The story illustrates that sometimes, complex solutions are inferior to simpler and more straightforward processes.

Scenario 3 Discussion Group A – Moti Mironi (Facilitator)

Same neutral

- In some countries, it is illegal for mediator to play a role as an arbitrator during post-settlement implementation stage.
 - When neutrals are “switching hats,” waivers should be encouraged (what type of waiver?).
 - Informed consent is paramount and ongoing throughout process.
 - The transition from mediation to arbitration is too difficult
 - . After mediation, need different neutral.
 - In China, med-arb-med is possible, with no additional consent/waiver required. In this case, the award and arbitral capacity is only based on evidence.
 - Possibility of review of arbitral award (in South Africa) if award is based on information not submitted in evidence.
 - Easier for same neutral in med-arb to issue consent award, because they are a party to the mediation.
 - People/market have need for protocols/best practices (we don’t want rule where you can’t object).
 - Q: If same neutral for med-arb, is there increased likelihood of settlement?
 - Moti Mironi on med-arb, “I will use everything said during mediation in rendering an award and if that is not acceptable to the parties, I will refuse to act as arbitrator.”
-

- If award is not reasoned, then concern is that award is based on information obtained during caucus.
 - Consider, as option, med-arb where mediation portion has no caucus.
 - Mediation pertains to different form of justice (e.g. interests, values, beliefs)
 - Issue with fitting mediation (new paradigm) into arbitration (old paradigm)
 - Mediation may be considered as a form of negotiation
-
- Some would not give consent to arbitrators saying they would take everything that was said at mediation into account. Issue: what was discussed in caucus of other party would not allow clients to be candid in mediation.
 - Consent: If we move to arbitration, I will base my award on law and fact. I will not take into account other information...

Cons of Arbitration-Mediation

- Issue with adversarial nature.
- Consider evaluation only in caucus.
- Some would still not want evaluative mediator as decision-maker.
- Processes are fundamentally inconsistent to be married together.
- Protocols to address conflict between two processes: e.g. no caucus, “Moti Model”, i.e. all information taken into account.
- Consider statutory “checks and balances.”
- Consider form of disclosure, issues for clients to sign off.
- Issues with waiver, depending on jurisdiction (e.g. Europe, USA etc.)
- List of questions (checklist) that mediator should ask regarding process issues.
- Flow chart of what to consider at each stage.
- Document to hand to the parties.
- Need for nuanced protocol – e.g. if anything concerns evidence in caucus. Should be put to other side (not subjective issues and interests).

Scenario 3 Discussion Group B – Tom Stipanowich (Facilitator)

Party control:

- * Party decision-making and self-determination are important here.
- *It makes a difference whether the parties are agreeing to a procedure before disputes arise or before a neutral is appointed, or are instead making procedural changes in the middle of a mediation or arbitration process
- *Parties need to take into account the potential concerns and consequences of switched roles: cost/benefit analysis.
- * What is the advantage of integrating mediation and arbitration (i.e. med-arb) instead of having mediation and arbitration running in parallel with separate neutrals?

*If both parties agree that a neutral will switch roles, isn't it a new dispute resolution contract?

*It is important that the agreement makes it clear when you are in mediation vs. when you are in arbitration.

*Note: importance of custom and related process goals and values....

- In China, arb-med-arb is established by law, custom...societal harmony, adherence to authority, avoidance of adjudication.

1. Where the agreement is reached on the front end, before a neutral appointed

- Should be arms-length
- Can any agreement pass muster, or are there limits under applicable law, etc.?
- Issue for neutral?
- Can this process work?
- Need in the record in writing: what parties agree as a process and they agree that the arbitrator-turned mediator will continue as arbitrator if the case does not settle.
- Options:
 - Parties have the ability to opt out of med-arb even if they had previously agreed to do so. Or may ask that neutral not continue.
 - Arbitrator should also have the ability to opt out.
 - There should be no caucus in the mediation process in order to avoid "contamination."
 - The arbitrator can agree to mediate or to help find somebody else to mediate the disputes

2. Where the agreement is sought midstream – arb-med or med-arb is suggested by both parties during the course of dispute resolution

See elements above.

Contrast judicial settlement conference

- Power situation/ official imprimatur
 - Uzbekistan – judge can initiate mediation. Consider cost savings
-

Scenario 4:
Arbitrators “Setting the Stage” for Settlement

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

The precise dynamics of arbitrators’ management of procedural matters might be better understood; in particular, there are important questions surrounding the roles of arbitrators (or judges) in helping to “set the stage” for settlement through negotiation or mediation. Such activity may take a variety of forms. Arbitrators and other adjudicators are sometimes able to enhance the possibility of settlement by making decisions on discovery/information exchange issues, or by ruling on motions which dispose of some aspect(s) of the dispute. Moreover, adjudicators sometimes advance the use of mediation by working with the parties to arrange "mediation windows" in the adjudication timetable. Others may go so far as to suggest, encourage or even order mediation or some other non-adjudicative procedure to promote settlement. Finally, adjudicators in some jurisdictions have been known to encourage settlement by offering parties preliminary views on issues in dispute or issuing preliminary findings of fact or conclusions of law. However, many arbitrators view their role strictly as a matter of preparing a case for adjudication, and regard settlement as a collateral prospect. The role of arbitrators in setting the stage for settlement has been a focus of discussion only recently, and is ripe for thoughtful deliberation and debate. Specific scenarios involving arbitrators include the following:

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

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

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

In jurisdictions where mediation is an established element of the dispute resolution landscape, arbitrators often include mediation on the agenda for a preliminary hearing or

prehearing conference. The resulting timetable for the arbitration process may include one or more windows for mediation. Some arbitrators may go so far as to encourage or order parties to mediate the dispute, although others regard such activity as inappropriate.

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

[Note that Scenario 4.3 involves conceptual overlap with Scenario 3, since activities undertaken by arbitrators in this kind of situation may fall within the categories of functions that are sometimes identified with mediators or conciliators.] Whether arbitrators should offer parties preliminary views on issues in dispute, including information regarding what additional proof the arbitrator believes might be necessary for a party to make its case, is another question that provokes very different responses. So is the question of whether arbitrators should issue preliminary findings of facts and conclusions of law. Although the final report of a commission convened by the Centre for Effective Dispute Resolution (CeDR) offered affirmative support for such activities, there are indications that arbitrators in some jurisdictions may be extremely reluctant to take such steps.

Shared Stories re Scenario 4 -- (Tom Stipanowich, Moderator)

Xinbo Liu: [Re Scenario 4.3] [See discussion of med-arb in China in connection with Scenario 3. He notes that arbitrators may issue preliminary findings of fact, conclusions of law as part of settlement process.]

Jan Schaefer: [Re Scenario 4.3] [A member of the Task Force from Germany who provided information in written form.] Jan explains,

“[German] judges normally take the facts submitted by the parties, feed them into their “Relationstechnik” and provide the legal analysis. They openly share their legal analysis, including the strength and weaknesses of the parties’ respective legal theories (but usually do not use decision-trees etc. but simply present things orally). Typically, judge raise doubts about aspects of the claim and the defenses, respectively, in order to encourage settlement (who would settle if the judge tells that the claim or defense will win?). Often judges then throw out specific numbers that they suggest for a settlement amount without having really digested the numbers (let alone having had the benefit of a witness or expert examination). To obtain a more or less obscure number is not really what parties usually appreciate but still many amicable settlements are brokered by the judges in this fashion. In the German Code of Civil Procedure it is stated that judges shall at any moment in the proceedings try to encourage a settlement. I think it would be interesting for you to find out the background to this provision. German arbitrators tend to align with judges and, for instance, the rules of arbitration of the German Institution of Arbitration contain a rule similar to the statutory rule for judges that encourages

arbitrators to seek a settlement. However, arbitrators are less blunt than judges. They will only suggest a settlement or alternative approach if both parties agree and they typically try to fully understand the commercial background before putting any number on the table. However, they also do not wait for the examination of witnesses or experts (which trigger further costs) before they engage in helping parties to settle.”

Patrick Green: Patrick Green: Patrick acted as an arbitrator in a dispute of the distribution of value in a significant family business and gave parties clear directions: (a) File an agreed list of issues you want to arbitrate. (b) File an agreed list identifying three issues that would be most likely to decide the case. (c) File cost estimates, that is, an estimated budget for arbitration. (d) File with the arbitrator a statement of the lowest amount under each head of claim, lowest amount parties would be willing to recover, in a sealed envelope, to be referred to only in the event that the arbitration proceeded and then only in relation to costs. During a 4-week stay for mediation, the parties settled.

Comment: In France, you run the risk of challenge for lack of due process due to caucus – ex parte communications.

Comment: Informed consent is essential for this kind of approach.

Question: Should an arbitrator in such a case have a duty to inform the parties that he is trying to facilitate settlement through the use of various techniques?

Comment: Might you ask parties, at start of arbitration, have you considered mediation? AAA Rules were amended in October 2013 to allow for concurrent mediation. Presented as default option; not forced but rather as an opportunity. Difficulty is that it takes more than an optional rule to influence. Whose role is it to encourage it? Administrator or arbitrator? Case managers take pause – but they are not presenting it to the parties as the default. Rule may actually be discouraging mediation because arbitrators are not encouraging it – leaving it to case managers who may or may not be encouraging it.

Comment: In the initial prehearing conference, one Task Force member points out rule that under AAA Commercial Rules parties must opt out of mediation (include in scheduling order). This only applies to domestic arbitrations, not ICDR rules.

Comment: Note, Randy Kiser cites information from studies of lawyers that suggests U.S. attorneys are less likely to engage in unassisted negotiation because they are waiting for the formal mediation window/process.

Jim Groton: Jim recommends requiring arbitrating parties to precisely state issues/ positions/ material facts early on. Once each statement is filed, he requires parties to join issues. It is practical to ask parties to submit issues early to promote settlement.

Comment: Arbitrators often taken Jim Groton’s approach but not necessarily overtly. Rarely does someone specifically identify the settlement issues vs. the adjudication issues.

Comment: Clearly, there is a division among U.S. arbitrators regarding their role in promoting settlement. Some view their role as strictly to adjudicate, and prepare the case for adjudication.

Cary Ichter: Participated in class action – mass tort action involving release of toxic gas. Defendant chemical company’s defense was based on alleged overreaction of first responders. There was a critical issue relating to expert testimony. The expert was challenged through a Daubert motion. The arbitrator excluded the expert, and within two months the case settled. The point is that who is in and who is out often gets you further down the road to settling.

Paul Mason: Anecdotally, arbitration cases are settling. The cost/benefit assessment has changed. High value cases proceed with arbitration due to cost/benefit analysis. Paul advises that he acts differently when he acts as arbitrator and when he acts as mediator. There is a different mindset between being decision-maker instead of facilitator. He affiliates with organizations like AAA, and operates on the assumption that there will be others working to promote settlement. Paul advises that to promote settlement, arbitrators can consider (a) discovery limits, and (b) dispositive motions (with due process in mind).

Comment: The settlement dynamics may change during the course of arbitration. Every time a brief is submitted, arbitrators are potentially swayed.

Patrick Green: Patrick Green: Case concerned U.S. Co and start up. Bifurcated ZOPA, effectively two ZOPAs in which settlement might be reached depending on the outcome of one issue, upon which no agreement could be reached. Needed arbitral answer on a term of agreement which would kick in if they were unsuccessful in reaching an agreement. Neither party was prepared to settle without resolution of that issue. That issue was briefly arbitrated by the mediator during the time allocated for the mediation, and the case then settled.

Facilitated Discussion A re Scenario 4 – Richard Mainland (Facilitator)

- Is it appropriate for arbitrators to set stage for settlement? Difficult question because longer cases mean more money for arbitrators (we need to acknowledge this unconscious bias).
- Is it the arbitrator’s role to set stage for settlement? Yes – maintain neutrality but some arbitrators have no problem signaling views without compromising neutrality.
- Role as arbitrator is to get to best decision.
- Secondary role is to get the parties to settle and conserve fees.
- Process used:
 - Comprehensive brief with all arguments
 - Arbitrator has one week to review and develop questions
 - Deliberate with co-arbitrators
 - Arbitrator sends questions to parties
 - Brings about settlement by focusing parties to face case early and often.

- Arbitrators are explicit in the beginning about what are the issues that can lead the parties to settlement.
- Work to enhance arbitration efficiency and economy.
- Prompt and firm hearings dates.
 - Limited tolerance for discovery disputes.
- Adjudication system (statute) (construction)
 - UK statutory adjudication. Procedure produces a “provisionally binding” decision in 28 days. This decision becomes final unless a party moves to arbitrate or litigate.
- Staging reflects strength of arbitrator.
- Procedure can exert a lot of pressure on parties.
 - Swiss procedure in Commercial Court, the parties set forth their case before three judges state who wins and then go before a five-member judicial panel that includes the three. Sometimes a different decision is reached.
- Preliminary views on merits:
 - In USA, it may not be a good idea to do this
 - Ok in China. Arbitrators provide tentative views then mediate. 50%+ settle. Chinese like to communicate through electronic means, so difficult to gather evidence.
 - Rule requiring mediation gives arbitrators cover.
 - Most people are uncomfortable with arbitrators giving preliminary views, except for China and Germany.
- Mediation windows
 - Generally they are a good idea
 - We need to keep in mind that the hearing date is the hearing date
 - Often cases settle in mediation windows.

Mixed Mode Summit - Day 2 – September 24, 2016

Introduction & Plan for the Day (Tom)

Day 2 was devoted to sharing stories and conducting facilitated discussions regarding Scenarios 5 and 6. In addition, there was a brief discussion of so-called “relational platforms” aimed at managing conflict within long-term relationships, most notably construction projects.

The proceedings concluded with facilitated discussions of next steps, including the formation of Working Groups, the gathering and analysis of information from exemplary countries around the globe, and the creation of educational materials / practice guidelines.

Scenario 5 – Arbitrators Rendering Decision Based on Settlement Agreement (Consent Award) (Kathleen Paisley, Moderator)

Arbitrators sometimes encounter requests from parties that have reached a negotiated settlement agreement to incorporate or convert the terms of their settlement into an arbitral award—a consent award. This step may afford parties the opportunity to avail themselves of the enforcement mechanisms under arbitration law. However, depending on the circumstances, such arrangements may raise questions of enforceability and even public policy.

Kathleen Paisley (Moderator and Presenter):

It makes a great deal of difference when the request or arrangement for a consent award is made. Four main scenarios:

1. Ongoing dispute is being arbitrated; the parties reach a settlement and ask the arbitrator to incorporate the settlement in an award.
2. In mediation, parties ask mediator to shift to role of arbitrator or appoint an arbitrator to issue award based on settlement.
3. Parties settle a dispute and appoint an arbitrator for the sole purpose of issuing consent award based on settlement.
4. There is no dispute; the parties appoint an arbitrator solely for purpose of enforcing a contract

Issue arise under the NY Convention: Arbitration is intended to settle all or any differences, which have arisen or may arise between the parties. In other words, it appears there needs to be an existing dispute.

One prospective approach to avoid problems of enforceability under the NY Convention would be for the parties to provide in their settlement agreement reached as a result of the mediation for expedited arbitration (for example, with a sole arbitrator) of all disputes arising under the settlement agreement and that the terms of the settlement agreement are binding as to all issues. This arbitration clause would be binding under the New York Convention, and likely would result in quick inexpensive enforcement.

Malik Dahlan (Presenter): Malik has extensive experience as an attorney and dispute resolution professional in dispute resolution, and helped set up systems in parts of the Middle East for infrastructure. He is familiar with the landscape of dispute resolution in 6 Gulf countries, and identifies three essential issues in the region:

1. Enforcement of awards.
2. Life cycle of deal/dispute – doesn't end or start once arbitrator is appointed. Who manages it? Case manager? Registrar of Court in Qatar – in charge of mediation and arbitration.
3. Court backed? Complications arise with AAA, ICC providers.

It is critical to understand the importance of officially registering a dispute, giving it legal status. This process sets certain expectations for the dispute and enforcement issues. This provides a causeway between two UAE countries, but limits the ability of parties to enforce mediated agreements as awards.

Gary Benton (Presenter): Gary was engaged in international litigation involving a Hong Kong bank with assets in the Philippines. There were concerns regarding the possible need for court enforcement of a settlement agreement against the bank's assets. The parties elected to convert the settlement agreement into a consent award so that it was enforceable under the NY Convention. They enlisted a discovery referee, a retired judge, with no experience with international law as arbitrator. Gary sees fundamental issues with enforcement of consent award, including issues of enforceability and public policy, and the potential for fraud and money laundering.

Edna Sussman (Presenter): There is a difference across jurisdictions. Will an award issued to record a mediated settlement agreement reached before the appointment of the arbitrator be enforceable under NY convention? The New York Convention is ambiguous and whether you can appoint an arbitrator after the dispute is resolved varies across jurisdictions. Maybe you can get around that issue by a picking law where it is permissible (e.g. Germany) to govern the settlement agreement. Assuming the arbitrator is appointed before the agreement is reached and apart from questions such as money laundering and other abusive uses of the forum, a consent award should be OK. But I note according to the UN Secretariat working with the UNCITRAL working Group on the convention for the enforcement of mediated settlement agreements so far there has been no court anywhere that has ruled the enforceability of consent award.

Comment: The ICC said that it wouldn't enforce an award where the settlement preceded arbitration. The dispute had to be a current one at the time of appointment. There is a debate in the IBA over this issue.

Christopher Miers (Comment): Comment: [Miers] Case of Singapore Court of Appeal – 'Persero', *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter* [2014] SGHC 146. A failure by a party promptly to comply with a decision of a Dispute Adjudication Board constituted under the standard provisions of the FIDIC 'Red Book' (Conditions of Contract for Construction) may be referred directly to arbitration; and an Award

rendered by an Arbitral Tribunal hearing such a dispute will be enforceable as an Interim or Partial Award (depending on the jurisdiction) as final and binding on the issue of the obligation promptly to comply with the DAB decision

Comment: Another option would be to negotiate or mediate to establish upper and lower limits on the arbitration award, and then appoint arbitrators to make the award.

Laura Kaster (Presenter): A new NJ statute will permit enforcement of consent awards under the NY convention.³

Laura had an experience with converting a mediated settlement of a court case to a consent award by dismissing the court case and issuing the award. She was a mediator appointed by the court to address a claim for business interruption issued under an insurance policy; confidentiality was a key concern so that no precedent would be set. The mediation was successful in attaining settlement. In order to foster confidentiality, the mediated settlement included a provision that the court case would be dismissed and a bare arbitral award would be entered based on the settlement agreement. Laura was then asked to enter the arbitral award.

Comment: Liability insurance may not cover new neutral signing off on consent award.

Ann Robertson (Presenter): Ann told the story of a client who obtained a Texas judgment against an Indian company. Her client, however, couldn't find many assets in the U.S. The Indian company asked her client to give them time to obtain funds for payment. The parties agreed to the mechanism of a consent arbitration award using an ad hoc arbitration procedure. The parties submitted the agreed number and interest rate to the arbitrator, who within fifteen minutes satisfied himself regarding disclosures, waivers of conflicts, etc. There was never an issue regarding the enforcement of the consent award because the Indian company paid the amount of the judgment.

Comment: There is debate in the labor law area regarding consent awards because of the prospect of a rigged award and potential money laundering. If case comes from the court, there is no issue because it goes back to the court. However, the commenter has been asked to sign a consent award on basis that he was the mediator. However, he will not switch roles for this purpose.

Question: Should arbitrators be allowed to issue rubber-stamp consent awards? Whether international or domestic, the ethical issues are the same.

The NY Convention applies to *foreign awards*. It doesn't matter whether the awards are international or domestic. Is it appropriate to turn any settlement agreement into an award? And under what circumstances?

Facilitated Discussion Group for Scenario 5 -- Ann Robertson (Facilitator)

³ The statute has been enacted: *The New Jersey International Arbitration Mediation and Conciliation Act*, Title 2A: 23-E 1 (2017).

[Notes misplaced.]

Scenario 6 – Other Kinds of Interaction between Evaluators, Mediators and Arbitrators (Edna Sussman, Moderator)

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

SCENARIO 6.1: Interplay between Nonbinding Evaluation and Mediation or Arbitration

For example, parties sometimes agree to a nonbinding evaluation of some kind in order to promote settlement of disputes between parties; examples of such approaches include: advisory appraisal, advisory expert determination, advisory/nonbinding arbitration, early neutral evaluation and mini-trial.⁴ In such situations it is appropriate to consider what relationship, if any, such activities have, or should have, to discrete efforts to mediate or to arbitrate the same matter, and what level of interplay, if any, is appropriate between the respective processes or the neutrals.

Scenario 6.2: Interplay between Mediation and Arbitration

Similarly, it is appropriate to consider the potential interplay between mediation and arbitration, and the level of interaction between mediators and arbitrators. Where mediation is an accepted element of commercial dispute resolution, mediation may precede arbitration or take place during the course of arbitration proceedings. In some cases, special arrangements are made to coordinate the activities of mediators and arbitrators. Again, questions abound.

Edna Sussman (Moderator and Presenter): Regarding Scenario 6.2, Edna had an experience in which she was appointed as an arbitrator in a law firm breakup. One of the parties was aggressively litigating with a constant stream of long complicated submissions making it difficult for the individual lawyer on the other side to maintain his practice and livelihood. She felt strongly that the case should be settled and persuaded the parties to use the emergency arbitrator who had handled the case as the mediator. She would have liked to tell the emergency arbitrator/mediator what production of documents would be helpful in the mediation. However, she felt constrained from communicating with the mediator and did not do so. . The case did not settle with the emergency arbitrator/mediator. She ended up taking over the mediation and serving as the mediator and settling it but with an informed consent which would allowed her to serve as the arbitrator if it did not settle.

⁴ Although third parties are sometimes retained by a single party for the purpose of providing a confidential evaluation to that party in the course of preparing for dispute resolution, our focus here is on nonbinding evaluations provided to both/all parties.

Edna A mediator handled case involving billions of dollars in Argentine debt held by hedge funds. The mediator worked “hand-in-glove” as he described it, with the judge, who issued rulings to assist the mediation process and set deadlines for consequences in court of parties did not resolve. The judge and mediator were in constant touch and working together for settlement, and all but one dispute was settled.

Edna In another case, however, a judge issued a ruling which counsel felt was wrong and only issued to force settlement, and it was reported that the parties were unhappy as a result.

Jonathan Marks (Presenter): Jonathan is sometimes specifically authorized to have some level of interaction with the judge on procedural issues. Jonathan co-mediated the Microsoft antitrust case with Eric Green, in which the judge forced mediation into a certain timeline; there was no interaction on substance. In the Microsoft Visa case, the mediators gave progress reports to the judge from time to time. Jonathan also offered two other examples that offer creative ways of addressing barriers to resolution and moving the process forward:

Case #1: Jonathan mediated a case before a state court judge in Atlanta involving twenty institutional plaintiffs aligned against an accounting firm. During an initial day of mediation, the plaintiffs were at 9 figures, while the defendant was in the ballpark of 7 figures. The differences hinged in part on differing expectations regarding how the judge would handle summary judgment motions.

Over several months, Jonathan spoke to the parties, both of whom had confidence in their jury focus groups. He proposed that the parties go to the judge and ask for a summary jury trial. The judge agreed, and a two-day process was convened for the purpose of selecting two advisory juries. The lawyers made 4-hour presentations based on video testimony, and the judge gave the juries truncated instructions, including two interrogatories. After a mixed verdict, the parties returned to mediation, which closed the gap but did not produce a settlement. There were still different views among the institutional plaintiffs. Jonathan suggested one more mediation session with all plaintiffs and representatives. Arrangements were made to have the judge conduct a settlement conference mediation—she received approval for the parties to pay her expenses. Up to the point of the summary jury trial, there were no communications with judge. Then open kimono communications. She was careful not to say how she was going to rule. Resolution??

Case #2: As mediator in a multi-party construction case, Jonathan’s agreed protocol for mediation indicated that he could communicate with the judge regarding process issues but not substantive issues. Sometimes, it is hard to draw the line between process and substance. Jonathan was asked by the judge to help appoint an independent expert to be available to offer views on pertinent issues. Jonathan worked with the parties to design a process to resolve the dispute. Issues included (1) selection of expert; (2) possibility of early settlement; (3) scope of expert’s role (assisting in mediation phase only, or available to testify in front of jury?). The judge indicated he would be pleased if the parties could agree on the role of the expert.

Merril Hirsh (Presenter): In federal courts in the U.S., special masters could play an important intermediate role between judge and mediator in the course of managing a case. The order empowering the special master could specify the authority of the special master in a way that might not simply replicate that of a judge. For example, the special master might be able to communicate ex parte with parties, and also with the judge, in order to help create a procedure to set the stage for settlement. The special master could explore whether selective discovery could spur settlement discussion, perhaps through a focus on damages, or perhaps identify issues that, if resolved, could encourage broader resolution. Special masters may be able to perform these functions better than judges.

John Sherrill (Presenter): U.S. judges are not permitted to correspond with a mediator, except in writing and with copies to counsel.

Considering same issues as district judge. Still working on case, as he was not advised otherwise. Rule on issues before me. Called the judge's clerk re status update. Issued a decision based on one issue before the court. Remainder of dispute sent to him as arbitrator.

Another judge calls John and asks re conflict with counsel/parties. 2-3 weeks asks for status on process. City in Georgia did not want to settle and City Council had to approve \$20m settlement. Mediator's proposal for less than original decision. Two days later gets request for status update. I have mediator's proposal out – requested to give presentation. City attorney had to listen to presentation because judge asked that it be done within 2 weeks. City attorney said we will accept if other side has. Public would have known about it if they didn't accept.

Facilitated Discussion Group A for Scenario 6 – Jonathan Marks (Facilitator)

- What “structures” are used/possible?
 - What rules (mandatory/party adopted)?
 - What best practices / guidelines? (Existing, appropriate, party modification)
- Should we promote settlement in arbitration?
 - What about role of mediation?
 - Current practices: institutional providers or arbitrators (CCA)
 - What changes? Rules, practices, education, clause generator
 - What constraints? Ethics, communications, rules, statutory constraints
 - Party autonomy - Informed consent
 - Clause generator
 - How do you make it the parties' decision?
 - Implications of priorities of choices. Ex: CEDR Commission proposals were dominated by one cultural preference
 - Awareness of pitfalls and constraints
- Is it ever appropriate in a mediation window to have any interaction between a mediator and an arbitrator?
- Has anyone heard of a situation where the mediator and arbitrator are having interaction?

- Another form of interactions: Mediators sitting in arbitration - shadow mediator - sitting and watching the arbitration.
 - Makes the communication easier.
 - Should arbitrator also sit in mediation?

2 situations:

- 1) Judge as process director - communication is less questionable
- 2) When judge is decision-maker, then it is more questionable.

Dubai:

Influenced by Asia.

- National policy - if you have authority at the high level, committee different from panels, preside over by an enforcement judge.
- Group of mediators trained in Singapore
- Mediator is external, ad hoc, and reports directly to a judge (called counsel). Judge allows sound decision-making to be made so process does not start.

Mediation in the shadow of the court or arbitration

- What structure we envisioned as possible?
- What kind of best practices can we come up with there?
- What kind of rules or guidelines - best practices - exist or might be appropriate? Ought to be the default.
- What kind of parties' modifications ought to be appropriate?
- Question: do you wish to regulate?
- Cautious about rulemaking in this area – danger of unintended harm.
- Value in the rules that institution have?
- We are beginning to see the use of mediation being mandatory in some rules
- Are there ways where one can think of modification of institution rules that would create better use of rules?
- Court will have to rule about those things
- Conversation about best practices should take into account specific process goals and priorities
- Parties won't develop these things by themselves, they need institutional support in the form of choice templates, etc.
- Lack of awareness
- Who are the actors or players to decide this process, who is the orchestrator?

Facilitated Discussion Group B for Scenario 6 – Edna Sussman (Facilitator)

- What communications can there be between arbitrators and mediators in parallel track processes? What is in the public interest? Settlement?
- What are constraining factors?
 - Public policy – money laundering, corruption, access to justice
 - Interests of parties
 - Integrity of process
 - [In the above cases, parties’ consent should not be required to communication between arbitrator and mediator]
 - EU directive – overriding public policy
- Exception to mediation confidentiality for purposes of enforcement of agreement
- Distinction between interaction on procedural issues vs. substantive issues (especially for purposes of making process more efficient)
- What is line between procedural and substantive issues?

Court-ordered mediation

- Consider timing (timeline imposed by court or arbitrator for mediation) – abusively short vs. short enough to promote settlement
- Court-ordered mediation: indicate settlement to court (yes/no) --but what else can be divulged?
- In the introduction to court-ordered mediation: two types of confidentiality – 1) confidentiality within ex parte caucus and 2) information that should remain confidential from court
- UK: dividing line between court and mediation – slight “breakdown” due to concern, question of “good faith” in negotiations
- Interaction between court and mediator should be to facilitate settlement
- Issue guidelines for countries where there is no interplay between court and mediator
- Are mediators in different position from court due to informed consent?
- “Open kimono” communications with courts – OK provided there is informed consent and party autonomy
- Do parties know about the interplay/communication between mediator, arbitrator and judge?
- Consent:
 - Ongoing/open-ended/front-end consent; or
 - Specific consent on case-by-case basis (i.e. for certain issues)
- Bifurcated ZOPAs – consider where public policy intersects with parties’ interests
- Issue with limitations of mediation/arbitration is that they don’t develop precedents
- Assumption that mediation provides access to justice
- Need to be able to trust the mediator to hold confidentiality
- Need guidelines to determine what can/cannot be shared (cannot simply rely on the conscience of mediator)
- Obtaining consent – different by judge? Arbitrator? Mediator?

- BP case – mediator appointed to ensure that practices were changed to prevent further issues
- Ability to withdraw consent at any time?
- Court could pose questions and be put to parties as to whether information be divulged by mediator/arbitrator
- Mediator/arbitrator could show “draft answer” to parties before sharing with judge
- Consider difficulty in creating protocols/best practices vs. guidelines

Pros

- Promotes settlement
- Autonomy
- Informed consent
- Open-ended
- Specific (once parties know what has been divulged to court)

Cons

- Disclosure of parties’ position
- Parties less forthcoming in mediation
- “Shadow disclosure” – possibility to infer other issues from permitted disclosure – duty of mediator to warn parties about this – make an additional disclosure
- Rulings perceived as coercive from the court

Special Considerations Involving Relational Platforms

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

Standing Neutrals

Standing neutrals or neutral panels are sometimes employed on construction projects. “The appointment of a “standing” dispute resolution professional to mediate issues as they arise during the course of a construction project has proven valuable in keeping the job on track and helping to limit the number of claims that must be subjected to more formal and expensive dispute resolution procedures.⁵ As discussed below, standing dispute boards frequently offer advisory

⁵ See NICHOLAS GOULD, CLAIRE KING AND PHILIP BRITTON, MEDIATING CONSTRUCTION DISPUTES: AN EVALUATION OF EXISTING PRACTICE at 17 (Centre of Construction Law & Dispute Resolution, King's College London, 2010)(discussing project mediation in the United Kingdom and CEDR's Project Mediation package). See

decisions or preliminarily binding decisions on current controversies affecting major infrastructure projects.

Project Partnering and Other Platforms

Construction projects also furnished a setting for other approaches aimed at proactive management of conflict within commercial relationships. Project partnering, a concept borrowed from the manufacturing and distribution sectors and pioneered by the U.S. Army Corps of Engineers, was designed to encourage collaboration and team work by deliberate early efforts to create an atmosphere of trust and cooperation on projects. Facilitated partnering workshops were commonly conducted shortly after contract signing and attended by owner representatives and key members of the design and construction team. The aim was stronger individual bonds, better understanding of each other's objectives and expectations, and non-adversarial approaches for resolving problems on the job.⁶ There were also indications that partnering might be useful in other kinds of long-term commercial relationships. However, partnering usage has not expanded beyond its early roots.

Another exemplary relational conflict management platform was a customized program with tight time frames for jobsite decision making and handling of claims, and a flexible, dynamic dispute resolution system centered upon the figure of a Dispute Resolution Advisor (DRA), a construction expert with dispute resolution skills who would remain throughout the project. The DRA first met with job participants to explain and build support for a cooperative approach to problem solving. Thereafter, the DRA made monthly visits to the site to monitor the status of the job and facilitate discussions regarding emerging issues. If negotiation failed, the DRA could make arrangements for mediation, mini-trial or expert fact-finding. Although the DRA model has apparently not been widely replicated, many of its benefits may be achieved through the use of an approach like Guided Choice.

Shared Stories about Relational Platforms

Christopher Miers (Presenter) (Dispute Boards): One common form of early dispute resolution method is the dispute board. Dispute boards allow for resolution of issues in collaborative way before they escalate, and are commonly used on large public infrastructure projects. Two models:

1. US model (dispute review board, or DRB): DB can make recommendations, or advisory opinions, as standing neutral.
2. The U.K. and much of rest of world embrace a “dispute adjudication board” model in which the board’s decisions are preliminarily binding—that is, they binding on an interim basis, and become final and binding unless a party decides to take the dispute on to arbitration or court.

also James P. Groton, The Standing Neutral: A ‘Real Time’ Resolution Procedure that also Can Prevent Disputes, 27 ALTERNATIVES 177 (December 2009).

⁶ ADAM K. BULT ET AL, NAVIGANT CONSTRUCTION FORUM, DELIVERING DISPUTE FREE CONSTRUCTION PROJECTS: PART III – ALTERNATIVE DISPUTE RESOLUTION (June 2014) at 9.

Dispute boards usually meet with parties onsite every 3 to 4 months, and have authority to provide informal assistance to help parties resolve issues. The process is designed to produce a factual review and recommendation or decision regarding contractual rights or payment within a short time, often guiding a resolution of the dispute and allowing the parties to continue working together.

Hypothesis: Early decisions are often a stimulus to drive people to settlement. This explains some of the appeal of med-arb, but is also a function of dispute boards which may work better in some ways.

Example #1: One example of a dispute board involves a long-term project to produce fusion energy involving a 500MW prototype. The collaborative process involves various stakeholders including China, Korea, the EU, Russia, India, Japan and the U.S. Construction is taking place in France.

The project features a six-member dispute board before which parties make informal presentations. The board can recommend, inter alia, that the parties have a series of meetings to see if they can resolve matters, in order to move from confrontation to collaboration. The support of the board to set the agenda and the timetable for such meetings allows the board to facilitate a new level of communication.

Example #2: Africa, tower building – shopping center. The DB attended the site 13 or 14 times. The parties were unable to resolve an issue regarding maintaining and cleaning the high-rise building, and the issue threatened to escalate into a major dispute. The DB engaged with the parties jointly in a constructive and controlled environment, without prejudice to their right to bring claims. The DB gave a preliminary opinion, confirmed in writing, based on a review of the contractual requirements and evidence. The parties could either take or leave the opinion, allowing them the opportunity to resolve the dispute amicably. Process empowers parties to move forward, in circumstances that can be very disempowering. Eighty percent of the DB's effort is to prevent issues from escalating. If there is escalation, the DB will give interim binding decision between 84 and 90 days.

Patrick Green and Christopher Miers (Presenters): There is a new software tool/service, ResoLex's RADAR, that monitors trends and stakeholders' concerns, in order to allow the parties to predict and prevent disputes on infrastructure projects by examining perceptions of risk. It is currently being employed on some infrastructure projects in the U.K., and Christopher is one of a panel of experts (along with an experienced project manager and a team psychologist). One description of RADAR explains,

Risk on projects is often addressed solely at a technical level, i.e. construction, whereas the areas of projects that most commonly cause disputes are the inter-personal and inter-team dynamics, leaving projects at best sub-optimal, at worst in failure.

Combined with an effective traditional risk management process, ResoLex's RADAR approach improves delivery team engagement and management by giving the programme

leadership team an understanding of the differing perceptions of project concern and risk amongst the stakeholder base and enabling a team by team approach to project communication and dispute avoidance.⁷

The RADAR process consists of seven steps:

The Seven Steps in the RADAR Process

- *Steps 1-3 enable the setting up of the monitoring process*
- *Steps 4-7 form a monthly loop*
- *At progressive project stages, Steps 1 & 3 may be repeated.*

1. Generate initial risk list

Undertake a confidential risk assessment with all key project personnel and assimilate the results into a grouped project risk list. This list is anonymous at the point of delivery back to the project but open for the ResoLex team to understand the context surrounding identified areas.

2. Panel selection

From the initial understanding of the project and more detailed exercise of understanding the areas of concern from the team risk review, a selection of a project RADAR panel will be made. This may be a fixed panel for the duration of the project (typically a panel of three experts of mixed disciplines) or, depending on size and complexity, may have a larger pool to draw individual skill sets from as a project changes stages. i.e. business case and briefing, design, value engineering, construction, team psychology.

3. Implementation Workshop

Facilitate a risk workshop using the results of the online risk exercise as base risks to explore. This workshop is essential in building the team's understanding of why they are tracking individuals' perceptions across the team. The team explores the root causes that lie beneath the risks identified in the previous exercise. As teams work through this root cause analysis exercise they identify for themselves just how much 'soft risk' i.e. interpersonal behaviour, impacts the project.

The result of the workshop is an agreed set of potential risk areas that will then be tracked over time.

4. Use RADAR to monitor changing perceptions and complete feedback loop with stakeholders.

⁷ Ed Moore & Christopher Miers, RADAR (Unpublished Word document, 2016).

On a monthly basis, team members are invited to respond to an online evaluation exercise. This is a short questionnaire, the initial feedback of which is confidential between the respondent and ResoLex, and tracks the identified areas of risk but also allows individuals to identify new areas of concern that they have.

5. Panel review

The chosen RADAR panel reviews the monthly feedback via a software system that promotes a specific workflow:

Contextual overview, understanding the overall trends in the identified risk areas. Successes, reading what team members are identifying that is working well. Concerns, reading what the team members are identifying as particular concerns to them.

In-depth analysis, studying the individual questions and the breakdown of answers by company, role on project, hierarchical placement of individuals. All looking for signs of divergence amongst any part of the project team.

6. Report

The RADAR panel produce a report including narrative summary from the panel and graphs to represent answers display trends. The report is distributed across the team to all those invited to contribute. A RADAR panel member will also often join the project leadership team in the monthly meeting to go through the report.

7. Action and feedback

Notes are taken during the monthly project leadership meeting of the actions that are agreed as a result of discussing the report. These actions are shared with the project team as a “you said – we did” feedback loop. Thus cementing the link between giving feedback and instigating change on the project.⁸

Question: How do you identify and value emotions? Emotion is reflected within responses to questions. Responses capture more emotional reaction than contract-based reaction. Reports are disclosable - without prejudice. Part of ongoing mediation process. Anonymous report about soft perception about progress and risk.

Comment: This could be used outside the construction arena. It would also be useful for projects involving telecommunications and technology, and on other long-term contracts, including joint ventures more generally.

⁸ *Id.*

FINAL DISCUSSIONS REGARDING NEXT STEPS

The final segment of the Summit was devoted to small group discussions of next steps, considering:

(1) What additional information do we want to collect to better understand current practices and possible practices?

- What is going on in different countries?
- What would you like to know?
- Existing rules that may affect rules-based constraints?
- Court-annexed dispute resolution processes?
- Survey, interview methodology? How to best use a survey - follow ups with interviews? What do we want?

(2) Looking ahead, what kinds of information and guidance are we interested in developing as a Task Force?

- What kind of guidelines or practice-oriented materials do we want to develop?

The following are summaries of three small group discussions on next steps.

Final Discussion Group A -- Debbie Masucci (Facilitator)

- Report with descriptive information.
- Model guidelines or best practices – standards and criteria for neutrals who practice in this area
- Forms
- Database
- Stories
- Commentary will have cultural context
- Training modes that assist with conducting
- Ethical guidelines: for whom? Neutrals; advocates - contract drafters; providers - models; courts
- Encourage updates
- Focusing on your jurisdiction
- Determine whether hybrid practices are suitable for investor/state dispute settlement (may be regulated) [*Group is negative regarding developing guidelines for investor/state, or employment, or consumer*]
- Be informed about practices in other areas that may be adopted here (EEOC workplace)
- Legal framework:
 - Consent awards

- Med-arb
- Legislation (mediation, arbitration, med-arb)
- Part of jurisprudence includes custom and practice
- [See whether there is a compilation of this information already someplace]
- Identify advocates and parties who are engaging in a mix mode:
 - Where are you?
 - What rules are you practicing under?
 - What are you doing?
 - What rules do you follow?
 - What disclosures are made to parties?
 - What forms?
 - What are the principal rules for providers in the jurisdiction?
 - Challenges they experience
 - Any case law/failure to enforce/others?
- Crowd sourcing model:
 - Website
 - Karl Bayer
 - Lurie
 - IMI Consultative Process
 - Wolters Kluwer Blog
 - Singapore International Mediation Academy
 - CCA
 - IAM
 - Chartered Institutions and all providers
 - ACC
 - Construction
 - ABA (Sections)
 - GPC – trace answers to specific people
 - RSI –
 - MACRO –
 - International Judicial College
 - National Center for State Courts
 - IBA
 - Dispute Resolution Institute
 - Tort & Insurance Practice Section
- Should we increase possibility of settlement?
- In the U.S., 95% of disputes are settled - we could generate value by creating early settlement. Avoid cost related to settlement.

Final Discussion Group B -- Edna Sussman (Facilitator)

What information do we need? Methodology?

- Legal analysis per country on each scenario (Canada, US, Brazil, Mexico, China, HK, Singapore, Africa, Morocco, South Africa, Australia, Europe, Russia etc)
- Identify 2 or 4 practitioners in each country
- What rules/ethics codes apply?
- Address by scenarios first? 1) Yes/No 2)? What laws/rules apply?
- May need to refine scenarios – create sub-scenarios
- What are the actual practices, rather than what is described in print, or permitted?
- Policy considerations
- Practitioner/experts need to be vetted
- Concern with expanding the task force (too big) – Task Force member should be “point person” to collate information from country experts and conduct interviews (if necessary)
- Consider length of survey: (Tony Cole does large surveys – geared toward practitioners)
 - Broad survey vs. targeted survey
- Importance of surveying users: e.g. Association of Corporate Counsel, CCIAG, USCIB, tap into “provider organizations” and “thought leaders”
- Research Assistants to look into laws/rules/research? [*Cost issue?*]
- Survey of practitioners should be short on practices, perceptions etc.
 - Consider survey expert to increase rate of response and quality of answers

Intended audience?

- Users (issue: not all are open-minded to mixed modes) – may not be appropriate to ask “is this something you are interested in?”
- Need to “reality check” these options: need a threshold of “general interest” rather than such specific options

Output

Should be a practical tool:

- Clauses
- Educational (innovative/quick/delivery)
- Forms

Scenario 1

- Not much more information needed
- Perhaps cross-cultural/geographic differences – is there a need for all six scenarios?
- What are best practices?

- What are permissible techniques?

Scenario 2

- How important is this?
- Consider less emphasis on this scenario
- Is this rebranding of mediation process?
- Is there room for more process innovation?

Scenario 3

- Survey on legal limits in different jurisdictions
- “Heart and soul” of mixed modes
- Concept of looking at one mode and expanding it to incorporate another mode
- Interplay between neutrals in sequential process and information shared

Scenario 4

Gathering practices:

- 1) Survey of existing (publicizing what is happening)
- 2) Thinking about new practices

Scenario 5

- Are we trying to address these issues in court context?
- More technical
- Does it undermine NY Convention?
- Number of consent awards being rendered? Ask ICC
- Survey City Bar Associations
- UNCITRAL said no consent awards enforced
- Think carefully about the 4 different scenarios of consent awards and their differences. Distinction between consent award with no arbitration process and ones where arbitration is pending
- In Asia, several institutions are adopting rules which allow for conversion of mediated agreement into arbitral award (e.g. China and Singapore)
- Research practices: ethical obligations? Do we want guidelines?

Scenario 6

- Gather case law (public policy exception)
- Guidelines for informed consent
- Court ordered arbitration – can you liaise with court re: clarification of court’s order
- What is arbitrator doesn’t have jurisdiction?
- Limits of law and practices

Work product of Task Force

- Guidelines
- Best practices
- “Short and punchy”
- Shorter on face (with something larger behind), e.g. CCA Protocols
- User-friendly/not academic
- Concrete and effective

Final Discussion Group C -- Moti Mironi (Facilitator)

(1) What additional information do we want to collect to better understand current practices and possible practices?

- We should collect information from people that are working on transactions.

(2) Looking ahead, what kinds of information and guidance are we interested in developing as a Task Force?

- Should we aim at developing guidelines for the use of mixed-modes only for litigation disputes or also for deal-making disputes.

Scenario 1:

We should collect the following information:

- Should evaluations be reported only in caucuses or in joint sessions?
- Are there different models of evaluation?
- How frequently evaluations are used?
- What are the expectations of users (parties and lawyers)?
- What types of disputes are more inclined to evaluations?
- What are the psychological impact and processes that are triggered by the results of evaluations? Do evaluations change the dynamics of mediation?
- Is there a need for legal or ethical regulations regarding evaluations?
- Should mediators or only conciliators evaluate?

Need for a taxonomy

- We should create a continuum of evaluations and evaluation techniques. A taxonomy - coherent description of conciliation in different part of the world.
- Look at different countries we have not reached with the Task Force so far

Methodology

- Appoint one or two people in each country
- Ask structured questions
- Ask Task Force members to circulate the questions in their countries

- Circulate to users, neutrals, mediation institutions of all countries, mediation centers, business organizations, corporate counsels, small and medium businesses.
- Include questions regarding: civil procedure, legal challenges to mixed modes

Creation of a panel of experts for each country

- It may be more valuable to interview small groups - members of Task Force could conduct interviews in their countries.
- Panel of experts should be comprised of: 4-5 judges; 4-5 general counsels; 4-5 arbitrators; 4-5 mediators.

Creation of a Taxonomy of Regulations

Taxonomy at three levels:

1. Supranational level: ICC, EC, WIPO, ICSID, etc.
2. National level: ex: ABA
3. Membership, professional bodies, ethical level

What do we want to create?

- Some sort of guidelines
 - Which would have the effect of diminishing the risk of being sued for negligence (for neutrals and counsel)
- Educational material
 - Case studies from Champions can be cited
 - Needs for small, medium, large businesses - aimed at litigation people
 - We could publish a book on mixed modes stories

Material to look at:

- Look at surveys that have been conducted by institutions: ABA, Straus / CCA, IAM, etc. We may not be able to do a broader survey than what already exists.
- Catherine Rogers, *Ethics in International Arbitration* (2014).

Formation of Task Force Working Groups

Finally, Summit attendees also identified which Working Groups (each of which was to address one of the Mixed Mode Scenarios) they would prefer to join.

[Please see Appendix C for the complete list of Working Groups and members.]