Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators

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CONTENTS

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Introduction

Today as never before, commercial dispute processing is "mixed mode,"[1] with business parties and counsel employing a variety of diverse approaches in order to promote their varied priorities in resolving conflict.[2] Just as drivers on a multi-lane highway shift from lane

1. *See generally* Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration*, 40 Fordham Int'l L. J. 839 (2017) (discussing various scenarios involving multiple dispute resolution processes and mixed roles for neutrals), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920785.

2. *See* Michael McIlwrath & John Savage, International Arbitration and Mediation: A Practical Guide (2010); ADR in Business: Practice and Issues Across Countries and Cultures (Jean-Claude Goldsmith et al. eds., 2006); Christian Buhring-Uhle et al., Arbitration and Mediation in International Business (2nd ed. 2006); Klaus Peter Berger, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (2006). This phenomenon is most salient in the United States, along with the United Kingdom, Canada, Australia, and New Zealand—all of which share a common-law tradition and some other cultural characteristics. However, the "Quiet Revolution" in dispute resolution has stimulated change in many other places around the globe. *See generally* Thomas J.

to lane as circumstances require in the course of reaching their destination, disputants move from settlement modes (such as negotiation and mediation or conciliation[3]) to adjudicative modes (binding arbitration[4] or litigation) and back again as circumstances warrant. However, we still have far to go in understanding and addressing the dynamics of "lane-shifting" in dispute resolution—the combination and interplay of settlement-focused activities and third-party adjudication. This is especially true of situations where it is agreed that a mediator will shift to the role of arbitrator, or when an arbitrator mediates or engages directly in efforts to help parties reach a negotiated settlement of substantive issues in dispute.[5] Although such scenarios (often denoted by terms such as "med-arb," "arb-med," or "arb-

Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, 46 VICTORIA U. WELLINGTON L. REV. 1191, 1192–2000 (2015), http://ssrn.com/abstract=2712457.

3. As generally understood in the context of commercial dispute resolution, "mediation" refers to a process in which a third party facilitates discussions between the parties in order to promote settlement of issues in dispute by engaging with the parties in joint sessions and/or in caucuses (meetings with individual parties in which at least some communications are understood to be made in confidence). Klaus J. Hopt & Felix Steffek, *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 11–15 (Klaus J. Hopt & Felix Steffek eds., 2013). In some cases, mediation may result in the restoration or improvement of relationships. As discussed in this paper, however, there are significant differences in perspectives and practices when it comes to the nature and scope of the mediator's role—reflecting the personal preferences and choices of mediators, parties and counsel, all of whom may be influenced in different ways by culture and legal tradition. *See infra* Part II. Conciliation, like mediation, refers to processes involving a third-party neutral who engages in activities aimed at helping to promote settlement but who does not render a legally binding decision. Stipanowich & Fraser, *supra* note 1, at 867. The terms are often used interchangeably, but in some cases the term "conciliation" may denote a form of non-binding evaluation. *Id.* at 868, 872–74. Definitional issues sometimes complicate practice. *See infra* text accompanying notes 236–244.

4. In the commercial context, "arbitration" is usually understood to refer to a process in which one or more third parties adjudicate disputes outside the court system and produce a binding and legally enforceable decision or award. In the course of fulfilling this obligation, arbitrators will supervise the prehearing process, during which the case is made ready for adjudication; conduct a hearing in which both parties present evidence and arguments on the issues in dispute; and render a decision (award) on the issues in dispute that will be legally binding on the parties. This is an expanded version of the arbitral function as described in the CEDR COMMISSION ON SETTLEMENT IN INT'L. ARB. FINAL REPORT (2009). As we will see, perspectives and practices differ with regard to the role of arbitrators in negotiated settlement of disputes—reflecting differences in culture and legal tradition as well as the customs, personalities, and preferences of arbitrators, parties and counsel. *See infra* Parts II, VI.B.2.

5. Arbitrator engagement in settlement discussions may or may not be perceived as "mediation" depending on the circumstances and the cultural backgrounds of the parties, but such activities overlap sufficiently with some concepts of mediation

med-arb"[6]) occur with some frequency in practice, perspectives and practices vary widely as a result of differing cultural and legal traditions. Moreover, given the dearth of effective practical guidance for legal counselors and dispute resolution professionals, opportunities for costly missteps abound. In the absence of specific, reliable information about actual experiences with such processes, conventional attitudes in the U.S. and many other countries are shaped by concerns about the perceived risks of mixed-mode commercial dispute processing, leading some jurisdictions to proscribe or impose significant limits on mixed roles for neutrals. Yet evidence that such approaches can be effective in appropriate cases is emerging. It is time to reevaluate med-arb, arb-med, and arbitrator roles in negotiated settlement in light of their potential utility as creative alternatives for problem-solving in appropriate situations and to propound more systematic guidance for their use, including effective options for avoiding or managing attendant risks.

In the realm of domestic and international commercial disputes, resort to negotiation very often occurs against the backdrop of binding arbitration.[7] While settlement rates in international arbitration have been a focus of interest for some time,[8] they are now receiving increased attention. A recent study of four major case types of international commercial arbitration revealed rates of settlement or withdrawal ranging from forty percent (construction disputes) to nearly

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that they are a necessary element of any discussion of mixed roles. *See, e.g.*, Part II.C (discussing the German experience).

6. *See infra* Part I.A.

7. The Queen Mary University of London/White & Case LLP International Arbitration 2018 Survey indicated "a significant increase in the overall popularity of arbitration combined with ADR." Queen Mary University of London /White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* 5 (2018), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf [hereinafter *2018 International Arbitration Survey*]; Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, *in* ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 381–82 (Arnold Ingen-Housz & Jean-Claude Goldsmith eds., 2nd ed. 2011).

8. *See* BUHRING-UHLE ET AL., *supra* note 2, at 112–23 (citing survey data on settlement during arbitration).

ninety percent (hospitality and travel disputes).[9] There are also indications that the rate of negotiated settlement in commercial arbitration has increased in recent years.[10] In the absence of recognized mechanisms for the international enforcement of settlement agreements, binding arbitration itself provides a surrogate vehicle in the form of "consent" arbitration awards founded on negotiated settlement agreements.[11] Although the approach is not without pitfalls,[12] such awards have been enforced under the International Convention on the Recognition and Enforcement of Arbitration Awards (New York Convention).[13]

In recent decades, growing attention has been given to settlement-oriented strategies involving the intervention of a mediator or other third-party "neutral."[14] In the U.S. and some other countries, mediation has become a preeminent feature of the commercial dispute resolution landscape, and is practically unavoidable in the course of adjudication.[15] Proponents of mediation as a strategy for resolving business disputes emphasize its potential for focusing dispute resolution on key business priorities, promoting collaborative solutions, restoring or maintaining relationships, and improving communications among commercial parties while avoiding many of

9. Brian Canada et al., *A Data Driven Exploration of Arbitration as a Settlement Tool: How Can We Express Confidence in Small Data Samples?*, KLUWER ARBITRATION BLOG (Oct. 19, 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/19/a-data-driven-exploration-of-arbitration-as-a-settlement-tool-how-can-we-express-confidence-in-small-data-samples/.

10. A survey of leading commercial arbitrators in the United States indicated that most arbitrators had experienced higher than usual rates of settlement during arbitrations in the five years preceding the survey. *See* Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators,* 25 AM. REV. OF INT'L ARB. 395, 456–61 (2014), http://ssrn.com/abstract=2519196.

11. Sussman, *supra* note 7, at 391–98.

12. *Id.*

13. *Id.* at 395–98.

14. *See* THE VARIEGATED LANDSCAPE OF MEDIATION: A COMPARATIVE STUDY OF MEDIATION REGULATION IN EUROPE AND THE WORLD (Manon Schonewille & Fred Schonewille eds., 2014); MEDIATION: PRINCIPLES AND REGULATION, *supra* note 3; Thomas J. Stipanowich & Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations,* 19 HARV. NEGOT. L. REV. 1 (2014), http://ssrn.com/abstract=2221471 (summarizing empirical data on use of dispute resolution processes by major companies); Stipanowich, *supra* note 2.

15. Sussman, *supra* note 7, at 381–82; Stipanowich, *supra* note 2, at 1194.

the costs and risks of adjudications.[16] Although the tempo of evolution varies,[17] mediation appears to be gradually gaining acceptance as a tool for international resolution of commercial disputes, alongside arbitration.[18] When respondents to an online survey associated with the "Global Pound Conference," a series of day-long meetings at more than thirty sites around the world focused on trends in commercial dispute resolution, were asked to identify what makes up effective dispute resolution processes, the most popular answer was "combining adjudicative and non-adjudicative processes (e.g. arbitration/litigation with mediation/conciliation)."[19] The Queen Mary University of London/White & Case LLP International Arbitration 2018 Survey indicated "a significant increase in the overall popularity of arbitration combined with ADR [alternative dispute resolution]" in recent years,[20] and reflected "a clear preference" among corporate in-house counsel for utilizing international arbitration in combination with ADR—which generally means mediation.[21] Mediation provisions now appear in many international contracts, sometimes as part of multi-step or multi-tier dispute resolution provisions.[22] A substantial segment of commercial litigators and corporate counsel are promoting their services as neutral dispute resolution professionals,[23]

16. Jean Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, *in* ADR in BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES *supra* note 7 at 13–47; *see also* Thomas J. Stipanowich, *Why Businesses Need Mediation*, *in* COMMERCIAL MEDIATION IN THE EU (Nancy Nelson & Thomas J. Stipanowich eds., 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423097.

17. *See generally* Stipanowich, *supra* note 2.

18. *See* THE VARIEGATED LANDSCAPE, *supra* note 14; MEDIATION: PRINCIPLES AND REGULATION, *supra* note 3.

19. Poll respondents included attendees at one of several conference venues, as well as others who took the online poll. Respondents were mainly dispute resolution professionals, outside counsel, consultants, educators and other individuals who derive a livelihood from the resolution of conflict, although fifteen percent identified as "parties"—commercial users of dispute resolution services, primarily in-house counsel. Thomas J. Stipanowich, *What Have We Learned from the Global Pound Conferences?*, KLUWER ARBITRATION BLOG (Nov. 27, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/.

20. *2018 International Arbitration Survey, supra* note 7, at 5.

21. *Id.*

22. *See* Yip Man, *Combinations of Mediation and Arbitration: The Singapore Perspective* and Thomas J. Stipanowich, *Multi-Tier Commercial Dispute Resolution Processes in the United States*, *in* MULTI-TIER APPROACHES TO THE RESOLUTION OF INTERNATIONAL DISPUTES: A GLOBAL AND COMPARATIVE STUDY (Anselmo Reyes & Gu Weixia eds., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601337.

23. Stipanowich, *supra* note 2, at 1195; Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals,* 25 AM. REV. OF INT'L ARB. 297, 383–86 (2014), http://ssrn.com/abstract=2519084.

with many claiming expertise in mediation as well as arbitration.[24] Recently, proponents of mediation secured passage of the Singapore Convention,[25] which provides a mechanism for international recognition and enforcement of mediated agreements akin to the role played by the New York Convention in the realm of binding arbitration.

These developments raise many practical and normative questions for business clients and counsel with respect to the opportunities and challenges posed by "mixed mode" resolution of commercial disputes.[26] There is not yet consensus on the answers to these questions, nor is there any generally accepted set of guidelines addressing current "multi-mode" or "mixed-mode" practice in international commercial practice.[27]

Among "mixed-mode" processes, none have inspired such varied perspectives and practices as scenarios in which neutrals switch from performing the role of mediator shifts to that of an arbitrator (often referred to as "med-arb"), or when an arbitrator assists in facilitating settlement discussions (sometimes described as "arb-med," although in some legal traditions such activities may be viewed as an aspect of the arbitral role).[28] The UNCITRAL Model Law on International

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24. *Id.*

25. G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation, (Aug. 7, 2019) (entered into force Sept. 12, 2020) [hereinafter SINGAPORE CONVENTION].

26. *See* Stipanowich & Fraser, *supra* note 1; Stipanowich, *supra* note 22.

27. The absence of authoritative guidance may be due in part to the tendency of scholars and practitioners to take a "siloed" approach to practice, research, and development of dispute resolution processes, with considerably less attention to the interplay of processes. That phenomenon may be related to the fact that mediation has emerged as an important commercial dispute resolution process only in recent decades. Stipanowich, *supra* note 2, at 1198–2000. With increasing experience and expertise in mixed modes, however, this is changing.

28. The subject has stimulated a wide range of commentary by practitioners and scholars. *See, e.g.*, DILYARA NIGMATULLINA, COMBINING MEDIATION AND ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION (2019); CEDR COMMISSION ON SETTLEMENT IN INTERNATIONAL ARBITRATION FINAL REPORT (2009); COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 20–33 (Thomas J. Stipanowich & Peter Kaskell, eds. 2001); Richard H. Silberberg & Anthony P. Badaracco, *Arb-Med: Workable or Worrisome?*, 12 NYSBA N.Y. DISP. RES. LAW. 33 (No. 2, Fall 2019); Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution,* 20 HARV. NEGOT. L. REV. 157, 177–78 (2015); Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 YEARBOOK ON ARB. AND MEDIATION 1 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461839; Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review,* 5 Y.B. ON ARB. & MEDIATION 219 (2013); Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case,* 63 BAYLOR L. REV. 317 (2011); Sussman, *supra* note 7, at 381; Bernd Ehle, *The Arbitrator as a Settlement Facilitator in Walking A Thin*

Commercial Mediation and International Settlement Agreements from Mediation, 2018[29] expressly permits parties to agree that their mediator can switch hats and assume the role of arbitrator,[30] carrying forward language from its predecessor Model Law.[31] However, though such processes have inspired much commentary[32] and have been employed in many parts of the world in economies large and small, procedural models are in short supply and guidance for legal counselors and advocates, arbitrators, and mediators is woefully inadequate. Matters are further complicated by divergent cultural and legal traditions, and laws that prohibit or place severe limits on neutrals performing mixed roles.

Conflicting perspectives associated with mediators changing hats to arbitrate or arbitrators facilitating settlement are symptomatic of broader disparities in how different cultures and legal traditions define "mediation" (or "conciliation") and "arbitration," and

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Line—What an Arbitrator Can Do, Must Do or Must Not Do, in RECENT DEVELOPMENTS AND TRENDS, Colloquium CEPANI 40, 79, 83–85 (Olivier Caprasse et al. eds, 29 Sept. 2010); Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, DISP. RESOL. J. 52 (2010); Alan Limbury, *Making Med-Arb Work in Australia*, 1 NYSBA NEW YORK DISPUTE RES. LAWYER 2 (Spring 2009); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 J. LONDON COURT INT'L ARB. 187, 190 (2009); Daniele Favalli & Max K. Hasenclever, *The Role of Arbitrators in Settlement Proceedings,* 23 MEALEY'S INT'L ARB. REP. 1 (July 2008); Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. DISP. RESOL. 871 (2007); John Blankenship, *Developing Your ADR Attitude: Med-Arb, A Template for Adaptive ADR*, 42 TENN. BAR J. 28 (2006); Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, DISP. RESOL. J. 24 (2005); Carlos de Vera, *Arbitration Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 150, 185, 192–94 (2004); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Case*s, 10 AM. REV. INT'L ARB. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, AM. REV. INT'L ARB. 8 (1997); M. Scott Donahey, *Seeking Harmony—Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, DISP. RESOL. J. 74, 76–77 (Apr. 1995); Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 WILLAMETTE L. REV. 661 (1991).

29. U.N. Comm'n on Int'l Trade Law, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION (2018) (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), U.N. Doc. A/73/17, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

30. It provides in Article 13, "*Unless otherwise agreed by the parties*, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship." (emphasis added). *Id.* at 59.

31. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, Art. 12. (2002).

32. *See supra* note 28.

their perceptions of the roles of mediators or arbitrators. These perceptions often reflect the realities of different public justice systems.[33] Conventional attitudes in the U.S. and in many other countries disfavor mixed roles as entailing undue risk.[34] Although some neutrals will successfully take on a dual role in response to, for example, changing circumstances resulting from the current pandemic,[35] a greater number are likely to refuse the challenge.[36] Or parties may agree to what they believe is a creative solution in which their neutral is engaged in multiple roles, only to find that the resolution of their dispute presents problems of legal enforceability.[37] On the other hand, in places like Germany, it is common for arbitrators to play an active role in setting the stage for settlement.[38] In China, arbitrators can shift to the role of mediator if the parties agree.[39] The latter approaches in Germany and China are reflected in standards such as the "Prague Rules" (Rules on the Efficient Conduct of Proceedings in International Arbitration).[40]

The growing use of mixed mode practice and the disparities in our perceptions and expectations raise important issues of practice and policy, both internationally and domestically, regarding the interplay between mediation and adjudication, which in the commercial realm often means arbitration. There is a growing need for clearer mutual understanding and more broadly authoritative international guidance for parties and counsel, arbitrators and mediators, dispute resolution provider institutions, and policymakers on norms of practice regarding the interplay of adjudicative processes and settlement-oriented functions. This is the mission of the International Task Force on Mixed Mode Dispute Resolution, a body composed of

33. Jacqueline Nolan-Haley, *Mediators in Arbitration*, *in* OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION, Chapter 14 at 2–3 (Thomas Schultz and Federico Ortino eds., 2020).

34. *See infra* Part I.D. Even in the U.S., where mixed roles for neutrals are conventionally disfavored, nearly half of polled mediators and arbitrators report having engaged in such practices occasionally. *See infra* text accompanying note 90.

35. *See infra* text accompanying note 188.

36. Stipanowich & Ulrich, *supra* note 28, at 26–27.

37. *See infra* Part I.D.6 (discussing potential defenses to awards).

38. The traditional strong, proactive role of judges in Germany has strongly influenced the practice of German arbitrators. Some German arbitrators offer, upon the consent of the parties, their preliminary views about the parties' case. In addition, if the parties agree, German arbitrators sometimes also propose the terms of settlement. *See infra* Part II.C.

39. *See infra* Part II.B.

40. *See infra* Part IV.C. *See also* CEDR COMMISSION, *supra* note 28, at 2.4.2, p.2 (Objectives, Principles and Summary), discussed *infra* Part IV.B.

experienced lawyers, arbitrators, mediators, and scholars from countries around the world.[41]

A number of key questions demand fresh and searching examination:

> What are the stimuli for a mediator switching to the role of arbitrator, or for an arbitrator to mediate or to take a direct, active role in facilitating settlement? When and where are such approaches most likely to be employed?
>
> What concerns are raised by such practices, and how and why are some neutrals able to play mixed roles successfully despite attendant risks?
>
> Why are such approaches a standard feature in some legal systems, but are met with conventional disapproval, and sometimes limited by regulation or outright prohibition, in others?
>
> Finally, is it possible to set forth practical guidance for resolution of commercial disputes, including international disputes, or at least to identify key process options?

This article, developed as a white paper in conjunction with the work of the International Task Force, is intended to take a fresh and searching look at these questions and to offer a blueprint for reflection and action affecting international commercial dispute resolution in countries worldwide. It aims to present measured solutions, including careful consideration of options for med-arb, arb-med, and settlement-oriented activities by arbitrators, and to make recommendations for the guidance of stakeholders in the dispute resolution process: business clients and counsel, advocates, dispute resolution professionals, and organizations providing and regulating dispute resolution services.

Part I focuses on specific circumstances in which neutrals "switch hats"—that is, when a mediator shifts to the role of arbitrator, or vice versa, or an arbitrator directly engages in settlement discussions. It explores the stimuli for such efforts, voices concerns regarding such practices and notes the emerging awareness of successful "mixed mode" practice. Part II examines key divergences in perspectives and practices around the world, exemplified by the U.S.,

41. *See* Stipanowich & Fraser, *supra* note 1, at 867. A parallel initiative focused on developing practice guidance for the U.S. is being sponsored by the Mixed Mode Committee of the College of Commercial Arbitrators.

where despite conventional disapproval of so-called mixed roles for arbitrators and mediators, a substantial percentage of experienced neutrals have actually played such roles. It also examines China, where arbitrators routinely mediate commercial disputes, and Germany, where settlement-focused activities are conventionally viewed as part of the arbitral role. Part III discusses the implications of legal regulation of such scenarios in Brazil, where med-arb is prohibited, and Singapore, Hong Kong and Australia, where mixed roles are permitted, subject to regulatory limits. Part IV summarizes and compares notable efforts to develop guidance regarding appropriate roles for commercial arbitrators, if any, in respect to settlement, as well as potential dual roles for neutrals in commercial disputes. Part V offers guiding priorities and principles for the development of more helpful directions for international mixed mode practice. Part VI puts forth proposed substantive practice guidelines for med-arb, arb-med, and arbitrators engaging directly in settlement efforts.

I. The Phenomenon of Neutrals "Switching Hats": Med-Arb, Arb-Med, Arb-Med-Arb, and Arbitrator Engagement in Settlement in Modern Commercial Practice

A. *Introduction; Med-Arb, Arb-Med, Arb-Med-Arb; Arbitration Engagement in Settlement Negotiations*

1. *The phenomenon of "switching hats"*

Should a mediator ever switch to the role of arbitrator and render a binding award when mediation is unsuccessful in resolving a dispute? Should an arbitrator ever shift to the role of mediator during the course of resolving a commercial dispute, or directly engage with parties with respect to settlement? How commercial advocates and counsel, dispute resolution professionals, and business parties answer these questions vary depending on the circumstances of the dispute, personal preferences, and the influence of different cultures and legal traditions (including traditions in which the role of arbitrator often includes helping facilitate negotiated settlement).

In the current environment of commercial dispute resolution, many professional arbitrators have also developed skills and experience as mediators.[42] Similarly, many commercial advocates have garnered experience with mediation as well as arbitration.[43] Hence, it

42. *See infra* note 188.
43. Stipanowich & Lamare, *supra* note 14, at 40–42.

should not be surprising that a significant percentage of practicing neutrals have had experiences playing dual roles (or moving beyond what some might perceive as the normal boundaries of their arbitral role) in the course of resolving disputes.[44] These arrangements generally fall within one of the following categories: med-arb, arb-med, or arb-med-arb.

2. *Med-arb*

As used here, "med-arb" refers to a consensual dispute resolution process in which a neutral first attempts to mediate the dispute and, if mediation is unsuccessful in fully resolving the dispute, switches to the role of arbitrator in order to render a binding decision (award), fully and finally addressing the issues in dispute.[45] Resort to med-arb may be stimulated by a variety of factors, including cultural predispositions and the desire to promote efficiency.[46] On the other hand, the notion of a neutral arbitrating after having mediated raises a variety of concerns in many quarters, most of which are triggered by a neutral's ex parte communications with parties (known as caucuses) during the mediation phase.[47]

3. *Arb-med, arb-med-arb*

"Arb-med" refers to a consensual dispute resolution process in which an appointed arbitrator takes on the role of mediator of substantive disputes at some point during the arbitration process.[48] This

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44. *See infra* note 188.

45. It should be noted that there are instances where "med-arb" has been used to describe any kind of procedure in which the processes of mediation and arbitration are both employed in the course of resolving a dispute, and not just those situations where both functions are performed by a single neutral. *See, e.g.*, Stipanowich & Lamare, *supra* note 14, at 41–42. This article rejects that approach and instead embraces the more common usage of "med-arb," in which the term means dual roles performed by a single neutral—that is, same-neutral med-arb. Med-arb has a number of variants, one of which is mediation followed by last-offer arbitration (MEDALOA). *See infra* Part VI.H.2.

46. *See infra* Part I.C.

47. *See infra* Part I.D.

48. "Arb-med" or "arb-med-arb" may also be used to refer to multi-step processes in which arbitration and mediation are conducted by different neutrals. For example, the Singapore Arb-Med-Arb Protocol (AMA Protocol) contemplates a multi-step arrangement, preferably using different neutrals for arbitration and mediation. Singapore International Arbitration Centre (SIAC) & Singapore International Mediation Center (SIMC), *SIAC-SIMC Arb-Med-Arb Protocol* (2014), http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf. Again, however, our use of the terms here is limited to *same-neutral* arb-med or arb-med-arb.

kind of transition does not ordinarily raise many of the concerns associated with med-arb. Moreover, should mediation resolve the dispute, it may be possible to convert the settlement agreement into a consent arbitration award. If, on the other hand, mediation is unsuccessful in fully resolving the dispute, there will be an issue regarding next steps.[49] If the parties agree that the arbitrator-turned-mediator will revert to the role of arbitrator in order to render a binding decision ("arb-med-arb"), the concerns associated with med-arb may come into play.[50]

4. *Arbitrator engagement in settlement that may not be viewed as "arb-med"*

Different views of the proper roles of mediators and arbitrators may cause differences of opinion about what constitutes a "switching" of roles. For example, as discussed below, German arbitrators sometimes engage with the parties in settlement-oriented activities, but might challenge the notion that this is wholly outside the parties' expectations regarding the arbitral role or that it constitutes "mediation."[51] Such scenarios are, however, an essential element of the present discussion.

B. *How and When: Scenarios in Which Neutrals "Switch Hats"*

1. *Prior agreement or understanding*

Parties may engage in med-arb or arb-med as a result of a prior agreement between the parties, perhaps by incorporating existing institutional rules or procedures. Such agreements are sometimes made prior to the existence of disputes, or after disputes arise but prior to the commencement of dispute resolution proceedings.

a. *Arbitrator as conciliator/mediator (arb-med) (Chinese model)*

Arb-med or arb-med-arb with a single neutral sometimes occurs pursuant to standards that reflect prevailing cultural and legal traditions, framing expectations for dispute resolution. In China, there is a long tradition of authority figures promoting informal resolution of disputes by engaging in a directive way with the parties.[52] The rules

49. *See infra* Part I.D (discussing concerns with the neutral arbitrating after engaging in mediation), Part VI (offering proposed guidelines).
50. *See infra* Part VI.I.2.
51. *See infra* Part II.C.; *infra* text accompanying note 229.
52. *See generally infra* Part II.B.

of leading Chinese arbitration institutions have enshrined the practice of "conciliation within arbitration," as illustrated by the rules of official arbitration commissions such as the China International Economic and Trade Arbitration Commission ("CIETAC")[53] and the Beijing Arbitration Commission ("BAC")[54]—a process sometimes referred to as "arb-med."[55] When mediation fails to resolve the dispute, the neutral may resume the role of arbitrator.[56]

b. *Arbitrator as settlement facilitator or "conciliator" (German model)*

In a number of civil law countries such as Germany, arbitrators may act as settlement facilitators during the course of arbitration proceedings.[57] In these circumstances, settlement-related activities are normally viewed as within the scope of the arbitrator's normal role and not a separate function.[58] Practitioners from other jurisdictions, however, might view things differently and be uncomfortable with a German-style arbitrator engaging with the parties' settlement efforts.[59]

c. *Med-arb pursuant to "neutral branding"*

Parties' agreement to med-arb may be connected with the selection of a particular dispute resolution professional whose "branding" includes med-arb. A growing number of dispute resolution professionals in the U.S. have promoted "med-arb" or "arb-med-arb" as among their areas of practice.[60] For example, one prominent U.S. dispute resolution professional regularly promoted his use of "MEDALOA"—

53. CIETAC Arb. Rules art. 47 (China Council for the Promotion of Int'l Trade /China Chamber of Int'l Comm. 2014).

54. BAC Arb. Rules art. 42 (Beijing Arb. Commission 2014).

55. *See infra* Part II.B (describing Chinese practice).

56. Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. Int'l Arb. 479, 485 (2008).

57. *See infra* Part II.C (describing German practice).

58. Renate Dendorfer, Mediation in Germany: Structure, Status Quo and Special Issues, Report at Chartered Institute for Arbitrators European Branch (CIArb): 2011 Annual General Meeting and Conference 9–10 (April 8–9, 2011), http://docplayer.net/48518922-One-continent-many-methods-mediation-in-germany-structure-status-quo-and-special-issues-ciarb-chartered-institute-for-arbitrators-european-branch.html.

59. For example, in the United States, mediators engage in a wide variety of activities, including some of those performed by German judges or arbitrators. *See* Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions,* 22 Disp. Res. Mag. 4, 9–10 (Winter 2016), http://ssrn.com/abstract=2759982.

60. *See infra* Part I.E. (discussing perspectives and experiences of current "mixed-role" specialists).

mediation, followed by last-offer arbitration if mediation failed to produce settlement.[61]

d. *One-off arrangements for med-arb*

Resort to med-arb, arb-med or arb-med-arb is often the result of a one-off contractual agreement contemplating dual roles for the neutral. The agreement may be struck as a part of a commercial contract, or after disputes arise but before mediation or arbitration of substantive issues, perhaps in response to changed circumstances such as the dramatically altered economic conditions brought about by the COVID-19 pandemic. Such arrangements are often made with the active input of the neutral.

2. *Agreements for neutrals to change roles during dispute resolution*

In jurisdictions where mixed roles are not widely embraced by lawyers and dispute resolution professionals, a shift of roles from mediator to arbitrator, or vice versa, is often triggered by a proposal from the parties or by the neutral[62] during the course of dispute resolution. The following are illustrative real-life scenarios.

a. *Parties jointly approach the mediator about making a switch to the role of arbitrator during the course of dispute resolution*

Where mediation does not produce a final settlement of disputes, the desire for finality and efficiency may cause parties to look to their neutral to shift to an arbitral role. An example from the author's experience follows.

> *During the course of mediating a longstanding federal court case involving claims against an insurer with experienced commercial counsel on both sides, I sought to overcome impasse by asking each of the parties if they might employ final offer arbitration (with another neutral) as a way of resolving their dispute. Each of the parties expressed interest in the idea and after meeting together the parties approached me about conducting the final offer arbitration. After discussing the pros and cons, I agreed*

61. *See, e.g.*, Tom Arnold, MEDALOA, The Dispute Resolution Process of Choice (Dec. 27, 1996) (unpublished monograph).

62. Special issues and concerns raised by the neutral promoting a switch of roles during dispute resolution are discussed below. *See infra* text accompanying note 105.

to do so. We jointly set up the procedure and I rendered an arbitration award on the basis of one of the offers. The defendant complied with the award.

b. *Parties approach the arbitrator about mediating during the course of arbitration proceedings.*

As previously noted, opportunities for negotiation (with or without a mediator) may arise at any time before, during or after adjudication, and many arbitrators have observed higher rates of settlement in arbitrated cases in recent years.[63] In some cases, parties seeking a negotiated resolution may conclude that engaging their arbitrator to help them reach an informal settlement is more beneficial than reaching out to another mediator. One experienced U.S. neutral recounts:

I've engaged in dual roles in several matters involving sophisticated clients represented by self-secure, experienced counsel. In one dispute involving the purchase of a regional software business by a large international corporation, I was initially appointed as solo arbitrator under well-drafted one-off agreements and had supervised part of the pre-hearing process when I was approached jointly by counsel with creative ideas for suspending arbitration for an interim mediation involving various technical issues relating to ongoing software development and support and a transitional role for the seller. I helped flesh out an agreement clearly expressing the parties' consent to the interim steps in spite of specified concerns about potential problems the interim steps might create for my arbitral decision-making; counsel offered written joint guidance on what I could and could not do during the interim mediation. After a successful mediation, I resumed the role of arbitrator to rule on past damages; attorney fees were awarded based on a last-offer arbitration model.[64]

The author recalls a similar experience:

I was serving as arbitrator of a case involving issues associated with the breakup of a business relationship. The proceedings were bifurcated; the first phase of arbitration was focused on valuation of business assets, and the second phase on breach of contract issues. After several days of hearings on valuation, counsel for both parties announced that they were making good progress toward a negotiated settlement of the valuation question, and wondered if I could assist them in reaching a final agreement.

63. *See* Stipanowich & Ulrich, *supra* note 28, at 15–18.

64. E-mail to author (April 21, 2020) (on file with author). Name of sender withheld by request.

> *After discussing the concerns associated with my acting as mediator, we modified the agreement of the parties to permit me to serve in that role. It was agreed, further, that the parties would waive any right to challenge any subsequent arbitration award on the grounds of my serving as mediator. We also agreed that the entire mediation process would be conducted as a joint session with no caucuses. Within a couple of hours, the mediation produced an amicable agreement on the valuation issue; the settlement was incorporated into an arbitration award. I subsequently served as arbitrator on the phase two issues; those latter hearings proceeded in normal fashion to an award.*

A variation of this scenario involving different mediation techniques (including evaluation and separate meetings with individual parties (caucuses)) was reported by another U.S. dispute resolution professional:

> *Several years ago, I was appointed arbitrator in a case involving two investors in a business dispute. During the pre-hearing stage, counsel for both parties asked if I would be willing to act as mediator, to see if the case could be settled rather than arbitrated. Through the case management team, I confirmed that counsel wished me to remain as arbitrator in the event the case did not settle. I prepared and the parties signed a Med-Arb Stipulation, and we mediated the case over the course of a long day. During mediation I met separately with both sides and offered some evaluations of the parties' claims and defenses. I eventually made a mediator's proposal; one side accepted, the other did not. Months later, when the arbitration hearing was about to commence, counsel asked me again to attempt to mediate the case to conclusion. I suggested we take the morning to mediate, break for lunch, then start the hearing if the case hadn't settled. Counsel confirmed the continuing effect of the previous stipulation. The case settled by noon for an amount very close to the mediator's proposal made in the earlier mediation.*[65]

c. *During arbitration hearings, the arbitrator suggests to the parties that he be permitted to switch to the role of mediator*

In some parts of the world, arbitrators may be expected to engage in activities that help promote settlement or even mediate the dispute.[66] In other places, settlement facilitation is normally not a part of the arbitral role. In the former situation, it may be expected that the arbitrator brings up the subject of engaging in settlement-

65. The name of the neutral was withheld by request.
66. *See infra* Part II.A, B.

oriented activities. In the latter case, however, an arbitrator's request to the parties to permit the arbitrator to change roles may present a dilemma for the disputants and even undermine their autonomy.[67]

d. *Participants agree that the arbitrator will mediate after the completion of arbitration hearings and writing the award, but before its publication (post-hearing arb-med).*[68]

Although such circumstances are probably uncommon, parties may agree to engage in mediation after an arbitration award has been rendered but before publication; the mediation might be conducted by their arbitrator.[69] Michael Leathes, former corporate counsel with British-American Tobacco and founder of the International Mediation Institute, wrote the following summary based on his own experience with arb-med after the completion of arbitration hearings:

> The process starts as an arbitration, often on an accelerated basis. The neutral makes the award, but instead of immediately announcing it to the parties, seals it in an envelope and keeps it secret. Then the neutral (who could be the same or a different person) becomes a mediator, facilitating the parties to come to a negotiated settlement. The parties agree beforehand that if they are unable to settle (say by a certain time, or if they stop the mediation phase) then the envelope is opened and the parties are bound by that outcome. The advantage is that the parties know they will reach an outcome, but the uncertainty of what the envelope contains motivates them to find a negotiated outcome rather than risk opening Pandora's Box. Arb-Med can be used to break deadlocks in mediations and even in negotiations (for example, where parties cannot agree on an amount of money to change hands).[70]

e. *Arbitrating issues under a previously-mediated settlement agreement*

Some U.S. mediators have developed the practice of agreeing to the inclusion of an arbitration clause with themselves named as arbitrator to adjudicate any disputes under the settlement agreements

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67. *See infra* text accompanying note 105 (offering example of pressure exerted by arbitrator to shift to mediator role).

68. See MICHAEL LEATHES, DISPUTE RESOLUTION MULES: PREVENTING THE PROCESS FROM BEING PART OF THE PROBLEM 2 (monograph).

69. For a discussion of the application of this approach in three cases, *see* Haig Oghigian, *Perspectives from Japan: A New Concept in Dispute Resolution—the Mediation-Arbitration Hybrid,* N. Y. DISP. RES. LAW. 110 (2009)*; see also* NIGMATULLINA, *supra* note 28, at 153–57.

70. LEATHES, *supra* note 68, at 2.

that they mediate. Although a post-agreement change-of-hats may be viewed by some as less problematic than changing roles before an agreement is in place, problems with the switch can occur when, for example, the neutral withdraws from the arbitral role.[71]

C. *Why Make the Switch?: Triggers, Impetus, and Rationale for Dual Roles*

Those who support the concept that a neutral third party should be able to function in dual roles (as where a mediator switches roles and becomes an arbitrator of a dispute, or vice versa), may perceive several benefits of the mixing of roles in a single individual:

1. *Prioritizing amicable resolution and societal harmony; preserving relationships*

In some cultures and legal traditions, great emphasis is placed on amicable resolution of conflict and the avoidance of adversarial judicial proceedings. In China, for example, long-standing cultural emphasis on stability and harmony and on deference to authority have underpinned the practice of conciliation by arbitrators or judges.[72] These and other authoritative decision makers afford parties opportunities to engage in discussions aimed at amicable settlement and even offer to facilitate to such discussions.[73]

2. *Promoting efficiency and economy, business solutions, relationships*

Having a single neutral serve in both roles (or having an arbitrator engage in settlement discussions) permits the parties to avoid having to educate two separate neutrals, with attendant savings of time and cost.[74] There may be circumstances, for example, where both parties regard the need for a final resolution as paramount. In such situations, having their mediator transition to an arbitral role, or vice versa, may be viewed as the simplest and best way of meeting their mutual needs. This is most likely to be true in circumstances in

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71. *See Morgan Phillips v. JAMS/Endispute*, 44 Cal. Rptr. 3d 782 (Cal. Ct. App. 2006) (mediator sued for later withdrawing as arbitrator after agreeing to serve).

72. *See infra* Part II.B; Gu Weixia, *The Delicate Art of Med-Arb and Its Future Institutionalization in China,* 31 UCLA Pac. Basin L.J. 97, 121 (2014); Vera, *supra* note 28, at 149.

73. *Id.*

74. Nigmatullina, *supra* note 28, at 32–34; Vera, *supra* note 28, at 149; Commercial Arbitration at Its Best, *supra* note 28, at 20–21; *see* Man, *supra* note 22, at 9–10.

which an arbitrator has heard much of the evidence and is well-acquainted with the issues in dispute, and may be able to shift to a mediator role immediately, with none of the delays and costs associated with engaging another mediator.[75]

The rationale for having an arbitrator engage with the parties in settlement discussions was eloquently put forward by David Rivkin in the course of promoting a "Town Elder" model for international arbitration[76]—a vision that hearkens back to the "original conception of arbitration . . . two business people taking their dispute to a wise business person who they both trusted . . . and then asking the arbitrator to provide them with the best solution to their dispute."[77] The latter would include circumstances in which "each side has a problem proving an important part of its case; when there is a clear middle ground that is beneficial to both sides; or when a written award may cause difficulty for both sides, no matter who wins."[78]

Unlike arbitration, negotiated or mediated settlement discussions may afford parties the opportunity to craft integrative solutions that better achieve business priorities.[79] As many skilled mediators

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75. *See supr*a Part I.B.2.b; *infra* text accompanying note 124 (providing actual examples of such circumstances).

76. David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 ARB. INT'L. 375 (2008).

77. *Id*. at 378. Motivated primarily by concerns about efficiency and economy, Rivkin envisions the possibility of more direct engagement in settlement discussions with the consent of the parties in appropriate cases. *Id*. at 379–81. Rivkin posits:

> In many circumstances, the Town Elder, might, after hearing the parties, ask if he or she can propose a solution. The desire of arbitrators not to show any prejudgment of the case is important. On the other hand, by the time of the hearing, . . . both sides will have had an opportunity to present a substantial part of their case through their written submissions. It is not wrong for the arbitrators to have formed some opinions by then. Similarly, hearings are often split because of the difficulty in finding time in everyone's schedules. While breaking from one set of sessions, that might also be an appropriate time for arbitrators to see if they can help the parties.
>
> This may take a variety of forms. Arbitrators can ask if they can give some preliminary thoughts. They may say they think one side will have a tough time demonstrating what it needs on one issue or the other has not yet presented evidence to prove something else. Or arbitrators can ask if they can propose a general solution, or if it would be helpful to discuss with the parties where they stand on settlement and to offer their perspectives to help accelerate that process.

Id. at 382.

78. *Id*.

79. *See, e.g.*, NIGMATULLINA, *supra* note 28, at 32–34 (describing scenario in which neutral's efforts in arb-med-arb eventually led to the parties negotiating "a constructive forward-looking agreement." (quoting Toshio Sawada, *Hybrid Arb-Med: Will West and East Never Meet?*, 14 (2) ICC INT'L CT. ARB. BULL. 29, 31–32 (Fall 2003))).

know, even if facilitated discussions do not lead directly to resolution of substantive disputes, the mediation process may permit the structuring of customized approaches that lead to a final resolution, including refined formats for binding arbitration.[80] The prospect of a quicker and more efficient process combined with the opportunity to structure business solutions or customized processes for final resolution augurs well for the maintenance or improvement of underlying relationships.[81]

3. *Taking advantage of rapport with, or trust in, a neutral*

A mediator who has won the confidence and trust of the parties may be viewed as the ideal third party to adjudicate the dispute if the parties are unable to reach a negotiated settlement.[82] For similar reasons, parties may look to an arbitrator to take on the role of mediator if there is reason to believe a dispute may be resolved amicably before the conclusion of arbitration. In addition to being a convenient choice, the sitting arbitrator may also have extensive familiarity with the issues and the evidence. Having had an opportunity to observe the arbitrator manage arbitration proceedings, including supervising aspects of the pre-hearing process and hearings, the parties may have developed a level of rapport with and trust in that person. This may permit them to feel comfortable with that person playing a more direct role in negotiations, including perhaps their offering of preliminary views or serving as a facilitator/mediator going forward.

4. *Finality; greater impetus to settle—the "big stick"*

Med-arb (or arb-med-arb) also offers parties the prospect of a final resolution if mediation fails to achieve informal settlement.[83] Moreover, it is sometimes said that if the parties are aware that their mediator will render a final and binding decision in the absence of a settlement, they may feel additional pressure to settle their dispute in mediation. In other words, the mediator's ultimate arbitral authority functions as a "big stick" to settle the case[84] which starkly emphasizes the opportunity to reach a mutually acceptable resolution and

80. *See supra* Part I.B.2.a. (providing actual example).

81. Gu Weixia, *supra* note 72, at 98.

82. *See* E-mail of Richard Silberberg, Partner, Dorsey & Whitney, New York, NY to author, (June 12, 2020) (on file with author) (discussing importance of neutral developing trust and good will with parties and counsel in laying the foundation for mixed roles).

83. Blankenship, *supra* note 28, at 35.

84. *See* Bartel, *supra* note 28 (discussing early empirical studies on med-arb); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 21.

avoid the risks of a third-party decision.[85] Indeed, at least one study indicates that med-arb with a single neutral may promote more problem-solving, reduce hostility and competitiveness between parties, and lead to more concessions.[86]

5. *Opportunity to set the stage for a consent arbitration award*

Arbitrating parties may see special benefits in informally settling disputes prior to the rendition of an award so that the settlement may be incorporated in a "consent" arbitration award, thus laying the groundwork for enhanced enforcement.[87] Having the arbitrator play a more direct role in negotiated settlement is one way of increasing the likelihood that a settlement will occur, with the added benefit that the arbitrator who is being asked to issue the consent award may be more familiar with the details of and circumstances surrounding the settlement.

D. *Concerns Associated with Switching Roles: The "Parade of Horribles"*

In a survey conducted by the Straus Institute for Dispute Resolution, more than sixty percent of members of the International Academy of Mediators indicated that they had at least some experience playing dual roles (arbitrator and mediator) in the course of resolving a dispute.[88] Of those with experience with mixed roles, more than two-thirds reported that their experience was "generally satisfactory."[89] There are also indications that many experienced U.S. arbitrators have "switched hats" on occasion.[90] Nevertheless, in countries

85. Blankenship, *supra* note 28, at 34.

86. *See, e.g.*, NIGMATULLINA, *supra* note 28, at 45 (*citing* Neil B. McGillicuddy et al., *Third-Party Intervention: A Field Experiment Comparing Three Different Models*, 53 J. PERS. SOC. PSYCHOL. 104 (1987)).

87. In order to avoid difficulties of enforcement of a consent award where a single neutral plays multiple roles, it is important to ensure that the arbitral tribunal is engaged with respect to an active dispute, which would mean that an arb-med-arb format would be necessary. *See* NIGMATULLINA, *supra* note 28, at 106–11 (citing sources and noting different perspectives on enforceability). This kind of format is illustrated by the Singapore AMA Protocol, which permits single-neutral arb-med-arb but recommends the use of separate neutrals as arbitrators and mediators. *SIAC-SIMC Arb-Med-Arb Protocol*, *supra* note 48.

88. *See* Straus Institute, *International Academy of Mediators Survey of Experienced Mediators* (2014) (data available from author).

89. Fifty of seventy-four (67.6%) reported "generally satisfactory" experiences. Thirteen (17.6%) reported mixed experiences ("sometimes satisfactory, sometimes unsatisfactory"), and eleven (14.9%) "general unsatisfactory" experiences. *Id.*

90. Stipanowich & Ulrich, *supra* note 28, at 26–27 (summarizing results from survey of members of the College of Commercial Arbitrators).

where mediation has developed as a distinct professional role in commercial dispute resolution, especially common law jurisdictions including the U.S. and Commonwealth countries, conventional opinion has tended to disfavor a neutral shifting from the role of mediator to that of arbitrator during the course of resolving a dispute.[91] Even in many civil law jurisdictions, concerns regarding med-arb (especially when the mediation stage involves the mediator conducting separate, confidential meetings, or "caucuses," with individual parties) have resulted in legal limitations on the use of med-arb procedures. Concerns are especially high with regard to scenarios in which arbitrators shift to the role of mediator and then return to the arbitral role if mediation is unsuccessful.[92] There are a number of reasons for this traditional caution regarding med-arb (or antipathy toward med-arb), most of which are prompted wholly or in part by concerns about the influence of ex parte communications during mediation on subsequent arbitration.[93]

1. *Fundamental incompatibility of mediative and arbitral roles*

The mediative and arbitral roles are often seen as diametrically opposed.[94] Conventionally, the arbitrator's interaction with the parties is largely, or wholly, confined to adversary hearings in which parties present evidence and contest opposing evidence before the arbitrator, who is charged with adjudicating the dispute; ex parte communications between arbitrators and parties are generally strictly limited. Mediation, on the other hand, may entail extensive

91. Nolan-Haley, *supra* note 33, at 23–24. *See, e.g.*, The Final Report of a CPR-sponsored commission comprised of more than fifty leading arbitration counsel and arbitrators states: "The majority of Commission members generally discourage parties from entering into pre-dispute or even post-dispute arrangements before a mediation in which the same individual is assigned the roles of mediator and arbitrator." COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22. However, the Commission's report went on to offer cautious guidance for med-arb and arb-med-arb. *See id.* at 22–24; *infra* Part IV.A (summarizing Commission guidance). One early U.S. critic was Lon Fuller, who addressed med-arb in the context of dispute resolution under collective bargaining agreements. *See* Lon Fuller, *Collective Bargaining and the Arbitrator, in* PROC. OF THE FIFTEENTH ANN. MEETING OF THE NAT'L ACAD. ARB. 8, 29–31 (1962).

92. *See infra* Part III.B (discussing Brazilian law proscribing med-arb).

93. A survey of the extant literature indicates that much of the discussion of the potential advantages and concerns about med-arb and dual roles for neutrals is theoretical; empirical evidence is often lacking. *See* NIGMATULLINA, *supra* note 28, at 30.

94. Sussman, *supra* note 7, at 390–91 (concluding that "the mediator's role requires the use of many of the skills of a psychologist, whereas the arbitrator's role requires the use of many of the skills of a judge.").

ex parte communications between the mediator and individual parties in the form of separate, private caucuses involving confidential communications—all with the goal of helping the mediator facilitate a consensual resolution of the dispute.[95] This disparity underpins the UNCITRAL Model Law on International Commercial Mediation, which establishes broad prohibitions on the use "in arbitral, judicial or similar proceedings" of evidence of communications or actions related to mediation proceedings,[96] and prohibits a mediator from shifting to the role of arbitrator in a range of situations unless contrary agreements have previously been made by the parties.[97]

Since the essential functions of mediators and arbitrators are often perceived as fundamentally different, experience and competence as a mediator does not automatically qualify an individual to perform the role of arbitrator.[98] Some excellent mediators may not have the temperament, managerial skills or procedural knowledge to be effective arbitrators. Similarly, many arbitrators lack the ability to be effective mediators. There are also issues of personal preference or philosophy; many mediators avoid arbitrating due to lack of interest, concerns about its impact on their mediation practice, or discomfort with an adjudicative role. In response to a 2014 survey by the Straus Institute of members of the International Academy of Mediators, over sixty-four percent of respondents indicated that at least some of their professional hours were devoted to arbitrating cases.[99] The other thirty-six percent, however, offered a variety of reasons for not embracing the arbitral role, including: (1) lack of interest in serving as an arbitrator, (2) concerns that arbitrating might cost them business as mediators, (3) lack of training or credentials to serve as an arbitrator, (4) lack of comfort with an adjudicative role, and (5) lack of credentials in the law or law practice.[100] As we will see, mixed roles present unique challenges even for neutrals experienced in both arbitration and mediation.[101]

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95. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 21; Stipanowich & Ulrich, *supra* note 28, at 25–26 (summarizing reasons given by some mediators responding to International Academy of Mediators survey for not engaging in med-arb or arb-med-arb).

96. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION Art.14.

97. *See id.* at Art. 13.

98. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 23–24. For related sources from the labor arena, *see* Bartel, *supra* note 28, at 675.

99. Straus Institute, *supra* note 88.

100. *Id.*

101. *See* Memo on Med-Arb from John Blankenship to author (Apr. 20, 2020) (discussing special challenges of med-arb for the neutral and noting various differences

2. *Concerns about party autonomy*

Some fear that the "big stick" wielded by a mediator who is expected to arbitrate a dispute if mediation fails to achieve settlement will undermine party self-determination and prevent a negotiated settlement from truly representing the will of the parties.[102] This fear is particularly acute in situations in which the neutral "telegraphs" a personal perspective on the issues. Awareness of such dynamics, however, may cause neutrals to avoid or tread very lightly with respect to evaluation in the course of settlement discussions.[103]

Similar concerns may arise if an agreement by disputing parties to have their neutral switch roles appears to be driven by the neutral, as exemplified by this scenario:

> *An experienced mediator with little arbitration experience was appointed by a state court to arbitrate a large, complex commercial dispute involving hundreds of millions of dollars under the terms of an ad hoc arbitration agreement. During arbitration hearings, the neutral repeatedly asked the parties to allow him to mediate the dispute. This caused great consternation on the part of one of the parties due to concerns that if they did not agree to a shift in roles they might be penalized by the arbitrator in his final award. I was one of several outside experts brought in to advise client and counsel on how to handle the dilemma posed by the arbitrator's request to shift roles.*[104]

3. *Less candid communications; increased incentive to "spin" the mediator*

Parties who know a mediator reserves the arbitral role should mediation fail may be less forthcoming in their discussions with the mediator, thereby compromising the ability of the mediator to serve the parties effectively.[105] Moreover, parties and counsel may feel incentivized to manipulate the mediator in ways favorable toward their positions, with both sides putting on a performance of sorts to shape

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between his activities during the mediation phase of med-arb and stand-alone mediation).

102. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 21; Blankenship, *supra* note 28, at 34.

103. *See infra* text accompanying note 399 for comments of John Blankenship.

104. The author was one of the outside consultants brought in to address the situation.

105. *See* Man, *supra* note 22, at 10. This concern was mentioned by several mediators who reported unsatisfactory experience with mixed roles in a 2014 survey. *See supra* note 88.

the neutral's view in an attempt to increase their chances of prevailing when he or she becomes the arbitrator—the ultimate decision-maker. One U.S. lawyer reported:

> *I went through a thirteen-session mediation where the neutral was supposed to fill a dual role, first mediating and, if that didn't work, acting as a special master who would make findings of fact for the court. What ended up happening in the mediation was that both parties were putting on a performance of sorts to shape his view as the ultimate fact finder. Wearing multiple hats can produce a very murky process where roles are unclear, and people are dancing around and posturing. It's very risky.*[106]

4. *Due process concerns*

Mediation frequently involves extensive confidential ex parte communications between the mediator and individual parties. If mediation is unsuccessful, there is always the possibility that the mediator-turned-arbitrator's view of the issues has been affected by information shared in ex parte discussions. This may include information which is not directly relevant to the issues contested in arbitration and has never been tested by cross-examination or rebuttal in the arbitration hearing—but which nevertheless colors a neutral's view of the parties or their positions on the issues in conflict. How, some might ask, can a mediator-turned-arbitrator purge his mind of acts and positions learned in confidence,[107] and what is to prevent the neutral from relying on information vouchsafed confidentially in mediation in making an award?[108] And how, if at all, might a party not privy to the confidential communication effectively respond and counteract its potential impact?[109]

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106. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 21–22.

107. *See, e.g.*, Jon Lang, *Med-Arb – An English Perspective*, 1 N.Y. DISP. RESOL. LAW. 2, 98 (Spring 2009); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22; Man, *supra* note 22, at 10.

108. *See* Sophie Nappert & Dieter Flader, *A Psychological Perspective on the Facilitation of Settlement in International Arbitration—Examining the CEDR Rules*, 2 J. INT'L DISP. SETTLEMENT (2011); Sussman, *supra* note 7, at 381, 384–85; Man, *supra* note 22, at 10; *cf.* Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005); Nolan-Haley, *supra* note 33, at 382. This concern was mentioned by several mediators who reported unsatisfactory experience with mixed roles in a 2014 survey. *See supra* note 88; *see also Bowden v. Weickert*, WL 21419175 (Ohio 2003) (vacating arbitration award because it was improperly based on terms rejected during prior negotiation in which neutral had served as mediator).

109. Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAW. 71, 71 (Spring 2009).

5. *Expectations raised by mediator communications, evaluation*

Although critiques of med-arb nearly always focus on what parties share with mediators in private caucuses, little emphasis has been placed on concerns relating to what mediators communicate to the parties—or how what mediators say and do is perceived by the parties.[110] Communications between mediators and parties tend to be exceptionally free-flowing, and may include vague or ambiguous statements. What a mediator thinks (s)he said and what a party thinks they heard may be very different. These dynamics are of particular concern in regard to case evaluations. A mediator's guarded evaluation of elements of a case or prediction of what might happen in arbitration could be interpreted or remembered as setting a floor of expectations for an award they might make at the conclusion of arbitration hearings. In other words, communications made by the mediator during mediation, including case evaluations or predictions offered during caucus, may raise one or both parties' specific expectations regarding a future award by the mediator-turned-arbitrator, as exemplified by the following scenario:

> *Two subcontractors were in the process of negotiating a merger. One of the companies was involved in a pending claim at the time of the merger negotiations. In many respects it was a fairly common sort of claim. The subcontractor was seeking additional compensation for post-contract changes that delayed its work and made the work more expensive. The general contractor counterclaimed for delay damages alleging the subcontractor's work delayed project completion.*
>
> *Senior management for both potential merger partners participated in mediation; one as the owner of the company with the claim, the other as an observer. The subcontractor was represented by experienced construction counsel. During the course of the mediation the subcontractor team (both CEOs and counsel) interpreted the mediator's comments during private sessions as being highly supportive of the subcontractor's position; so much so that the subcontractor team readily agreed to allow the mediator to serve as the sole arbitrator when the matter did not settle in mediation. A separate arbitration hearing was held.*
>
> *Between the date of the mediation and the date of the arbitration the two subcontractors agreed to go forward with their merger,*

110. *See* Stipanowich & Ulrich, *supra* note 28, at 15 (2014); Blankley, *supra* note 28, at 325.

> *based in part on their joint expectation that the arbitration would result in a positive cash recovery. This expectation on the part of the subcontractor team was so strong that they "booked" the award to be entered in the pending arbitration as an asset on the merger balance sheet.*
>
> *Expectations are often unfulfilled. The arbitrator found in favor of the general contractor. Most disturbing to the subcontractors was that information shared by the subcontractors in a private mediation caucus, but not addressed in the arbitration hearing itself, was used by the mediator/arbitrator as part of the basis of the arbitration award.*
>
> *The balance sheet asset was transformed into a joint liability of the recently-merged companies. The two CEOs fell out and litigation was instituted to unwind the merger. The merger was unwound, the situation snowballed, and the subcontractor with the original claim in mediation ultimately declared bankruptcy.*[111]

6. *Potential defenses to arbitration award*

Because in many countries legal frameworks for arbitration and mediation tend to be "siloed," that is, developed and regulated separately and independently,[112] having a neutral engage in both activities during the course of dispute resolution may raise questions about the nature of the process and the enforceability of the results under applicable law(s).[113]

For example, efforts to structure a suitable, workable, and enforceable resolution are sometimes undermined by a lack of precision, preventing a reviewing court from determining whether it is being asked to enforce a mediated settlement agreement or an arbitration award. Such an issue may be particularly acute when a single individual is assigned multiple roles, or where the neutral's role may be characterized in more than one way. Lack of clarity in delineating the boundaries between a neutral's activities as mediator and as arbitrator may create problems for any party seeking to enforce a resolution

111. E-mail from David Ratterman to author (Jan. 20, 2020) (on file with author).

112. *See infra* Part II.A (discussing evolution of arbitration and mediation in U.S.), Part III.A., B (discussing legal framework in Brazil and Singapore).

113. *See* Deason, *supra* note 28, at 5; *see infra* Part III (discussing legal framework in various countries).

reached through an out-of-court process. These concerns are illustrated by *Ex parte Industrial Technologies* (Ala. 1997),[114] a court decision resulting from an agreement to refer a dispute to an out-of-court process described as "mediation or arbitration" with a retired circuit judge as "mediator/arbitrator." The parties subsequently disagreed about the nature of the process and the outcome, and the legal dispute that followed ultimately reached a state supreme court which determined that both the parties' agreement and the subsequent process were fatally flawed in that there was no meeting of the minds regarding the precise nature of the procedure, the neutral's role, or the final result. While the participants had the opportunity to overcome their lack of precision in tailoring the original ADR agreement during the subsequent negotiation and drafting of their final "stipulation of agreement," they instead merely exacerbated their earlier mistakes.[115]

Moreover, the perceived fundamental dichotomy between mediation and arbitration—their diametrically opposite orientations toward ex parte discussions—may give rise to procedural grounds for motions to disqualify an arbitrator or overturn arbitration awards.[116] As discussed below, parties who want a neutral to serve in mixed roles must be very clear about the resolution of the foregoing issues and should address pertinent waiver issues (such as parties' waiver of the right to challenge any resulting arbitration award on grounds of ex parte contact).[117] In some other jurisdictions, additional strictures on dual roles may create other procedural hurdles for parties.[118]

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114. 707 So. 2d 234 (Ala. 1997). *See also* JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE AND LAW 794–95 (Wolters Kluwer-Aspen Publishers 3rd ed. 2016).

115. Lack of clarity regarding neutral role(s) was also a factor in the non-enforcement of a stipulated settlement agreement reached through a process described as "binding mediation." *See Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846 (Cal. Ct. App. 2006); *see also* Sussman, *supra* note 7, at 381, 389–90.

116. Concern about the enforceability of arbitration awards is a central theme of recommendations made by the CEDR Commission on Settlement in International Arbitration. *See infra* Part IV.B. *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22 (showing Report of CPR Commission on the Future of Arbitration).

117. *See infra* text accompanying notes 307, 333, 392, 406.

118. Some of these hurdles are exemplified by the laws of Brazil, Singapore, Hong Kong and Australia. *See infra* Part III.

E. *An Emerging View: Creativity, Risk and Effective Problem-Solving*

For the foregoing reasons, many lawyers and dispute resolution professionals eschew process options involving mixed roles for neutrals. However, as noted above, recent studies indicate that today many neutrals do "switch hats" from time to time,[119] with some having established such services as a part of their professional brand. As one professional in the latter group explains,

> *I have embraced [mixed roles] because I view myself, above all else, as a "problem solver," rather than just an arbitrator and a mediator, and because I think being an effective problem solver requires exercising some creativity and involves taking some risk. I strongly believe that mixed mode dispute resolution is the wave of the future of our field.*[120]

In 2001, a Commission sponsored by the New York-based CPR Institute for Dispute Resolution first propounded guidance for business parties considering med-arb and arb-med.[121] Although recognizing that mixed-role processes might prove beneficial in some cases, the emphasis was on the various risks and how they might be addressed. Twenty years later, the experience of neutrals who have since developed a specialization in mixed roles reinforces the notion that such roles can be more fully embraced, if done so selectively and carefully. We may glean a number of tentative conclusions from their collective experience.

1. *There may be strong reasons for the parties to have a neutral "switch hats," including changed circumstances*

As some of the illustrative anecdotes reveal,[122] employing separate individuals to mediate and arbitrate a dispute may not always be practical or preferable. As New York neutral Richard Silberberg puts it,

> *In each instance [where I participated in arb-med], the parties had one or more compelling reasons, some of a highly personal*

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119. *See infra* note 188 and accompanying text. *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22.

120. E-mail from Richard Silberberg, Partner, Dorsey & Whitney, New York, NY, to author (June 12, 2020) (on file with author).

121. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22 (showing Report of CPR Commission on the Future of Arbitration). The sponsoring organization is now known as the International Institute for Conflict Prevention & Resolution. Relevant aspects of the CPR Commission Report are discussed below in Part IV.A.

122. *See* scenarios *supra* section I.B.2.

> *nature, why they wanted me to switch hats and mediate. . . . In each instance, the designation of a different neutral to mediate the dispute would not have accommodated or been responsive to the stated concerns that motivated the parties to ask me to switch hats.*[123]

These situations often involve changed circumstances, including the impact of the COVID-19 pandemic, which came on during a hiatus between arbitration hearings:

> *The Claimant was unemployed, and the Respondents, . . . suddenly found that there was no demand for their services. The parties' counsel informed me that they wished to mediate the dispute rather than schedule additional hearing days. I encouraged counsel to . . . line up a mediator, but they rejected that suggestion, indicating that it "only made sense" to mediate if I would agree to serve as the mediator. Counsel explained that they did not have the inclination to get another neutral "up to speed" nor did their clients wish to expend the money to do so. . . . Counsel further commented that I had heard enough testimony to see where the case was going and that the additional fact testimony remaining to be heard was unlikely to change my view of the case (whatever that might be). I explained to counsel at some length the risks that would be involved if I were to switch hats and serve as the parties' mediator (particularly if the case were not settled), but the parties expressed very little concern about those risks and readily agreed to execute the written Arb-Med consent form that I use in such circumstances. The parties' counsel had concluded that "our clients need the case to be over so they can get back to the business of preserving their livelihood during the pandemic," and "we view you as our best chance to get that done."*[124]

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123. E-mail from Richard Silberberg, Partner, Dorsey & Whitney, New York, NY to author (June 12, 2020) (on file with author).

124. E-mail from Richard Silberberg, Partner, Dorsey & Whitney, New York, NY to author (June 12, 2020) (on file with author). In other cases, the role change was motivated in an international dispute by the parties' belated recognition that their best chance to reach a negotiated settlement would be when they were all together in the same city for arbitration hearings.

> *At the lunch break of the fourth hearing day, the parties' counsel approached me about mediating a resolution of the dispute. As I always do in such circumstances, I suggested that counsel [arrange for another neutral to mediate], but they rejected that suggestion out of hand. Counsel emphasized that since the parties' principals would be unlikely to be in the same room again in light of the diverse geographic locations at which they reside and work, the fortuity of their being together for the arbitration hearing presented the only real opportunity to negotiate a settlement on a "face-to face" basis. The parties' "ask" was that we immediately suspend taking testimony in the arbitration and move into mediation mode. We sent out for sandwiches and did precisely that*

2. *The risks of some mixed-role processes may be overstated.*

Some experienced repeat players insist that the "parade of horribles,"—many of which spring from concerns about mediators shifting to the role of arbitrator after having been exposed to prejudicial information in ex parte discussions with the parties—is overblown. One frequent med-arb neutral has argued that there is an over-emphasis on what happens if mediation fails and a neutral becomes an arbitrator, instead of focusing on the key priority and normal conclusion of the process: a negotiated settlement in mediation.[125] Another dispute resolution professional points out,

> *I have engaged in arb-med-arb approximately ten times during the course of my career as a neutral, each time at the request of both sides' counsel on an ad hoc basis. Fortunately, I have only had to proceed to the second "arb" stage on one of those ten occasions.*[126]

3. *Effective performance of mixed roles requires an atmosphere of trust and the exercise of special care and skill.*

Experienced mixed-role neutrals remain highly attentive to the pervading concerns associated with switching hats, and emphasize that effectively changing hats depends on a confluence of several factors, including: a relationship of significant trust and confidence between neutral and parties; a neutral with a range of pertinent skills and abilities, as well as comfort with taking on multiple roles; autonomous, consensual decision-making by parties who are informed of the known and unknown risks of mixed-role arrangements, as well as procedural options to avoid or minimize risks; and a written agreement clearly setting forth the parties' understandings and incorporating appropriate waiver language.[127] Such elements will be considered more fully in Parts IV and VI of this paper.

Any discussion of neutrals switching hats or of arbitrators engaging in settlement discussions in the commercial realm is particularly

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(once the parties had signed my Arb-Med informed consent form). [Mediation resolved the dispute that night.]

Id.

125. Blankenship Memo, *supra* note 101.

126. E-mail from Richard Silberberg, Partner, Dorsey & Whitney, New York, NY to author (June 12, 2020) (on file with author).

127. *See, e.g.*, E-mail from Richard Silberberg, Partner, Dorsey & Whitney, New York, NY to author (June 12, 2020) (on file with author).

complicated in the realm of cross-border disputes, where differing national cultures and legal traditions have produced a highly variegated landscape. Part II will examine practical and normative realities related to role-switching in the United States where, although conventional perspectives reflect the concerns expressed above, many neutrals are given opportunities to engage in dual roles. It will also compare and contrast very different legal traditions in countries like China and Germany. Part III will explore the impact of legal regulation of dual roles in Brazil, Singapore, Hong Kong and Australia.

II. Mixed Roles in a Variegated International Landscape: The Impact of Culture and Legal Tradition on Perspectives and Practices Regarding Mixed Roles for Neutrals and Settlement-Oriented Activities by Arbitrators

Although the architects of a sophisticated dispute-resolution system enjoy some ambit in designing it, the culture in which they function limits the range of options available to them and inclines them in certain directions when choices are presented.[128]

Cultures and related legal traditions play an important role in the practices and perspectives of those engaged in commercial dispute resolution, both within and across borders.[129] Their influence operates on individuals as well as organizations and industry and professional groups that also impact dispute processing. Culture and legal traditions also affect the way people think about the roles of mediators and arbitrators as well as combined roles. The United States, China and Germany exemplify three distinctive approaches to mixed roles for neutrals and arbitrator engagement with settlement.

A. *The United States: A Complex Mix of Perspectives on Dual Roles and Arbitrator Settlement Activities*

1. *Traditions underpinning current practices and perspectives*

Four decades ago in the United States, the "Quiet Revolution" in dispute resolution ushered in a wave of change in both the public and private spheres of dispute resolution.[130] Beginning in the late 1970s,

128. Oscar G. Chase, Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context 49 (2005).

129. Raymond Cohen, Negotiating Across Cultures: Communication Obstacles in International Diplomacy 11–14 (1991).

130. *See* Linda R. Singer, *The Quiet Revolution in Dispute Settlement*, 7 Mediation Q. 105 (1989); Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on*

U.S. lawyers and adjudicators began to explore opportunities to employ mediation and other third party intervention strategies in the resolution of disputes on the path to court trial or arbitration.[131] Although perspectives vary on the causes and results of these developments,[132] there is no question that they significantly altered the landscape of dispute processing, including commercial dispute resolution. Early on, there was some experimentation with mixed modes, including med-arb, arb-med, and facilitation of settlement by arbitrators. However, the prevailing attitude toward mixed roles for neutrals remains skeptical, reflecting dominant values in U.S. culture and legal tradition.[133]

Alternative dispute resolution (ADR) was (and is currently) presented as an expression of several dominant cultural values, including individual autonomy and self-determination, populism and egalitarianism.[134] Neighborhood justice centers, court-annexed and agency programs, contract-based options and systems of organizational conflict management offer parties the option of new or refined forms of "triadic" dispute processing, including non-binding arbitration, mini-trial, early neutral evaluation, and mediation—all aimed at promoting negotiated settlement or, in some cases, relational change[135]—and binding arbitration, a private counterpart to court adjudication.[136] These approaches offered parties the opportunity for enhanced engagement in dispute processing as well as greater control over process and outcome. From a business perspective, ADR made it possible to employ a tailored third-party intervention strategy over which the parties exerted some degree of control in lieu of the cost, length, and risks of going to court.[137]

As for other sectors, the central thrust of the Quiet Revolution for the business community was toward mediation. Provisions for

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Four Decades of the Quiet Revolution in Dispute Resolution, 18 CARDOZO J. CONFLICT RESOL. 513 (2017).

131. Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 848–50 (2004).

132. Oscar Chase touches on various narratives associated with these developments, including concerns with the costs and limitations of litigation, a societal overemphasis on law, a renewed emphasis on community, and the drive toward privatization. CHASE, *supra* note 128, at 94–113.

133. This is reflected in the Report of CPR Commission on the Future of Arbitration. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 20–22.

134. CHASE, *supra* note 128, at 109.

135. *See* Stipanowich & Lamare, *supra* note 14, at 9–12.

136. *Id.* at 7–9, 19–22.

137. *Id.* at 60–66.

multi-step dispute resolution with mediation as a preliminary stage began to appear in standard form contracts for construction or commercial transactions,[138] in conflict management programs for non-unionized workplaces, and in other settings.[139] Besides saving costs and reducing the time to resolve a business dispute, mediation sometimes produces more creative and effective solutions.[140] Most importantly, and in tune with the individualist society of which it was borne, mediation is founded on the concept of party self-determination. It leaves control of the dispute in the hands of the parties, and the final resolution, if there is one, is theirs to achieve by their own lights and according to their particular priorities and values.[141]

From early on, another strain of U.S. culture and legal tradition was evident in ADR: the emphasis on substantive and process norms, especially those associated with court trial. Dispute resolution mechanisms incorporated elements that reflected the United States' law- and legal-process-oriented culture, and the fact that parties (and counsel) bargain "in the shadow of the law."[142] Court-annexed summary jury trial telescoped elements of traditional trial, producing an advisory jury verdict as a predictive device and, perhaps, a spur towards settlement.[143] Court-annexed non-binding arbitration performed a similar function utilizing an advisory panel of trial attorneys.[144]

The shadow of the justice system also heavily influenced the development of mediation. In this "low power distance" culture, mediators do not typically derive their authority from hierarchical

138. *See* Stipanowich, *supra* note 22.

139. *See* DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT 3–22 (2003).

140. *See* Stipanowich, *supra* note 138, at 5–6.

141. *See* Stipanowich & Lamare, *supra* note 14, at 60–66. *See also* RICHARD D. LEWIS, WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES: A MAJOR NEW EDITION OF THE GLOBAL GUIDE 180–81 (Nicholas Brealey International 3d ed. 2005).

142. Mariana Hernandez Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 92 (2008) ("In the United States, ADR generally works as an alternative to the judiciary within the framework of the legal system, operating under what has been described as 'the shadow of the law.'"); Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789 (2009).

143. Benjamin F. Tennille et al., *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 72–97 (2010).

144. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE & LAW 569 (Wolters Kluwer-Aspen Publishers 3d ed. 2016).

positions but from their perceived value in helping facilitate settlement. For many U.S. mediators, this ultimately meant bringing to bear their ability to offer perceptibly valuable insights regarding the strengths and weaknesses of parties' cases and the likelihood of their success in court.[145] One of the earliest studies of commercial mediation processes examined the growing use of mediation in construction disputes; a survey of individual mediated cases indicated that the great majority of mediators were attorneys or retired judges.[146] In almost three-quarters of the reported cases the mediators expressed to the parties views of the factual and legal issues in dispute.[147]

American opponents of such "case evaluation" practices also couch arguments in terms in line with a dominant cultural dimension. They embrace an individualist narrative, maintaining that directive mediators who offer evaluations of factual and legal arguments or assess likely outcomes in litigation were undermining party autonomy and self-determination.[148]

Individualist and egalitarian narratives also underpin arguments that the mediative function be isolated from the judicial function.[149] Mirroring the hostility of U.S. law and practice to overt judicial settlement efforts, U.S. law and practice established a high barrier between the activities of the mediator and the court.[150] Despite a trend toward greater emphasis on what has been called "managerial judging" aimed at moving a case along and promoting settlement,[151] this dividing line remains bright. The primary national standard for mediation, the Uniform Mediation Act, focuses on preventing confidential communications made during mediation from being disclosed in litigation, with certain exceptions.[152]

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145. It should be noted that many retired judges have, however, assumed the mantle of mediator, and successfully traded upon their experience as adjudicators and case evaluators.

146. Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,* 31 WAKE FOREST L. REV. 65, 115–16 (1996).

147. *Id.* at 118, 123.

148. *See, e.g.*, Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

149. *See, e.g.*, James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 11 (Fall 1999) (outlining various reasons why Judges should not mediate their cases).

150. *See infra* note 152 and accompanying text.

151. CHASE, *supra* note 128, at 63.

152. UNIFORM MEDIATION ACT, *Prefatory Note* (NAT'L CONF. OF COMM'RS OF UNIF. STATE L. 2003) ("[A] central thrust of the Act is to provide a privilege [to mediation communications] that assures confidentiality in legal proceedings.").

Similar concerns are reflected in practices and perspectives regarding mediation vis-a-vis binding arbitration, which developed as a wide-ranging alternative to court adjudication.[153] The professional orientation of the mediator was conceived as distinct from that of the arbitrator, and, even today, these roles and competencies are viewed as totally discrete.[154] The academic and practice-oriented literature is replete with repetitions of the mantra that in U.S. practice the roles of mediator and arbitrator *shalt not be joined.*[155] The primary concern is that during mediation, a neutral may be privy to information shared confidentially in caucus, which could at least subconsciously influence a later decision if the mediator switches roles and becomes an arbitrator.[156] This concern, which also underpins rules prohibiting ex parte contact between arbitrators and parties,[157] appears to mirror perspectives arguing for the separation of mediation from the judicial function.[158] Some commercial dispute resolution rules and procedures prohibit a neutral from changing roles.[159] Leading ethical standards for mediators and arbitrators reinforce the inherent differences in the roles.[160]

Although arbitration was for many years characterized by courts themselves as a quicker, leaner and less punctilious forum than court

153. *See* Blankley, *supra* note 28, at 325.

154. This is the case, although many professional arbitrators also have experience with mediation. *See infra* text accompanying note 188.

155. Donahey, *supra* note 28, at 76–77; Favalli & Hasenclever, *supra* note 28; Ehle, *supra* note 28, at 79, 83–85; Kaufmann-Kohler, *supra* note 28, at 190; *cf.* Fuller, *supra* note 91, at 29–31 (offering arguments against med-arb in neutral practice under collective bargaining agreements).

156. *See, e.g.*, Deason, *supra* note 28, at 228–29; Blankley, *supra* note 28, at 332–37; Pappas, *supra* note 28, at 177–78; Vera, *supra* note 28, at 192–94; Donahey, *supra* note 28, at 76–77.

157. The *AAA/ABA Code of Ethics for Commercial Arbitrators* provides that the neutral "should not discuss a proceeding with any party in the absence of any other party." CODE OF ETHICS FOR ARB. IN COMM. DISP., Canon III, B (AM. ARB. ASS'N 2004).

158. *See supra* text accompanying notes 149–52.

159. CPR NON-ADMINISTERED ARBITRATION RULES, (INT'L INST. FOR CONFLICT PREVENTION 2018), https://www.cpradr.org/resource-center/rules/arbitration/non-administered/2018-cpr-non-administered-arbitration-rules. *See id.* Rule 19.2 (noting that where arbitrators arrange for mediation during the proceedings, the "mediator shall be a person other than a member of the Tribunal."); *id.* Rule 19.3 ("The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.").

160. Compare the Model Standards of Conduct for Mediators (2005) (emphasizing party self-determination, competence as a mediator, and obligations to maintain confidentiality) and the Code of Ethics for Arbitrators (2004) (emphasizing the obligations of arbitrators to maintain the integrity and fairness of the arbitral process, to maintain impartiality and independence from the parties, and to avoid ex parte communications).

adjudication, perceptions changed over time as arbitration was gradually thrust into the role of a full-blown court surrogate in civil cases by the U.S. Supreme Court,[161] as exemplified by the Court's opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[162] Today arbitration, like court adjudication, is often described (and evaluated) in terms of a process for divining and applying principles of justice. In pursuit of such ends, the independence and impartiality of the neutral is a central concern of arbitration law.[163] Exposing neutrals to confidential information from one side could undermine this goal.[164] Keeping the functions of mediator and arbitrator separate and discrete, like those of mediator and public judge, also reinforces the cultural emphasis on self-determination, first by encouraging candid and thorough communication with the neutral during mediated negotiation, and second by enabling parties to be confronted by and able to respond to all of the evidence in presenting their cases before an arbitrator unacquainted with the parties and their dispute. In a number of cases across various Western jurisdictions, arbitral awards have even been set aside for due process defects or other procedural irregularities related to the use of med-arb.[165]

Despite these commonly expressed concerns regarding the use of med-arb, many U.S. neutrals do find themselves switching hats some of the time.[166] Switching hats in the U.S. is culturally acceptable—even expected—if the process is the result of party self-determination, the touchstone of individualist culture. U.S. courts have therefore recognized the parties' right to tailor a mixed-role dispute resolution process to their needs, while exerting care to ensure that the parties have given informed consent to the neutral switching roles.[167] Some leading dispute resolution procedures contemplate the possibility of neutrals playing dual roles, or of an arbitrator rendering assistance to the parties' settlement efforts.[168]

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161. Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1, 10 (2010).

162. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (challenging traditional perspectives of the capabilities and limitations of arbitration and arbitrators as expressed in *American Safety Eqpmt. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968)).

163. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW III, Ch. 36 (Aspen 1994).

164. Pappas, *supra* note 28; Deason, *supra* note 28; Blankley, *supra* note 28.

165. For examples of awards vacated on the basis of confidentiality issues, *see* Blankley, *supra* note 28, at 346–58; Deason, *supra* note 28, at 229–49.

166. *See infra* text accompanying note 188.

167. *See* Sussman, *supra* note 109, at 71.

168. For example, JAMS Comprehensive Arbitration Rules, Rule 28 "Settlement and Consent Award" provides:

Given societal concerns about the mixing of roles, parties should reasonably expect to have a fair opportunity to consider and weigh these issues before committing themselves to participate in such processes. Along the way, parties consenting to med-arb often attempt to address concerns about the neutral playing mixed roles by agreeing that the mediation phase will be conducted without ex parte caucuses, or arrangements that permit either party and/or the neutral to withdraw from the proceeding before the arbitration phase in the event mediation is unsuccessful.[169]

2. *The pervasive influence of the bench and bar*

In the United States, the legal profession often wields enormous influence in dispute resolution processes, particularly in the realm of business disputes.[170] Today, representatives of the bench and bar

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

JAMS Comprehensive Arbitration Rules & Procedures 28 (JAMS 2014).

169. *See supra* Part I.B.2.b (offering example of no-caucus mediation in arb-med where there was a possibility of returning to arbitration if mediation did not settle the dispute).

170. *See* Stipanowich, *Insights on Mediator Practices and Perceptions, supra* note 59.

tend to dominate the ranks of mainstream mediators[171] and arbitrators[172] and the neutral panels of leading dispute resolution organizations.[173] Leading dispute resolution organizations focused on commercial conflict, such as the International Institute for Conflict Prevention & Resolution,[174] have tended to concentrate on the activities of corporate legal departments and of law firms.[175] When we speak of party agendas and choice-making in dispute resolution, it is impossible to ignore the controlling role played by lawyers in negotiating and drafting contracts with dispute resolution provisions and in post-dispute counseling and advocacy.[176] Lawyers' perceptions about their roles and those of other participants in these processes may be heavily colored by professional culture and the legal system from which it derives—both of which, as seen above, are often inextricably intertwined with broader cultural values.[177]

Having become a fixed and familiar element of U.S. litigation process, mediation is also largely the province of legal advocates, and

171. More than nine-tenths (90.6%) of 117 respondents to a survey of members of the International Academy of Mediators had practiced as litigation attorneys, with 71.8% of all respondents indicating they had worked as a litigation attorney for 11 years or more and 9.4% reporting at least a quarter century of litigation experience. Slightly over one-tenth (11.1%) said they had served as a judge, and just over one-quarter (25.6%) had transactional lawyering experience. Although about one-fifth of respondents (19.7%) claimed non-legal experience, only 10 individuals (8.5% of the total response group) lacked experience as an attorney or judge. These results reinforce the conclusion that at least when it comes to mediating cases in litigation, lawyers tend to hire those with legal backgrounds as mediators. INT'L ACAD. OF MEDIATORS, STRAUS INST., SURVEY ON MEDIATOR PRACTICES AND PERCEPTIONS (2014) (results on file with author).

172. In a survey of members of the U.S. College of Commercial Arbitrators conducted by the Straus Institute, the great majority (81.9%) of respondents reported having a "litigation" background. About three in ten (28.3%) claimed experience as transactional attorneys, and 9.4% as judges. Although two individuals reported having "non-legal" backgrounds, only one lacked experience as an attorney. Stipanowich & Ulrich, *supra* note 10, at 404–05.

173. A notable example is JAMS, which sponsors panels composed of retired judges and lawyers.

174. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR), https://www.cpradr.org/.

175. *See generally id.*

176. Professor Chase observes: "In many respects much of ADR has become part of 'official' disputing not only because it is so often court annexed but also because it has undergone a process of legalization by virtue of its regulation by law and lawyers." CHASE, *supra* note 128, at 95.

177. MICHAEL MCILWRATH & HENRI ALVAREZ, COMMON AND CIVIL LAW APPROACHES TO PROCEDURE: PARTY AND ARBITRATOR PERSPECTIVES, IN INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES 2–1, 2–4 (Horacio A. Grigera Naon & Paul E. Mason eds., 2015).

their influence on mediation is pervasive.[178] The looming realities of litigation and the prospect of court trial are reflected in the very common emphasis on mediator evaluation of parties' courtroom prospects and "litigation leverage."[179] Nonbinding evaluations by a mediator may very well prompt early, informal settlement of a dispute and produce process cost savings and better results. Moreover, the nonbinding nature of such evaluations may offer useful and objective insights for client and counsel while leaving ultimate control in their hands. From the perspective of lawyer control, therefore, leaving evaluation in the hands of a mediator is likely to be strongly preferred over an evaluation by the judge or arbitrator of the case who ultimately has the power to make a binding judgment.[180]

The legal culture has also been the primary influence on the evolution of American commercial arbitration. Binding arbitration has expanded across much of the landscape of civil adjudication and taking on the role of court surrogate, as noted above. During this time, arbitration processes have tended to gradually embrace more of the features of litigation, including extensive discovery, prehearing motion practice, court evidentiary standards, and awards supported by written opinions.[181] Whatever their practical utility, these features have been identified with increased costs and delays that are frequently at odds with the priorities of business parties.[182] This phenomenon has prompted user demands for speed and cost-efficiency in arbitration practice,[183] as well as rising rates of settlement prior to

178. Thomas J. Stipanowich, *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution*, 34 (4) CONSTR. LAW. 13, 13 (Fall 2014) (Special Issue), *reprinted as a chapter in* 100 YEARS: CHARTERED INSTITUTE OF ARBITRATORS, SELECTED TOPICS IN INTERNATIONAL ARBITRATION—LIBER AMICORUM (2015), *http://ssrn.com/abstract=2484598*.

179. Stipanowich, *Insights on Mediator Practices and Perceptions, supra* note 59, at 9–10.

180. *See* Stipanowich & Lamare, *supra* note 14, at 60–66 (discussing importance of control to lawyers and clients).

181. Stipanowich, *supra* note 161, at 1–20.

182. Leslie A. Gordon, *Clause for Alarm*, A.B.A. J. 19 (Nov. 2006); Sylvia Hsieh, *Arbitration Falling out of Vogue*, LAWYERSUSA 1 (Mar. 10, 2008); *Knocking Heads Together*, ECONOMIST, Feb. 3, 2000, at 62; Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?,* INSIDECOUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW (July 13, 2006), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005457792; Michael M. Marick et al., *Excess, Surplus Lines and Reinsurance: Recent Developments*, 26 TORT & INS. L.J. 231, 232 (1991); Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J. 13 (June 14, 2004); Benjamin J.C. Wolf, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306–07 (2006).

183. *See* THE COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS ON EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS,

award, even during the pre-hearing process.[184] The phenomenon of "arbi-gotiation" has sometimes led, among other things, to experienced arbitrators strategically handling key procedural or substantive issues to stimulate the early settlement of the dispute.[185] Paradoxically, it has also opened the door for mediated negotiation prior to or during the course of arbitration[186] and, occasionally, triggered the use of med-arb or arb-med.[187]

3. *Guidance on med-arb and arbitrators' involvement in settlement*

To summarize, U.S. attorneys and dispute resolution professionals tend to disfavor mixing the roles of arbitrator and mediator. Their conventional stance respecting the separation of these functions is broadly consistent with predominant U.S. cultural values and legal traditions, and, arguably, with the interest of legal advocates in maintaining control over the dispute resolution process. On the other hand, it appears that for one reason or another, many U.S. neutrals have been given the opportunity to play mixed roles in the course of resolving disputes, at least occasionally.[188] It is perhaps natural that

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COUNSEL, ARBITRATORS AND ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich et al. eds., 2010), *http://ssrn.com/abstract=1982169*.

184. Stipanowich & Ulrich, *supra* note 28, at 17.

185. Stipanowich & Ulrich, *supra* note 10, at 458.

186. Stipanowich & Ulrich, *supra* note 28, at 21–25.

187. *Id.* at 25–28.

188. This is illustrated by results from a survey of experienced arbitrators, all members of the U.S. College of Commercial Arbitrators, conducted by the Straus Institute:

> Those 59 Survey respondents who indicated they were at least "sometimes" concerned with the informal settlement of cases before them were asked about their experiences changing roles or playing multiple roles (that is, as both an arbitrator and mediator) in a particular case. Of those 59 individuals, just under half (45.8%) indicated that they had "sometimes" mediated a dispute in which they had been appointed an arbitrator . . . ."
>
> The respondent sub-group was also asked, "Have you served as both a mediator and arbitrator with respect to the same dispute, where during arbitration, the parties asked you to switch to the role of an arbitrator?" More than nine-tenths of the group (25 of 27, or 92.6%) answered, "Yes." In response to the further question, "Have you served as both a mediator and an arbitrator with respect to the same dispute, where the parties agreed beforehand to have you first mediate and then arbitrate, if necessary?," two-thirds of the group (18 of 27, or 66.7%) responded affirmatively. Thus, there is support for the notion that despite conventional concerns among U.S. advocates and arbitrators respecting neutrals wearing multiple hats, quite a few arbitrators have experience with forms of single neutral med-arb."

Stipanowich & Ulrich, *supra* note 10, at 464–65. An earlier survey of lawyers and arbitrators regarding international commercial arbitration indicated that at least

as attorneys and neutrals have amassed experience with mediation and arbitration and become accustomed to employing these and other dispute resolution processes in combination, some have experimented with the possibilities afforded by having neutrals engaged in dual roles.[189] In such circumstances, experts suggest, parties should exercise special deliberation and caution. These realities are mirrored in the most authoritative statement regarding U.S. perspectives on the subject of med-arb and the role of arbitrators in settlement, the Final Report of the CPR Commission on the Future of Arbitration,[190] discussed in Part IV.A.

U.S. parties and counsel are sometimes surprised to encounter widely disparate perspectives and practices regarding mixed roles and arbitrators engaging actively in settlement efforts during the resolution of international disputes. As discussed in detail below, these variances range from embracing a highly flexible view of mixed roles and arbitral engagement in settlement (exemplified by the traditions of China and Germany) to channeling the use of mixed roles by legislation (Singapore, Hong Kong, and Australia) or outright prohibition (Brazil).

B. *China: Mixed Roles (Arb-Med, Arb-Med-Arb) as a Manifestation of Tradition and National Culture*

In China, it is customary for arbitrators to facilitate settlement discussions if the parties consent.[191] Settlement facilitation by arbitrators in China is a reflection of traditional practices[192] overlaid by

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some U.S. respondents did become involved in settlement-related activities, although U.S. respondents were much less likely to participate directly in settlement negotiations than their German counterparts. *See* BUHRING-UHLE ET AL., *supra* note 2, 111–28; *see also* Favalli & Hasenclever, *supra* note 28, at 2, 8 ("A detailed analysis may show, however, that the arbitrator could participate in settlement proceedings, even under the auspices of common law rules, if certain limitations are respected." And later on page 8: "A review of the ICDR rules, the FAA, and U.S. Federal Rules of Civil Procedure does not seem to *a priori* exclude that the arbitral tribunal induce and (even) accompany settlement negotiations between the parties."); Donahey, *supra* note 28, at 77 ("[T]he traditional Western view is changing, largely due to the influence of Asian cultures.").

189. Several exemplary scenarios are presented in Part I.

190. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 20–33.

191. On the practice of arb-med in China, *see* Kaufmann-Kohler & Kun, *supra* note 56; Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONFLICT RES. 777 (2014); FAN KUN, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS 163–69.

192. On the legal tradition of non-adversary method of dispute resolution in China, *see* Fan Kun, *Glocalization of Arbitration: Transnational Standards Struggling Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175 (2013); Fan Kun, *Glocalization of International Arbitration—Rethinking*

recent government policies.[193] If discussions do not resolve all of the issues in dispute through amicable settlement, the neutral may resume the arbitral role if the parties have no objection. This mixed-role process is reflected in the rules of leading Chinese arbitration institutions. There are reports that twenty to thirty percent of CIETAC arbitration cases are resolved through conciliation (mediation).[194] However, the CIETAC Rules also provide that if the parties, assisted by the arbitrator-turned-conciliator, are unable to resolve their dispute informally, the neutral once again returns to the role of arbitrator (i.e., "arb-med-arb").[195]

It is apparent that during the conciliation/mediation process, arbitrators may conduct ex parte private caucuses with parties, and may conceivably be exposed to confidential information of potential prejudice to an opposing party. There is explicit procedural protection for arbitration proceedings following unsuccessful conciliation in the form of rules that make inadmissible in evidence communications made during conciliation;[196] it is unclear, however, how a conciliator-turned-arbitrator is to eliminate such information from his or her mind. Moreover, the provisions are silent as to whether the arbitrator

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Tradition-Modernity East-West Binaries Through Examples of China and Japan, 11 U. PA. E. ASIA L. REV. 244 (2016).

193. *See* Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMPAR. L. 4 (2011); Hualing Fu,, *The Politics of Mediation in a Chinese Country: The Case of Luo Lianxi*, 5 AUSTRALIAN J. OF ASIAN L. 107 (2003); Hualing Fu and Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, *in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA (Margaret Woo and Mary Gallagher eds., 2011).

194. *See* Paul E. Mason, *Follow-Up Note to 'The Arbitrator as Mediator, and Mediator as Arbitrator'*, 29 J. INT'L ARB. 225, 226 (2012) (citing Alison Ross, *Med-Arb Put in Context by Hong Kong Court,* GLOBAL ARB. REV (Dec. 12, 2011) ("Whether true or not, according to the *GAR,* the Secretary-General of the China International Economic and Trade Arbitration Commission, Yu Jianlong, said that 20% to 30% of CIETAC's caseload is resolved by this method each year.")). On the current practice of med-arb, *see* Kaufmann-Kohler & Kun, *supra* note 56; Kun, *An Empirical Study of Arbitrators*, *supra* note 191, at 777–811; Kun, *Arbitration in China*, *supra* note 191, at 163–69.

195. CIETAC, *Arbitration Rules*, art. 47(9) (2015). It should, however, be noted that Article 48(8) also provides for the possibility of parties who wish to conciliate their dispute, but do not wish to have the same neutral arbitrate and conciliate their dispute, may request CIETAC to facilitate settlement of their dispute. China International Economic and Trade Arbitration Commission ("CIETAC"), *Arbitration Rules*, art. 47(8) (2015); Beijing Arbitration Commission ("BAC"), *Arbitration Rules*, art. 67(2) (2014).

196. CIETAC, *Arbitration Rules*, art. 47(9) (2015); BAC, *Arbitration Rules*, art. 42(5) (2014).

is allowed to use any confidential information—including any statement, opinion, view or proposal made in conciliation either in joint or private session—to form the basis of the arbitration award.[197]

Although it may or may not reflect normal practice, there are reported instances of a Chinese arbitrator-turned-mediator acting in a highly directive manner, even to the point of dictating terms of settlement for the parties. An "arb-mediator" might conceivably go as far as to tell the parties (during private caucuses or indirectly, through third parties) that if they do not accede to proposed settlement terms, his or her ultimate arbitration award will contain the same terms.[198]

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197. CIETAC 47(9) and Shanghai International Economic and Trade Arbitration Commission art. 41(8) only prohibit *parties* to invoke "any opinion, view or statement, or any proposal or proposition expressing acceptance or opposition" made in the process of conciliation in the subsequent arbitral proceedings. It is not clear whether such obligation does extend to the conciliator-turned-arbitrator when rendering the award. CIETAC, *Arbitration Rules*, art. 47 (2015); Shanghai International Economic and Trade Arbitration Commission ("SHIAC"), *Arbitration Rules*, art. 41 (2015). According to two Chinese commentators: "The Law is further silent on whether arbitrators are restricted from using their knowledge of such information when deciding the case afterwards." They further reported that "many mainland Chinese med-arbitrators are found to have heavily relied on such information in making the award." Weixia Gu & Xianchu Zhang, *The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration Between Hong Kong and Mainland China*, 42 H.K.L.J. 1001, 1021 (2011). For supporting views, *see* Fan Kun, *The Risks of Apparent Bias When an Arbitrator Acts as A Mediator: Remarks on Hong Kong Court's Decision in Gao Haiyan*, 13 Y.B. PRIV. INT'L L. 535, 553–54 (2011); Lijun Cao, *Combining Conciliation and Arbitration in China: Overview and Latest Developments*, 9 INT'L ARB. L. REV. 84, 89 (2006); Russell Thirgood, A *Critique of Foreign Arbitration in China*, 17 J. INT'L ARB. 89, 94–95 (2000).

198. An example of such techniques is found in the recent case *Gao Haiyan v Keeneye Holdings Ltd*. Professor Weixia Gu from the Faculty of Law of the University of Hong Kong reports as follows the salient facts of the case which demonstrates a clash in culture between the Chinese' and the United States' interpretation of a neutral's ethical obligations:

> During mediation, there was a private meeting between an arbitrator nominated by the applicants, the Secretary General of the Xi'an Arbitration Commission, and an affiliate of the respondents who was told to work on an RMB 250 million proposal with the respondents. Following an unsuccessful mediation, the tribunal resumed arbitration proceedings and rendered an arbitral award of RMB 50 million, an amount much lower than that proposed during the mediation. The Hong Kong Court of First Instance refused to enforce the award on the ground that the award was tainted by the appearance of bias. It appeared to the court that the mediators first pushed for a favourable result for the applicants, and when the respondent refused to cooperate, the mediators-turned-arbitrators penalized the respondents with an adverse judgment in arbitration. The Court of Appeal reversed this decision, holding that apparent bias had not been sufficiently proven to warrant a refusal to enforce the award.

Weixia, *supra* note 72, at 99 (citing Gao Haiyan v Keeneye Holdings Ltd., [2010] H.C.C.T. ¶¶ 5, 17, 52–69, 100 and 102, as appealed in Go Haiyan v. Keeneye Holdings

These practices are generally consistent with cultural traditions emphasizing the preference for amicable dispute resolution[199] and informal settlement over adjudication.[200] Arb-mediators being highly directive also comports with a cultural preference for having authority figures play a central role in helping to achieve settlement, or, alternatively, to have discretion to render a fair decision based on the parties' particular circumstances and the context of the dispute—a decision which will also have the effect of re-establishing relational harmony.[201] Whereas in the U.S., the locus of power is in many respects with the parties (and counsel), whose choices determine the shape and structure of the process, in high power distance societies like China the power is very much in the hands of the authority figure—the arbitrator or judge. Parties actually expect and appreciate direction from a neutral—direction which is symbolic of fairness in the parties' eyes.[202] These preferences reflect Confucian standards and collectivist values emphasizing the necessity of avoiding conflict, as well as the emphasis on preservation of community or societal stability and harmony.[203] Adversarial processes such as adjudication remain an ultimate last resort, as they are viewed as potentially

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Ltd., [2011] C.A.C.V ¶¶104–06). For supporting views, *see also* Peter Phillips, *Commercial Mediation in China: The Challenge of Shifting Paradigms*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION*:* THE FORDHAM PAPERS 319, 320–21 (Arthur W. Rovine ed., 2008); Vera, *supra* note 28, at 184; Stipanowich, *supra* note 2, at 1213–21 (discussing traditions and recent evolution of mediation in China); Thomas J. Stipanowich et al., *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 PEPP. DISP. RESOL. L.J. 379 (2009) (Transcript of international videoconference co-sponsored by The Beijing Arbitration Commission and The Straus Institute for Dispute Resolution); Kun, *The Risks of Apparent Bias*, *supra* note 197, at 93–114.

199. Vera, *supra* note 28, at 185–86; Kaufmann-Kohler & Kun, *supra* note 56, at 491 ("For the Chinese, the problem of caucusing is much less serious in practice than it is in theory, as they believe that the parties are not likely to reveal to the mediator damaging facts during the mediation phase that the mediation/arbitrator could not have found out from the record. The Chinese believe that if the judges are trusted to be capable of disregarding inadmissible evidence when they make the adjudication, there should be no reason to doubt those well-trained arbitrators in their ability to remain impartial despite the information obtained during mediation.").

200. Kaufmann-Kohler & Kun, *supra* note 56, at 485.

201. Vera, *supra* note 28, at 186.

202. Phillips, *supra* note 198, at 319, 320–21.

203. Fan Kun, *Glocalization of Arbitration*, *supra* note 192, at 187–92; Bobby Wong, *Traditional Chinese Philosophy and Dispute Resolution,* 30 HONG KONG L.J. 304, 307 (2000); Zhengdong Huang, *Negotiation in China: Cultural and Practical Characteristics,* 6 CHINA L. REP. 139, 139 (1989–90). Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 327 (1996) (Robert Perkovich, arbitrator and mediator, reports visits in People's Mediation Committees China and a conversation with Section Chief Jin Zhao Wen who stated that there were thirty-eight mediation

undermining of social harmony and may lead to a loss of face for participants.[204]

C. *Germany: Expanded Concepts of Arbitrator as Settlement Facilitator*

In legal traditions such as those of Germany and Switzerland, arbitrators "are generally willing at an early stage in the proceedings to provide the parties with an indication of their preliminary views on the issues in the case."[205] Such practices stand in the background of arbitration rules and guidelines promulgated by the CEDR Commission[206] as well as the Prague Rules,[207] both of which are discussed in Part IV.

In Germany, as in many other civil law jurisdictions, reducing costs and delays generally have not been the key driving factors for parties and counsel to use dispute resolution processes such as mediation or arbitration since litigation in civil law systems is usually much less costly and lengthy than in common law systems.[208] The civil law preference for documentary evidence over witness testimony has the effect of substantially reducing the time for hearings to no

committees at work in Cai Xian, a district in the west of Suzhou, which purpose is to "make people happy" and to see that people "live in harmony."); Vera, *supra* note 28, at 164; Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966); BEE CHEN GOH, LAW WITHOUT LAWYER, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION 1 (2002).

204. Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China,* 5 CAL. L. REV. 1284 (1967); Wang Wenying, *The Role of Conciliation in Resolving Disputes: A PRC Perspective*, 20 OHIO ST. J. DISP. RESOL. 421 (2005). It should, however, be noted that arbitration is gaining increasing popularity in China. CIETAC's caseload has doubled in the past ten years, from 979 foreign domestic and domestic cases in 2005 to 1968 cases in 2015. *See* CIETAC, *Statistics*, http://www.cietac.org/index.php?m=page&a=index&id=40&l=en. Yet, it has been reported that approximately 20 to 30 percent of CIETAC' cases are settled through med-arb, reflecting the Chinese' strong preference for amicable means of settlement. Alison Ross, *Med-Arb Put in Context by Hong Kong Court,* GLOBAL ARB. REV (Dec. 12, 2011).

205. CEDR COMMISSION, *supra* note 28, at 2.2, p. 2.

206. *See id.*

207. Dendorfer, *supra* note 58, at 9–10; Prague Rules, *Rules on the Efficient Conduct of Proceedings in International Arbitration* (2018), https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf.

208. MCILWRATH & ALVAREZ, *supra* note 177, at 2–17.

more than a day or two, as witness testimony is limited and is generally only used to fill any gaps in the documents produced.[209] In addition, there is no pretrial process and the concept of pretrial discovery is virtually non-existent.[210]

Moreover, in Germany and some other civil law systems, the role of the judge diverges considerably from common law jurisdictions: the civil law judge is much more the driver of the process. The judge has the responsibility to decide both facts and law, since juries in the common law fashion are not an option. Civil law judges also have a proactive duty to elicit relevant evidence. Indeed, German judges have responsibility for gathering and sifting evidence with the active involvement of lawyers.[211] They are also responsible for scheduling the hearing after getting a preliminary sense of the dispute from the materials gathered; summoning witnesses identified in the parties' pleadings whose testimony seems necessary;[212] and conducting the main examinations.[213] If either the judge or counsel need assistance on technical issues, the judge—in consultation with the lawyers—will appoint an expert and define his or her role.[214]

Throughout the proceedings, the German judge seeks to enlist the help of counsel in finding procedural economies; s/he methodically searches for the most efficient and cost-effective way to resolve the dispute, including identifying the single issue of law or fact that, if addressed, might dispose of the case.[215] During the course of hearings, moreover, it is common for a German judge to discuss the case with lawyers and even suggest avenues of compromise.[216] As the case progresses, the judge may sometimes go so far as to indicate his provisional views of the likely outcome and even encourage a party to

209. *Id.* at 2–15.

210. Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions,* 73 NOTRE DAME L. REV. 1017, 1020 (1999). The burden of proof is on the claimant who is required to disclose only the facts needed to prove his claim. In order to get the other party to produce a specific document, a request must be made to the judge and the demanding party must make a strong argument as to the need of the document, its relevance to the dispute and also the existence of the document itself. As opposed to the common law systems, requests for documents do not extend to all documents that are deemed relevant for the plaintiff to make his claim. *Id.* at 2–9.

211. John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 826 (1985). The judge's dossier includes the parties' pleadings, the documents produced by the parties and any subsequent evidence-gathering. *Id*. at 827.

212. *Id.* at 828.

213. *Id.*

214. *Id.*

215. *Id.* at 830.

216. *Id.* at 828.

abandon a case for which the party does not have sufficient supporting evidence and legal arguments.[217] These activities could fairly be characterized as forms of conciliation by the adjudicator, although some German lawyers might take issue with such a label.[218]

Perhaps this traditional approach of German courts is a reflection of cultural preferences for minimizing uncertainty and maximizing transparency in the dispute resolution process, and may also evince German faith in expert guidance and the need to have right answers.[219] It may also be the natural result of Germany's codified legal regime, as well as a lack of civil juries that put the judge in the driver's seat.[220] There is strong emphasis on the result, the content of decision, rather than the process by which it is reached.[221]

The proactive role of judges in Germany has strongly influenced the practice of German arbitrators. Some German arbitrators offer, upon the consent of the parties, their preliminary views about the parties' case. Article 27.4 of the 2018 Arbitration Rules of the Deutsche Institution für Schiedsgerichtsbarkeit e.V. ("DIS") (German

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217. *Id.* at 832. Furthermore, as experienced German advocate and commercial arbitrator Jan Schäfer explains:

> The 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 tell 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.

E-Mail from Jan K. Schäfer, LL.M., Partner, Rechtsanwalt, King & Spalding LLP, Frankfurt am Main, Germany to Prof. Stipanowich (Nov. 2, 2016) (on file with author).

218. German advocate and arbitrator Jan Schäfer explains:

> If you define conciliation as an ADR method in which a third neutral provides a specific settlement proposal after having heard the parties that the parties are free to accept, I think it would be fair to label the German judge's approach as conciliation. Though you will likely find a number of German ADR-lawyers who would take issue with using ADR-terminology in the court or arbitration context.

Id.

219. Geert Hofstede & Robert R. McCrae, *Personality and Culture Revisited: Linking Traits and Dimensions of Culture*, Cross-Cultural Research 52, 74 (Feb. 2004).

220. Schäfer E-Mail, *supra* note 217.

221. *See* Langbein, *supra* note 211.

Institution of Arbitration) directs arbitrators to discuss, among other things, measures to promote procedural efficiency including "[p]roviding the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto."[222]

Obtaining an arbitrator's preliminary views allows the parties to avoid an unexpected binding decision about their case and to increase the likelihood of a negotiated outcome for which they retain an important degree of control.[223] Such practice also assists German parties to make a fully informed decision as to whether they ought to settle their dispute or continue to arbitral proceedings.[224] In the case of an amicable resolution, it also provides them with reinsurance that their settlement is *right,* reflecting the outcome of an adjudicated process.

In addition, if the parties agree, German arbitrators may take other steps in order to promote amicable settlement. Article 26 of the DIS Arbitration Rules provides: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues."[225] Practices among arbitrators vary, and some may go so far as to propose terms of settlement to the parties.[226] DIS Conciliation Rules contemplate, moreover, that "[t]he parties in conciliation proceedings may, at any stage in the proceedings, agree in writing

222. Deutsche Institute für Schiedsgerichtsbarkeit (German Arbitration Institute), 2018 DIS Arbitration Rules, Art. 27.4 (2018), https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules ("During the case management conference, the arbitral tribunal shall discuss with the parties the following measures for increasing procedural efficiency: . . . Providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto.").

223. Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 ARB. INT'L 523, 534–36 (2005) (explaining, as a German arbitrator, how he proceeds to seek the parties' consent before offering his preliminary views regarding the parties' dispute or before making a proposal containing the terms of settlement).

224. *Id.*

225. 2018 DIS Arbitration Rules*, supra* note 222, at Art. 26.

226. Raeschke-Kessler, *supra* note 223, at 533–36 (describing such practices). In Jan Schäfer's experience:

> >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. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 278, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.). 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.

that the conciliators continue with their mandate in the function of arbitrators."[227]

Perhaps in light of these realities, in which arbitrators (like judges) may play a more forthright role in facilitating settlement, commercial mediation has not emerged in Germany to the extent it has in the United States.[228] However, the evolution of mediation in Germany has produced some interesting variations on traditional procedures in which arbitrators use additional techniques associated with interest-based mediated bargaining while at the same time taking care to avoid prejudice to their adjudicative role should mediation fail.[229]

The distinctions between U.S. and German perspectives and practices are reflected in a survey of commercial arbitrators and counsel from various countries.[230] German respondents were more likely to "regard . . . arbitration as an effective means to facilitate voluntary settlement,"[231] and experienced a much higher rate of settlement of arbitrated cases.[232] They were much more likely to hint to the parties at a possible outcome of arbitration or propose a settlement formula (at the parties request), and while very few U.S. practitioners had experience with arbitrators participating in settlement negotiations, German respondents tended to have more than occasional experience with such activities.[233] They also were much more

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Schäfer E-Mail, *supra* note 217. It is recognized that this practice of German arbitrators creates severe discomfort among common law lawyer counterparts. Ehle, *supra* note 28, at 79, 83–84.

227. DIS Conciliation Rules, Art. 14 (2002) ("Follow-on Arbitration"), https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules#c351.

228. Burkhard Hess & Nils Pelzer, *Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation*, *in* NEW DEVELOPMENTS IN CIVIL AND COMMERCIAL MEDIATION: GLOBAL COMPARATIVE PERSPECTIVES 291–94 (Carlos Esplungues & Louis Marquis eds., 2015).

229. German advocate and arbitrator Jan Schaefer explains:

> Some arbitrators in Germany who also work as mediators (and have been trained in the canon of mediation techniques) apply mediation techniques in arbitration (asking questions to understand the underlying interests, sharing decision trees, [and so on]). However, they will most likely be hesitant to meet individually with parties ([in] caucuses) as this could impair the right to be heard and then jeopardize them continuing as arbitrators in the matter if the mediation efforts fail. Whether or not that is the case, I think it is a good practice to abstain from bilateral meetings in an arbitration context and just apply the other methods if all agree (what they normally do).

Schäfer E-Mail, *supra* note 217.

230. *See* BUHRING-UHLE ET AL., *supra* note 2, at 110–28.

231. *Id.* at 111.

232. *Id*. at 112 (69% settlement versus 33% settlement reported by U.S. respondents).

233. *Id.* at 120.

likely to have experience with arbitrators acting as mediators than their U.S. counterparts. Like the U.S. respondents, however, they hardly ever had experiences in which arbitrators met separately with the parties during settlement discussions, and tended to disfavor such practices.[234]

Thus, perspectives and practices regarding the employment of med-arb or arbitrator involvement in settlement discussions may vary considerably by culture and legal tradition. As discussed in Part III, international mixed-role practice may be further complicated in some jurisdictions by legal prohibitions or regulation.

III. Legislative Frameworks Regulating and Limiting Med-Arb and Mixed Roles for Neutrals

Although most countries have not enacted legislation governing med-arb, arb-med, or arbitrator engagement in settlement efforts,[235] a few jurisdictions are notable for the extent of regulation. These include Brazil, which prohibits single-neutral med-arb, as well as jurisdictions with frameworks that regulate med-arb and arb-med-arb.

A. *Proscriptive Legislation (Brazil)*[236]

In Brazil, where mediation has only recently been recognized as a potential mechanism for the resolution of commercial disputes,[237] legislation regulating mediation includes an explicit prohibition of med-arb. The Brazilian Mediation Act (2015), which established broad provisions for the use of mediation of civil disputes, states: "The mediator cannot act as arbitrator nor act as a witness in adjudication or arbitration proceedings pertaining to a conflict in which it has acted as a mediator."[238]

From a policy standpoint, this broad prohibition of mixed roles seems contrary to the policy of the Brazilian Arbitration Act, which contemplates that arbitrators may attempt "conciliation" under Art. 21, §4.[239] However, much appears to have changed since 1996, when the Arbitration Act was passed, and "conciliation" was a mechanism

234. *Id*. at 120–21.

235. Hiro N. Aragaki, *A Snapshot of National Legislation on Same Neutral Med-Arb and Arb-Med Around the Globe*, 9 (forthcoming).

236. The author acknowledges the contributions of Brazilian advocates Ricardo D.C. Barcellos, Marcio Vasconcellos, and Carmen Garmendia de Borba.

237. Stipanowich, *supra* note 2, at 1208.

238. Brazilian Mediation Act, Assistant Deputy for Legal Affairs, Law 13.140, Art. 7, Presidency of the Republic Civil House (26 June 2015).

239. The Brazilian Arbitration Act, Act No. 9.307 of 23 Sept. 1996, Art. 21, § 4, 36 I.L.M. 1565, 1571 (1997).

for court-driven settlement.[240] Today, although the Civil Procedure Code does differentiate mediation from conciliation,[241] there may be little difference in practice—and a neutral other than the judge typically engages with the parties.[242] Anecdotal evidence suggests that, either because they disfavor mixed roles or conciliation generally, Brazilian arbitrators rarely engage in conciliation.[243] Where conciliation does occur, one Brazilian authority explains, the practice is for Brazilian arbitrators to conduct conciliation like judges do, in joint

240. The Arbitration Law may have adopted the word "conciliation" since it was the term applied by the Brazilian legal system at that time to designate a non-adversarial resolution before a judicial court. Before the year 2010, when the mediation practice was initially regulated by the National Justice Council ("CNJ") by the resolution # 125, the Brazilian Courts broadly adopted the legal expression "conciliation" to designate the judges' initiatives to drive the parties towards an agreement. The 1973 Civil Procedure Code, which was in force from 1973 to early 2016, foresaw a "conciliation hearing" handled by the judge with this purpose. Nevertheless, such hearings were not often conducted since one or both parties might express a lack of interest. Thus, conciliation rarely achieved any positive outcome in commercial disputes. Memo from Ricardo D.C. Barcellos to author (Jan. 16, 2020) (on file with author).

241. In 2015, the new Civil Procedure Code was enacted and mediation and conciliation were first treated by the law as two different techniques. Article 165 says that conciliation should be used in cases where there wasn't any previous relationship between the parties—such as a car accident—and mediation should be applied when there was a previous connection—like a divorce or dispute under a commercial agreement. Moreover, the Code foresees that the "conciliator" can suggest resolutions for the parties. The "mediator" just facilitates the communication between them who might find by themselves a room towards an agreement. In both cases, the sessions are managed by a neutral appointed by the parties or handled by a judiciary center. *See* Brazil Civil Procedure Code, Law 13.105, Art. 165, Presidency of the Republic Civil House (16 March 2015).

242. The Mediation Law, which came in force in 2016, does not make any distinction between mediation and conciliation. In practice, there is no clear difference between one and another method in the Brazilian legal system. Barcellos Memo, *supra* note 240.

243. Brazilian lawyer Ricardo D.C. Barcellos states:

> I talked with . . . lawyers, mediators, and arbitrators with a large experience in the Brazilian market and all of them rarely have seen a neutral taking the initiative to start a "conciliation." One of them says that "this provision is something foreseen in the law, but nobody pays any attention to that". When the parties show interest to negotiate a settlement, the lawyers usually lead the negotiation without an arbitrator's participation. Another lawyer told me [they supported the policy of not mixing the roles of mediator and arbitrator]. He sees an advantage in preserving the mediator's neutrality and parties' openness to share data and concerns that they would not feel comfortable to disclose with "a future or current decision-maker." Those "whispers" could influence the arbitrator's opinion against the party. Moreover, most of the arbitrators are lawyers who are not "big fans" of mediation or conciliation. Therefore, they do not usually take a conciliation approach when they act as arbitrators.

Barcellos Memo, *supra* note 240. Another authority, Dr. Carlos Pianovski Ruzyk, Professor of Civil Law at the Federal University of Parana, says that arbitrators may

session; in this way, they avoid the perils of ex parte communication.[244]

Outright prohibition of med-arb may be an appropriate means of safeguarding the interests of parties who do not have the benefit of legal counsel or who have little or no negotiating leverage, such as consumers or employees. The breadth of the statutory prohibition suggests, however, the motivation springs from broader suspicions about mediation and mediators.[245] In regard to the broad-run of commercial arrangements, moreover, it seems an undue restriction on the ability of business parties to make their own process choices and, recalling the memorable words of Professor Sander, to "fit the forum to the fuss."[246] In addition, the prohibition raises concerns about recognition and enforcement by Brazilian courts of international arbitration awards resulting from a med-arb or arb-med-arb process, or one in which arbitrators have undertaken activities aimed at assisting the parties reach a negotiated settlement.[247]

B. *Examples of Regulated Med-Arb, Mixed Roles*

Several other jurisdictions are notable for their efforts to explicitly authorize—but also regulate—med-arb and arb-med-arb. These efforts reveal the challenges confronting legislators and policymakers in this area, including definitional issues (what constitutes mediation, conciliation, etc.), varied process permutations (including med-arb, arb-med, arb-med-arb), and balancing the tension between protecting the confidentiality of communications made in mediation and the need to ensure parties' informed consent before a mediator shifts to the role of arbitrator.

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raise the possibility of conciliation with the parties but should not participate "in obedience to the principles of impartiality and independence inherent in the arbitration proceedings," although he indicated that some arbitrators do end up conciliating. Memo from Carmen Garmendia de Borba to author (Jan. 22, 2020) (on file with author).

244. Carlos Alberto Carmona, Arbitragem e Processo: Um Comentário à Lei n 9.307/96, p. 302 (São Paulo: Atlas 3rd ed 2009).

245. *See supra* note 238.

246. *See generally* E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negot. J. 49 (1994).

247. Article V of the New York Convention states:

> 2. Recognition and enforcement of an arbitral award may . . . be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> b. The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958).

1. *Med-arb or arb-med-arb with arbitrator disclosures: Singapore*

Singapore has made great strides as an important player in the international commercial dispute resolution market, aided by a high level of integration of lawmaking and institutional standards.[248] Among other things, Singapore legislators took steps to integrate settlement-oriented efforts with arbitration.[249] The Singapore International Arbitration Act includes provisions for "conciliation", and the Arbitration Act (addressing domestic disputes) provides for "mediation," but the statutes avoid any questions about terminology by defining each of the respective terms as referring to both conciliation and mediation.[250] Among other things, the statutes explicitly contemplate the possibility that the parties will agree to a procedure in which a mediator (or conciliator) "shall act as an arbitrator in the event of the [mediation/conciliation] proceedings failing to produce a settlement acceptable to the parties[.]"[251] Furthermore, the statutes clarify that in such cases, prior service as a mediator/conciliator should not serve as the sole grounds against appointment of an individual as arbitrator, or to his or her conduct of arbitration proceedings,[252] although any party may apparently withdraw consent at any time.[253] In addition, the statutes explicitly authorize arbitrators acting as mediators/conciliators to meet jointly or separately with the parties, and require them to treat information obtained from a party as confidential.[254] However, having explicitly authorized agreements

248. *See* Man, *supra* note 22.

249. *Singapore International Arbitration Act* (Ch. 143A) §§ 16, 17 (Dec. 31 2002), https://sso.agc.gov.sg/Act/IAA1994#pr16-.

250. *Singapore International Arbitration Act* defines "conciliation" to include mediation proceedings. *Id.* at § 16(5). The Arbitration Act defines "mediation" to include conciliation proceedings. *Id.* at § 16(4).

251. *Id.* at § 62(3).

252. *Id.* at § 17(4); § 63(4).

253. If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator. *Id.* at § 17. *See also, id.* at § 63(1) (In the International Arbitration Act, the consequences of a withdrawal of consent are not made explicit. It is unclear whether a unilateral withdrawal of consent merely concludes the mediation/conciliation phase, or also withdraws authority for the neutral to resume the role of arbitrator).

254. The International Arbitration Act at § 17(2) provides:

> An arbitrator or umpire acting as conciliator —
>
> (a) may communicate with the parties to the arbitral proceedings collectively
>
> or separately; and
>
> (b) shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless

for med-arb, including med-arb in which neutrals meet separately with parties during the mediation phase, the statutes impose a draconian requirement for cases in which mediation fails to produce a settlement which obliges the neutral to disclose any confidential information received during ex parte meetings that might be material to the arbitration proceedings before resuming the arbitration:

> Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during [mediation/conciliation] proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings.[255]

This significant mandate supports the concept of transparency in the arbitration phase of med-arb and aims to avoid the impact of bias resulting from confidences revealed during caucus on subsequent awards by exposing information the arbitrator regards as "material" to all parties.[256] Conceptually, however, this obligation creates great uncertainty regarding the scope of disclosures that might be made in the wake of mediation.[257] Because of its potential impact on confidential discussions which many view as critical to effective mediation, this legal requirement may discourage parties from employing med-arb, or cause them to engage in med-arb without separate caucusing. Another, less likely option for parties is to employ med-arb with caucuses while taking extreme care in sharing information with the neutral.[258]

2. *Med-arb, arb-med-arb with arbitrator disclosures: Hong Kong*

Hong Kong, another Asian competitor in the global dispute resolution marketplace, approaches mixed roles in a fashion substantially similar to Singapore. In its Arbitration Ordinance in 2011, Hong Kong enhanced terms from its earlier law providing for arbitrators to

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subsection (3) applies.

Id. See also, id. at § 63(2).

255. *Id.* at § 17(3); 63(3).

256. *See* Man, *supra* note 22, at 11.

257. For a discussion of related concerns, *see* NIGMATULLINA, *supra* note 28, at 200–02.

258. *See* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 84–85 (2001).

act as "conciliators."[259] Part 4, Division 2 of the 2011 Ordinance instead makes reference to "mediation" against the backdrop of arbitration.[260]

The Hong Kong Ordinance explicitly recognizes the ability of parties to agree to either "med-arb" or "arb-med," and provides that no objections may be made to an arbitrator or the conduct of the hearing on the basis that they had previously served as a mediator.[261] As

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259. *Hong Kong Arbitration Ordinance*, Cap 609, § 33 (2011), https://www.elegislation.gov.hk/hk/cap609.

260. The relevant section of the 2011 ordinance provides:

> 32. Appointment of mediator
>
> . . .
>
> (3) If any arbitration agreement provides for the appointment of a mediator and further provides that the person so appointed is to act as an arbitrator in the event that no settlement acceptable to the parties can be reached in the mediation proceedings—
>
> (a) no objection may be made against the person's acting as an arbitrator, or against the person's conduct of the arbitral proceedings, solely on the ground that the person had acted previously as a mediator . . .
>
> . . .
>
> 33. Power of arbitrator to act as mediator
>
> (1) If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.
>
> . . .
>
> (3)]An arbitrator who is acting as a mediator—
>
> (a) may communicate with the parties collectively or separately; and
>
> (b) must treat the information obtained by the arbitrator from a party as confidential, unless otherwise agreed by that party or unless subsection (4) applies.
>
> (4) If—
>
> (a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and
>
> (b) those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.
>
> (5) No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section.

Id. at §§ 32, 33.

261. It has been observed, however, that although the Ordinance attempts provide a degree of protection from set-aside of an award rendered by an arbitrator who had previously served as mediator of the dispute, there remains the possibility that an award might be set aside on grounds of public policy if a "med-arb" or "arb-med" process is conducted in a way that creates an impression of bias under the holding in *Gao Haiyan v Keeneye Holdings Ltd.*, [2011] H.K.E.C. 514. Justin D'Agostino, *New Hong*

noted below, however, in some other respects the terms of the Ordinance do not appear to treat the two circumstances in uniform fashion.[262]

If, pursuant to the agreement of the parties, an arbitrator changes hats to become a mediator, the Ordinance provides that "the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings."[263] The Ordinance further provides that arbitrators acting as mediators may engage with parties jointly or separately.[264]

The Ordinance states that when arbitrators serve as mediators pursuant to the agreement of the parties, any party may terminate the mediation unilaterally.[265] There is no reference to termination at the behest of the neutral, however.[266]

Arbitrators serving as mediators are required to maintain the confidentiality of information shared in private caucus with individual parties.[267] If the mediation terminates, however, the neutral must, before returning to the role of arbitrator, disclose to all parties any information that was shared confidentially in caucus that the neutral considers material to the arbitral proceedings.[268] There is, however, no specific requirement for a renewal of consent by the parties after mediation and before the resumption of arbitration.[269]

3. *Australia: An extensive legal blueprint for mixed roles*

Like their counterparts in the U.S., Australian lawyers and neutrals have very mixed views on med-arb and arb-med.[270] Although

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Kong Arbitration Ordinance comes into effect, KLUWER ARB. BLOG (June 1, 2011), http://arbitrationblog.kluwerarbitration.com/2011/06/01/new-hong-kong-arbitration-ordinance-comes-into-effect/?doing_wp_cron=1595626835.0755529403686523437500.

262. *See infra* text accompanying notes 266–69.

263. *Hong Kong Arbitration Ordinance*, *supra* note 259, at §33(2).

264. *See supra* note 260. Curiously, the statute is unclear whether mediators appointed under a "med-arb" provision under the Ordinance may communicate with the parties separately. It may have been the intention of the drafters to leave this matter to the agreement of the parties, although that should have been made explicit.

265. *Id.*

266. *See supra* note 263. There is also no parallel provision with respect to med-arb.

267. *See supra* note 260.

268. *Id.*

269. *Id*. Such a provision is included in the Australian Commercial Arbitration Act. *See infra* text accompanying note 279.

270. *See, e.g*., Alan L. Limbury, *Med-Arb: Getting the Best of both Worlds*, https://www.imimediation.org/wp-content/uploads/2017/09/hybrid-processes-2010-article-by-alan-limbury.pdf (last visited at Aug. 19, 2020) (quoting Victorian Law Reform Commission, *VLRC Civil Justice Review Report* 235 (2008)).

fully conscious of the pitfalls associated with neutrals changing hats, some Australian practitioners are strong advocates for measured use of such approaches.[271] Australia's extensive legislative framework for med-arb and arb-med-arb processes, incorporated in the Commercial Arbitration Act ("CAA") Model Bill of Australia (2010), includes some features similar to its counterparts in Singapore and Hong Kong.[272]

The CAA Model Bill creates a uniform framework for domestic arbitration in Australia; as of 2017, the CAA Model Bill had been adopted by every state and territory of Australia.[273] Article 27D of the CAA addresses several key questions associated with neutrals changing hats against the backdrop of arbitration.[274]

Agreements for mixed roles. Section 27D permits arbitrators to act as mediators "in proceedings relating to a dispute between the parties to an arbitration agreement. . .[if that] agreement provides for the arbitrator to act as mediator in mediation proceedings[.]" This would include situations in which mediation occurs prior to proceeding to arbitration, or where each party has consented in writing to such an arrangement.[275] The article attempts to minimize definitional concerns by stating that the term "mediator" includes individuals who act as conciliators or "other non-arbitral intermediar[ies]."[276]

Private caucuses. The article authorizes arbitrators to "communicate with the parties collectively or separately"—thus permitting private caucuses—and requires arbitrators to keep information from private caucuses confidential in the absence of party agreement.[277]

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271. *Id.*

272. Unlike Singapore and Hong Kong, however, Australia did not address med-arb or mixed roles in its international arbitration law. Albert Monichino, *Arbitration Reform in Australia: Striving for International Best Practice*, THE ARB. & MEDIATOR 29 (Oct. 2010), https://ssrn.com/abstract=2784084.

273. There are no corresponding provisions in the International Arbitration Act. Firth et al., *All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia*, ASHURST (July 16, 2018), https://www.ashurst.com/en/news-and-insights/legal-updates/alright-stop-mediate-and-listen-guidance-on-the-use-of-med-arb-in-australia/.

274. *See Commercial Arbitration Act 2017*, pt. 5 s. 27D (Austl.) ("Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary").

275. *Id*. at 27D(1)(a). The provision applies to "arbitrators who act as mediators," but the language appears to contemplate application in scenarios in which an individual is appointed to mediate before arbitrating. *Id.*

276. *Id.* at 27D §(8).

277. *Id.* at 27D §(2)(a).

Opting out of mediation. The article provides that mediation may be terminated in any of three ways: by the arbitrator, by the agreement of the parties, or by a unilateral withdrawal of consent to the arbitrator mediating by any party.[278]

Renewal of consent for arbitration. The article requires that if mediation proceedings are terminated, the neutral "may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all parties to the arbitration given on or after the termination of the mediation."[279] Once consent is given, no party may object to the neutral acting as arbitrator on the basis of prior activities as mediator in the proceedings.[280] In the event consent is not given by both parties, the provision calls for the appointment of a substitute arbitrator. Although the "renewal of consent" standard, like opt-out opportunities for parties, enhances the possibility that the anticipated economies of a dual neutral role will be lost, this seems a fair trade-off for enhanced comfort and perceived due process.[281]

Revelation of material information shared in caucus. Like the laws of Singapore and Hong Kong, Article 27D calls for neutrals who assume the role of arbitrator after mediating in the same proceeding to disclose confidential information shared by a party during private caucus. Arbitrators are required to "disclose to all other parties to the

278. *Id.* at 27D §(3).

279. *Id.* at 27D §(4).

280. *Id.* at 27D §(5).

281. Gu Weixia, *supra* note 72, at 119. The country of Georgia passed a new law on mediation on September 18, 2019, following the country's signing of the Singapore Convention. *See Georgian Law on Mediation*, Article 3, (2019), https://matsne.gov.ge/ka/document/view/4646868?publication=1. The law appears to contain unique provisions calling for renewed consent when neutrals shift roles:

> A person shall not act as a mediator if he/she was/is . . . an arbitrator in the same case or in any related case . . . . The above rule shall not apply if a mediator has reviewed the same case, or related case, as an arbitrator and the parties agree in writing to select the same person as a mediator upon the arising of the dispute subject to mediation.

Id. at Art. 6(3).

> A person who has acted as a mediator on the case, shall not act as an arbitrator or otherwise participate in arbitration on the same or any other related case, unless the parties agree in writing upon the initiation of the arbitration process.

Id. at Art. 6(4). The law emphasizes the importance of timing in consent to shifting roles in mediation or arbitration, and appears to call for the parties to confirm assent to the neutral shifting roles after one process (mediation or arbitration) is finalized and at the beginning of the other. Thus, the law apparently does not fully enforce a preliminary agreement for med-arb or arb-med.

arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings."[282]

While there is not much guidance in the form of med-arb case law,[283] the decision in *Ku-ring-gai Council v. Ichor Constructions Pty Ltd.*[284] provides some insight into how Australian courts may interpret and apply Article 27 D(4), requiring written consent for a mediator to proceed as arbitrator after the termination of mediation without a resolution of underlying disputes. This case involved arbitration proceedings in which the arbitrator asked if the parties would consent to a proposal for settlement from him "under the cloak of mediation."[285] Written consent for the arbitrator to act as a mediator was given by both of the parties,[286] but the neutral's proposal was not accepted; the arbitration resumed without written consent for the arbitrator to resume the proceedings.[287] The court ruled that the arbitrator's mandate was terminated due to the lack of written consent that is explicitly required by Article 27 D(4) of the CAA.[288] As such, the arbitrator was not authorized to continue with the arbitral proceedings after assuming the role of the mediator, and the award made by the arbitrator was invalid.[289] The court rejected the argument that because the parties willingly continued to participate in the arbitration, written consent should not be required;[290] the court held that implied consent would not satisfy the CAA's explicit requirement for written consent to recommence arbitration after the termination of mediation.[291]

Some commentators have applauded Australia for its forward-thinking effort to address key concerns associated with mixed-role processes.[292] It should be repeated, however, that the mandatory requirement of disclosure of certain confidential information shared

282. *See* Commercial Arbitration Act, *supra* note 274 at § 27D.

283. Hon. Clyde Croft, *Alternative Dispute Resolution in Arbitration: Is Arb-med Really an Option?*, 2014, at 6 (prepared for the International Arbitration Conference 2014 in Sydney, Australia).

284. *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610 (Austl.).

285. *Id.* at *3–4.

286. *Id.* at *4.

287. *Id*. at *6.

288. *Id.* at *17.

289. *Id.* at *23.

290. *Id.* at *13.

291. *Id.* at *17.

292. *See* Limbury, *supra* note 270.

during mediation prior to resuming arbitration may serve as a disincentive to the use of med-arb.[293]

C. *Developing Practice Guidance on Mixed Roles*

Our overview of the landscape of mixed-role processes in Parts I–III highlights the variety of challenges and questions confronting those who would contemplate employing med-arb, arb-med, arb-med-arb, or settlement-oriented activities for arbitrators in the resolution of international or domestic commercial disputes, and those who would purport to offer authoritative guidance in this area. Part IV will summarize and critique notable efforts to produce such guidance, including initiatives by two key international dispute resolution organizations.

IV. Practice Guidelines for Processes in Which Neutrals Switch Hats or Arbitrators Engage in Settlement Discussions

In recent years, two important efforts have been made to provide guidance for parties considering med-arb, arb-med, or the engagement of arbitrators in settlement discussions. The earlier initiative, sponsored by the CPR Institute for Dispute Resolution, reflects the impact of the emergence in the U.S. of mediation alongside arbitration as a mechanism for resolving commercial disputes, an early experience with mixed mode practice. The second, conducted under the auspices of the Center for Dispute Resolution (CEDR), is strongly influenced by German and Swiss practices, with some reference to Chinese traditions; it also takes into account the potential impact of legal regulation in some countries.[294]

A. *CPR Commission on the Future of Arbitration*

The first effort to set forth practice guidance regarding med-arb and the role of arbitrators in settlement was made as a part of the 2001 Final Report of the CPR Institute for Dispute Resolution Commission on the Future of Arbitration, a group composed of more than fifty leading commercial advocates and arbitrators.[295] As discussed in

293. *See supra* text accompanying notes 256–58.

294. We will also touch on the *Rules on the Efficient Conduct of Proceedings in International Arbitration* (The Prague Rules), published in 2018. However, these guidelines are substantially less fulsome or useful than the other standards in respect of mixed roles for neutrals.

295. The Final Report was published in a book titled "Commercial Arbitration at Its Best: Successful Strategies for Business Users." *See* Commercial Arbitration at

Part II.A., while U.S. business parties, counsel and neutrals have amassed extensive experience with mixed mode dispute resolution, there is general pushback against dual roles for neutrals, or for arbitrators to engage directly in settlement discussions; on the other hand, many experienced neutrals have played dual roles in med-arb, arb-med, or arb-med-arb.[296] The Report reflects this variegated experience. It states that due to frequently voiced concerns regarding med-arb, "a majority of Commission members generally discourage parties from entering into pre-dispute or even post-dispute arrangements before a mediation in which the same individual is assigned the roles of mediator and arbitrator."[297] Nevertheless, in recognition of the fact that there are situations in which parties and counsel might conclude that the prospective benefits of med-arb, or of an arbitrator engaging in settlement discussions, outweighed the risks, the Commission offers cautious guidance.[298]

Where parties contemplate having a mediator shift to the role of arbitrator, the Report recommends that "parties should make an informed decision regarding the mediator's continued service in the role of arbitrator, and confirm their agreement in writing."[299] The neutral should "strive to avoid perceptions that parties are being coerced to [allow the change of roles to] settle the dispute."[300] "[Their] agreement should include an appropriate waiver of grounds for disqualifying the [neutral as] arbitrator or challenging the arbitration award." Moreover, "[a] mediator taking the role of arbitrator should be fully qualified for both roles."[301]

ITS BEST, *supra* note 28, at 20–33, https://www.americanbar.org/products/inv/book/213889/. The Commission was funded by the William & Flora Hewlett Foundation. The CPR Institute is now known as the International Institute for Conflict Prevention & Resolution. *Id.*

296. *See supra* text accompanying note 188.

297. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 22.

298. *Id.* at 22–27, 28–33.

299. The Report states:

> When a mediator is invited to continue service in the role of arbitrator, she should make reasonable efforts to ensure that the parties are making an informed decision regarding the process and her own qualifications. The mediator may discuss potential advantages and disadvantages of the arrangement as well as other alternatives to this course of action.

Id. at 23. The Commission did not address how parties might acquire information about communications made during private sessions with individual parties, if any.

300. In a related vein, the Report states, "In no event . . . should parties be requested to make a decision regarding choice of process or of the neutral's [possible change of role] in the presence of the neutral." *Id*. at 23.

301. *Id.* at 23.

The Commission left the management of concerns regarding the impact of shared confidences during the mediation phase on any subsequent arbitration award to the discretion of the neutral, concluding: "A mediator-turned-arbitrator should respect the confidentiality of settlement communications [made during mediation], and should be capable of deciding issues on the formal record."[302] If, "[a]fter mediating, . . . neutrals considered themselves "unable to render a partial decision on the record [of] the arbitration hearing . . . as a result of being exposed to certain confidential information conveyed ex parte or under other circumstances," they should recuse themselves from service as arbitrator.[303]

The Report also incorporated a Draft Protocol for Arbitrators Who Participate in Settlement Discussions[304] that in many respects parallels the recommendations on med-arb.[305] Although the Protocol is introduced with the rather bold statement that "[u]nder appropriate circumstances arbitrators should participate in settlement discussions," two significant limitations on such activities are identified. First, the Protocol makes it clear that during the mediation phase of med-arb, a neutral must avoid telegraphing his or her views regarding the evidence or the likely outcome of the case in case mediation fails to resolve the dispute and the matter must be resolved through arbitration—in other words, to resist making overt evaluations.[306] Second, the Protocol admonishes arbitrators to "take especial care not to add subconsciously to the record [in arbitration] as a result of information acquired informally and off the record during settlement discussions." In light of these concerns, the Protocol suggests that

302. *Id*. at 24.

303. *Id.* at 24.

304. The Protocol was drafted by Commission member David Plant. *Id.*, Appendix 1.1, at 31–33.

305. These include provisions on the need for a detailed written agreement on the arbitral role in settlement; the importance of party self-determination; neutral competency in arbitration and settlement facilitation; the need for waiver language; the protection of confidential documents, statements and conduct during settlement discussions; and the requirement that in rendering an award the arbitrator must confine himself or herself to the record in arbitration. *See infra* Table A ("Comparison of Key Practice Guidelines on Med-Arb, Arb-Med, and Arbitrator Engagement in Settlement Discussions.").

306. "During settlement discussions, the arbitrator will not hint at the arbitrator's view of the evidence or the likely outcome on the merits if the arbitration goes forward, and will attempt to avoid a feeling of coercion on the part of any party." COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at Protocol 9, Appendix 1.1, at 32.

settlement discussions might be conducted without private caucuses between the neutral and individual parties.[307]

The Report itself raises critical questions about the impact of both of these factors—case evaluation and private caucus—on the ability of "even highly skilled arbitrator[s]" to act in a truly neutral and impartial manner after attempting unsuccessfully to mediate disputes.[308] To make a decision on the record after engaging in private caucuses during settlement discussions, it continues, "may be challenging even for a highly sophisticated arbitrator."[309] Moreover, parties who had earlier given consent to an arbitrator helping with settlement might "develop doubts as to the arbitrator's ability to live up to [the Protocol]," or attribute a subsequent unfavorable award to the arbitrator having been influenced off the record.[310] The Report concluded that "some neutrals will believe they are capable of serving in dual roles and some commercial parties will be willing to experiment with such processes," but urged caution and deliberation.[311]

B. *CEDR Commission on Settlement in International Arbitration*

The civil legal tradition of Germany was an important influence on the development of arbitration rules and guidelines promulgated by the CEDR Commission on Settlement in International Arbitration in 2009.[312] The CEDR Commission was formed for the purpose of "review[ing] the current practice regarding the promotion of settlement

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307. The admonition reflects a stance taken by Prof. Abramson in an earlier article. *See* Abramson, *supra* note 28. Also reflecting concerns about the arbitrator's potential exposure to influences during caucus is a parenthetical to the language of waiver proposed in the Protocol:

> The parties and their counsel must expressly agree in writing or on the record that the arbitrator's participation in settlement discussions will not be asserted by any party as grounds for disqualifying the arbitrator or for challenging any award rendered by the arbitrator (unless, for example, on its face it is apparent that the award is based prima facie in material part on information outside the record and learned by the arbitrator during settlement discussions).

Id. Protocol 8, Appendix 1.1, at 32.

308. *Id.* at 29–30.

309. *Id*. at 30. In his "Town Elder" recommendations, David Rivkin insists that any involvement by arbitrators in settlement should not involve private meetings with individual parties—which he personally equates with the term "mediation." Rivkin, *supra* note 76, at 382. On the other hand, he advances the notion that arbitrators might offer perspectives on parties' cases and even offer solutions in appropriate circumstances. *Id.*

310. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 30.

311. *Id*.

312. CEDR, COMMISSION ON SETTLEMENT IN INTERNATIONAL ARBITRATION, Final Report (Nov. 2009), Objectives, Principles and Summary 2.2, p. 3 [hereinafter CEDR

by international arbitral tribunals and to come up with recommendations to improve this aspect of the process for end-users."[313] Its work was premised on the notion "that parties generally want their problems solved cost effectively and efficiently and that this will often be best achieved through negotiated settlement."[314] This led the Commission to embrace the principle that "[u]nless otherwise agreed by the parties, the arbitral tribunal, assisted by the arbitral institution where applicable, should . . . take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute."[315] For this purpose, the Commission sought to encourage arbitrators to use 'appropriate' techniques that "will not lead to successful challenges to their role as arbitrators and will not jeopardise enforceability of any award."[316]

A side-by-side comparison of the CPR and CEDR Commission recommendations is set out in Table A. Although the CEDR Commission appears to have drawn upon some aspects of the work of the CPR Commission, the CEDR group broke new ground by focusing on the landscape of international dispute resolution (including some of the realities raised in Parts II and III above). It also drew on evolving practices to identify a spectrum of possible means by which arbitrators might set the stage for settlement. In a series of Recommendations, the Commission invited consideration of having arbitrators take specific affirmative steps, including:

- more actively enforcing contractual provisions for pre-arbitration mediation when it is within their power to do so;[317]
- at the first procedural conference, reminding the parties that settlement is always an option;[318]
- exploring various settlement-oriented processes that might be accommodated during the course of arbitration, including "mediation windows;"[319]

Commission] (noting the influence of "the approach prevalent in Germany and Switzerland where arbitrators are generally willing at an early stage in the proceedings to provide the parties with an indication of their preliminary views on the issues in the case.")

313. *Id.* at 1.5, p. 2.
314. *See id.* at 1.5, p. 2 ("Introduction").
315. *Id.* at 2.4.2, p. 2.
316. *Id.* at 2.7.3.
317. *Id.* at 4.2.1, p. 4.
318. *Id.* at 4.2.2.
319. *Id.* at 4.2.3.

- querying parties regarding the status of settlement discussions;[320] and
- considering parties' previous offers to settle in the course of allocating costs of arbitration.[321]

If the parties agree, moreover, arbitrators may provide preliminary views on the merits of the case[322] and chair settlement meetings attended by representatives of the parties.[323] Upon the request of the parties, they may submit proposed terms for settlement of the dispute to the parties.[324]

Many of these recommendations are reflected in the CEDR Rules for the Facilitation of Settlement in International Arbitration,[325] which envision a very assertive role for arbitrators in promoting amicable settlement. Among other things, the rules give arbitrators the discretion to indicate to the parties the issues it has identified in the case and what evidence may be required for each party to prevail on the key issues, and even to provide parties with preliminary findings of fact and conclusions of law.[326] If the parties consent in writing,

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320. *Id.* at 4.2.4.

321. *Id.* at 4.2.7.

322. *Id.* at 4.2.5., providing:

> If both parties agree, [the arbitration tribunal may] provide an indication as to the tribunal's preliminary view on the merits of the case. This can be done in different ways. One approach is for the tribunal to set out the issues in the case that it has identified and what the tribunal considers will be required in terms of evidence from each party in order to prevail on the key issues.

323. *Id.* at 4.2.6, providing:

> If both parties agree, [the arbitrator(s) may] chair one or more settlement meetings attended by internal representatives of the Parties (or other persons with authority to negotiate and settle) at which possible terms of settlement are negotiated. The involvement of one or more members of the tribunal or a neutral chairperson can improve the chances of settlement discussions proving successful. . . . The arbitrators must . . . avoid putting pressure on the parties to settle.

324. *Id.* ("Upon the request of the parties, the members of the arbitration tribunal or the chairperson may submit to the parties proposed terms of settlement.").

325. *Id.* at Appendix 1.

326. CEDR, RULES FOR THE FACILITATION OF SETTLEMENT IN INTERNATIONAL ARBITRATION, Article 5 [hereinafter CEDR Rules] "Facilitation of Settlement by Arbitral Tribunal," provides in pertinent part:

> 1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute;
> 1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;

moreover, arbitrators may hold settlement conferences,[327] and may even offer the parties proposals for negotiated settlement of the issues.[328] In important respects, this assertive vision of arbitral engagement in settlement departs from the more cautious stance advanced by the CPR Commission.[329]

Like the CPR Commission, however, the CEDR Commission drew a firm line when it came to arb-med or arb-med-arb with private caucuses. Embracing the principle that arbitrators meeting separately with parties makes their awards susceptible to a successful challenge or non-enforcement, the Commission concluded that arbitrators should not engage in such activities "unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award or unless the Parties explicitly consent to this approach and its consequences."[330] While not advocating for dual roles with private caucuses during the mediation phase, the Commission provided recommended safeguards for those contemplating such activities,[331] similar in several respects to earlier recommendations in the Report of the CPR Commission[332]:

1) Before mediating, have the arbitrator(s) sit down with the parties and explain the risks of mediating with private meetings, and the alternative of appointing a different independent third party as mediator;[333]

1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration.

327. *Id.* at Art. 5, 1.4 ("where requested by the Parties' in writing, [the Arbitration Tribunal may] chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.").

328. *Id.* at Art. 5, 1.3 ("where requested by the parties in writing, [the Arbitration Tribunal may] offer suggested terms of settlement as a basis for further negotiation.").

329. *See supra* text accompanying note 306 (recommending that neutrals not offer evaluations while mediating in the event the neutral must subsequently assume or resume the role of arbitrator).

330. CEDR Commission, *supra* note 312 at 2.4.3, 2.5.

331. *Id.* at Appendix 2.

332. *See supra* text accompanying notes 297, 298.

333. These include the risk that as a mediator/conciliator, "the arbitrator is likely to behave in a way which is inconsistent with the behavior expected of an arbitrator . . . [including] becom[ing] privy to information regarding the motivations and interests of parties which would otherwise be privileged and/or confidential, and/or which might separately influence an arbitrator's judgment in [making] . . . the award." CEDR Commission, *supra* note 312 at Appendix 2, Rule 4. Other risks include the increased threat of challenge to any resulting award if the parties have not made an effective waiver, and the possibility that parties will be less candid during private meetings with the neutral if they are aware he or she will resume the role of arbitrator. *Id.* at Appendix 2, Rule 5.

2) Ensure that any consent to have the arbitrator engage in mediation using private meeting is given prior to the mediation/ conciliation phase,[334] is in writing,[335] and:
   a. includes "a statement that the parties agree to the arbitrator meeting with each privately during the mediation/ conciliation phase"[336] and also "consent as to the way in which the arbitrator is to deal with information learned in confidence by the arbitrator during the mediation/ conciliation;"[337]
   b. includes, if the parties desire more protection, a requirement of "second consent" after the conclusion of the mediation/conciliation phase, before arbitration resumes;[338]
   c. includes a statement waiving any right to challenge the arbitrator or the award on the basis that the arbitrator acted as a mediator/conciliator;[339]
3) Provide that "[i]f as a consequence of his or her involvement in the mediation/ conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign."[340]

Credit should be given to the CEDR Commission for promoting consideration of a range of ways in which arbitrators might directly or indirectly set the stage for settlement, and especially for addressing the special concerns regarding ex parte communications during the mediation phase of arb-med-arb. While having arbitrators engage in early case evaluation and offering proposals for settlement may be

334. *Id.* at Appendix 2, Rule 7.3.

335. *Id.* at Appendix 2, Rule 7.2.

336. *Id.* at Appendix 2, Rule 7.4.

337. *Id*. at Appendix 2, Rule 7.1 ("This may require the arbitrator to disclose any such information to all parties and provide them with an opportunity to comment on it. Alternatively, it may provide that the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and that he or she should be under no duty to disclose it."). *Id. See also id*. at Appendix 2, Rule 7.4 (referencing the two alternative disclosure options). The arbitrator disclosure option may reflect the influence of laws requiring arbitrators who engaged in private caucuses during the mediation/conciliation phase to disclose information that might affect their views as arbitrators. *See supra* text accompany notes 255 and 282.

338. CEDR Commission, *supra* note 312 at Appendix 2, Rule 7.3. It is explained that post-mediation consent may be "particularly important because it is given in the knowledge of developments during the mediation." *Id.*

339. *Id.* at Appendix 2, Rule 7.5.

340. *Id.* at Appendix 2, Rule 7.6.

more familiar to practitioners from Germany and some other civil jurisdictions, perhaps as forms of arbitral "conciliation,"[341] such activities may be viewed in the U.S. and some other countries as outside the normal role of arbitrators, and instead falling within the ambit of mediation. As previously noted, even arbitrators and advocates who accept the concept of arbitrators as settlement facilitators may favor significant limits on that role, including avoidance of evaluation.[342] Moreover, without explanation, the CEDR Rules specify that during the mediation phase of med-arb involving private meetings with individual parties (caucuses), neutrals would engage in "interest-based mediation."[343] Whatever the underlying rationale, this designation might be interpreted as prohibiting a neutral from engaging in case evaluation in the mediative role, even though the CEDR Report expressly envisions that arbitrators might engage in evaluation of the merits if the parties so agree.[344] Although the point is not clearly made, it may be that the intended distinction is that neutral evaluation should not be made in ex parte meetings, but only in joint sessions. In any event, this key element requires clarification.

C. *The Prague Rules*

The Rules on the Efficient Conduct of Proceedings in International Arbitration ("The Prague Rules"),[345] published in 2018, are a set of soft-law guidelines "intended to provide a framework and/or guidance for arbitral tribunals and parties on how to increase the efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings."[346] The Prague Rules' promulgation was a pushback against the "[a]mericanization of arbitration and the passive role of arbitrators."[347] The Rules embrace an inquisitorial

341. CEDR Rules, *supra* note 326 at Art. 5, 1.

342. *See supra* note 306.

343. CEDR Commission, *supra* note 312 at Appendix 2, Rules 6–8. This may be a direct reflection of concerns raised by mediator evaluation in med-arb. *See supra* text accompanying notes 103, 111. On the other hand, it may mirror a more general orientation by CEDR and some international mediators toward "facilitative" or "elicitive" mediation and away from "evaluative" or "directive" mediation. *See* Stipanowich, *supra* note 59, at 7–8 (examining a survey that international mediators are less likely to engage in case evaluation than U.S. mediators).

344. *See supra* note 322 and accompanying text.

345. Prague Rules, *Rules on the Efficient Conduct of Proceedings in International Arbitration* (2018), https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf.

346. *Id.* at 3 ("Preamble").

347. Annett Rombach & Hanna Shalbanava, *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing*, 17 German Arb. J. 54 (2019).

model familiar to civil law practitioners, and in doing so envision a role for arbitrators as settlement facilitators.[348] On the basis that they might afford parties an opportunity to achieve a speedier, less costly path to resolution of commercial disputes, the scriveners of the Prague Rules encouraged arbitrators to offer preliminary views of different aspects of the case and the parties' positions at an early stage of arbitration,[349] and to "assist the parties in reaching an amicable settlement of the dispute."[350]

In prescribing a "proactive role" for arbitral tribunals in promoting speed and efficiency in dispute resolution, Article 2 of the Rules promotes assertiveness by tribunals in the scope of discussion at case management conferences and later stages of arbitration. Article 2.4 provides, among other things, that:

> the arbitral tribunal may, if it deems appropriate, indicate to the parties:
>
> . . .
>
> e. its preliminary views on:
>
> i. the allocation of the burden of proof between the parties;
>
> ii. the relief sought;
>
> iii. the disputed issues; and
>
> iv. the weight and relevance of evidence submitted by the parties.[351]

The Rules provide that communicating such preliminary views "shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification."[352]

Moreover, Article 9 "Assistance in Amicable Settlement," provides that "[u]nless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration."[353] Furthermore, "[u]pon prior written consent of the parties, any member of the arbitral tribunal may also act as a mediator to assist in the amicable settlement of the

348. *See* Duarte G. Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, 36 ASA BULLETIN 351, 356, 360–61 (discussing role of arbitrators as settlement facilitators under Prague Rules).

349. Prague Rules, *supra* note 345, at p. 5 art. 2.4.

350. *Id.* at p. 11 art. 9.1.

351. *See id.* at p. 5 art. 2.4.

352. *Id.*

353. *Id.* at p. 11 art. 9.1.

case."[354] If the mediation does not produce a settlement "within an agreed period of time," the arbitrator-turned-mediator may revert to the role of arbitrator if all parties consent in writing.[355]

As was the case with the CEDR Commission, those who promulgated the Prague Rules relied heavily on legal traditions which embrace arbitrators sharing preliminary views and assisting the parties in amicably settling the case. The Rules, however, do not offer clear direction or comfort for the many arbitrators (including those in the United States, the U.K., and other common law jurisdictions) who may lack successful experience—or indeed, any experience—with such approaches, and therefore view such approaches with concern. As one leading corporate counsel observed in his critique of the Rules' provisions for sharing of preliminary views, "[i]t is open to question whether any enforcing jurisdictions would treat the right to assert lack of an arbitrator's impartiality as being waivable by a party."[356] Furthermore, the Rules include no protocols—dos and don'ts as to timing and substance—for the offering of preliminary views on aspects of the case. Some commentators recognized that in light of widespread concern regarding such activities in common law jurisdictions, arbitrators must take steps to ensure that they are perceived as being open to altering their preliminary views in the face of new evidence or arguments.[357]

There is, moreover, no clear line of demarcation in the Rules between "the arbitral tribunal . . . assist[ing] the parties in reaching an

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354. *Id.* at p. 11 art. 9.2.

355. *Id.* at p. 11 art. 9.3.

356. Michael McIlwrath, *The Prague Rules: The Real Culture War Isn't Over Civil vs Common Law*, Kluwer Arbitration Blog (Dec. 12, 2018), *http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/*; *see also* Rombach & Shalbanava, *supra* note 347 (noting that it is unclear whether expressions of preliminary views might create problems of enforcement of subsequent arbitration awards by common law courts); Caroline Simson, *Prague Rules Launched, But Jury Still Out on Usability*, LAW360 (Jan. 18, 2019) (raising concerns about arbitrators functioning as mediators), https://www.law360.com/articles/1120251/prague-rules-launched-but-jury-still-out-on-usability.

357. Rombach & Shalbanava, *supra* note 347, at 55–56. They explain:

> [T]ribunals should be principally more open to alter a [preliminary] view they have expressed on the basis of, e.g., Article 2.4 (e) of the Prague Rules when new arguments or evidence warrants that the issue be assessed differently. Tribunals often appear too hesitant in changing a view shared with the parties earlier because they fear looking weak or indecisive. But it is precisely their aversion to alter an expressed view as a result of the case development that creates the concern that any such preliminary views may, in fact, not be "preliminary", but set in stone.

Id.

amicable settlement" and "[a] member of the arbitral tribunal . . . act[ing] as a mediator"—the latter, but not the former, requiring the prior written consent of the parties. Commentators have also expressed the concern that when an arbitrator or tribunal proposes to shift to the role of mediator, there may be a risk that parties feel compelled to give consent.[358]

Although the Prague Rules reflect some of the same practices and perspectives that inspired the CEDR Commission, the Prague Rules are considerably less fulsome. They are more cursory in their treatment of the arbitral role in promoting amicable settlement, probably because the Rules are focused more broadly on the role of arbitrators in expediting the arbitration process. They fall far short of providing an authoritative global template for neutrals changing hats or for arbitrators setting the stage for amicable settlement, and produce more questions than answers.

D. *Next Steps*

The CPR and CEDR initiatives are important steps toward the goal of formulating an authoritative template for the guidance of business parties, legal advisors, dispute resolution professionals, and organizations providing dispute resolution services regarding the use of med-arb, arb-med, or arb-med-arb, and settlement-oriented activities by arbitrators. Drawing on our evolving experience with mixed-role processes and our critical overview of the international commercial dispute resolution landscape in Parts I–IV, we are in a position to envision a more workable framework for the future of mixed-mode practice. Part V sets forth general priorities and animating principles for the development of such a template, a detailed prototype of which is offered Part VI.

V. A Workable Solution: Developing Effective Guidance for Processes in Which Neutrals Switch Hats or Arbitrators Engage in Settlement Discussions

A. *The Need for Guidance That is Comprehensive as Well as Specific*

As we have seen, there are various situations in which business parties in conflict might agree to, or at least consider agreeing to,

358. Rombach & Shalbanava, *supra* note 347, at 59 (noting the "risk that an arbitral tribunal who is eager to switch to mediation for the purpose of settling the case efficiently considers [a] refusing party to be obstructive.").

having a mediator shifting to the role of arbitrator, or an arbitrator mediating or taking steps to help facilitate settlement,[359] and there is evidence that such approaches may produce satisfactory outcomes.[360] On the other hand, a range of practical concerns exist, including differing cultural traditions and legal frameworks for mixed mode practice.

Whether one is a proponent of med-arb or arbitrator-facilitated settlement or views such practices with trepidation, the development of more effective guidance should be a welcome step. By examining our collective experience, drawing selectively upon existing norms and practices, and positing additional parameters in order to fill gaps, it should be feasible to develop a constructive, serviceable, and perceptibly fair framework that accommodates varying practices, perspectives, and needs.

A set of non-binding guidelines providing a comprehensive and specific framework for choice-making in consensual commercial dispute resolution is the logical starting point for the development (or refinement) of norms and practices for and by business users and in-house counsel, advocates, arbitrators, mediators, and policymakers. This foundation may eventually facilitate the development of better rules and procedures for med-arb, arb-med, and arbitral facilitation of settlement, along with ethical standards governing the arena of "mixed-mode" practice for neutrals. It may also assist in the promulgation or refinement of relevant statutes and judicial decisions affecting domestic and international arbitration and dispute resolution, as well as interpretations of international conventions and treaties.

B. *Principles Underlying Proposed Practice Guidelines*

Practice guidelines should identify the steps necessary to promote key values in mixed role processes including encouraging of amicable settlement, party autonomy and self-determination, procedural fairness and transparency—including the impartiality of mediators and arbitrators—and fair outcomes.

1. *Emphasis on amicable settlement*

As a general matter, amicable settlement of business disputes is much preferred over adjudication resulting in a binding decision by a third party—especially when the costs and risks of adjudication are

359. *See supra* Part I.A–C.
360. *See supra* text accompanying notes 88–89, 119–127.

perceived as high. Practically speaking, planning for conflict management should always take into account the likelihood that parties will resort to negotiation, with or without third-party mediation or facilitation, prior to, during, or after arbitration or litigation, and should take proactive steps to lay the groundwork for such efforts. For one reason or another, parties may consider the possibility that a neutral will play a dual role in the course of resolving disputes (as where a mediator shifts to an arbitral role), or that an arbitrator will take direct steps to help facilitate a negotiated resolution of disputes.

2. *Need for informed, deliberate decision-making*

Knowledge and understanding are critical to effective choice-making in the management of conflict. In a world where commercial dispute resolution very often involves resort to negotiation against the backdrop of arbitration or litigation, increasingly with assistance from third-party facilitators, participants require diverse skills and insights to effectively exploit the flexibility of process options, honor party autonomy, and avoid unfairness or unwelcome surprise. They require not only an ability to make the most of individual elements (negotiation, mediation, arbitration, etc.), but also an understanding of how to use these elements in combination and how to move between processes.

3. *Appreciation of differing cultural and legal traditions*

Mixed-mode practice, like other aspects of international practice, should be undertaken with appreciation of divergent perspectives and practice among different cultures and legal traditions. If possible, efforts should be made to accommodate these differences and offer a balanced approach.

Underlying definitional issues that inhibit communication and understanding, beginning with the way we understand what mediators and arbitrators do and don't do, are a major barrier to international dialogue on mixed roles. These fundamental differences in perspective on the roles of mediators and arbitrators underpin perspectives on mixing roles—and even what constitutes a mixed or dual role. Guidelines should promote mutual understanding by "deconstructing" terms such as "mediation," and "arbitration"—mediation, by identifying specific activities that might be identified with such roles or functions in different settings, circumstances or traditions,

and arbitration, by identifying several ways of thinking about arbitrators' roles, if any, in mediating substantive disputes or in helping promoted negotiated settlement.[361]

4. *Importance of compliance and/or enforceability*

Effective conflict resolution presupposes party compliance with outcomes or the availability of judicial enforcement. Dispute resolution process choices should be made with full awareness of laws prohibiting mediators shifting roles to arbitrate or placing other limitations on the use of mixed modes.[362]

With these principles in mind, Part VI proposes a template for the guidance of business parties, counsel, dispute resolution professionals, and provider institutions regarding med-arb, arb-med, arb-med-arb, and settlement-oriented activities for arbitrators.

VI. Practice Guidelines for Business Parties, Legal Counselors and Advocates, Dispute Resolution Professionals and Dispute Resolution Institutions

A. *Need for Careful, Informed, Independent Deliberation and Consent by Parties and Counsel*

Any decision by parties to employ neutrals in dual roles (med-arb, arb-med or arb-med-arb) or to have an arbitrator engage directly in helping facilitate settlement should be the product of careful, informed, and independent reflection and discussion by all concerned.[363] In most cases, the parties' priorities will be best achieved by employing different third persons in the roles of arbitrator and mediator, either sequentially or in parallel. There may be situations, however, where business parties and counsel consider the matter before or during dispute resolution and conclude that the prospective benefits of dual roles, or of arbitrator engagement in settlement discussions, outweigh the risks.

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361. *See infra* Part VI.B.

362. For this purpose, the CEDR Commission sought to encourage arbitrators to use 'appropriate' techniques that "will not lead to successful challenges to their role as arbitrators and will not jeopardise enforceability of any award." CEDR Commission, *supra* note 28, at 2.7.3 (Objectives, Principles and Summary).

363. *See* Thomas J. Brewer & Larry Mills, *Combining Mediation and Arbitration*, 54(4) Disp. Resol. J. 32 (1999) (discussing deliberative process for development of protocol).

Ultimately, the success of such arrangements depends upon: (1) mutual understanding between the participants as to their expectations regarding mediation and arbitration; (2) the ability of parties and counsel to understand the concerns associated with mixed roles and then to employ the process in the most effective, mutually acceptable manner; (3) the involvement of a neutral who is willing and is qualified by background and experience to handle the anticipated dual role; and (4) an agreement that integrates the mutual understandings and expectations of all participants[364] and develops organically from the circumstances.[365]

The best approach is for parties and counsel to think carefully about all of these factors in advance, or in the early stages of dispute resolution. This may involve discussions during the process of contract negotiation and drafting or after disputes have arisen, either before or after the retention of mediator(s) and/or arbitrator(s). Although it is important that parties and counsel have the opportunity to exercise independent judgment regarding mixed roles or arbitral engagement in settlement, it will be critical for the parties to engage the neutral(s) in the discussion to receive their input and to ensure their comfort with and commitment to the process. This might occur either at the time they are retained or in initial planning for the dispute resolution process—such as, for example, during an initial prehearing management conference in arbitration.[366] Indeed, the parties' faith and trust in the ability of a neutral to "thread the needle" of a dual role may be the single most critical element in submitting to such arrangements.[367]

As discussed below, these mutual understandings should be integrated in an agreement.

364. For a discussion of consent issues, *see* NIGMATULLINA, *supra* note 28, at 166–77; Sussman, *supra* note 7, at 387–90.

365. As one neutral with considerable experience with med-arb notes, "As always, the parties should fashion the process to the dispute, not the dispute to some preordained process." Blankenship Memo, *supra* note 101, at 1.

366. *See, e.g.*, *supra* text accompanying note 318 (CEDR Rules).

367. *See supra* text accompanying note 127. *See also* Blankenship Memo, *supra* note 101.

B. *Ensuring Basic Understanding Regarding Roles of Mediator, Arbitrator*

1. *Clarifying expectations regarding the role(s) of mediators*

Mediation offers a variety of potential benefits for parties in commercial disputes,[368] and resort to mediation is increasing in many parts of the world.[369] As their role is generally understood in the context of commercial dispute resolution, mediators facilitate discussions between the parties in order to promote settlement of issues in dispute by engaging with the parties in joint sessions and/or in caucuses.[370] In some cases, mediation may result in the restoration or improvement of relationships.[371]

In any particular situation, however, the scope and nature of a mediator's activities may be determined or limited by the skills, attributes, and preferences of the mediator; the nature of the dispute; the understandings and preferences of the parties and counsel; and other surrounding circumstances. Moreover, perspectives and practices regarding the mediator's role(s) are often heavily influenced by prevailing law or cultural tradition. In places like the U.S., for example, mediators tend to have wide berth in their choice of strategies and methods, including some or all of the following:[372]

- exploring with the parties underlying personal or organizational interests, agendas, values, emotional factors that might need to be addressed in the course of settling the dispute;
- helping the parties consider what, if any, additional information or other steps might be necessary in order to set the stage for settlement;
- helping parties develop, consider, and/or communicate proposals that may lead to settlement;
- assisting the parties in restoring or improving their relationship(s) or their ability to communicate more effectively;
- helping the parties consider and develop other procedures, to resolve their dispute(s), including evaluative and adjudicative approaches;

368. *See generally* Stipanowich, *Why Businesses Need Mediation*, *supra* note 16, at 9–10.
369. *See supra* text accompanying notes 14–25.
370. *See* Hopt & Steffek, *supra* note 3, at 11–15.
371. *See* Guillemin, *supra* note 16, at 13–47.
372. *See* Straus Institute, *supra* note 88.

- evaluating the legal and factual elements of the parties' positions regarding the issues in disputes;
- predicting the potential consequences if the issues in dispute are adjudicated in court or in arbitration; or
- putting forward to the parties their own proposals for agreement.

In some legal traditions, however, mediation is understood as a more limited form of third-party intervention focusing on non-directive facilitation and exploration of disputants' interests rather than evaluation of parties' positions, predicting consequences, or putting forward proposals.[373]

Given these national or regional variances, it is especially critical for participants in international dispute resolution—parties, counsel, and dispute resolution professionals—to anticipate that there may be different expectations among parties from different legal traditions, and to take responsibility for parties ensuring that there is a meeting of the minds regarding the role and functions of mediators. Similar diligence is due with respect to usages of "conciliation" and the functions of conciliators.[374]

2. *Clarifying expectations regarding the role of arbitrators in facilitating settlement*

The primary responsibility of an arbitrator or arbitral tribunal is to adjudicate disputes and produce a binding and enforceable award.[375] However, perspectives and practices differ regarding the

373. *See* Hopt & Steffek, *supra* note 3, at 58 (outlining various legal traditions that disfavor evaluative mediation).

374. Both internationally and in domestic settings, the term "conciliation" is often used as a synonym for mediation. *See* Stipanowich & Fraser, *supra* note 1, at 874. In some circumstances, however, conciliators focus on some or all of the following activities: evaluating the legal and factual elements of the parties' positions regarding the issues in disputes; predicting the potential consequences if the issues in dispute are adjudicated in court or in arbitration; or putting forward to the parties their own proposals for agreement. *Id.* at 872–74 (discussing different usages of the term in different commercial and relational settings).

375. In the course of fulfilling this obligation, arbitrators will supervise the pre-hearing process, during which the case is made ready for adjudication; conduct a hearing in which both parties present evidence and arguments on the issues in dispute; and render a decision (award) on the issues in dispute that will be legally binding on the parties. This is an expanded version of the arbitral function as described in CEDR Commission on Settlement in Int'l. Arb. (2009).

arbitrator's role in negotiated settlement of disputes—reflecting differences in culture and legal tradition as well as the customs, personalities and preferences of arbitrators, parties, and counsel. Participants in international commercial disputes should be aware of several possible perspectives on the role of arbitrators regarding negotiated settlement of disputes:

a. *Settlement is no concern of arbitrators*

It is possible that arbitrators may be reluctant to focus on settlement in any way. In the U.S., for example, many arbitrators believe that they should not concern themselves with settlement, but should focus entirely on their role as adjudicators.[376]

b. *Arbitrators "set the stage" for settlement through prehearing management, routine rulings*

It is frequently understood that by engaging in certain activities that are routine elements of their adjudicative role, arbitrators may influence parties' perspectives on and prospects for a negotiated settlement. For example, many U.S. arbitrators acknowledge that their management of the prehearing process at least sometimes plays an important role in helping settle cases prior to hearings.[377] Their rulings regarding discovery or their summary disposition of issues may prompt informal settlement.[378]

c. *Arbitrators take steps to encourage negotiation, or to accommodate mediation with a different neutral*

Arbitrators may also be asked to take steps to encourage the parties to consider informal settlement,[379] or to accommodate efforts to mediate (utilizing a different neutral) during the course of arbitration.[380] Arbitrators may include mediation on the checklist of topics to be addressed at the preliminary hearing or prehearing conference,

376. In a survey of experienced U.S. arbitrators in the College of Commercial Arbitrators by the Straus Institute, fifty-four percent of respondents indicated that they were never concerned with informal settlement of the cases before them. Stipanowich & Ulrich, *supra* note 28, at 19–21.

377. *Id.* at 21–25.

378. *Id.* A large majority of experienced arbitrators in the U.S. acknowledged the connection between such activities and settlement of disputes during arbitration.

379. *See* BUHRING-UHLE ET AL., *supra* note 2, 120–23 (indicating significant experience with and approval of arbitrators suggesting settlement negotiations).

380. For example, one set of international rules promulgated by the International Institute for Conflict Prevention & Resolution (CPR) provides:

Rule 21: Settlement and Mediation

and the procedural timetable for arbitration may include one or more "windows" during which the parties may engage in mediation.[381] Where the parties have agreed to mediate prior to arbitration, moreover, it may fall within the authority of arbitrators to direct the parties to comply with the obligation to mediate.[382] Finally, arbitrators may consider parties' previous offers to settle in the course of allocating costs of arbitration.[383]

d. *Arbitrators engage directly in facilitation of settlement*

As a general rule, activities described in subsections a., b., and c. are viewed as falling within the arbitral role. In addition, as we have seen, some legal traditions and related international guidelines envisage arbitrators playing a more direct role in facilitating settlement.[384] For example, the CEDR Rules for Facilitation of Settlement provide that in the absence of contrary agreement arbitrators may "provide all Parties with preliminary views on the issues in dispute . . . and what the Arbitration Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues,"[385] or may "provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration."[386] The CEDR Rules also provide that, if the parties make a joint request in writing, "[arbitrators may] chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement

> 21.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.
>
> 21.2 With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal.

International Institute for Conflict Prevention & Resolution (CPR), *CPR Rules for Administered Arbitration of International Disputes* (March 1, 2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019.

381. Stipanowich & Fraser, *supra* note 1, at 859–60.

382. *See* Stipanowich, *supra* note 22, at 14–15.

383. *See supra* text accompanying note 321.

384. *See supra* Part II.B, II.C; BUHRING-UHLE ET AL., *supra* note 2, 120–25 (summarizing survey data indicating relatively greater experience with or support among German and other civil law respondents for arbitrators hinting at possible case outcomes, rendering a case evaluation if requested by the parties, proposing a settlement formula (at parties' request) or participating in settlement negotiations (upon request)).

385. *See* CEDR Rules, *supra* note 326, at Art. 5, 1.2.

386. *Id.* at Art. 5, 1.3.

may be negotiated,"[387] or "may offer suggested terms of settlement."[388]

We have seen that in many traditions, private caucusing with a mediator is a focus of special concern, especially if that neutral will switch to an arbitral role if disputes are not settled in mediation.[389] There may even be laws prohibiting mixed roles or requiring disclosures of information received from individual parties during mediation;[390] such limitations may support a challenge to the appointment of arbitrators or to the enforceability of an award.

In light of these realities, participants in international dispute resolution must be careful and deliberate in their approaches to the role of arbitrators in setting the stage for negotiated settlement, especially in the absence of mutually accepted standards or practices.

C. *Need for Cooperative Joint Decision-Making by Parties*

Ideally, a decision to have a neutral change roles from mediator to arbitrator or from arbitrator to mediator during the course of resolving a dispute should be left to the parties. In the absence of mutual understandings to the contrary, it should not normally be prompted or initiated by the actions of the neutral, although the neutral's input and commitment will eventually be critical.[391] In the absence of shared expectations regarding the matter, arrangements for a neutral to play dual roles (med-arb, arb-med, or arb-med-arb) or for

387. *Id.* at Art. 5, 1.1.

388. *Id.* at Art. 5, 1.4.

389. *See supra* Part I.D.

390. *See supra* Part III.

391. Under some standards, an arbitrator is constrained from suggesting that she/he serve as a mediator, although, if appropriate, the arbitrator may encourage the parties to consider mediation with a different neutral. For example, Section III.B. of the *JAMS Arbitration Ethics Guidelines* states:

> An Arbitrator may encourage the Parties to mediate their dispute but should not suggest that the Arbitrator serve as the mediator. In the event that, prior to or during the Arbitration, all Parties request an Arbitrator to participate in discussions of settlement or to combine the Arbitration with another dispute resolution process, the Arbitrator should explain how the Arbitrator's role and relationship to the Parties may be altered, including the impact such a shift may have on the willingness of the Parties to disclose certain information to the Arbitrator serving in the settlement-related role. Nothing in these Guidelines is intended to prevent an Arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all Parties and if an appropriate written waiver is obtained. The Parties should, however, be given the opportunity to select another neutral to conduct any such process.

JAMS, *Arbitration Ethics Guidelines*, https://www.jamsadr.com/arbitrators-ethics/.

an arbitrator to engage directly in settlement discussions should begin with the parties. In cases where dispute resolution is proceeding, proposals or suggestions that the mediator should switch to the role of arbitrator, or vice versa, or requests to discuss the pros, cons, and options for such an approach with the neutral, should preferably made jointly by both/all parties after they have discussed the matter outside the presence of the neutral.[392] This is the best way to avoid undue pressure on parties and prevent efforts at "one-ups-man-ship" in the presence of the neutral. It also affords decision-makers on all sides time and space to reflect and deliberate. At some point, however, the neutral should be a full participant in discussion and planning.

Given the often-dynamic nature of processes involving mixed roles, moreover, it is possible that there will be other points in the process during which there are discussions among parties and neutral regarding process options. These discussions may lead to further changes in procedures for mediation or arbitration.[393]

D. *Neutral's Competency, Availability, Independence, Impartiality*

A mediator should be authorized to shift to the role of arbitrator in the course of resolving a dispute, or vice versa, only if the parties are confident of the neutral's fitness for managing dual roles.[394] The qualifications for the roles are significantly different; moreover, it

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392. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 23 ("In no event . . . should parties be requested to make a decision regarding choice of process [of med-arb] or of the [mediator's shift to the role of arbitrator] . . . in the presence of the neutral.")

393. *See supra* text accompanying note 64.

394. *See supra* text accompanying note 300. Essential requirements for service as a mediator or arbitrator are catalogued in leading ethical and practice standards. For example, the *IBA Rules of Ethics for International Arbitrators* provide:

> 1. Fundamental Rule
> Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias.
> 2. Acceptance of Appointment
> 2.1 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias.
> 2.2 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration.
> 2.3 A prospective arbitrator should accept an appointment only if he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.
> 2.4 It is inappropriate to contact parties in order to solicit appointment as arbitrator.

may not be possible for a neutral to effectively shift to the role of arbitrator after having served as mediator, or vice versa. Before agreeing to have a neutral change roles, or potentially take on both roles, the parties should ensure that a neutral has the following:

1. *Competence, capability, and ability to inspire trust*

Competence and capability may mean very different things depending on the neutral's role.[395] Highly effective mediators may not have the skills, experience, or disposition to be good arbitrators; the reverse is also true. Parties should make discrete evaluations of a neutral's process management skills and preferences, temperament, and relevant substantive knowledge or experience. Moreover, many neutrals may be uncomfortable playing mixed roles, which entail special dynamics and challenges.[396]

In order to assess an individual's ability to fulfill the role of mediator, it is important to understand what that role is likely to entail. For example, where there is a possibility that a mediator will be shifting to an arbitral role, a mediator might not engage in overt evaluation of parties' positions[397] or arguments, or might engage with the parties jointly and eschew private caucusing.[398]

What may be most critical, however, is the degree of confidence and trust that parties have in their neutral and the neutral's ability to gain and maintain a high level of rapport during the various stages of complex processes. While these elements are always important to success in mediation, they may be paramount in this context.[399]

2. *Availability*

Dual roles for neutrals may raise particular concerns regarding availability. For example, when a mediator shifts over to an arbitral role, it is probable that a greater time commitment will be required. In such circumstances, the parties should ensure that their reasonable expectations for a timely proceeding can be met.

International Bar Association ("IBA"), *Rules of Ethics for International Arbitrators* (1987).

395. *See supra* Part I.D.1.

396. *See* Blankenship Memo, *supra* note 101.

397. *See id.* at 5, 7–8 (noting need for great care in evaluating during mediation phase of med-arb, and concerns about implying predisposition toward a particular outcome in the arbitration phase).

398. *See supra* notes 307 and 330 and accompanying text.

399. *See* Blankenship Memo, *supra* note 101, at 3, 6–7.

3. *Independence and impartiality*

Although independence and impartiality are often regarded as important considerations in the selection of mediators, in arbitration they are often of paramount significance given the fact that arbitrators are empowered to render legally binding decisions with limited judicial oversight. If a mediator is persuaded that he or she is willing and fully able to undertake the role of arbitrator, the mediator should disclose in writing any circumstances currently known which are likely to give rise to any justifiable doubts as to his or her impartiality or independence in the mind of any party, or any other facts that might raise questions about his or her ability to effectively perform the arbitral role. It is possible that the disclosure obligations for arbitrators may be stricter or more expansive than those for mediators under applicable law or procedures. If the parties have agreed to arbitrate under specific published arbitration rules, then any disclosure should be in accordance with those rules.

As discussed below, moreover, under the law of some jurisdictions, a mediator shifting to the role of arbitrator must disclose (prior to serving as an arbitrator) certain information communicated during private caucuses with individual parties during the mediation stage.[400]

4. *Confidentiality*

Expectations regarding the nature and scope of confidentiality may be very different in mediation and arbitration. Protecting the confidentiality of settlement-related communications during mediation—particularly communications between the mediator and individual parties during ex parte caucuses—are usually a primary concern of parties in mediation. Where the mediator shifts to the role of arbitrator, however, such concerns must be weighed against countervailing concerns about the viability of any award by the mediator-turned-arbitrator.[401]

E. *An Agreement in Writing*

The agreement of the parties for med-arb (or arb-med-arb), including agreements providing for a currently serving neutral to shift

400. *See supra* text accompanying notes 255–58, 267–68, 282.

401. *See supra* notes 112–118.

roles, should be in writing, and should be clearly and carefully drafted.[402]

1. *Clear demarcation of phases or stages; scope of settlement discussions*

The agreement should include a clear demarcation of the respective phases or stages of the process, using clear and concise language to separately identify and delimit mediation and arbitration. The agreement should avoid conflating roles (such as "mediator/arbitrator" or "binding mediator") and should be precise in describing how and when an arbitrator shifts to the role of mediator, or vice versa.[403] Where some but not all of the matters in dispute are the subject of settlement discussions, care should be taken in delineating the scope of what is and is not being addressed.

2. *Reasonable allocation of time*

One experienced practitioner insists that in order to place appropriate emphasis on the mediation phase of med-arb, efforts should be made to avoid unduly rushing the process in order to hasten the arbitration phase.[404] He concludes:

> In mediation, the neutral's focus should be on mediation—successfully achieving a negotiated resolution of the dispute. The arbitration phase can not only wait, it should only be initiated when ALL efforts to successfully mediate the dispute have been exhausted, and every participant is in agreement on this fact and/or requests the neutral to commence the arbitration phase.[405]

3. *Clear description of the character of mediation and arbitration*

As noted above, parties have a number of choices regarding process options, including the format for mediation and the scope of activity of the mediator. Understandings regarding specific process options should be included in the agreement. This is particularly important when parties and/or counsel come from legal traditions with different expectations of mediator roles.

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402. *See* Brewer & Mills, *supra* note 363, at 36–38 (discussing development of protocol).

403. For discussion of problems arising as the result of lack of clarity in this respect, *see supra* text accompanying 112–18.

404. Blankenship Memo, *supra* note 101, at 6.

405. *Id.*

If necessary, the agreement may also include a clear description of the scope of evidentiary hearing in arbitration, rules governing arbitrator disclosures and challenges, the format for the award, an arbitration timetable, and other appropriate procedural elements. If the agreement incorporates the published rules and procedures of an institutional provider of arbitration services, it may be appropriate to consult that institution regarding procedural questions. The provider institution may offer a template for med-arb or arb-med-arb.

4. *Waiver language*

Agreements may include a provision to the effect that the neutral's participation in prior settlement discussions will not be asserted by any party as grounds for challenging the appointment of the neutral as arbitrator or any arbitration award rendered by the neutral.[406]

F. *Process Options Where Med-Arb (or Arb-Med-Arb) is Contemplated, or Discussed, Prior to the Start of Mediation*

If, prior to the commencement of mediation, the parties are considering med-arb or arb-med-arb, any of the following process options may be considered by the parties and explored through discussions with a prospective mediator. Such provisions should be incorporated in the parties' written agreement. Perhaps the two most consequential choices to be made by the parties are: first, the scope of the neutral's role as mediator/facilitator of settlement—specifically, whether the neutral will engage in case evaluation or offer proposals for settlement; and, second, whether settlement discussions should include private caucus sessions with individual parties.

1. *Evaluation / no-evaluation option for mediation phase*

Parties contemplating dual roles for neutrals should carefully consider whether and to what extent the neutral should engage in evaluation of parties' positions and arguments during the mediation phase, as such communications could create certain expectations regarding the neutral's possible rulings as arbitrator.[407] As we have

406. Experienced dispute resolution professional John Sherrill has developed a very thoughtful stipulation for mixed roles that includes waiver language. John Sherrill, *Stipulation* (on file with author). *See also* JAMS, *Draft Arbitration Stipulation for Mediation Followed by Arbitration* (containing extensive waiver provision) (on file with author).

407. *See supra* text accompanying notes 110–11.

seen, standards differ in this area: the CPR Commission raised serious concerns about evaluation in the context of mixed roles, while the CEDR Commission approved the practice, at least in the context of settlement discussions involving both parties in joint sessions.[408]

Given the diversity of views respecting evaluations in this context and the potentially significant impact of evaluation, it is advantageous for neutrals and advocates with relevant experience to share details of approaches that have proven effective, either in stimulating negotiated settlement or in permitting the neutral to preserve the trust and confidence of the parties when shifting to the role of arbitrator when settlement efforts do not resolve disputes. Such experience would provide a starting point for discussion of process options when the possibility of dual roles is raised by the parties. Despite the expressed concern about arbitrators telegraphing views of the parties' cases during settlement discussions, evaluations may be an important stimulus for settlement.[409] Problems may arise, however, when the neutral subsequently shifts roles and renders an arbitration award.[410] Much more needs to be understood about how and why this is the case.[411]

For example, one U.S. neutral who has successfully engaged in arb-med-arb on multiple occasions tries not to communicate strong perspectives on the merits during the mediation phase, but recognizes the difficulty of completely avoiding conveying impressions.[412] Another explains:

> Extreme care must be employed by the mediator in whether and how an evaluation will be offered in a med-arb. In my view, this is the most challenging aspect of the med-arb process. I do not think the mediator can offer the same kind of evaluation during med-arb as he/she can in stand-alone mediation. It goes without saying that the mediator cannot say or even imply how he/she is

408. *See supra* text accompanying notes 306, 322–29.

409. *See supra* text accompanying note 65.

410. *See supra* text accompanying notes 110–11.

411. David Rivkin's exposition on a "town elder" model offers a glimpse of how an arbitrator might engage in an evaluative manner in settlement discussions. *See supra* text accompanying notes 76–78.

412. He explains,

> Parties and lawyers keep trying to figure out my evaluation and continually tried to make inferences from the questions I asked them. Some of my questions in caucus were, of course, designed to allude to risks (no matter which way I was going to decide in the final arbitration phase). I do not allow anyone to keep notes of our confidential sessions and I ceremonially destroy my notes with theirs after each private session.

E-Mail to author (Apr. 23, 2020) (On file with author). Name of sender withheld by request.

> going to rule, thus improperly coercing a party to settle. However, with the right set up, including the assurance that you are giving evaluations to the other side, and being careful to say that your statements are in no way to be viewed as an indication of how you are going to rule if the matter goes back to arbitration, an evaluation can be skillfully made. However, I still think the better practice, in most cases, is to reframe your evaluation in the form of a question, such as: "What if I were to find . . . ?" "How would you respond or deal with a finding that your key position fails because . . . ?"[413]

Our efforts to understand more about the dynamics of evaluation in these circumstances should include not only evaluation during caucuses, but also during joint session—especially since this may be a widely-used mode for arb-med-arb in international dispute resolution.[414]

2. *Caucus / no-caucus options for the mediation phase*

As illustrated above, under some circumstances it may be possible for neutrals to engage effectively with parties in joint meetings and settle disputes without ex parte caucuses.[415] Because ex parte communications during the mediation phase are at the root of many of the frequently expressed concerns regarding med-arb or arb-med-arb,[416] the no-caucus option should normally be considered prior to commencing dispute resolution proceedings. On the other hand, some mediators and parties will not wish to engage in mediation without the opportunity to caucus, and in some cases disputes have been successfully resolved by dual-role neutrals as arbitrators even after they engaged in caucuses during prior settlement discussions. Some U.S. neutrals who engage in med-arb or mixed roles employ caucuses most of the time due to the expectations of counsel.[417]

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413. Blankenship Memo, *supra* note 101, at 9.

414. *See supra* text accompanying note 344 (CEDR Commission appears to support evaluation by arbitrator in the course of assisting with settlement negotiations, but not in caucus). *See* Blankenship memo, *supra* note 101, at 9–10 (describing one scenario in which the neutral offered an analysis of parties' positions after presentations by both sides, and offered a proposed range of values for settlement).

415. *See id.*, Part I.B.2.b (describing arb-med in which mediation was conducted without caucuses).

416. *See supra* Part I.D.

417. *See, e.g.*, Blankenship Memo, *supra* note 101, at 1–2 ("Commercial mediation has evolved into a process where caucusing is not only a given, it is essentially a necessity.").

3. *Options for med-arb (or arb-med-arb) where mediation involves separate ex parte caucuses*

Should the parties elect to conduct med-arb with caucuses during the mediation phase, consideration should be given to the scope of discussion in caucus, and any specific limitations.[418] Attention should also be given to the option(s) to be followed if mediation fails, as discussed below.

a. *Arbitrator's award must be dependent solely on evidence and arguments presented during arbitration proceedings*

Parties are well-advised to include a provision to the effect that if mediation is unsuccessful and mediator becomes the arbitrator (or, in arb-med-arb, returns to the role of arbitrator), the arbitration award "shall be based solely on the evidence and arguments presented during arbitration proceedings and not on communications made during mediation."

b. *Mediator must disclose confidential information that the mediator considers material to the arbitration proceedings*

Several national laws regarding med-arb require that neutrals make disclosures of confidential information received from parties during mediation prior to proceeding with arbitration.[419] Such ex post measures are likely to discourage parties from sharing confidential information with mediators and perhaps from using caucuses or even employing med-arb at all, and parties are well-advised to choose among other approaches.[420] On the whole, if parties are truly concerned about the danger of ex parte communications affecting the arbitration award, the ex post approach seems substantially less

418. One U.S. neutral with multiple experiences with mixed roles indicated that in his practice, "counsel for the parties work with me to finalize joint instructions about my mediation role, including instructions about what I could talk about and what I couldn't." E-Mail to author (Apr. 23, 2020) (on file with author). Name of sender withheld by request.

419. *See supra* text accompanying notes 255–58, 267–68, 282.

420. *See supra* text accompanying notes 256–58. For those who nevertheless wish to employ such an approach, two possible formulations follow:

Option A. *The mediator shall disclose to the parties as much of the confidential information (s)he received during the mediation as (s)he considers material to the arbitration proceedings.* (This is similar to language employed in the Australian Commercial Arbitration Act and some other laws.)

Option B. *The mediator shall disclose to the parties as much of the confidential information (s)he received or provided during the mediation as (s)he believes might be material to the his or her decision-making process in*

desirable than a simple agreement to avoid independent private caucuses during the mediation process.

c. *Parties consent to med-arb with full awareness that arbitration award may be influenced by information received in ex parte caucus in mediation phase*

A diametrically opposite approach from those above would be for the parties to acknowledge the possibility that any award produced in med-arb may be influenced by private ex parte communications during the mediation phase.[421] While it is not necessarily true that any award will be influenced by private discussions, such a result is certainly possible. As discussed below, an alternative would be to address the risk posed by private communications as a part of the language of waiver in the agreement.

d. *Parties confer regarding continued service of neutral at the conclusion of mediation*

The parties may wish to include a provision that they will meet and confer outside the presence of the neutral after the mediation phase of med-arb to determine whether they remain in agreement regarding his or her serving as arbitrator. This may be tied to a provision requiring neutral disclosures after the mediation phase, and/or to a requirement of written consent to the continued service of the neutral.

e. *Requirement of written consent for arbitration after mediation; party opt-out*

Parties may wish to incorporate a provision (similar to that set forth in Australia's Commercial Arbitration Act) to the effect that an arbitrator who has acted as mediator may not resume the role of arbitrator without the written consent of all parties given after mediation has terminated.[422] Along the same lines, provision might be made for either party to opt-out of post-mediation arbitration.

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arbitration. (This version includes communications by the mediator to parties as well as confidential information conveyed by the parties.)

421. *See, e.g.*, JAMS, *supra* note 406.

422. *See Commercial Arbitration Act 2017* pt. 5 s 27D (Austl.) ("(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.").

f. *Recusal of neutral*

At some point before or after the mediation phase, a neutral may determine that as a result of being exposed to certain information during the mediation, the neutral is incapable of rendering an impartial decision during the arbitration phase. For this reason, the parties may want to provide that the neutral has an obligation to recuse herself from the role of arbitrator.[423]

G. *Process Options Where Med-Arb is Contemplated During Mediation*

If the parties are contemplating the use of med-arb after mediation has commenced, it may be impractical or impossible to employ some of the process options set forth above (such as, for example, the no-caucus option for mediation).

H. *Variations on Med-Arb*

1. *Opportunities for creative process guidance*

Even if mediation is not successful in resolving substantive issues in dispute, mediators may be able to help set the stage for a dispute resolution process that is customized to more effectively suit the circumstances and serve the needs of the parties.[424] This may include single-neutral med-arb formats as well as more traditional arbitration procedures.

2. *Mediation and last-offer-arbitration (MEDALOA)*

MEDALOA is an acronym for Mediation and Last Offer Arbitration.[425] It involves traditional mediation followed by a process in which each party submits a written final or "last offer" to the arbitrator. The arbitrator proceeds to pick the last offer he considers most equitable, or most appropriate under the standards established by the parties.

In some cases, MEDALOA is a means of breaking an impasse in a mediation, particularly where there is relatively little at risk or

423. *See supra* text accompanying notes 303, 340.

424. *See* Stipanowich & Fraser, *supra* note 1, at 8–9.

425. *See generally* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 25–26; Tom Arnold, *supra* note 61 (detailed monograph by well-known arbitrator with considerable experience in the intellectual property field); Edna Sussman & Erin Gleason, *Putting Final Offer/Baseball Arbitration to Use*, 37 ALTERNATIVES 19 (Feb. 2019). NIGMATULLINA, *supra* note 28, at 150–51 (describing scenario in which author Stipanowich was mediator and arbitrator in MEDALOA).

where the parties are not so far apart as to justify a full-fledged arbitration, and where the parties repose great trust in the mediator. In such cases, the mediator is likely to become the arbitrator; after some form of hearing (perhaps short, trial-type summations of the parties' cases), the mediator-turned arbitrator chooses the "last offer" which s/he regards as most just or reasonable. The choice becomes the basis of an arbitration award. An example of MEDALOA is described above.

A variation would be where the parties exchange written last offers but do not disclose their offers to the neutral. The parties agree that the award will be the offer closest to the arbitrator's number.

3. *Mediation followed by bracketed or bounded arbitration*

Another variation on med-arb would be where the parties exchange written last offers, but do not disclose the offers to the neutral.[426] After a hearing, the neutral, acting in the role of arbitrator, makes a ruling. If the ruling is between the two offers, the arbitrator's number becomes the award. If the arbitrator's ruling is below the low offer, the low offer becomes the award. If the arbitrator's number is above the high offer, the high offer becomes the award.

I. *Arb-Med: Considerations for Parties Contemplating Arb-Med, Arb-Med-Arb*

1. *Generally*

As discussed above, an individual appointed as arbitrator may agree to switch to the role of mediator at some point in the arbitration process—early on, midway through the process, or after drafting an award but prior to its publication. The switch is likely to be prompted by the parties' belief that with the help of the neutral, a negotiated settlement is achievable. An added advantage is that the neutral's initial arbitral appointment will facilitate the conversion of any mediated settlement agreement into a consent arbitration award. As discussed above, any switching of roles requires careful, informed, and independent reflection by parties and counsel, cooperative joint decision-making by the parties, and consideration of the neutral's pertinent skills and attributes.

426. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 28, at 25; Sussman & Gleason, *supra* note 425.

2. *What happens if mediation fails to end the dispute? Arb-med-arb?*

A critical element of the discussion should be what happens if mediation does not resolve the dispute. Should the neutral resume the role of arbitrator? If so, under what conditions? As discussed above, if "arb-med" becomes "arb-med-arb," all of the concerns associated with med-arb will come into play, along with the need for careful consideration of related process options.

3. *"Eleventh-hour" arb-med*

On occasion, it is agreed that an arbitrator will take on the role of mediator after rendering a final award but prior to its publication. Such an approach may have appeal for parties who are anxious about the risks of defaulting to a third-party decision. (In some accounts, the completed award is placed, unopened, on the table in full view of the parties like a Damoclean sword.)[427] Moreover, the neutral has the benefit of full information regarding the dispute and the strengths and weaknesses of the parties' cases.

On the other hand, eleventh-hour settlement lacks many of the benefits of an earlier resolution. The parties have already gone to considerable time, trouble, and expense of preparing for and conducting adjudication.[428] From a psychological point of view, moreover, one wonders if parties who have just endured a complete adjudicative process in which they played adversary roles will be attuned to engage in bargaining[429]—especially the collaborative kind. Moreover, unless the arbitrator is in a position to finalize an award immediately upon the close of hearings, mediation might have to await the completion of the award. Finally, one wonders about the expectations of an arbitrator-turned-mediator in such a situation: although it is doubtful that many have experiences with this kind of procedure, one would think that the parties would be scrutinizing the neutral's words, facial expressions, tone, etc. for any hint of how s/he ruled. However, resort to a process of this kind may make sense is where the parties are both very concerned about the risks associated with the arbitration award, or where they have come rather belatedly to the mutual realization that a negotiated resolution may permit the

427. *See, e.g.*, NIGMATULLINA, *supra* note 28, 156–57 (describing arb-med hearing in Queensland, Australia).

428. *See id.* at 155–56.

429. *Id.* at 156.

crafting of arrangements beyond the rather limited remedial scope of arbitral awards.

4. *Arb-med, arb-med-arb with a tribunal*

If parties have agreed to arbitration with a three-member tribunal, discussions about arb-med or arb-med-arb should consider which members of the tribunal should engage in dual roles.[430] Having all three arbitrators acting as mediators might end up being overly cumbersome. Two options are readily apparent: having the chair of the arbitration panel act as a mediator, or, alternatively engaging the two wing arbitrators as co-mediators. A variant of the latter approach might involve each wing arbitrator being authorized to meet separately (caucus) with the party that appointed him or her during the course of mediation—although the downside of this approach would be to reinforce concerns about the independence and impartiality of the respective wings. An alternative would be to have wing arbitrators caucus with the party that did *not* appoint them.[431] In international proceedings, the cultural backgrounds of the arbitrators may be an important factor.

J. *Guidance for Arbitrators Engaging in Settlement-Oriented Activity*

As previously discussed, arbitrators in Germany and some other jurisdictions sometimes engage directly in activities associated with settlement as a part of their arbitral role; participants in such settings would not necessarily perceive these efforts as engaging in a dual role.[432] Again, however, in international dispute resolution an

430. *See* NIGMATULLINA, *supra* note 28, at 157–62 (discussing various permutations).

431. Jan Schäfer, German advocate and arbitrator, reports:

> Something that I recently considered with my co-arbitrators in a long-term license dispute is the following: A termination was on the table which would result in a black-and-white result (either the agreement was terminated on good cause or not). All parties understood that a black-and-white result would not really help them in the long-run, so it would make much sense to consider grey compromises. The parties spoke but failed several times to cut things through. What we considered was that my co-arbitrators would speak bilaterally with the party that did NOT appoint him, I as chair would not be involved in the mediation but remain neutral in case that things were not solved. If a party then had objections against either arbitrator to continue sitting as arbitrator, I would have continued as a sole arbitrator. The understanding would further have been that no information provided to my co-arbitrators could be used in the arbitration.

Schäfer E-Mail, *supra* note 217.

432. *See supra* Part II.C.

arbitrator's direct engagement with the parties in settlement discussions may be perceived by some other parties and counsel as performing activities normally associated with mediation. In any case, any direct engagement by arbitrators in settlement negotiations should take into account the practical guidelines set forth above.

K. *The Need to Capture Meaningful Accounts and Data Points from Our Successes—and Failures*

The insights, and especially the exemplary personal anecdotes, offered in this article are intended to illustrate not only the issues and concerns surrounding dual roles for neutrals and arbitrator engagement in settlement, but also the potentially rich store of data that might be drawn upon to develop more authoritative international and domestic guidance for business clients and counsel, dispute resolution professionals, international institutions, and lawmakers. As a practical matter, cultural and legal traditions channel our perspectives and practices in powerful ways, establishing expectations that may limit our thinking about what is possible or practical. Only by collecting and sharing meaningfully detailed accounts of our experiences—good and bad—with med-arb, arb-med, and arbitrator engagement with settlement will we be in a position to overcome our varied predispositions in favor of more deliberate and functional approaches. Only by this means may we come to appreciate the potentialities and limits of different forms of third-party engagement during the settlement process, including the use of private caucusing, forms of evaluation, putting forth specific proposals for settlement, and other formats that are now subjects of controversy.

VII. Conclusion

Med-arb, arb-med, and active engagement by arbitrators in settlement discussions are not process options that have been, or probably ever will be, universally embraced by business parties, counsel, or dispute resolution professionals. It is likely that, influenced by culture and legal traditions, risk tolerance, personal predilections or other factors, many clients, counsel and neutrals will continue to avoid assigning neutrals dual roles or involving arbitrators in settlement discussions. The great majority of the time, parties will opt for the simple expedient of employing separate individuals to fill the roles of arbitrator and mediator/settlement facilitator. On the other hand, faced with dramatically changed circumstances such as those confronting many businesses as a result of the COVID-19 pandemic,

disputants may see critical advantages in mixed-role schemes. Although these arrangements present particular challenges, most pitfalls can be avoided by careful planning and thoughtful implementation, informed by well-developed practice guidelines. It is hoped that this article will be an important step toward developing such guidance, promoting greater mutual understanding across cultures, and encouraging the practice of capturing and sharing specific experiences to further our insights into what works—and what doesn't.

VIII. Table A. Comparison of Key Practice Guidelines on Med-Arb, Arb-Med, and Arbitrator Engagement in Settlement Discussions

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Primary influence(s)	U.S. law and practice	German and Swiss practice, some reference to Chinese practice
Specific guidance for med-arb	Generally "discourage[s] parties from entering into pre-dispute or even post-dispute arrangements before a mediation in which the same individual is assigned the roles of mediator and arbitrator," but parties may conclude in some cases that benefits outweigh risks. [Specific guidance offered.]	
Specific guidance for arb-med, arb-med-arb / direct involvement by arbitrators in settlement	If an arbitrator-turned-mediator is able to resolve all the issues, "all may work out well"; but problems may arise if the neutral resumes the role of arbitrator. [Specific guidance offered.] "Under appropriate circumstances arbitrators should participate in settlement discussions." [Specific guidance offered.] Protocol, Introduction.	"[Without "knowingly act[ing] in such a way as would make its award susceptible to a successful challenge,"] . . . the Arbitral Tribunal will take proactive steps in accordance with these CEDR Settlement Rules to assist the Parties to achieve a negotiated settlement of part or all of their dispute." CEDR Rules for the Facilitation of Settlement in International Arbitration, Art. 3.1., 3.2. "[W]here requested by the Parties' in writing, [the Arbitration Tribunal may] chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated"). CEDR Rules for the Facilitation of Settlement in International Arbitration, Art. 5.1.4.

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Informed consent by parties, written agreement	"[P]arties should make an informed decision regarding the mediator's continued service in the role of arbitrator, and confirm their agreement in writing." "[A]ll concerned must be aware of the consequences of revealing different information [when arbitrators are to become involved in settlement discussions]." "Parties [and] counsel must be fully informed as to the proposed procedure and its implications, and must agree expressly, specifically, and in writing as to the role of the arbitrator in settlement discussions." "The arbitrator must agree to participate in settlement discussions (a) only with the foregoing express agreement, and (b) only in accordance with the specific terms and conditions of such agreement." (Later modifications may be required due to the "fluid" nature of negotiation.)	"The Arbitral Tribunal shall invite the Parties themselves . . . to participate in the First Procedural Conference . . .. The Parties shall be encouraged to speak directly with the Arbitral Tribunal . . . on matters relating to settlement." CEDR Rules Art. 4.1. (See also Article 4.2, covering topics to be covered by Arbitration Tribunal with Parties.). More specific informed consent recommended where it is proposed arbitrator take on role of mediator/conciliator and meet with individual parties in private session (caucus). CEDR Rules Art. 7; CEDR Final Report Appendix 2.
Independent decision-making by parties; self-determination	"The [neutral] should strive to avoid perceptions that parties are being coerced to settle the dispute." A mediator should not "solicit a dual role or put pressure on the parties to employ the mediator in a dual role." "[In respect to involvement in settlement discussions, [t]he arbitrator must respect the principle of self-determination."	

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Ex parte discussions with individual parties (caucus)	Transition from mediator to "truly neutral and impartial arbitrator" may be possible "if the arbitrator, acting as mediator . . . did not caucus separately with either party and did not receive information from either party that was not shared with the other." "[H]olding caucuses is likely to complicate shifting . . . to the arbitral role." [With regard to arbitrators participating in settlement discussions, one source indicates that arbitrators should be forbidden from caucusing privately with individual parties unless the parties agree otherwise. Protocol 6 (note).]	Arbitrators meeting separately with parties during settlement discussions makes their awards "susceptible to a successful challenge"; arbitrators should not engage in such activities "unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award or unless the Parties explicitly consent to this approach and its consequences." CEDR Rules Art. 2.4.3, 2.5. [The CEDR Report also sets out special guidelines for situations in which arbitrators conduct private meetings with parties during mediation phase. CEDR Final Report, Appendix 2.]
Evaluations during mediation	Transition from mediator to "truly neutral and impartial arbitrator" may be possible "if the arbitrator, acting as mediator, did not provide the parties with an evaluation of the dispute, however informal or elliptical, and gave the parties no clue as to his views on any other issues."	No specific discussion, although CEDR Report only refers to "interest-based mediation." CEDR Final Report, Appendix 2.

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Evaluations by arbitrators as participants in settlement discussions.	"[T]he arbitrator-turned-settlement-participant [should] avoid an evaluative role. An evaluation at the settlement discussion stage may be materially inconsistent with the later view of the re-transformed arbitrator." Protocol, Introduction. "During settlement discussions, the arbitrator will not hint at the arbitrator's view of the evidence or the likely outcome on the merits if the arbitration goes forward, and will attempt to avoid a feeling of coercion on the part of any party." Protocol 9.	CEDR Rules Article 5 "Facilitation of Settlement by Arbitral Tribunal," provides: "1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute: 1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues; 1.2. provide all Parties with preliminary non-binding findings of law or fact on key issues in the arbitration." 1.3. where requested by the parties in writing, [the Arbitration Tribunal may] offer suggested terms of settlement as a basis for further negotiation." CEDR Rules Art., 4.6.6 provides that arbitral institutions could "[p]rovide training to arbitrators in how to give an early view on the merits in order to encourage settlement, without making themselves or their award vulnerable to a successful challenge."
Neutral competence for dual roles	"A mediator taking the role of arbitrator should be fully qualified for both roles." "The neutral should be trained in both arbitration and in settlement facilitation." Protocol 1.	

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Confidentiality of mediation in med-arb, or of settlement discussions in which arbitrator is involved.	"A mediator-turned-arbitrator should respect the confidentiality of settlement communications." "Documents, statements and conduct during the settlement discussions are confidential and subject to [Federal Rules of Evidence] Rule 408 kinds of protections . . . unless the parties and the arbitrator expressly agree otherwise in writing." Protocol 6.	"Nothing said or done by any Part or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that the arbitration resumes (save as regards the allocation of costs in accordance with . . . these Rules). CEDR Rules Art. 3.4. [*But see* CEDR Rules Art. 7.7.1 where mediation/conciliation has involved private meetings with individual parties, discussed below.]
Neutral disclosures after mediation		[Where mediation/conciliation has involved private meetings with individual parties,] "[t]he parties' consent to the mediator/conciliator resuming as arbitrator should include consent as to the way in which the arbitrator is to deal with information learned in confidence . . . during the mediation/conciliation. This may require the arbitrator to disclose any such information to all parties and provide them with an opportunity to comment on it. Alternatively, it may provide that the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and that he or she should be under no duty to disclose it." CEDR Rules Art. 7.7.1.

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Neutral's ability to make decision on the arbitral record	"A mediator-turned-arbitrator . . . should be capable of deciding issues on the formal record." "In the event the arbitrator must resume the role of arbitrator after participating in settlement discussions, the arbitrator must undertake to decide the remaining issues only on the merits and only on the formal record. The arbitrator must take especial care not to add subconsciously to the record during settlement discussions." Protocol 7. [Other specific provisions prohibit arbitrators from judging the credibility of witnesses or party's case in light of anything that happened in earlier settlement discussions. Protocol 11, 12.]	"The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions." CEDR Rules, Art.3.5.
Neutral recusal after mediation, before arbitration	"After mediating, a neutral should recuse herself from service as arbitrator if she had considered herself "unable to render a partial decision on the record [of] the arbitration hearing . . . as a result of being exposed to certain confidential information conveyed ex parte or under other circumstances."	Where arbitrator has engaged in private ex parte meetings with parties, agreement should provide that "[i]f as a consequence of his or her involvement in the mediation conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign." CEDR Rules Art. 7.7.6; CEDR Final Report, Appendix 2.

	CPR Commission on the Future of Arbitration	**CEDR Commission on Settlement in International Arbitration**
Waiver language	"The parties and their counsel must expressly agree in writing or on the record that the arbitrator's participation in settlement discussions will not be asserted by any party as grounds for disqualifying the arbitrator or for challenging any award rendered by the arbitrator (unless, for example, on its face it is apparent that the award is based prima facie in material part on information outside the record and learned by the arbitrator during settlement discussions)." Protocol 8.	"The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal . . . or for challenging any award rendered by the Arbitral Tribunal." CEDR Rules Art. 3.3. Waiver language recommended if parties agree to have arbitrator engage in mediation with private meetings with individual parties. CEDR Rules Art. 7.7.5; CEDR Final Report, Appendix 2.