

**WORKING GROUP 7 OF “MIXED MODE” IMI/SI/CCA TASKFORCE  
FUTURE DIRECTIONS: INTERACTIONS BETWEEN MEDIATORS AND  
ARBITRATORS**

*Cooperation Between Mediators and Arbitrators  
Should a Confessor Discuss Your Case with the Almighty?*

**I. INTRODUCTION**

Working Group 7 of the IMI/SI/CCA Taskforce focused on scenarios in which arbitrators and mediators that are not the same people are appointed on the same case and may wish to speak to one another or collaborate.

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There are a number of examples of rules and procedures where such appointments are made. This Working Group, however, was not able to identify examples from practice where arbitrators and mediators have actually worked together, as proposed by this paper. The proposition of this paper is that mixed mode processes should be flexible, and that parties and the neutrals they appoint should be free to design the structure of their engagement in a way that meets the parties’ needs without compromising any final desired outcomes, including allowing the mediator and arbitrator to communicate with each other in some fashion.

Allowing mediators and arbitrators to work together or at least in tandem, to resolve a commercial dispute requires weighing benefits against costs. Of course, the involvement of two (or more) different neutrals increases the cost and duration of the process as compared to the situation where the same person acts as a mediator and an arbitrator. Nevertheless, this type of “mixed-mode” dispute resolution can still be faster, less expensive and improve the quality of dispute resolution as compared to the use of mediation and arbitration separately without any interaction between mediators and arbitrators appointed on the same case. At the same time, there are also risks inherent in such arrangements that can compromise rather than advance the parties’ individual interests as well as the joint goal to solve their problem. Notably, these risks seem to be quite similar to the ones that arise in the process where the same person acts as a mediator and an arbitrator.

While arbitration and mediation are compatible modes of dispute resolution, there are clearly risks associated with allowing certain communications or information obtained in mediation to be brought to the attention of arbitrators.<sup>1</sup> As explained below, although it is not possible to eliminate

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<sup>1</sup> For an article discussing the compatibility of mediation and arbitration, highlighting some of these areas of risk, see : Dendorfer & Lack, “*The Interaction Between Arbitration and Mediation: Vision v Reality*”, Dispute Resolution

all risks associated with mixed-mode processes, these risks can be substantially mitigated through careful structure of the process, vigilant attention to certain procedural details, transparency and informed consent. Properly informed parties may find the risks worth taking to a certain degree. The main premise is always to make sure that the parties are aware of and knowingly accept these risks as part of the process, while keeping an eye on the opportunities they present as well.

Embarking on an arrangement that involves arbitrators and mediators working together and communicating with each other on the same matter requires, at the outset, a number of factors to come together. These include:

- careful consideration of the risks of tainting the arbitration process or the outcome of an arbitral award in such an arrangement;<sup>2</sup>
- a strategy for managing those risks;
- an informed determination by all the participants to proceed;
- well-documented consent; and
- well-defined contingency arrangements.

Once the participants make an informed decision to proceed, risk mitigation structures and policies can be applied.

A risk-free approach of combining mediation and arbitration processes is to keep them separate and sequential, without any exchange of information at all between the two processes. This is likely, however, to sacrifice potential benefits of speed, costs and quality that may be significant in the matter if these processes can be handled in parallel or in an integrated manner. The results of the Global Pound Conference (GPC) series suggested that a significant body of well-informed users, providers and advisors perceive that there could be significant benefits to mixing these processes in such a way, and that properly informed disputants therefore may be willing to accept any risks if they are properly addressed, managed and mitigated upfront.

## **II. MODELS OF RULES AND PROCEDURES COMBINING MEDIATION AND ARBITRATION**

Working Group 7 identified several models in the international context where professional organizations developed rules and procedures for arbitrators and mediators to be appointed on the same case. None of these rules, however, provide for potential communications between the arbitrator and mediator.

The Chamber of Mediation and Arbitration of Paris (CMAP) offers a combined set of “Simultaneous Mediation and Arbitration Rules.” They provide for a complete separation between the two proceedings, but within an agreed timeframe and at a cost fixed in advance. The two procedures take place simultaneously, completely independently from one-another. The dispute is thus entrusted to a mediator and to one or three arbitrators, who refrain from communicating with

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International Vol 1 No 1 June 2007, pp. 73-98 ([http://lawtech.ch/wp-content/uploads/2016/03/jl\\_2007\\_The\\_Interaction\\_Between\\_Arbitration\\_and\\_Mediation-1.pdf](http://lawtech.ch/wp-content/uploads/2016/03/jl_2007_The_Interaction_Between_Arbitration_and_Mediation-1.pdf)).

<sup>2</sup> While it is no doubt possible that information obtained from an arbitration process might affect a mediation, there seems to be less concern about this having an irreversible and detrimental impact on any parallel or subsequent mediation proceedings, whereas the consequences of information from a mediation irreversibly affecting an arbitration (e.g., information heard in a caucus that was not shared with the other party) could irreversibly nullify any arbitral award.

one-another about the matter. The arbitral tribunal does not render its award until eight days after the expiration of the time limit set by the parties for the conduct of the mediation and, only in the event the mediation phase does not result in a settlement agreement. This combination is designed to ensure that the disputants are sure to have a solution in any event by the deadline they had set for themselves initially, whether in the form of a settlement agreement achieved through mediation, or an award posited by an arbitral tribunal. The CMAP also offers a Baseball Arbitration or Final Arbitration process, which can presumably be combined with a mediation, although the CMAP is silent on this combination.<sup>3</sup>

The European Center for Dispute Resolution (ECDR) Rules on med-arb and arb-med contain provisions that allow for the appointment of multiple neutrals to the same case. It appears that there is no experience with the specific provisions, but they are instructive. Articles 6<sup>4</sup> and 13<sup>5</sup> of the ECDR Rules provide for the appointment of co-mediators. The arbitration process is first under Article 6. Before making a decision, the arbitrator changes hats and presides as a mediator. In the alternative, a co-mediator can be appointed who will independently take over the mediation procedure. Under Article 13, the mediation process is first. If the case does not settle through the efforts of one mediator, then the co-mediator transforms into an arbitrator who then presides over an arbitration hearing and makes a decision. This co-mediator turned arbitrator is precluded from taking part in any private caucus so the co-mediator is not privy to any confidential information that might be disclosed during the mediation process.

The Singapore International Arbitration Center (SIAC) and the Singapore International Mediation Center (SIMC) established protocols<sup>6</sup> allowing for an arbitrator and mediator to be appointed independently under the rules of the respective organizations. It is expected that the arbitration process be initiated first and the parties either elect to mediate during the course of the arbitration or the parties are required to mediate pursuant to an agreement. If the mediation results in a settlement, then the parties can return to arbitration and enter a consent award that can be enforced under the New York Convention.<sup>7</sup> The protocols were developed before the Singapore Convention<sup>8</sup> was adopted by UNCITRAL. The protocols were intended to provide confidence in mediated settlements through enforcement under the New York Convention. The protocols will continue to be used until there is more experience under the Singapore Convention.

The China International Commercial Court (CICC) has another model. One of WG 7 Task Force members has actual experience with this provision. Under Article 51<sup>9</sup>, the Arbitration Tribunal (Tribunal) may conduct a conciliation. In practice, once the Tribunal is convened, the parties are

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<sup>3</sup> For more information about CMAP's offerings, see: <https://www.cmap.fr/notre-offre/les-autres-modes-alternatifs-de-resolution-des-conflits/>.

<sup>4</sup> Article 6 of the [ECDR RULES ON ARB-MED PROCEDURE](#), states that: *Parties may agree that in the arbitration part of arb-med procedure a third, neutral person as potential co-mediator is engaged, who will independently take over the mediation procedure or will as co-mediator participate in the mediation procedure.*

<sup>5</sup> Article 13 of the [ECDR RULES ON MED-ARB PROCEDURE](#) states that:

*Parties may in order to protect the fairness of the med-arb procedure agree that co-mediator is engaged in the mediation procedure, who is not entitled to take part at caucusing. In case parties fail to reach the agreement in mediation procedure, co-mediator assumes the role of arbitrator.*

<sup>6</sup> See: <http://simc.com.sg/dispute-resolution/arb-med-arb/>.

<sup>7</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

<sup>8</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018).

<sup>9</sup> See: <http://cicc.court.gov.cn/html/1/219/199/200/638.html>.

asked whether they wish to proceed to conciliate. If they do, then the entire Tribunal meets in the conciliation process. One of the Tribunal members then serves as a conciliator. The conciliator needs not be the Chair of the Tribunal. The conciliation proceeds with the entire Tribunal present at all times. There are no private caucuses with the parties. If the conciliation does not result in settlement, the Tribunal proceeds under the CICC arbitration rules.

As for trends in China's Belt and Road Initiative (BRI), the Chinese People's Court has promoted mixed approach in its "Opinions of the Supreme People's Court (SPC) on Further Deepening the Reform of the Diversified Dispute Resolution Mechanism of the People's Courts" and "Provisions of the SPC on Invited Mediation by the People's Courts" promulgated in June 2016. In addition, a breakthrough announcement, known as the Beijing Joint Declaration of BRI Arbitration Institutions, was made during the 6-7 November 2019 Belt and Road Arbitration Institutions Roundtable Forum organized by CIETAC. In 2020, during the COVID-19 pandemic, CIETAC supplemented the declaration with the "Working Mechanism under the Beijing Joint Declaration" to expedite arbitrations through coordinated mediations. The Beijing Joint Declaration is a treaty<sup>10</sup> that states that the 47 undersigned institutions will work to speed up the construction of a sound legal and business environment for international arbitration services.<sup>11</sup>

The Hong Kong Department of Justice has similarly supported the establishment of an online mediation and arbitration service for Belt and Road related disputes called eBRAM.hk. According to its rules, parties can sign up to engage in "online negotiation, e-mediation or e-arbitration, or a combination of all three." eBRAM.hk has also established a COVID-19 ODR scheme by which parties engage in a successive tiered negotiation, mediation and arbitration process. Each stage is successively initiated following a period of three days. At the outset of the mediation stage, a list of five mediators is offered to parties, and if mediation fails to result in settlement, a separate list of five arbitrators is provided to parties, who can then utilize arbitration to reach a final settlement.<sup>12</sup>

The Swiss Chambers' Arbitration Institution (SCAI), which offers both mediation and arbitration services, clearly states that the two proceedings can be combined, with the help of the same secretariat that administers both mediation and arbitration proceedings. Article 18 of the SCAI Mediation Rules clarifies that the parties may at any time in a mediation submit their dispute or any part of it to arbitration or to obtain a consent award ("*an award on agreed terms*"). Likewise, Article 19 of these same rules provides that: "*In all arbitral proceedings pending before SCAI, a party or the arbitrator(s) may suggest that the parties seek to amicably resolve the dispute, or any part of it, by recourse to mediation.*"<sup>13</sup>

The World Intellectual Property Organization (WIPO) has similar provisions, but it goes slightly further. Article 14(b) of its Mediation Rules provides that "*Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the*

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<sup>10</sup> The Sino-British Joint Declaration is a treaty signed by the United Kingdom and China on the governance of Hong Kong under Chinese sovereignty after 1 July 1997.

<sup>11</sup> See: <https://harvardilj.org/2020/08/envisioning-foundations-for-the-law-of-the-belt-and-road-initiative-rule-of-law-and-dispute-resolution-challenges/>.

<sup>12</sup> See: <https://www.ebram.org/index.html>.

<sup>13</sup> See: <https://www.swissarbitration.org/Mediation/Mediation-rules>.

*mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. In particular, the mediator may so propose: (i) an expert determination of one or more particular issues; (ii) arbitration; (iii) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail.”*<sup>14</sup> While the WIPO Rules do not expressly provide for communication between the mediator and other ADR neutrals, the same secretariat would manage both proceedings, and there are no clear restrictions on the mediator’s ability to be involved in the appointment of the neutrals in such additional proceedings, or in setting the scope of their mandate.

In summary, the number of structures available for appointing mediators and arbitrators on the same matter who are different people is growing. None provide for the sharing of information between the people who serve in these roles but WG 7 believes that there is room for innovation and collaboration that would benefit the parties.

### **III. CONCEPTUAL FRAMEWORK FOR COMMUNICATION BETWEEN ARBITRATORS AND MEDIATORS WHEN COMBINING MEDIATION AND ARBITRATION**

Arbitration is often referred to as an “objective” form of justice, as the tribunal is required to make decisions applying findings of fact and law, or other dispositive rules of industry. Mediation, on the other hand, is frequently referred to as a “subjective” form of justice, as the parties are free to agree jointly on any outcome they wish.<sup>15</sup> These principles are generally accepted as correct action or behavior, binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior. The parties are free to deviate from these principles by mutual consent.

When arbitrators and mediators communicate, a central tension can arise because the “rules of engagement” between parties and arbitrators on the one hand, and parties and mediators on the other, may differ starkly. Parties most often agree before a dispute arises, to arbitration agreements that require arbitration once the dispute arises. Often, parties bind themselves then to use established provider arbitration rules with any modifications contained in the arbitration agreement. Mediation, on the other hand, is less often included in dispute resolution clauses when the contracts are signed (although the number of mediation or mediation followed by arbitration or litigation clauses are on the rise). Mediation is thus often chosen post dispute. It is purely

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<sup>14</sup> See: <https://www.wipo.int/amc/en/mediation/rules/#14a>.

<sup>15</sup> This difference between mediation and arbitration may also be discussed with respect to the relevance of norms – the existence of authoritative or binding standards that shape what an outcome should be. It is also possible to distinguish in this context between procedural and substantive norms, the former shaping “how” the process should be conducted, and the latter the outcome - the “what”, such as findings of fact, findings of law, or other dispositive norms that will influence or shape the final result. The manner and/or extent to which the parties wish norms to shape or determine the conduct or outcome of their proceedings is another basis on which to consider on what issues and the extent to which different modes of dispute resolution may be combined, and how the neutrals may clarify these issues between them, subject to the parties’ joint directions.

voluntary, as the parties are free to stop the mediation at any stage, even if they were compelled by court or pre-dispute clause in the agreement to initiate the mediation proceedings.

To parties, an arbitrator may be viewed as an authoritative figure who makes binding decisions that may dramatically affect their business. These decisions are often not appealable, save for the extremely limited grounds for judicial review provided in the various treaties and statutes that govern the enforcement of arbitral awards. The arbitrator or arbitral tribunal may be thought of in terms analogous to an “Irritable Almighty” (to use a religious metaphor), a figure of authority, who posits down procedural and substantive rules making binding substantive findings of fact and law, and who can easily be wrath or anger by what may be considered to be bad conduct or dilatory tactics by a party.

A mediator may be thought of using the same religious metaphor more along the lines of a “Confessor” or “Confidant”, a trusted person who respects confidences, who may or may not have any authority, and is guided by procedural principles (*e.g.*, confidentiality, impartiality and neutrality), and a few substantive principles such as not providing an evaluation. Mediators are thus likely to be more flexible and they need not be as explicit as arbitrators.

Of course, for both arbitration and mediation the truth lies someplace in between. Arbitration is governed by laws and rules and arbitrators are bound by significant due process limitations. Parties to arbitration naturally tend to safeguard information rigidly in what they perceive to be an adversarial and adjudicative process, revealing their confidential information only when helpful to them or compelled to do so. As in any adjudicative process, however, parties may make practical decisions that deviate from their formal rights and the rules of the process, as a matter of tactics, for purposes of time and cost considerations or with an eye to a later settlement position. Arbitrators likewise have substantial procedural flexibility within the outer bounds of due process, as well as substantial practical ability on merits decisions, as they weigh evidence and apply substantive standards such as “reasonableness” that permit significant discretion.

Mediation’s lifeblood is a more fluid mix of structure and candor under the safe shield of the mediator’s skilled discretion to compartmentalize sensitive considerations or subjective interests that are confidentially revealed. Ethical considerations guide mediators and mediation advocates. However, as noted below, as a practical matter, parties may be significantly less than candid in mediation.

Although these principles or rules are clearer in arbitration, where they have been established by decades, if not centuries, of practice, they tend to be less clear or defined in mediation. Some mediators may claim that there are no substantive rules that apply in mediation at all (although evaluative mediators may feel otherwise). Mediators would generally agree that the process that is followed varies greatly from culture-to-culture, country-by-country and even within different parts of the same country. For example, while in the United Kingdom mediators seem to follow facilitative mediation style, this is not the case in mainland China where mediators often cross the lines between facilitator and evaluator. Another illustration is differences in how mediation is practiced within the United States. Californian mediators tend to be more evaluative and dispense with opening sessions or joint caucuses relying on private caucuses more than their colleagues in other parts of the country. In addition, parties differ in the degrees of candor with their mediators. It is not uncommon for parties to “spin” the mediator or to use mediation primarily to obtain information about the adverse party’s position or evidence and to better position itself for the arbitration or litigation that will follow now that it has that information.

Working Group 7 proposes that arbitrators and mediators and all other participants involved in mixed-mode processes should first focus on what rules and principles may exist. In this regard, when considering the interaction between mediation and arbitration, questions such as the following arise:

- What rules or principles should apply to the resolution of the dispute itself?
- What principles or rules apply when arbitrators and mediators are appointed to assist parties to resolve their dispute, or are rules generated from scratch in each case, or do the parties/mediators/arbitrators each apply their own set of rules?
- Who monitors and ensures compliance with the rules once an arbitrator and a mediator have been appointed?
- Who should be appointed first: the mediator or the arbitrator? Or should they be appointed concurrently?

These are some of the questions that this Working Group sought to answer through discussions with academics, practitioners and through mock scenarios. It was clear early on, however, that while sequential or parallel mediation and arbitration processes often happen, the arbitrators and the mediators seldom speak to one-another, for fear of interfering with one-another's set practices. As such, it is not possible to talk of "generally accepted principles" or "best practices." As a result, the Working Group role-played several "mixed mode" scenarios and formulated a framework that provides some guidance on how to combine mediation and arbitration in ways that would allow the mediator and the arbitrator to have greater contact with one-another, in the interests of seeking faster, cheaper and/or better outcomes than allowing each process to progress independently.

When an arbitrator and mediator are appointed on the same matter, parties and the neutrals should consider what rules, especially procedural rules, apply to the different processes when deciding what and how the two neutrals may communicate, and who should take the lead. Unintended harm is quite possible. Contact between a mediator and an arbitrator might result from the inadvertent or thoughtless transmission of otherwise protected information that one party may believe is useful against the other's competing goals. Whether a morsel of information travels from mediator to arbitrator or *vice versa*, damage may occur and should be considered in advance and safeguarded.

While arbitrators, as "Irritable Almighty" deities, may believe they have a "sacred" duty to provide a correct and legally enforceable award, mediators may be more "secular" or even "profane" in their approach. For this reason, it could be assumed that deference should always be given to arbitrators over mediators. That assumption, however, may be incorrect and should depend on a clear understanding of what the parties wish and want. For example, trying to be helpful when speaking with the mediator, an arbitrator could imply (even through a clever phrase, body language or tone of voice), that the panel is discounting a claim, or giving scant weight to some key evidence. This could affect a mediator's risk analysis and unconsciously affect the outcome. Was that a proper and helpful thing to do, or an impermissible breach of neutrality? If that is what the parties wish for, and the mediator can apply such knowledge learned from the arbitrator to act preemptively and save the parties from wasting time or resources on that topic, it may be positive. But if the parties wish the mediator to ignore any such information, the mediator is unlikely to be able to "unring that bell," however faintly rung. She now possesses inside information. A strong impulse to promote settlement might shape the mediator's approach thereafter to accommodate the impact she foresees from the arbitrator's hint.

Likewise, if a mediator caucuses with the parties, or learns of information that would not normally be disclosed in an arbitration, disclosure of such information could adversely affect the arbitration, especially if it relates to the substantive merits of a case. Even the most careful mediator may unknowingly or unconsciously leak information that might affect the arbitrator, causing the arbitrator to downplay or take into consideration facts that should not be shared. In later oral argument or hearing, might those tidbits, which in the meantime have blended with other observations by the arbitrator, alter the course and outcome of the award? Might they inspire questions from an arbitrator who does not even realize how she became clued in? The arbitrator's findings of fact or law could be influenced by the mediator's views or information received in caucus. Here again, although obviously a concern, the outcome might not be negative. Jurists are frequently exposed to information about a case that is not properly received into evidence, and parties sometimes agree to have arbitrators attempt mediation and even resume arbitration if mediation fails. And, on occasions, a better awareness of parties' actual positions may assist the adjudication process. Prophylactic rules have the benefit of giving greater assurance that decision-making will not be improperly influenced. But a prophylactic rule preventing all contact comes at its own cost – of preventing beneficial coordination along with the detrimental.

What should not happen is that these risks be left to chance or to the appreciation of each neutral. Caution dictates that neutrals who are thinking of working collaboratively should first discuss with the parties and their counsel what rules might apply, whether of a procedural or a substantive nature, and which of the neutrals should take the lead in applying or deciding on these rules. But what if the rules are unclear or are themselves in dispute? It is helpful in this context to consider what the parties' desires are:

- Do they want a structure for proceeding to exist and be applied in the first place?
- Do they wish to create their own bespoke structure for the specific handling of this case (whether on procedural or substantive topics)?
- Do they wish help in ensuring they have a common understanding of the structure?
- Do they wish the neutrals to help in advocating the structure or process?
- Do they wish the neutrals or the parties themselves to ensure compliance with the agreed to structure?

Depending on the answers to these questions, five different scenarios seem to emerge:

1. “Structure Development”: the parties wish the neutrals to help set and posit procedural rules, without deciding initially who should lead as between the neutrals, which can result in a decision on what topics the arbitrator should lead on, and which topics the mediator should lead on;
2. “Shadow Arbitration”: the parties wish the mediator to be the primary neutral and to involve the arbitrator only on certain key dispositive issues where a binding evaluation is needed on specific points (*e.g.*, findings of fact, determinations of liability or quantum on specific points) where binding evaluative input is needed;
3. “Shadow Mediation”: the parties wish the arbitrator to take the lead and to involve the mediator on selected topics only (*e.g.*, preserving good relationships, or issues relating to discovery or witness testimony), where the arbitral tribunal would prefer not to know or have to take certain topics into consideration;
4. “A Mosaic”: where greater emphasis is placed at different stages of a process as it evolves (*e.g.*, in time, or on certain topics, starting off with arbitration, and then creating a

“mediation window”, reverting to arbitration if the dispute is not fully resolved or if a consent award is required); and

5. “An integrated process”: where there is a presumption that the neutrals will sit together as a team and consult with one-another and the parties at all stages, carving out exceptions – for example where an arbitrator’s ability to render a binding and dispositive award on a finding of fact or law may be compromised if the arbitrator overhears what happens in a caucus.

All of these processes have their advantages and disadvantages. Caution applies equally to both a “shadow mediator” scenario in which the mediator is simply keeping track of the arbitration proceeding (seeing filings and attending conferences or hearings in order to be ready to assist the parties on an informed, standing basis when the time is right), or where the mediator is alternatively engaged to intervene during a traditional “mediation window” period. A “shadow mediator” must be especially vigilant to avoid influencing the arbitration proceeding unfairly and a “shadow arbitrator” must equally be vigilant to ensure that her expectations regarding what evidence would be needed for findings of fact or of law do not dominate or unduly influence the mediation.

It is impossible to enumerate the endless permutations and situations where information could be exchanged harmfully. It is safer to assume any final arbitral award should be unimpeachable, to the extent possible. Thus, deference should be given to the arbitrator’s needs when the parties agree that the rules of engagement are key, and the neutrals’ roles are to help the parties clarify and advocate on the basis of these rules, before they are applied by the arbitral tribunal.

When thinking about who should take the lead on different topics, or at different times it is also useful to think of a few typical examples of information known only to one of the neutrals, which if disclosed could unduly affect the other’s autonomy or process.

As a general rule, arbitrators alone know:

- Their current leanings as to procedure: jurisdictional questions, party attempts to seek or limit disclosure, evidentiary disputes, or any subject of motion practice – especially if dispositive.
- Gaps perceived in the proof and argument to date.
- Actions each arbitrator might recommend to a party, were they representing that party.
- Personal impressions of parties, witnesses, and lawyers.

Likewise, as a general rule information known only to mediators includes:

- Party estimates of their chances of success.
- Party authority and offers.
- Confidential facts that limit a party’s ability to compromise but are potentially consequential if disclosed.
- Confidential facts that in the mediator’s estimation should be disclosed but are not.
- That a party or parties intend to request a mediator’s evaluation.

Before embarking further, the parties, their counsel, and the neutrals should consider whether a mediator and an arbitrator working together may provide benefits not available when the two work in separate or sequential silos. What unique skills will each role provide that may assist the parties to resolve the dispute efficiently and effectively, or in what way may the overall process be faster, cheaper and/or a better result achieved? Exploring rules and processes (procedural and

substantive) that need to be generated, clarified, advocated and/or applied may be a helpful starting point for these discussions. If they can be effectively compartmentalized or applied, then it may be sufficient in itself to simply start with a “Structure Development” process and then move onto two separate tracks.

Once a decision is made to use two neutrals on an ongoing basis with distinct roles, parties, their counsel and neutrals can determine which mixed mode process to follow:

- **Option 1 – Shadow Arbitration:** The mediator takes the lead on procedural issues. The mediator orchestrates the process and decides how and when to involve the arbitrator. There may be a benefit to having the “shadow arbitrator” observe all joint session proceedings, although waivers may be needed to ensure that she may take into consideration information overheard by her in joint session, so long as she identifies such information as important when making findings of law or fact and allows appropriate debate to be had by both sides on what was said. The “shadow arbitrator” is available to make “on-the-spot” binding decisions on procedural or substantive topics, if necessary.
- **Option 2 – Shadow Mediation:** The arbitrator takes the lead on procedural and substantive issues and orchestrates the process. The arbitrator informs the mediator of issues that the tribunal may wish the parties to try to resolve with the help of the mediator (which could also be clarifying certain rules or having them review information not yet presented to the mediator to joint submission, if possible). The “shadow mediator” is available to assist the arbitrator, although waivers and express permission of the parties and their counsel should be obtained if the mediator will be authorized to caucus with the arbitrator. The waiver would address issues like the mediator not providing to the arbitrator information obtained from the parties in private caucuses, but to hear what issues the arbitrators would find useful for the mediator to address with the parties (*e.g.*, the consequences of certain outcomes or the impact on relationships).
- **Option 3 – A Mosaic of sequential processes:** Depending on the topics that have been identified and the procedural or substantive rules that should apply for each topic, the mediator and the arbitrator could be assigned to take the lead through a series of sequential or parallel proceedings (*e.g.*, Med-Arb, Arb-Med, Med//Arb, Arb-Med-Arb, Med-Arb-Med, etc.). It is possible for the neutrals to allocate leadership roles per topic and possibly even to “hand-over” responsibility. One neutral could be involved up to a degree in the exchange of information that facilitates the transfer from one-process to another, or identifies what issues remain to be focused on by the other neutral. This may require ongoing consent and waivers from phase to phase if done sequentially.
- **Option 4 – An Integrated Process:** The neutrals sit together and jointly discuss and decide with the parties and their counsel what rules should apply at any moment. On a case-by-case basis they decide, for example, what the arbitrator should not be permitted to hear. This process may lead to reduced use of caucuses or the mediator caucusing only on extremely rare occasions, based on ongoing consultations with the parties, their counsel and the arbitrator. In the absence of consensus, no caucuses occur. The parties can choose on an ongoing basis at each juncture what they are willing to share as information with the arbitrator, as distinct from “shadow mediation” where the arbitrator would be leading on procedural and substantive process overall.

Working Group 7 focused its work on the first two processes above. The remaining two processes will be developed in future editions. They are areas that offer great promise, but where the interactions between the neutrals in such cases could be problematic.

#### IV. POSSIBLE CHECKLISTS OF ISSUES

Although it is premature to discuss or suggest “best practices” given the paucity of reported cases of mediators and arbitrators working together, Working Group 7 of the Task Force has identified a checklist of potential issues to be discussed, that may clarify which of the above options (or other options that have not been considered above) to pursue.

**STRUCTURE GENERATION:** This is very similar to the concept of Guided Choice discussed by Working Group 2 and the checklist of issues identified there for designing bespoke processes. The reader is referred to that Working Group’s initial working documents. The recommendation where a structure or process needs to be established is to focus early on in the proceedings on analyzing the different procedural and substantive principles that the parties and the counsel think may or should apply:

- a) Are there clear rules of procedure or applicable laws or industry standards that should apply?
- b) If not, do the parties want to generate their own structure or rules?
- c) Is an expert needed to explain, advocate or apply these rules?
- d) Are the expert’s findings on matters of fact or law meant to be binding or non-binding?
- e) Do the parties still wish to explore subjective interests after having heard about the zone of potential agreement they may create?

If parties are not in a position to generate their own structure, they might consider relying on the central principles for both arbitration and mediation like the investigation of relevant facts, fairness in process and outcome, and achievement of agreement or final outcome.

**SHADOW ARBITRATION:** The parties need to agree to the process and that they wish the mediator to lead discussions, with an understanding of what key dispositive issues they may want the shadow arbitrator to resolve (*e.g.*, findings of fact, issues of causation or liability, quantum, etc.). Before they agree on this, however, the mediator may wish to discuss any sensitive issues with the parties and their counsel to ensure they know what not to raise or discuss in the shadow arbitrator’s presence. These determinations may benefit from being clearly documented, and the parties should also clarify with the mediator, and the mediator may also wish to clarify with the shadow arbitrator what “taboo topics” exist that should not be discussed in the arbitrator’s presence. Even if the mediator takes the lead in orchestrating the process with the parties’ consent, she should be mindful of the procedural need not to compromise the shadow arbitrator’s ability to issue binding findings of fact or law. The neutrals will thus have joint responsibilities, including:

*Safeguarding interactions between the mediator and the arbitrator:* ensuring that the latter does not receive information that might prejudice her ability to issue binding findings of fact or of law on specific topics, especially those that might be dispositive if the outcome is shaped by law (*e.g.*, statute of limitations periods, limitations on liability, strict liability issues, etc.).

- a) *Issues for consideration by the neutrals:*
  - i) How to avoid having information shared (either with the arbitrator or from the arbitrators to the parties) that should not be shared?

- ii) What are the initial issues that might help the parties rapidly reach a global resolution?
- iii) What are the key dispositive issues, and what may generate significant savings of time or cost that may be proposed to the parties?
- iv) What are the areas where the mediator should be allowed to discuss topics outside the presence of the arbitrator?
- v) If discussions between the mediator and arbitrator are to be permitted, should they be confidential from the parties? Should a written record be generated?
- vi) Would it be workable to have counsel or the parties themselves (or both counsel and parties) always present at mediator–arbitrator discussions?
- vii) What significance might it have on the mixed mode process for one of the neutrals to have been appointed before the other? Should the arbitrator be involved in the selection of the mediator or vice versa?
- viii) What significance does the arbitrator’s style (interactive, with the ability to ask questions or only passive, observing the parties’ discussions with the mediator) have on how the mediator should run the process? Should the arbitrator communicate only with the mediator, even in joint sessions?
- ix) Are early written documents needed specifying the scope of authorization given to the arbitrator to have conversation with the mediator?
- x) Is a written agreement from each party needed before a mediator can talk to the arbitrator regarding substantive issues to ensure that anything that ultimately goes to arbitration is in a fashion and form that the arbitrator can decide in an efficient and final way?
- xi) What kind of disclosure and consent may be needed if the mediator wishes to communicate to the arbitrator either party's substantive positions and ask her to help clarify the rules and how they might be applied?
- xii) How does the arbitrator draw the line so that she is not corrupted by the discussion with the mediator, parties and their counsel and unable to issue a binding award?
- xiii) Should the arbitrator and mediator prepare for their first joint meeting with counsel and parties? Who needs to take a lead in the discussion? The mediator?
- xiv) What should neutrals do, if they feel a party is crossing a line by giving too much information that the arbitrator may not want to hear?
- xv) Is there a way to make sure that what is said in joint sessions in the presence of the shadow arbitrator can be used in the arbitration (so the arbitrator can be assumed to have the background information already, and is able to make a decision rather than have to formally be briefed or hear information all over again)?
- xvi) Is there any way for a party to opt out of (or change its mind about participating in) the process privately (without having to say that at the meeting where everyone is present)?
- xvii) How to address the concern that if the arbitrator sits in on the joint sessions:
  - (1) this might chill discussions in the course of the mediation?
  - (2) this may fundamentally change the tone and what the process is?
  - (3) the way a party wants to portray a case to a mediator is not the same as the way the party would want to portray a case to an arbitrator?
- xviii) How to gauge the significance of these issues in the future as compared to what happens now? (*E.g.*, might having an explicit understanding about these roles make

the process more transparent; might some of these problems exist even in ostensibly separate processes already?)

- xix) Where amount at stake justifies it, might it make sense for the parties *also* to have separate teams of lawyers deal primarily on arbitration and mediation?
- b) *The Shadow Arbitrator should not:*
- i) Sit in on caucus sessions between the mediator and the parties or receive any information about what was disclosed in a caucus. If so, any information shared with the arbitrator should be shared with both parties, who should have an opportunity to respond to it in joint session.
  - ii) Assume waivers were given allowing the arbitrator to hear everything that happened in joint sessions. This needs to be properly discussed upfront, including the risks of the arbitrator being influenced by information she may not normally receive in arbitration proceedings (*e.g.*, the emotional states of or impacts on the parties during past events).
  - iii) Meet privately with the mediator without express prior written permission from the parties to do so. The parties must agree clearly and in writing on what the arbitrator and the mediator can discuss and whether information can flow in both directions or go only from the arbitrator to the mediator or vice versa.
  - iv) Assume, even if the parties have agreed to the exchange between the mediator and arbitrator, that everything is fine:
    - (1) How can the parties know whether the arbitrator and mediator stayed within the scope of the procedural agreement regarding their ability to exchange information?
    - (2) How can the arbitrator and the mediator demonstrate that they did exactly what the parties had asked or agreed to?
    - (3) When should they seek written confirmation from the parties that they may proceed with their private conversations? This should be as early on as possible, but such written clarifications may also need to be periodically renewed, depending on recent developments in the process.
    - (4) The arbitrator may wish to set ground rules for her involvement in the process, and ask the parties, their counsel and mediator to agree to abide by them before accepting to proceed with their mandate.
  - v) Focus discussions on substantive issues (unless parties expressly consent). The primary focus for exchanges should be on procedural issues, regarding what the arbitrator may need to reach clear decisions on findings of fact and law.
- c) *Skills of the mediator:* mediator selected for the process needs to have an acute awareness of the arbitration process to avoid any routine disclosure of information which could prejudice the arbitrator's ability to issue validly binding findings of fact or law on topics that the parties have identified.
- d) *Skills of the arbitrator:* it is useful to have an arbitrator who understands mediation well, and can advise the mediator, the parties and their counsel on what should or should not be discussed in her presence, and the need to sign waivers from time to time, if they still want the arbitrator's ruling to be binding if certain information was provided in a joint session that the arbitrator would not normally have heard or considered. The arbitrator should be

particularly careful when discussing issues of a substantive nature, and ensure she has the parties' consent to do so.

**SHADOW MEDIATION:** In this mixed mode context, it is assumed that the arbitrator will take the lead to ensure that all procedural and substantive rules are addressed so as to achieve binding findings of fact and law, as well as a binding and enforceable arbitral award. The arbitrator and mediator may work simultaneously but need not be appointed simultaneously, so long as the arbitrator clearly retains primary control over what the arbitrator determines to be important to issuing a binding award. Here too, it is helpful for the arbitrator, the mediator, the parties and their counsel, to ask the arbitrator to identify clearly areas that may or may not be discussed in the arbitrator's presence. This allows the arbitrator to manage the arbitration proceedings as in any arbitration, but also affords the arbitrator the ability to confer and consult with the mediator (possibly on a unidirectional basis). This way the arbitrator can highlight topics the arbitrator would prefer be discussed and, if possible, resolved outside of the arbitrator's presence, or topics that may need additional information. There may be private caucuses between the arbitrator and mediator limited to procedure, possibly to include substantive considerations only with the prior (preferably written) consent of the parties. The shadow mediator should be given free access to observe the arbitration proceedings, in part, to be informed of what has occurred in arbitration without having to have this information repeated in mediation sessions. The first action of the shadow mediator should be to facilitate a discussion between the parties about the role of the shadow mediator going forward, including those topics where rules don't apply or the arbitrator does not wish to dispose of them, and what is the permitted scope of interaction between the arbitrator and the shadow mediator. Is it to be limited to procedural topics, may it include substantive topics, in a unidirectional manner or both ways, and what topics, if any are to be considered "taboo topics" that should not be discussed in private sessions in any event?

*a) Responsibilities of the shadow mediator:* The shadow mediator may have many responsibilities, including:

- i) Clarifying the procedural needs and interests of the parties and how they can be integrated into the arbitration proceeding.
- ii) Clarifying the procedural needs and interests of the arbitrator and how they can be integrated into any mediation sessions, *e.g.*, by carving out issues to be fast tracked for decision by the parties themselves.
- iii) Assisting the parties in assessing the cost-effectiveness of their respective strategies before or during arbitration hearings and how those strategies may ultimately influence the arbitral decision. For example:
  - (1) Adjust perceptions to diminish counsel's tendency to overestimate the clarity and persuasiveness of their own submissions and get counsel to agree on the zone of possible agreement in which they would like the arbitrator to consider rendering dispositive findings of fact or law.
  - (2) Ensure that clients and their counsel have discussed and are on the same wavelength regarding the parties' best-, worst- and most-likely-case scenarios. Ensure that they are aware of the consequences of not reaching amicable agreement, including the time, costs, likely award and consequences if the arbitrator were to rule one way or another on key issues.

Also ensure that evidentiary issues or pleadings on matters of fact or law are clearly presented, allowing the parties to keep their eye on their respective subjective interests looking to their future, what information is missing, and possible impediments to an amicable solution. The shadow mediator can, for example, help each party to do a clear analysis of the Strength, Weaknesses Opportunities and Threats (SWOT) the dispute represents, and to refine that analysis as the arbitral proceedings evolve, and costs are incurred.

- iv) Helping clients and counsel to confront their potential biases and the risks of being overly confident, or to do perspective-taking, trying to see the conflict from the other disputant's point of view.
  - v) Helping parties avoid the trap of being increasingly convinced of the merits of their case as time progresses. Sometimes, the longer one argues one's own positions, the more convincing they sound. A continuous risk analysis or assessment of each party's perceived strengths and weaknesses with the shadow mediator can help the clients to better assess the risks of in-group thinking, and whether to seek settlement or invest different resources into the arbitration.
  - vi) Conveying bad news or doing reality testing. The shadow mediator may be in a better position to convey bad news or do reality testing than counsel or counsel engaged in the arbitration proceedings.
- b) *Interactions between the arbitrator and the shadow mediator:*
- i) The neutrals should discuss and be sensitive to where they should draw the line in their communications. Can the mediator inform the arbitrator of topics where she thinks the parties may benefit from clarifications regarding the rules and how they may be applied? Are their discussions to be unidirectional or bidirectional? May they include substantive topics regarding issues of fact and/or law to be resolved by the arbitrator? And how to do so more cost effectively, to protect the arbitrator from any appearance of bias in these discussions with the parties, by the shadow mediator discussing these issues independently with the parties and the arbitrator?
  - ii) When (if ever) can the arbitrator be cued into the discussions between the mediator and the parties?
- c) *Considerations for selecting a shadow mediator:*

When selecting a shadow mediator, the parties should consider all of the factors they would need to consider in the normal course of appointing a mediator, but the following additional considerations should also be taken into account:

- i) Experience as counsel in arbitration and/or mediation proceedings (can they help to clarify, advocate or apply the law?)
- ii) Experience as a mediator and preferred style (*e.g.*, willingness to be evaluative, or purely facilitative or transformative).
- iii) Experience as an arbitrator: an ability to try and avoid or design around dispositive issues to preserve the arbitrator's ability to discuss and decide on certain topics without being compromised.
- iv) Understanding of any cultural issues or principles that may apply (*e.g.*, areas of legal expertise) as compared to the arbitration tribunal

- v) Ability to address and mediate issues regarding disclosures to be made to the arbitrator and conflicts regarding privileged communications, litigation work product, and the risks of waivers of privilege.
  - vi) Any other criteria important to the parties, their counsel, or the arbitrator.
- d) *The Shadow Mediator should not:*
- i) Be called as a witness.
  - ii) Be an advocate or create an appearance of being an advocate of the party.
  - iii) Repeat anything discussed in mediation (whether in joint session or in caucus) that may influence the arbitrator's perceptions of a particular procedural or substantive issue that the parties did not wish to disclose to the arbitrator.
  - iv) Operate without clear written permission from the parties, their counsel and the arbitrator.
  - v) Have private meetings with the arbitrator on relevant topics that the parties have not agreed they may discuss.
- e) *Additional considerations:* Even if the parties agree to the exchange between the shadow mediator and arbitrator:
- i) How can the parties know whether the arbitrator and shadow mediator stayed within the scope of the agreement?
  - ii) How do the arbitrator and shadow mediator demonstrate that they did exactly what the parties had asked?
  - iii) Should the shadow mediator and the arbitrator seek written confirmation from the parties that they may proceed with their private conversations?
  - iv) Do they need to establish ground rules for the arbitrator and shadow mediator to engage in the process, and should these be discussed in advance with the parties?
  - v) Should the focus of discussions between the shadow mediator and the arbitrator be on procedural, and not on substantive issues (unless the parties expressly consent otherwise)?
  - vi) What skills should a mediator have? Does the mediator selected for the process have an acute awareness of the arbitration process to avoid disclosure of information that could prejudice the arbitrator?
  - vii) What about skills of the arbitrator? How to address the arbitrator's concern about who she shares her candid thoughts with?
  - viii) Can intermediate issues be identified that could help the parties reach a global resolution?
  - ix) Should discussions between the mediator and arbitrator be confidential from the parties? Perhaps counsel or parties themselves (or both counsel and parties) can/should be present at the mediator–arbitrator discussions?
  - x) What significance will it have for the ground rules whether the mediator is appointed before the arbitrator and has held preliminary discussions where the parties have agreed on certain procedural issues or resolved certain substantive issues?
  - xi) What significance does the mediator's style (evaluative or facilitative or other) have on how mediator may communicate with the arbitrator?

- xii) Should there be an early written document specifying the scope of authorization given to the arbitrator to have conversation with the mediator?
- xiii) Should there be an agreement that everything that is said in the course of this meeting with everyone (counsel, parties, mediator and arbitrator) present will remain confidential and neither side will talk to a third party about anything?
- xiv) Should there be an agreement from each side that mediators can talk to arbitrators on non-substantive issues to ensure that anything that ultimately goes to arbitration is in a fashion and form that the arbitrator can deliberate in an efficient and final way?
- xv) What kind of disclosure and consent will be needed if the mediator communicates to the arbitrator either party's substantive positions?
- xvi) How does the arbitrator draw the line so that she is not corrupted by the discussion with the mediator, parties and their counsel and unable to serve as a neutral?
- xvii) How can the arbitrator and mediator prepare for the meeting with counsel and parties? Who needs to take a lead in the discussion?
- xviii) What should the neutrals do, if a party is crossing the line of giving them too much information that the arbitrator did not want to hear?
- xix) Have parties agreed to the process and before that have they discussed it with their counsel and received advice? Is their consent well documented?
- xx) Is there a way to organize the arbitration hearing to make sure that what is said then can be useful for mediation and significant to the resolution of the dispute?
- xxi) Is there any way for a party to opt out of the process privately (without having to say that at the meeting where everyone is present)?

### **RECOMMENDED DEFAULT AGREEMENTS BETWEEN PARTIES AND NEUTRALS REGARDLESS OF PROCESS**

Parties and neutrals should explicitly agree on the following matters:

- The mediator and arbitrator remain bound by their retention agreements and any ethical codes of conduct contained within the retention agreements.
- Additionally, neutrals agree to rules of conduct as enumerated below.
- As to consent for contact between the neutrals, select:
  - Mediators and arbitrators are free to consult with one another without advance notice to the parties; or
  - Mediators and arbitrators are free to consult with one another without advance notice to the parties, but are confined to specified purposes or subject matter; or
  - Mediators and arbitrators may only consult with one another after seeking and receiving specific all-party authorization in a given instance, possibly confined to a specified subject matter; or
  - Mediators and arbitrators may only consult in the presence of the parties and their lawyers.
- In all cases where the neutrals confer, they should issue a very brief and general notice to the parties afterward, including minimal detail: date, means of contact, general purpose and any agreed message to the parties as to next steps.

- The mediator will have contact with only the chair, or alternatively with all arbitrators simultaneously. No communication should occur between an individual party-appointed arbitrator and the mediator.
- Sequencing and scheduling of mediation and arbitration, on an ongoing basis.
- Whether and which deadlines in arbitration depend upon progress in mediation.
- The nature of periodic progress reporting between the neutrals.

#### Potential modifications if parties agree

In any case, the specific process goals and priorities may suggest any of these additional agreements:

- The mediator is permitted to inform the arbitrator whether the case has settled partially or fully.
- The mediator may indicate whether settlement is a reasonable prospect, and whether additional time may be required for that purpose.
- The mediator may request, upon request on behalf of the parties, that the arbitrator take a specific action, and may indicate reasons jointly provided by the parties. The mediator is confined to presenting those reasons and should not act as an advocate.
- Parties MAY / MAY NOT withdraw or alter consent for neutral-neutral contact.

### **RECOMMENDED PRACTICES FOR NEUTRALS**

The primary rule is Hippocratic: Help the parties or at least refrain from doing them any harm. Maintain situational sensitivity. Discuss principles by which you will engage, including methods to avoid the exchange of procedural or substantive information that might compromise any party's interest.

Any time a party's interest in the outcome of either process may change course even subtly as a result of communication between neutrals, the neutrals should slow down and maybe stop in their tracks. Remember the trial judge's principle of restraint. Parties should be allowed to try their own cases.

A safe first principle is that, absent the parties' agreement otherwise, the neutrals will not exchange or discuss material facts of the case with each other but will confine themselves exclusively to procedural matters. Any exceptions should be clearly agreed. Either neutral or any party may independently propose an exception by which specified substance may be discussed for an agreed purpose between the neutrals.

Sometimes it is hard to draw the line between procedure and substance. For example, what if the arbitrator were to suggest that the mediator help to select an independent expert to assist with case evaluation? Issues include 1) selection of the expert; 2) the possibility of early settlement; 3) the scope of the expert's role (assisting in the mediation phase only, or available to testify at hearing?). Aiding in these arrangements will draw the neutrals into mentioning substance of the dispute.

Indeed, in quite a number of situations, the neutrals may be forced to make general reference to issues in the case. As with the selection of an independent expert, if the parties agree that more disclosure is needed on a subject, or that bifurcation or sequencing of issues is appropriate (or in

other similar instances) it is permissible for the neutrals to refer generally to *e.g.* “the pricing issue”, “the quality issue”, or “the interest issue.” However, it is advisable to stay out of the details, facts and positions as much as possible when talking with the other neutral.

When in doubt, the neutrals need to discuss next steps with the parties. If the discussion involves the arbitrator(s), both parties should be represented.

With party consent, mediators may follow arbitration proceedings in order to remain informed, including seeing filings and acting as silent observers of conferences. Arbitrators may not attend, nor review materials exchanged in any mediation proceeding without the prior consent of the parties and mediator.