

ADR in Business

Practice and Issues across Countries and Cultures

Volume II

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Chapter 17

Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties

*Jeremy Lack**

We have to start by defining the process as part of the problem

David Plant

1. INTRODUCTION: CONSUMER CHOICE

Consumers have become accustomed to choosing among a wide variety of options when shopping or selecting from a menu of services. Yet, we tend not to think as consumers, nor of our choices, when faced with a dispute. Even in cross-border commercial disputes, key decisions are delegated by the disputants to their lawyers, who tend to approach things from a procedural angle with certain professional automatism. This entails filing a complaint, a statement of claim or a request for arbitration before the appropriate tribunal having jurisdiction over the matter or the defendant/respondent. The same happens once the pleadings are received.

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The defendant/respondent's lawyers tend to reply with an automatic statement of defence or an answer to the request for arbitration, possibly adding counterclaims as may be appropriate, or contesting jurisdiction. Once this is started, the process takes its natural path toward a judgment or an award. Whether the process is litigation or arbitration will typically depend on whether and what conflict resolution clauses exist in the contract (if there was one), where the defendants are domiciled and what seems to the parties' lawyers at that time to provide their clients with the best tactical advantage. Once the lawyers have embarked on a process, they will think creatively of tactics within the rules of procedure that apply in the court or tribunal where this dispute will occur, but they will seldom question the process itself, nor reconsider at a later stage whether an evaluative or non-evaluative form of dispute resolution may be more appropriate at any given subsequent stage.

There are always more choices than only litigation or arbitration. The parties to a dispute, however, are seldom aware or advised of the wide range of procedural choices they may actually have. Nor are they typically focused on their underlying interests when making procedural choices, such as what sort of relationship they wish to retain with the opposing party in the future or whether there are additional financial considerations that they may wish to take into account before embarking down a path of conflict resolution. A conflict, however, can paradoxically become an opportunity to strengthen ties and generate new business relationships depending on the process chosen for resolving the dispute. One such example is mediation, in which principals with authority to settle can meet and can transform a dispute into a new business deal.¹ Given the nature of the proceedings and the participants involved, the process can focus on the future instead of the past and generate new business opportunities that also resolve past grievances. Even if no such new business opportunities exist, the parties may have a cultural or psychological preference for a non-evaluative dispute resolution process, which would not require having to contradict one-another, and allow them to seek a more consensual outcome.

If disputants were to consider conflicts from the perspective of consumers of products or services in general, and they were aware of the wide range of tools available to resolve them, they would realize that they benefit from a far broader and richer tapestry of choices than litigation or arbitration. The purpose of this chapter is to touch on these alternatives, but mainly to explain the evolving field of hybrids, which allow combinations of different, tailor-made processes that are better suited to the particular circumstances of each conflict and the interests of the parties involved. It starts from the premise that disputants – like all other consumers – have choice. Just as there is always the option of purchasing an off-the-shelf product or service from a supplier, it is also possible to obtain tailor-made products that are more in line with the customer's preferences or that are better suited to the customer's needs. The important difference with this

1. Cees J.A. van Lede, the former Chairman of the Board of Management of Akzo Nobel NV has expressed that company's preference to first try mediation over litigation or arbitration as follows: 'Turn your dispute from a business threat into a business opportunity'.

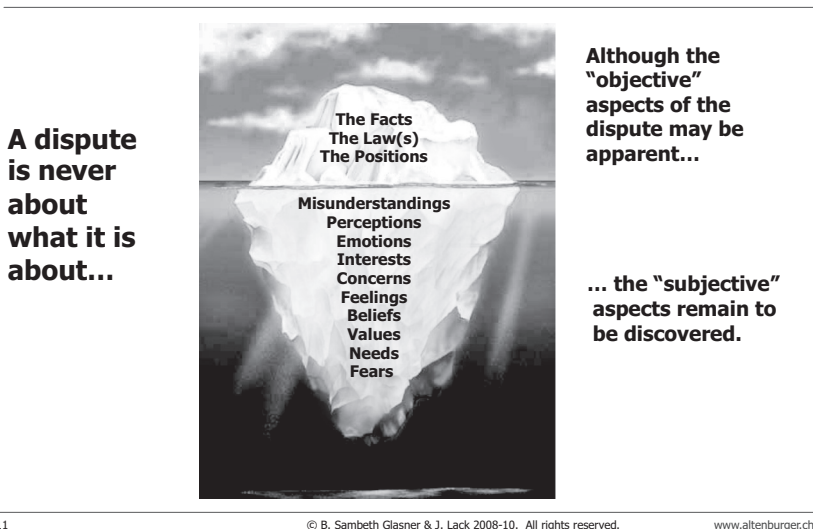
analogy, however, is that contrary to the general rule that personalized products or services tend to cost more than ‘off-the-shelf’ ones, they actually can provide cheaper and faster outcomes (not to mention better as well) when it comes to resolving disputes. It is all the more useful, therefore, for disputants to consider conflict resolution from a consumer perspective and to educate themselves properly of the range of dispute resolution processes available to them and to explore ways of tailoring each process and considering possible hybrids, working together with their counsel.

2. THE ICEBERG OF CONFLICT AND THE BENEFITS OF HYBRID PROCESSES

In order to understand the range of choices and hybrids that can be constructed, it is necessary to first recognize that each conflict is like an iceberg: it is seldom about what it appears to be about on its surface. Like an iceberg, in which only the tip is visible, the bulk of the object and its critical mass remain hidden from view (Figure 17-1). Commercial litigators tend to look at the tip of the iceberg and concentrate on the ‘objective’ facts and the applicable laws. They will assess the positions that have been argued or defended to determine liability and the kinds of damages or other relief that may be obtained from a tribunal to assess quantum. This, however, often misses the true cause of the dispute – the subjective

Figure 17-1. *The Iceberg of Conflict*

ALTENBURGER



Source: <<http://express.howstuffworks.com/gif/wq-iceberg-underwater.jpg>>

and invisible drivers that are causing it, such as fears, misunderstandings, feelings, beliefs, values, needs or interests, which are seldom discussed between counsel and their clients. Nor does focusing on the 'objective' path of litigation or arbitration allow the parties to re-assess these 'subjective' issues in the light of changing circumstances. Commercial litigators are not trained to explore the disputants' personal issues or interests. They tend, on the contrary, to avoid the hidden part of the iceberg, unless it is consciously addressed and placed on the procedural agenda for discussion. Once it is brought to their attention, however, and the customer's wishes and preferences are better understood, it is often possible for counsel to re-design the process to better suit what is really driving it.

In earlier chapters of this book, the acronym 'ADR' has been presented as standing for 'Amicable Dispute Resolution' or 'Alternative Dispute Resolution'. These definitions suggest that ADR is something distinct from litigation or arbitration (which are considered to be 'non-amicable' or 'normal' forms of dispute resolution). Litigation and arbitration are processes that try to confine themselves to so-called 'objective' parameters. They apply the legal syllogism 'facts + law = outcome', which focus essentially on the visible tip of the iceberg of conflict. Facts are usually disputed or may be difficult to establish or interpret. The tribunal's mission will be to establish 'the truth' by hearing witnesses and experts, reviewing written or forensic evidence and determining what is most likely to have happened or to have caused a chain of events. Based on the tribunal's findings of 'fact', it will then decide who should ultimately bear the blame, risk or burden for what happened and allocate damages and other relief accordingly. These are typically tasks that require looking to the past or focusing on the present, but seldom looking to the future.² Once issues of fact have been decided, the law theoretically operates like a mathematical algorithm, providing outcomes driven by these objective norms.

These sorts of non-amicable, so-called objective or evaluative dispute resolution processes are often fraught with problems. There are often no clear facts, but conflicting recollections of past events. Judges and arbitrators are often expected to make very tough choices as to which side's version of the facts is 'correct' or more credible, when it may simply be a matter of different perceptions. Recent discoveries in neurobiology further raise doubts as to whether 'facts' and witness or expert testimony can ever be more than subjective perceptions.³ There may be

2. Although quantum assessments will typically involve looking into the future, they are normally speculations as to an alternative future where there had been no breach or incident or ways of trying to calculate a net present value based on extrapolations. They do not really seek to assess or analyse what the consequences of the dispute may actually entail for the disputants in the future nor the actual impact of the award on the parties.

3. For a particularly intriguing example of subjective perceptions and how they affect 'objective facts', see <www.heraldsun.com.au/news/right-brain-v-left-brain/story-e6frf7jo-111114603615>. This webpage from the Australian paper the *Herald Sun* shows an animation of a dancer turning on one leg. Depending on an unconscious snap assessment, which happens within milliseconds (whether the viewer sees this dancer as standing on her left leg or right leg) the dancer is then perceived either to be turning clockwise or counter-clockwise. Thus, a group of viewers looking at this same image are likely to have diametrically opposing perceptions of the direction in which

no clear blame, risk or burden to allocate. It may even be that conflicting laws apply, leading to different outcomes based on the same facts and depending purely on jurisdictional issues. The wisdom of relying solely on an evaluative process in such a case can be questioned. Invariably, with hindsight, one party will feel the tribunal was biased and did not apply justice.

If it is indeed the invisible, subjective part of the iceberg that is really driving the conflict, it is questionable whether litigation or arbitration, which banish such concepts as emotions, beliefs, fears or feelings from consideration, should be the most common processes for resolving a dispute. The events that generated the invisible part of the iceberg or that triggered emotional responses or feelings, are not considered or assessed by the tribunal, and in some cases are even taboo. Most evaluative neutrals would consider it highly inappropriate for a judge, jury or arbitral tribunal to take such subjective issues as beliefs or values into consideration. Doing so would probably create grounds for an appeal, for example, on the grounds of bias or a manifest error of law. An arbitral tribunal may have more discretion than a court judge, but its discretion is still quite limited. Even when a tribunal is authorized to act as an *amiable compositeur, ex aequo bono*, and empowered to apply general principles of equity, it cannot issue its award based on purely subjective considerations. The award must be granted based on 'objective' facts, as presented to and perceived by the majority of the court or tribunal, applying the legal syllogism that 'facts + law = outcome', and then applying a limited toolkit of additional equitable remedies to reach a fair outcome, which must still be justified by the tribunal as a matter of law.

Looking only at the invisible part of the iceberg, however, may not be satisfactory either. If 'amicable dispute resolution' is a process focusing only on the invisible drivers of the process, it may not lead to an outcome at all because of its inherently subjective nature. Mediation is an amicable process that has been defined as 'the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs'.⁴ It may, therefore, be considered as a process that looks at the hidden part of the iceberg, because it seeks to identify the parties' needs and generate interest-based solutions that best respond to the parties' needs. Fears, misunderstandings, values and concerns are often elicited by a mediator, in private or in joint sessions, and the parties are encouraged to jointly seek and develop

the dancer is turning in real time (some seeing clockwise, and others anti-clockwise movement). What appears to be an incontrovertible matter of fact (which direction the dancer is turning) is in fact a subject perception, influenced by an unconscious prior assessment and each person's subjective abilities to process three-dimensional images. (For a more scientific explanation of this bizarre phenomenon, see <www.newscientist.com/blog/shortsharpscience/2007/10/bring-on-dancing-girl.html> from the *New Scientist*.) Whether a viewer sees the dancer as turning clockwise or anti-clockwise is not an objective fact (in fact, she is not even turning) but a purely subjective experience, which neurobiology suggests is always the case in matters of perception.

4. J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass Inc., 1984), 7.

options that are mutually acceptable. This process may lead to outcomes that are perceived as procedurally, psychologically or substantively more satisfactory than litigation or arbitration. However, such amicable dispute resolution processes can also have their shortcomings. If the parties are not willing to cooperate, if a deadline is pending, or if a precedent-setting ruling is necessary, mediation may be ineffective.

Commercial litigators generally support amicable dispute resolution processes as a matter of principle. They will typically discard such processes in practice, however, as inappropriate in this specific case because they believe the other party is unreasonable, that it is too soon to have a sense of the strength of the case or it is not advisable to start down that track yet because it distracts resources and does not guarantee an outcome or provide any business certainty, especially when there are tight time constraints involved. Litigation and arbitration, on the other hand, do (in principle) guarantee an outcome that is final, binding and enforceable (especially in arbitration, where the New York Convention will apply and there are limited grounds for appeal). The main variables are cost and time, and lawyers tend (rightly or wrongly) to have a sufficiently clear sense of what will be the likely outcome. Some litigators also fear that an amicable dispute resolution process may be misused by the other side to buy time, to fish for new information, or to waste resources. Another common (albeit erroneous) concern is whether suggesting or accepting an offer to try mediation may be misconstrued by the other side as a sign of weakness. Some litigators also feel uncomfortable with such a vague process, where their role and status are felt to be unclear. These litigators are likely to argue that summary judgment or injunctive relief will be more appropriate or cost-effective (sometimes rightly so). Regardless of whether they favour amicable or non-amicable dispute resolution processes, most commercial litigators will usually think in a binary 'either/or' mode, without looking at both the visible and invisible parts of the iceberg or of the iceberg as a whole or considering how both objective and subjective processes could be combined to generate an outcome that would address the entire conflict, taking into account the past, the present and the parties' future needs and interests.

Approaching the iceberg of conflict as a whole allows disputants to design processes that can take into account both the visible and invisible parts of the dispute and benefit from the best of both worlds. Rather than talk in terms of 'amicable' versus 'non-amicable' or 'objective' versus 'subjective' dispute resolution processes, and distinguish litigation and arbitration from other forms of dispute resolution, a new way of thinking is required. Litigation and arbitration are fully compatible with mediation and other forms of amicable dispute resolution.⁵ In fact, the acronym ADR should not stand for Amicable Dispute Resolution or Alternative Dispute Resolution, as is often the case, but for *Appropriate Dispute Resolution*. Arbitration and litigation should be considered only as options,

5. See R. Dendorfer & J. Lack. 'The Interaction Between Arbitration and Mediation: Vision vs. Reality', *Dispute Resolution International* 1, no. 1 (May 2007) (also published in *SchiedsVZ*, C.H. Beck Verlag, Munich, July/August 2007, vol. 4)

together with other forms of dispute resolution processes, as part of a wider range of conflict resolution possibilities. They should be treated as tools that can be combined with other tools to provide faster, cheaper and better outcomes, especially in international commercial disputes where proving the ‘facts’ may be costly or impossible, or there are overlapping or incompatible applicable laws. In most cases, arbitration and litigation should not be the instinctive or default mode of conflict resolution but, on the contrary, the processes of last resort. In order to appreciate and develop this line of thinking further, it is necessary to understand conflict escalation theory and a holistic approach to Appropriate Dispute Resolution (hereinafter ‘ADR’) for designing customized processes that can provide more satisfactory and certain outcomes.

3. DESIGNING A PROCESS: CONFLICT ESCALATION AND DEVELOPING A HOLISTIC ADR STRATEGY

If the parties wish to design a tailor-made dispute resolution process or make the best decision when choosing among different off-the-shelf ADR processes, it is important to know where the dispute currently stands on a conflict escalation scale and also within which range of the escalation scale they wish to resolve it. This requires an appreciation of conflict resolution from a new perspective, taking into accounts the parties’ individual values, needs, constraints and sense of desired process and outcome.

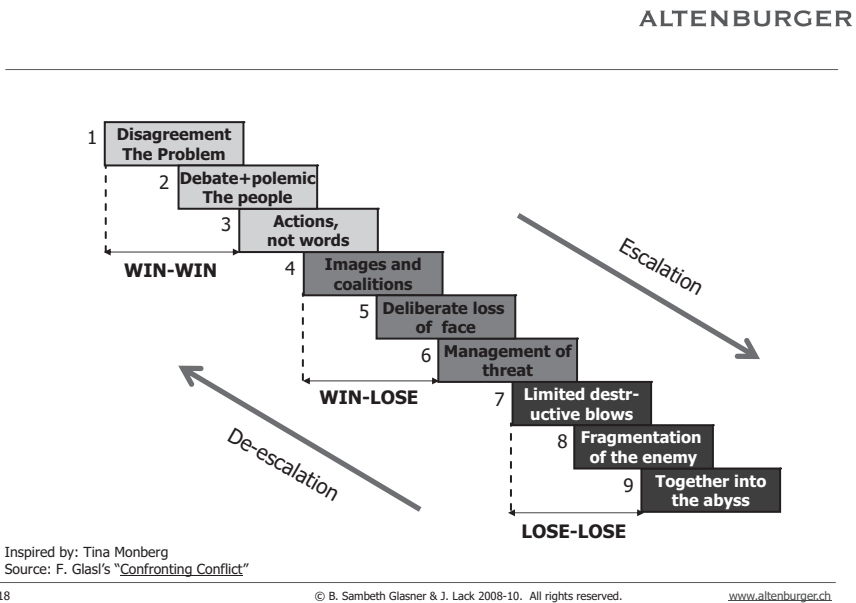
Conflict escalation theory is a topic seldom taught in law schools. It is not a topic commonly found on the bar examination of any countries or states, and it is a concept many litigators may not be familiar with at all, despite the fact that they are deeply immersed in such matters on a daily basis.⁶ ‘Conflictology’ can help lawyers and their clients to diagnose and identify where a conflict currently stands on a numbered scale and its propensity to escalate further or to de-escalate. This ability to assess the level of the conflict, or its ability to escalate or de-escalate may only be qualitative, but it will help to focus on the process itself and to understand that escalation or de-escalation may very much depend on the type of process that is being used to resolve the dispute. In fact, years of experience indicate that David Plant’s comment, with which this chapter begins, is a blind spot in many litigations. Once a process has been chosen it becomes part of the problem itself. The parties and their counsel limit their thinking in non-amicable processes to what the trial requires, thus typically leading to entrenched positions or an inability to look to the future or seek possible outcomes for mutual gain that analyse the clients’ interests differently. Identifying a conflict along a measurable scale (even if such

6. A notable exception here is The Netherlands, where under a pioneering programme set up by Judge Machteld Pel, the Dutch courts have received training in conflict diagnostics to try and develop a systematic approach to referring cases to mediation. For more information on this, see: M. Pel, *Referral To Mediation: A Practical Guide For An Effective Mediation Proposal*, Sdu Uitgevers (1 Apr. 2008)

measurements are subjective) allows parties and their counsel to think where and how they are currently positioned on it and in which area of the scale they would like to resolve their dispute. An example of such a scale is the nine-step diagnostic test developed by Prof. Friedrich Glasl, an Austrian mediator and consultant, whose model of conflict escalation can be applied to any conflict. Glasl⁷ suggests that there are three possible zones for resolving a conflict: a 'win-win' zone, a 'win-lose' zone and a 'lose-lose' zone. These zones correspond to the following nine stages or steps in the conflict escalation cycle illustrated in Figure 17-2.

At Stage 1 the parties become aware that they have different views about an issue. The disagreement takes on the dimension of a problem, where the parties start to discuss the problem and seek to bring the other party around to their line of thinking. If they cannot agree, their views then tend to harden into positions. At Stage 2, the problem has turned into a dispute. The parties are arguing and debating their respective positions. They wish the other to understand the logic and strength of their position and to agree with it. If a debate has not resolved the matter, a sense of frustration sets in and the parties enter Stage 3. One or both sides will start to take action. The parties' perceptions are that they have tried to negotiate in good faith but failed and that the other is being obstinate, unreasonable or is acting in bad

Figure 17-2. Conflict Escalation Theory: Glasl's 9 Steps



7. F. Glasl, *Konfliktmanagement: Ein Handbuch für Führungskräfte, Beraterinnen und Berater* (Bern: Paul Haupt Verlag, 1997). See also <www.trigon.at>.

faith. Communication breaks down as each party believes that further discussion is useless. A key next step in the escalation cycle is Stage 4 – the creation of coalitions. The disputants start creating groups or camps by seeking recognition from peers, leaders or experts as to the correctness of their position and to reinforce their image of themselves as being ‘right’ and the other party as being ‘wrong’. Having failed to convince the other side, each side tries to convince third parties to confirm they are right or to intervene on their behalf. The moment a party has succeeded in winning over a group of people, the other side will see their image as being tarnished and under attack. Stage 5 ensues as a result of what is perceived as a deliberate loss of face caused by the other party. Public refutation is now required, or refutation before a public body or council. This refutation must show that the other disputant is not right or reasonable, but wrong, causing him or her to also lose face within his or her own community. There is a strong sense of anger or humiliation that has often been experienced, which requires corrective measures. The parties will also start attributing antagonistic intentions to the other party’s observed behaviour. At Stage 6, the other side’s behaviour and refusal to change has now become a threat that must be managed and contained. The disputants will start to make counter-threats and impose ultimatums. Letters before legal action will be sent. Parties are now fully entrenched in their positions, and there is mutual fear given that their initial threats and deadlines have not been heeded. At Stage 7 the parties feel compelled to take protective measures and start to exert real pressure, such as initiating legal proceedings (limited destructive blows). They tend to resent the other side for compelling them to take such measures, seeing their actions as reasonably constrained and feeling that they are mere agents, compelled to resort to such limited blows by the other side’s intransigence. By now, all communication between the parties has usually ceased. The disputants typically communicate only via their lawyers, and all social relations have been cut off. It is now a matter of survival and protecting one’s self, which means that fear has become the fundamental factor driving the parties’ behaviour. At Stage 8, the parties are purely engaged in self-preservation mode. The consequences of each party’s limited destructive blows are that the other party feels wounded and there is increased pressure to take more forceful and demonstrable action. The concern becomes essentially one of survival. This increased pressure leads to further fragmentation, and the parties are now openly fighting. If this continues, and the ‘hidden part of the iceberg’ is not identified or understood, the parties’ fears and concerns can lead them to the extreme of forgetting that this was simply about their own preservation and now wishing to inflict revenge and destroy the other party (Stage 9). At this stage the concern is not only about survival, but punishing or destroying the enemy. Matters have degraded so far that inflicting greater harm on the other side than they have experienced themselves can become the main motivation. The desire to crush the other side overtakes everything else. Whether the disputant loses all of its assets, has to fabricate evidence or lie, file for bankruptcy or risk a jail sentence is no longer important, so long as the other side is destroyed. This phase is aptly called ‘together into the abyss’.

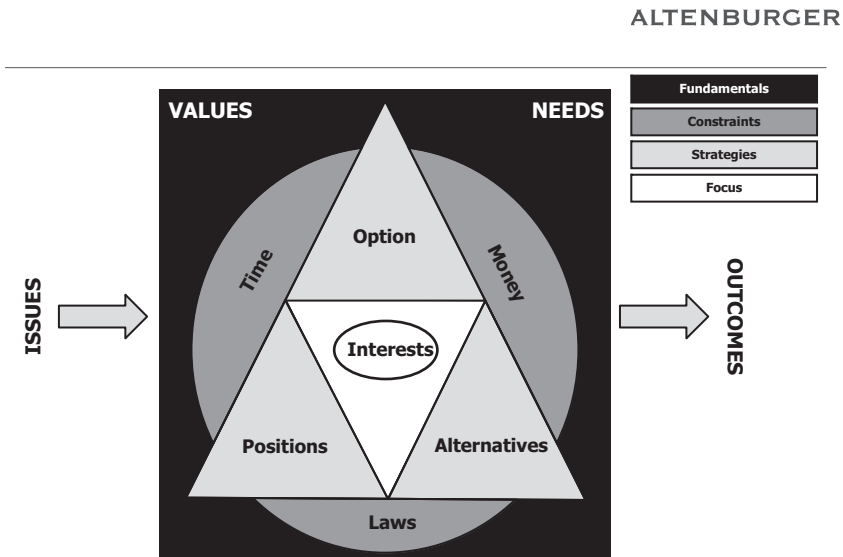
It is easy for seasoned litigators to recognize this escalation pattern from their own past cases, especially where the parties have been highly emotional. What lawyers do not tend to think about, however, is whether, and if so how or when, the legal process they embarked upon may have contributed to this escalation or how the lawyer's own behaviour may have contributed to this as well. To some extent, the parties were already at Stage 4 when they first came to see their lawyer. They were seeking to create a coalition with a legal expert who would confirm the 'rightness' of their position. The lawyer, by validating the party's position (or strengthening it), and confirming that the party has an actionable case or defence against the other party who has acted wrongfully, is often unwittingly contributing to the escalation process and may become part of the coalition-building process. The lawyer's opinion may contribute to further conflict escalation, because the parties will now declare that their position has been validated by a legal expert. The tougher the tone of the lawyer's support or the greater his or her reputation, the better it is, as far as the client is concerned. This helps to grow the disputant's coalition. As of this tipping point, the conflict tends to naturally escalate further, especially if an evaluative mode of dispute resolution has been chosen or recommended by the lawyer. Every evaluative conflict resolution process is based on competitive advocacy – the *principe du contradictoire* or *audi alteram partem*. All eyes are on the tribunal, and the process for each party and their counsel becomes creating the 'ultimate coalition' with the tribunal as well. Counsels' energies become focused on winning the case by convincing the tribunal to find in their client's favour. The tribunal, jury or judge is seen as the ultimate assessor of whether the claimant or the respondent's position is 'right' or 'wrong', or who will 'win' (regardless of the consequences of such a 'victory'). It is paradoxical, therefore, that the very processes that lawyers and other conflict professionals tend to automatically use to resolve disputes are themselves coalition-building processes, tending to contribute greatly to the escalation of the underlying conflicts in and of themselves. 'Winning' can sometimes be a loss or a lost opportunity for something significantly better (e.g., if the respondent has to file for bankruptcy and will not be able to pay adequate damages), especially if the parties are at level 9 of the Glasl scale, and the question is 'who has lost more?'.

Rather than immediately seeking to confirm a client's case (or how best to put the strongest spin on it), it is submitted that litigators could first seek to help their clients become aware of where they already lie on the conflict escalation scale and whether their search for legal confirmation is part of a coalition-building stage. Do they really need legal analysis to resolve this conflict, based on a legal syllogism, or can the conflict be resolved by re-assessing the various invisible elements of the iceberg of conflict with the help of a neutral facilitator? It is possible for counsel to recognize, when first advising on the merits of the client's case, that the process may become part of the problem itself. Before giving their opinion, lawyers can help the parties to understand their options in view of the area of the conflict escalation scale they are in and what possible combinations of ADR tools may be available to them should they wish to target a particular zone of the conflict escalation scale. It may also be that the other side does not perceive itself as being

at the same stage on the conflict escalation scale. In that case, any action taken by one party could be perceived as being unnecessarily aggressive by the other, thus unintentionally provoking the other party to become even more aggressive itself, thus needlessly accelerating the conflict escalation cycle. Designing a process using a conflict escalation scale such as Glasl's model requires a holistic view of dispute resolution and the client's procedural options, starting from the diagnosis of where the client is located on that conflict escalation scale as of this juncture.

Our law firm has designed a holistic approach to conflict prevention and resolution that can be approached in three steps, as illustrated in Figure 17-3.⁸ The first step (indicated as a square) provides the fundamental platform on which the entire process will be built. It involves helping the client to understand its basic needs and the values upon which it wishes its strategies and choices to be built. The second step (indicated by a circle) requires identifying and assessing the client's constraints, which typically involve the same three limiting parameters: (1) the amount of time available, (2) the amount of money or resources available and (3) the applicable laws. The third step (indicated by a fractal pattern of triangles) involves assessing possible strategies through four prisms: (i) Positions, (ii) Alternatives, (iii) Options and (iv) Interests. The first prism is that normally used by a litigator. It involves a legal evaluation of the strengths and weaknesses of

Figure 17-3. *The Holistic Approach to Conflict Prevention and Resolution*



8. The author is grateful to Birgit Sambeth Glasner for her contributions in developing this approach.

the client's case from a legal perspective. The second prism builds on the first analysis and also requires an evaluative legal perspective. It entails considering the client's alternatives to a negotiated outcome (i.e., its Best Alternative to a Negotiated Agreement [BATNA], its Worst Alternative to a Negotiated Agreement [WATNA] its Probable Alternative to a Negotiated Agreement [PATNA] or its Reasonable Alternative to a Negotiated Agreement [RATNA]). This involves looking at what happens if the client wins on all points (BATNA) or loses on all points (WATNA) and a probable sense of what is likely to happen in court (PATNA or RATNA). The BATNA, WATNA and PATNA/RATNA should be assessed in terms of the time it will take, the amount of money it will cost to get that outcome, the possible award and relief the tribunal will grant and the consequences of that award (e.g., how easy it will be to enforce or what will happen if the other side files for bankruptcy). The third prism involves trying to think of procedural options other than litigation or arbitration and what could be achieved through a non-evaluative process or negotiations, as well as possible solutions that could be generated by the parties themselves. Finally, the fourth prism (the most important one, which should remain the primary focal lens throughout the process) is to identify the parties' interests – one's own interests and those of the other side. Understanding the parties' interests will allow the attorney and the client to assess whether the client's positions, alternatives or options are better than a negotiated outcome. By focusing on the parties' interests, it should be possible to design a process that will lead to a faster, cheaper and/or better outcome, possibly including evaluative and non-evaluative components in the process and set aspirational goals that may even exceed the client's and the other side's BATNAs.

4. MIXING AND MATCHING ADR TOOLS AND THE TWO KEY AXES: PROCESS VERSUS SUBSTANCE

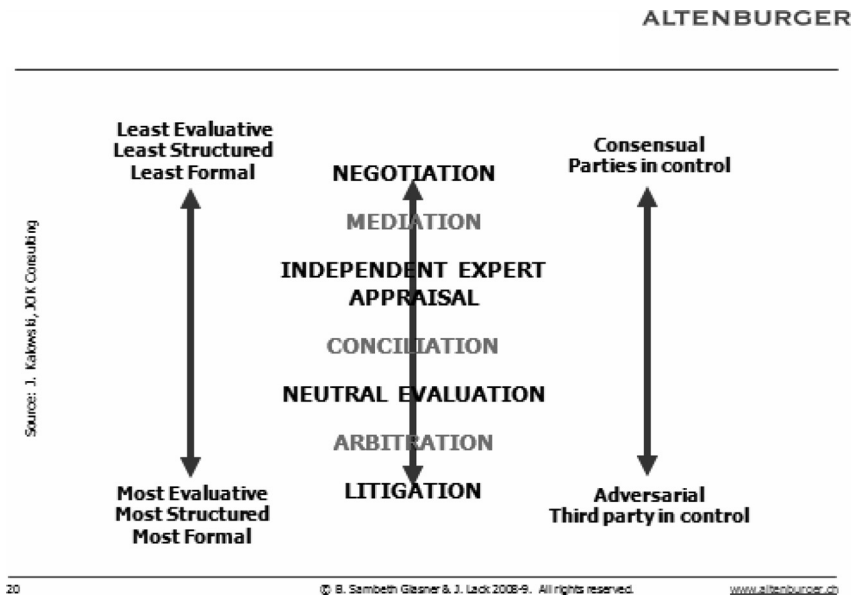
Thinking along these lines requires a new look at Appropriate Dispute Resolution, and re-assessing the range of tools available both in terms of the escalation stage the parties are at and the process that would best fit the client's future interests. The range of procedural tools available is rarely limited. It typically includes negotiation, mediation, independent expert appraisal (a determination of 'facts' by an expert), conciliation,⁹ non-binding evaluation by a neutral (an assessment of

9. Although the term 'conciliation' is often used interchangeably with 'mediation' by many lawyers, they are in fact considered to be very different forms of dispute resolution processes in some jurisdictions. Mediation is viewed as a subjective and non-evaluative process that focuses on the parties' needs and interests. Conciliation is a process that focuses on objective norms and is an evaluative process, in that the neutral helps the parties to identify the key parameters by which the dispute would be resolved using these norms (e.g., dispositive facts or principles of law) and helps create a Zone of Possible Agreement (ZOPA), in which it is expected that the conciliator will make proposals to the parties as to possible settlement solutions based on these norms. Reverting to our analogy of conflict as an iceberg, conciliation involves looking at the 'objective' tip and visible part of the iceberg (in a non-binding manner), whereas mediation looks at the

the ‘facts’ and the law), arbitration and litigation. These options create a spectrum of tools that ranges from unstructured, non-evaluative and informal processes to structured, evaluative and increasingly formal processes. This is illustrated in Figure 17-4 below.¹⁰ Depending on whether the parties are seeking a consensual dispute resolution process, in which they remain in control, or an adversarial process, in which a third party will determine procedural and substantive issues, the parties have a wide range of choices available to them. The important thing is not to think about them in a binary ‘either/or’ manner, but to realize that it is possible, and sometimes even advisable, to combine them.

Most of the procedural choices mentioned earlier are self-explanatory and need no explanation (e.g., negotiation¹¹ and litigation). Independent expert appraisals on this scale represent technical factual reports, in which pure findings of fact are given, as opposed to neutral evaluations, in which non-binding evaluations are given (of fact and of law, that recommend or provide an outcome). The parties

Figure 17-4. *The Process: Appropriate Dispute Resolution*



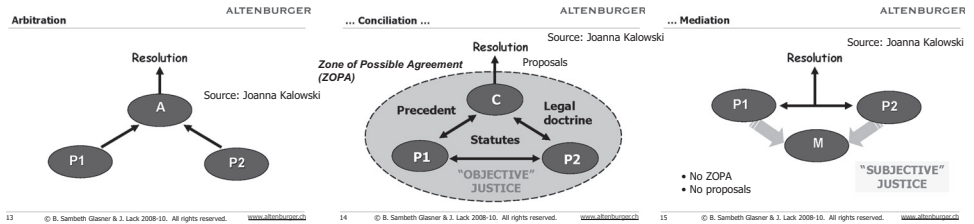
‘subjective’ and invisible submerged part of the iceberg. This important distinction is discussed later in more detail.

10. The author is indebted to Joanna Kalowski (jok@jok.com.au), an Australian mediator and consultant, for her kind permission to reproduce this diagram.
11. Even so, there are two types of negotiation seldom considered separately: positional negotiation, in which the parties seek to induce a compromise within a Zone of Possible Agreement, and interest-based (or problem-solving) negotiation, as taught in the legendary book *Getting to Yes* by Fisher and Ury.

are free to adopt or ignore them in their on-going negotiations. There is, however, considerable confusion in international conflict resolution circles between the words ‘mediation’ and ‘conciliation’, which are believed by many lawyers and ADR neutrals to be synonymous, but can involve very different processes, with different consequences from a conflict escalation theory perspective. In order to better understand the difference between mediation and conciliation, it is useful to start with arbitration and to compare them visually as is done below in Figure 17-5.¹²

Arbitration, conciliation and mediation are three commonly available forms of Appropriate Dispute Resolution that can be used together (as well as with other ADR tools) to create hybrids, once the differences between these processes are better understood. Understanding these distinctions is important when building hybrid processes, because mediation is a non-evaluative process in which no coalition is being sought with the neutral, whereas in conciliation, the neutral’s subject matter expertise is typically being sought to set norms or make proposals in a somewhat evaluative manner, which means that the neutral can be viewed competitively – as a person with whom a coalition can or should be built.¹³

Figure 17-5. Arbitration v. Conciliation v. Mediation



12. Once again, the author is indebted to Joanna Kalowski for her kind permission to use her slides comparing arbitration, conciliation and mediation.

13. This confusion between conciliation and mediation is captured by the UNCITRAL Model Law on International Commercial Conciliation (2002). Art. 1(3) of the Model Law states that:

For the purposes of this Law, ‘conciliation’ means a process, *whether referred to by the expression conciliation, mediation or an expression of similar import*, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute. (Emphasis added.)

Yet under Art. 6(4) it is clear that the UNCITRAL Model Law is aimed at an evaluative process, because it states:

The conciliator may, at any stage of the conciliation proceedings, *make proposals* for a settlement of the dispute. (Emphasis added.)

Mediation purists would deem this to mean that the UNICTRAL Model Law is not directed at mediation – in which no proposals or coalition can be sought from the mediator – but only to conciliation, in which a conciliator is encouraged to make proposals (even if

In arbitration the parties delegate control of the process and the outcome to a third party, the arbitrator or panel of arbitrators sitting as an arbitral tribunal. The resolution of the dispute is thus decided by the arbitral tribunal. In conciliation, the neutral acts somewhat as an arbitrator, but does not resolve the matter and makes non-binding recommendations. The conciliator acts evaluatively, by identifying norms by which the dispute can be resolved 'objectively'. A conciliator typically helps the parties to understand the parameters that could be used to dispose of the matter evaluatively, and to understand the key and weak elements in each party's line of reasoning, identifying key issues of fact or law. Based on the conciliator's understanding of the applicable law or the rules of the relevant industry by whose standards a solution may be sought, the parties are assisted in identifying precedents, rules or academic doctrines that would suggest an outcome. The conciliator helps the parties understand the dispositive issues on which such an outcome would be decided in applying these norms, and helps the parties to set a Zone of Possible Agreement (ZOPA) in which they can negotiate an outcome similar to what the law or another objective process would provide for, but doing so more speedily or cost-effectively. The conciliator can also make proposals based on these parameters and suggest possible outcomes to the parties based on these norms. Conciliation is thus a process that can be procedurally facilitative, but that is substantively evaluative, because possible outcomes are identified and resolved by means of objective norms and criteria. In mediation, however, there is no ZOPA and the neutral should refrain from making proposals. Nor are there any objective criteria. The goal in mediation is for the mediator to focus on each party's subjective needs and interests and to help them to understand them and reach an outcome based on these subjective considerations that will be satisfactory to both sides. Unlike a conciliator, it is felt that a mediator should refrain from making proposals unless requested to do so by both parties. The mediator's job is to help the parties reach a resolution to the dispute that is based on their subjective needs and interests, looking to the future.¹⁴

It is necessary here to distinguish procedural options from substantive options. These are the two main axes to consider when deciding what type of ADR process the parties may wish to use, using a grid system designed by Prof. Leonard Riskin,

non-binding) and the neutral can be viewed and used competitively as a result. Mediation purists will argue that a mediator should never make settlement proposals, and in any event not at an early stage of the proceedings or before having been asked to do so by all parties.

14. This distinction between mediation and other forms of ADR is captured in the Swiss Rules of Commercial Mediation, as follows:

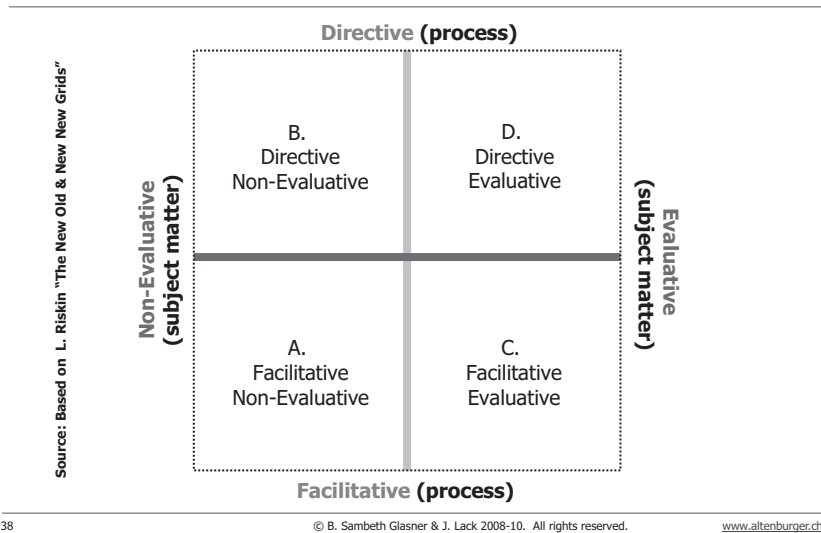
Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. *Unlike an expert the mediator does not offer his or her own views nor make proposals like a conciliator, and unlike an arbitrator he or she does not render an award.* (Emphasis added)

(Introduction, p. 5, para. 2, emphasis added). The concepts of subjective needs and interests, however, are missing from this more detailed definition.

the Chesterfield Smith Professor of Law at the University of Florida.¹⁵ A modified Riskin Grid (shown in Figure 17-6) can be used to design possible constellations and help the parties and their counsel to position themselves on the grid and discuss where they wish a neutral or parts of the process to be located. Do they want the neutral to be directive on procedural matters (e.g., imposing time constraints, written submissions, or rules of procedure) or to act only facilitatively (e.g., by only suggesting various possibilities and encouraging the parties to discuss and set their own procedural modalities on time, submissions, rules of procedure, or other procedural matters). The parties and their counsel can then consider separately whether they wish to have the neutral (or allow parts of the process) to be evaluative or non-evaluative on matters of substance, thus allowing the parties to also use the neutral (or parts of the process) competitively, to create coalitions with the neutral (or some of the neutrals, if more than one is involved). This combination of axes allows the parties to decide whether they wish the neutral(s) to decide all procedural issues and be extremely directive on such issues (e.g., telling the parties what to do at certain times of the day), but remain non-evaluative on substantive issues (e.g., preventing the neutral[s] from giving an opinion, ‘reality testing’ or making proposals until later on in the process) or vice versa. This is an important distinction because non-evaluative processes minimize the risk of coalitions with the neutral(s) and thus of further conflict escalation. Looking at the Riskin Grid in this way, four quadrants become apparent.

Figure 17-6. Two Axes to Consider: Process v. Substance

ALTENBURGER



15. Leonard L. Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New Grid System’, *Notre Dame Law Review* 79, no. 1 (2003): 1–53

It is important for parties and their counsel to be clear if hybrid processes are to be used, what part of the process versus substance grid they wish the dispute to resolve itself in or how they may wish the process to migrate over time. It is possible to start in one quadrant and end in another, or to work in parallel in different quadrants (usually using different neutrals) depending on the stage of the conflict escalation cycle the parties start off at or whether there are any preliminary dispositive issues to be decided or separated from other issues involved in the dispute. It is then possible to separate these issues and resolve them differently, using different processes in different quadrants to address each issue in the best and most cost-effective manner.

Quadrant A (Facilitative and Non-Evaluative Processes)

This covers typically facilitative mediation, in which a neutral is hired to help the parties find solutions based on their subjective interests, looking toward the future. The process is both non-evaluative (in that the mediator will not offer his or her own views) and non-directive (in that the neutral facilitates a discussion between the parties to help them decide their own procedural options and preferences). Issues such as time, venue and preparations for the process will all be left to the parties to decide, who remain in complete control of all aspects of the process. The neutral helps the parties to brainstorm and to find solutions that best meet both parties' subjective interests. The neutral avoids making any proposals as to possible outcomes and merely serves as a catalyst to facilitate a negotiation between the parties on procedural and/or substantive issues or conducts the mediation as a social process that empowers the parties to make a broader range of choices with full autonomy and choice at all stages.¹⁶

Quadrant B: (Directive and Non-Evaluative Processes)

This encompasses a directive mediation, in which a neutral is hired to help the parties find solutions based on their subjective interests and looking toward the future (as in Quadrant A), but in which the neutral takes a more directive role on procedural matters and may decide procedural issues. Examples of such procedural issues are: (1) setting the time, venue and manner in which discussions are conducted; (2) requesting specific submissions in advance of a first joint mediation session (such as statements of interests, descriptions of failed prior attempts to resolve the case through direct negotiations, and a list of suggestions as to how substantive issues may be resolved); (3) setting procedural rules on opening statements, and directing the parties themselves (as opposed to their counsel) to make certain presentations before or during the mediation; (4) providing procedural proposals (e.g., hybrid structures) if they feel an evaluative component would be helpful to the process, and so forth. The neutral refrains, however, from making assessments or proposals on substantive issues and limits any evaluative feedback to procedural issues.

16. See, e.g., the work of Austrian mediators Mario Patera and Ulrike Gamm on this issue at <www.konfliktkultur.com/>.

Quadrant C: (Facilitative and Evaluative Processes)

This includes non-directive conciliation or early expert evaluation, in which a neutral is hired to help the parties find solutions that may still take into account the parties' subjective interests, but where the neutral is also meant to act evaluatively, for example, by advising on objective parameters and norms, such as what the law provides for and what a tribunal is likely to find. A neutral acting in this quadrant helps the parties set up a ZOPA and identify themselves the information required to resolve key parameters that could be dispositive of the matter depending on how they are assessed. The neutral in this case may still leave the parties to discuss their own procedural preferences (e.g., as to time, venue, written submissions and preparations) and may make recommendations with the consent of the parties, but will be expected to use his or her substantive knowledge to also help the parties by doing reality testing (normally in private caucuses, sitting separately with each party) and identifying key parameters and benchmarks that will create a framework or ZOPA for a settlement, based on these objective norms. It is possible for the neutral in these cases to make proposals to the parties as to possible solutions or outcomes.

Quadrant D (Directive and Evaluative Processes)

This encompasses a broad range of legal processes, including directive conciliation, adjudication, non-binding arbitration and arbitration or litigation, in which one or more neutrals are hired to help the parties find a solution by controlling both axes. The process is very much based on reaching cost-effective outcomes using objective parameters and norms, such as what the law provides for and the need to make decisions in a given time frame. The neutrals in this case will direct the process based on their procedural preferences (e.g., as to time, venue, written submissions and preparations) and will also use their substantive knowledge to help the parties understand and set key parameters and benchmarks and set a ZOPA based on these norms. The neutral in this case is more likely to use time and procedural issues to move the parties along, will do more reality testing, and is likely to make proposals to the parties as to possible solutions or outcomes, sometimes going so far as to provide them with written opinions (binding or non-binding) as to where within the ZOPA they think the matter should settle.

It is possible for one or more neutrals to be used in each quadrant or for the same neutral to change styles (e.g., starting in Quadrant A and migrating to Quadrant D) depending on the parties' strategic choices, as external constraints (e.g., time and budgets) may require the neutral to be increasingly directive or evaluative. This will also often depend on the conflict escalation stage the parties have reached or in which zone of the scale they would like to resolve the matter. A Quadrant D process, for example, may be useful for parties who are already at levels 8 or 9 of the Glasl scale. A separate neutral could also work with them in Quadrant A or B to de-escalate the conflict. Having made these procedural choices,

it is now possible for the parties and their counsel to construct their own dispute resolution processes that are tailored to their needs and interests.

5. DESIGNING MIXED PROCESSES: SEQUENTIAL, PARALLEL OR HYBRID ADR PROCESSES

Using the Riskin Grid as discussed above, the iceberg of conflict can be viewed as a whole. The parties and their counsel should have an appreciation of conflict escalation theory and understand where they stand in the conflict resolution process, whether they share the same views of this and where they wish to resolve it along the conflict escalation scale. This will then affect what types of neutrals they may wish to use at different stages, to resolve both procedural issues and substantive issues. For example, although a mediator may be useful at any of Stages 1–9 of the Glasl conflict escalation scale, it would not be appropriate to appoint an arbitrator or a conciliator for a process that the parties wish to resolve within Stages 1–3 of the scale. Using evaluative neutrals in a Stage 3 conflict would likely turn the process into a coalition building exercise, thus automatically bringing the parties to Stage 4. It becomes clear from this process of analysis that different neutrals or combinations of different neutrals can be useful at different stages, and that combined processes can be sequential, separate but parallel or true hybrids, in which the roles of the neutrals can evolve or blend, and it becomes more difficult to distinguish one part of the process from another.

(a) Sequential Processes:

Sequential processes are very commonly used and are often drafted into contracts as escalation clauses. Typically the parties will try to first settle matters through negotiation between senior business executives. Then, the parties may try and bring in a neutral to assist with a mediation or conciliation. If this does not lead to an outcome by a certain deadline, the parties will move on to litigation or arbitration. This process is well known, and to some extent follows natural conflict escalation according to Glasl's 9 steps.

– MED-ARB

MED-ARB is the most common type of combined process used: mediation followed by arbitration. There are many international institutional rules that suggest combinations of mediation followed by arbitration (e.g., World Intellectual Property Organization (WIPO), International Chamber of Commerce (ICC), Chartered Institute of Arbitrators (CIArb), American Arbitration Association (AAA)). A list of these institutional clauses and related readings can be found on the website of the International Mediation Institute at <www.mediation.org>. ¹⁷ The mediation phase

17. See <www.imimmediation.org/model-mediation-clauses>.

allows the parties to first try to resolve the process taking into account the ‘invisible’ parts of the iceberg of conflict (via mediation) and to then resolve any remaining matters by taking into account only the ‘visible’ part of the conflict (via arbitration).¹⁸

– ARB-MED

ARB-MED is a less well known form of sequential process, which lends itself particularly well to disputes on issues of quantum, or where issues of liability have been separated from quantum, and it is only the amount of damages that remains in dispute. Rather than expend significant resources in trying to prove or disprove speculative or projected quantum issues, the parties first conduct a ‘rough and quick’ arbitration, appointing a neutral to give a short ruling as to the amount to be paid by one party to the other (e.g., an award stating a single number to be paid by one party to the other, with minimal or no reasoning provided). This process can take as little as half a day. Once the arbitrator has written the award, he or she seals it in an envelope marked ‘confidential’ and leaves it on the table without disclosing its contents. The parties then commence mediation proceedings, having agreed in advance to open the envelope and accept it as a binding ruling if they have not reached an agreement using mediation or conciliation by a specified time (e.g., 6:00 p.m. that evening). If the parties settle, the envelope is torn up and its contents remain unknown by the parties. This offers the benefits of allowing the parties to negotiate their own outcome based on interests (taking into account the invisible part of the iceberg) while at the same time having the certainty of knowing that there is already a guaranteed outcome waiting on the table in the form of a sealed envelope (i.e., based on the visible part of the iceberg). The sealed envelope is also helpful in that it puts the parties under psychological pressure to reach an agreement, because the fear of the unknown ruling in the envelope adds an incentive to settle on the parties’ own terms. This process is not limited to resolving conflicts but can also be extremely helpful in mergers and acquisitions, or in business negotiations (e.g., when the deal-makers are stuck on an issue of price).¹⁹

18. For further discussion on Med-Arb, see Edna Sussman’s and Alan Limbury’s chapters in this book. See also: (1) Dendorfer & Lack, at fn. 5 *supra* (2) G. Phillips, ‘Back to Med-Arb: Survey Indicates Process Concerns are Decreasing’, *Alternatives* (April 2008), 73–79; and (3) Y. Vorys, ‘The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes’, *Ohio State Journal on Dispute Resolution* (2007), 871–898.

19. For a case study describing an ARB-MED procedure, see B. Bulder, M. Leathes, W. Kervers & M. Schonewille, ‘Einstein’s Lessons in Mediation’, July/August 2006, *Managing Intellectual Property* (<www.managingip.com>), 23–26, in a matter involving the sale of intangible assets by British American Tobacco to a former supplier, in which there was no dispute but a business transaction being negotiated, and the parties were stuck on quantum. Although the same neutral was used in that case for both the initial arbitration and the subsequent mediation, two different neutrals could have been used.

– ARB-CON-ARB (Conciliation Window)

In the ARB-CON-ARB process the parties start with arbitration and then open a window for conciliation proceedings during the course of the arbitration. If the matter does not resolve itself through conciliation, the arbitration panel will resume the proceedings and issue a binding award. Such combinations of arbitration and conciliation are well known in many civil law jurisdictions and indeed are viewed as an inherent part of normal arbitration proceedings.²⁰ Some civil law arbitrators will hold a meeting at some stage of the process to provide preliminary views, or to provide a draft or oral version of the tribunal's award in order to promote the opportunity of a final settlement before issuing its award. This process is relatively unknown, however, in most common law jurisdictions and may even be frowned upon by common law arbitrators as an improper form of 'appeal before verdict' or risking exposure of a subsequent award to possible attack for bias, depending on when the preliminary views were given. On the other hand, there is nothing unusual about this process or wrong with it if the parties agree to it. The neutrals do not caucus separately with the parties, and the role of the arbitrator(s) remains evaluative at all times – the only difference being whether the tribunal wishes to provide a recommendation before imposing its opinion on the parties. It can be viewed as a form of consensus-based arbitration and remains quite different from a process involving mediation.²¹ This sort of consensus-based arbitration is possibly poised to become more accepted in common law jurisdictions pursuant to the Centre for Effective Dispute Resolution (CEDR) publication of its new *CEDR Rules for the Facilitation of Settlement in International Arbitration* (the 'CEDR Settlement Rules') in the United Kingdom in November 2009. These rules essentially recommend using conciliation (as well as separate mediation windows) within all international arbitrations.²²

20. For recent discussions on this, see: (1) Hilmar Raeschke-Kessler, 'The Arbitrator as Settlement Facilitator', *Arbitration International* 21, no. 4 (2005), 523–536; and (2) D. Favalli & M.K. Hasenclever, 'The Role Of Arbitrators In Settlement Proceedings', *MEALEY'S International Arbitration Report* 23, no. 7 (July 2008): 1–10.

21. Thorough discussions of the use of conciliation in arbitration have been provided by Michael Schneider, 'Combining Mediation with Conciliation', in *International Dispute Resolution: Towards an International Arbitration Culture* (ICCA Congress Series No. 8) ed. van den Berg (The Hague, 1998), 57–99, and by Gabrielle Kaufmann-Kohler, one of the co-chairs of the commission that drafted the CEDR Settlement Rules discussed below, in 'When Arbitrators Facilitate Settlement: Amiable Imposition or Actual Solution?' Clayton Utz/The University of Sydney lecture, *Arbitration International* 2008. Neither of these papers, however, make a distinction between mediation and conciliation, treating them as equivalent processes.

22. Although the CEDR Settlement Rules do not contain the word 'conciliation' or refer to this process by name, they appear to recommend considering its use (as a separate process from mediation) within arbitration. Conciliation is recommended at Art. 5.1 for all cases, whereas mediation, in the form of a mediation window, is suggested as an option only at Art. 5.3. In line with the tradition of certain civil law arbitration practices that combine arbitration and conciliation, Art. 5.1 suggests that the arbitral tribunal may assist the parties while still sitting as the tribunal as follows:

'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:

– ARB-MED-ARB (Mediation Window)

ARB-MED-ARB is a combined ADR process less commonly used in arbitration proceedings that is beginning to make an appearance. It is anecdotally gaining in popularity in the United States. The idea is for the arbitral tribunal (which is acting directly and evaluatively) to suspend the arbitration at some stage to allow (and even encourage) the parties to meet with another (non-evaluative) neutral and explore issues of fact or law on which the parties may reach a consensus view. The expectation is not necessarily that the parties will try to resolve the entire dispute (which remains possible), but only certain aspects that the tribunal can pick up and incorporate, to be able to complete its mandate and issue a binding award. The process is gaining attention, for example, to resolve discovery issues, where the arbitral tribunal does not (yet) wish to weigh in on issues of what it deems to constitute reasonable discovery requests or the amount or time to be allocated to fact or expert witnesses. The idea is to create a mediation window within the arbitration to allow the parties to reach their own outcomes on both procedural and substantive matters, which can then be accepted by the tribunal and incorporated into its thinking when issuing its award. This process is also promoted by the CEDR Settlement Rules that, in addition to suggesting the use of conciliation, recommend the use of a separate ‘mediation window’ within arbitration.²³

– ARB-CON-MED-CON-ARB (Conciliation and Mediation Windows)

ARB-CON-MED-CON-ARB is a combination of the two previously mentioned processes –ARB-CON-ARB and ARB-MED-ARB – in which the arbitral tribunal

1.1. Chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated;

1.2. 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 ;

1.3. Provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;

1.4. Where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation.

It should be noted, however, that this is indeed conciliation and not mediation, because it entails an evaluative and norms-based role by the tribunal.

23. The CEDR Settlement Rules provide for mediation (separately from conciliation) at Art. 5.3, which reads as follows:

3. The Arbitral Tribunal shall:

3.1. Insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place;

3.2. adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment).

These are intended to be subjective interest-based windows, as opposed to norms-based evaluative sessions, as per Art. 5.1 of the CEDR Settlement Rules discussed above.

may choose to try to conciliate and mediate certain issues before resuming its task of issuing a binding award. The CEDR Settlement Rules seem to provide for this as well, in that Articles 5.1 and 5.3 of these rules appear to be cumulative and not separate alternatives. The idea is to first appoint an arbitral tribunal and start off the arbitration proceedings as usual. At one stage, the tribunal or its chair can act as a conciliator, by explaining to the parties the issues of fact or law it thinks may be dispositive of the case, but without giving its own views on the matter yet. This sets up a possible ZOPA. The parties can then choose to mediate certain topics (preferably using a separate neutral) and determine which outcomes (if any) they can negotiate and which they can benchmark with their best and worst case scenarios based on the parameters discussed during conciliation and within the ZOPA. If the parties cannot reach an agreement during the mediation window phase, the tribunal or chair can act once again as a conciliator, possibly indicating this time the tribunal's views on certain key findings of fact or law and making non-binding proposals as to possible outcomes. If none of these outcomes are chosen and the parties have still not reached an agreement, the arbitration process can resume and the tribunal can issue its final and binding award. Several international neutrals have expressed positive views or experiences with such hybrid processes or variants thereof, moving from arbitration to conciliation to mediation and back to arbitration, after having possibly tried another attempt to conciliate and provide the tribunal's non-binding views to provide a final incentive to settle before imposing an outcome.²⁴ Those who have used such a process report that the tribunal seldom resumes the arbitration phase of the process, because the parties tend to settle. They stress, however, the importance for the neutral and the parties to clearly delineate which phase they are at throughout the process, especially when moving from one phase of a combined process to another and when it involves the same neutral swapping hats. This can be done, for example, by having the parties sign written waivers indicating that they are aware of and willing to assume the risks of moving from one step of the combined ADR process to the other, with the understanding that the tribunal will continue to act as an arbitral tribunal, capable of issuing a final and binding award that will be enforceable under the New York Convention. For this to work, however, it is important to ensure that the parties and their counsel are fully in agreement on the use of this process and have understood its risks, that

24. For example, Marc Blessing of Switzerland; Alan Limbury of Australia, David Plant in the United States and Mercedes Tarrazón of Spain. For descriptions of variants on this process and other ways in which arbitration, conciliation and mediation may be procedurally combined or offered, see M. Tarrazón, 'Arb.Med: A Reflection à Propos of a Bolivian Experience', *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 87–88. See also David Plant's book *We Must Talk Because We Can*, ICC Publication No. 695 (2008) at Ch. XII (Ethics and IP Mediation), 105–117, in which he considers ethical issues relating to a mediator acting as an arbitrator and an arbitrator acting as a mediator. The book provides specific examples of international commercial and intellectual property disputes that used combinations of mediation, conciliation and arbitration with satisfactory outcomes. David Plant proposes eight rules for arbitrators willing to act as mediators and conciliators in Appendix G to his book, entitled: 'Arbitrator as Settlement Facilitator: Suggested Rules', 173–174). These are provided below under the section on a neutral 'switching hats'.

the process respects all procedural formalities of the site of the arbitration and the jurisdictions in which a subsequent arbitral award may be enforced, and that it does not offend any public policy issues in that jurisdiction.

– Consent Awards

Consent Awards are commonly used in arbitration and may be a way of combining mediation or conciliation with arbitration. A consent award is an arbitral award made by a tribunal that is based on a proposed settlement jointly provided to the tribunal by the parties. The idea is that as an arbitration progresses, the parties may re-assess the relative strengths and weaknesses of their case, negotiate amongst themselves, and agree on a compromise. This may be done in parallel or within the arbitration process, as a result of a conciliation window or ‘settlement conference’ during an arbitration process in which the arbitrators have also acted as the conciliators. Rather than end the arbitration if a settlement is reached, the parties may wish to present their agreement (in an unsigned draft format) to the arbitral tribunal as a mutually acceptable award for the tribunal to issue, thus conferring business certainty by adding the strength of the New York Convention to their settlement agreement, giving it automatic full force and effect in all Members States that are signatories to the Convention. This process is expressly provided for by Article 30 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and in almost all modern institutional arbitration rules.²⁵ Although explicit links with mediation or conciliation were not made in these rules, and were presumably not in the minds of the drafters of these rules at that time, they are not incompatible. There is no reason why the parties should not be able to convert a tentative agreement reached through negotiation, conciliation or mediation into an internationally binding award if this is what the parties wish and provided there was still a valid bona fide dispute when the tribunal was appointed. This possible link between arbitration and other forms of ADR is clearly proposed in some of the more recent and modern institutional mediation and arbitration rules, which have specifically provided for possible links in this process and mediation. For example, the Swiss Rules of Commercial Mediation (‘SRCM’)²⁶ provide as follows:

Article 23 – Recourse to arbitration. 1. In international mediations, the parties may jointly agree in writing at any time during the course of their mediation to

25. Article 30 (Settlement) of the UNCITRAL Model Law on International Commercial Arbitration provides as follows:

(1) If during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. (2) An award on agreed terms [. . .] has the same status and effect as any other award on the merits of the case.

26. For a copy of the SRCM, adopted by the Swiss Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich in 2008, see: <www.sccam.org/sm/download/swiss_mediation_rules_version_2007_english.pdf>.

refer their dispute or any part of their dispute to an Arbitral Tribunal under the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce [‘SRIA’] for resolution by arbitration. Either party may then initiate arbitration proceedings under those Rules, including the provisions for an Expedited Procedure *If the parties settle the dispute during the arbitral proceedings, article 34 [SRIA] shall be applicable for the rendering of an award on agreed terms.*²⁷ (Emphasis added.)

(b) Parallel Processes:

It is possible for ADR processes to also be run in parallel. This allows the parties to negotiate their own outcome in an amicable way while maintaining an arbitration or litigation process ongoing but separate, in which neither process interferes with the other and there is no danger of one influencing the other. The idea is to keep the two processes hermetically sealed off from one-another, with separate neutrals who do not meet, sit together or know anything about what is happening in one-another’s proceedings.

– MED//ARB

MED//ARB processes are parallel proceedings in which the parties have appointed separate neutrals, who do not communicate with one-another in any way, and in which the parties agree that no information can be exchanged or presented in one process to the other (or at least, not in the arbitration process, in which the arbitral tribunal should proceed unaffected by whatever may have appeared to be a possible outcome outside of the arbitration process). This can be done institutionally by having two separate ad-hoc proceedings or running the proceedings before two separate institutions or within the same institution having two separate secretariats. The Centre for Mediation and Arbitration of Paris in France (CMAP) has in fact developed an interesting set of ‘Simultaneous MED-ARB’ rules that provide for

27. Article 34.1 SRIA (Settlement or Other Grounds for Termination) reads as follows:

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

By expressly referring to Art. 34.1 SRIA in Art. 23 SRCM, the rules of the Swiss Chambers of Commerce suggest linking both forms of ADR in novel and innovative ways. The Swiss rules further make this possible by explicitly stating at Art. 21 SRCM (Settlement Agreement) that: ‘Unless otherwise agreed to by the parties in writing, no settlement is reached until it has been made in writing and signed by the relevant parties’. So long as no agreement has been signed, the dispute continues to exist. Thus, a draft settlement agreement reached through a negotiation, mediation or conciliation would not preclude an agreement from being converted into a Consent Award (‘arbitral award on agreed terms’) under 34.1 SRIA if all other formalities are respected.

mediation and arbitration to be run in parallel during a three-month period.²⁸ The premise for this process is the complete independence of the two proceedings from one another, which is embodied at Article 9 of the CMAP Simultaneous Med-Arb Rules as follows:

ARTICLE 9: INDEPENDANCE OF THE PROCEDURES. The mediation and arbitration take place independently of one-another. The Centre does not allow the mediator to know the name(s) of the arbitrator(s) and vice versa. The mediator and the arbitrator(s) are forbidden to discuss the matter between themselves should they happen to know of one-another.

It is interesting to note that although the CMAP rules provide for one or more arbitrators, there is a presumption that there will only be one mediator in such cases.

– Carve-Outs

This is another form of separate but parallel proceedings in which the arbitration tribunal carves out topics it does not wish to handle or have to deal with in its final award. It may send these issues off to mediation or to another neutral for evaluation as part of a separate process. This can be used, for example, if a tribunal thinks it may not have the subject matter competence to address certain issues of law or that its ruling may involve non-arbitrable issues that relate to matters of public policy (e.g., matters of labour law, which are expressly excluded from the scope of arbitration by some national laws, or where intellectual property law matters, if the tribunal feels it cannot or should not decide on the invalidity of a patent or a trademark under national law in a jurisdiction in which the national courts or legislation have claimed exclusive subject matter jurisdiction on such issues). They may also be used to also carve out highly emotional, sensitive or internal issues in family disputes, where the tribunal or the parties feel that a neutral operating in a different quadrant of the previously mentioned Riskin Grid could be more effective, and the tribunal does not wish to be influenced by finding out what the parties have decided in that context. Carve-outs can also work well for subjective issues of process or fact, just as in ARB-MED-ARB. The difference with carve-outs is that the tribunal does not wish to have these issues reappear before it, but prefers for them to be resolved completely through separate proceedings with separate neutrals.

– Shadow Mediation

Shadow mediation is a form of parallel hybrid that is only partially separate, in that only one of the neutrals (called a ‘shadow mediator’) may follow and advise on what is happening in another process and possibly also make procedural

28. Article 8.1 CMAP Simultaneous Med-Arb Rules.

suggestions that may help the parties and the neutrals in the other process. An example of this is a shadow mediator monitoring arbitration proceedings, receiving a copy of all the pleadings and possibly auditing the hearings with the tribunal. The shadow mediator (with the consent of the parties and the other neutrals) may even speak to the tribunal or actively participate in the arbitration process. The mediator can then suggest possible topics and areas to be resolved by mediation or conciliation identified in the arbitration phase and that the parties may wish to negotiate rather than leave to the decision of the tribunal (e.g., a cap and ceiling on damages that the arbitral tribunal should possibly not be aware of in case it may influence its award). A shadow mediation can also be useful where the neutral assists the parties in redesigning their procedural options as the matter evolves and the parties mutually agree to try to fast-track or reduce costs on certain aspects of the evaluative process taking place in parallel (e.g., by working on agreed findings of fact to submit jointly to the tribunal or narrowing the range, number of topics or questions to be asked to certain witnesses or mediating discovery and document production issues).

– Partnering

Partnering is a concept that has been discussed and often used in the construction industry and can be expanded to be used in more areas.²⁹ It involves a structured management approach to address the conflict by facilitating the parties working together as a team, using neutrals who focus on relationships outside of the courtroom or the arbitration proceedings. These neutrals are involved as early as possible in the process, with periodic joint meetings that are committed to beforehand by all of the parties' senior executives, independently of developments that may transpire during arbitration, litigation or other parallel proceedings. The project partnering team can include both sides' consultants, project managers, key specialists and key suppliers. Several co-mediators having complementary skills may also be involved in addition to a main facilitator, depending on the numbers of people involved and the complexities of the case (e.g., some having substantive knowledge and others procedural skills). Initial meetings are convened by the chief facilitator as soon as possible after the project is launched, to discuss how to work collaboratively and deal with possible conflicts before any disputes or initial pleadings have been filed and to encourage team members from both sides to meet regularly throughout the process, do some team-building exercises and create channels for the senior executives from the parties to continue to behave cooperatively and try to reach consensus without invoking blame. Partnering processes seek to maintain a strong on-going relationship throughout the project and create a sense of mutual trust between the parties early on, which can overcome anything that may happen in subsequent proceedings. Initial meetings (before any disputes

29. The author is indebted to Bruce Edwards, a neutral with JAMS, for his descriptions of such processes.

exist) can address issues of collective performance, ‘horror stories’ of past disputes that should be avoided, how to continue working together pending an outcome while evaluative proceedings may continue or to set and agree on common goals notwithstanding parallel ADR proceedings. Such a process requires a high degree of upfront commitment, both in time and resources, outside of arbitration or litigation, but can be worth it where an entire project or the future of an industry is concerned. A partnering process will typically involve eliciting early on mutually agreed upon values, interests and outcomes that the parties wish to avoid based on prior experiences, so that their relationship or industry will not suffer, regardless of the outcome. Successful ingredients for such a process are mutual commitments to transparency, openness, clearly articulating mutual objectives, seeking to identify impediments and ways of generating mutually acceptable information, a commitment to continuous improvement as far as the conflict resolution process is concerned and measuring the process (and or the project) against Key Performance Indicators (KPIs). In addition, some type of a musketeer bonus³⁰ or incentive may be used to incentivize the parties to work together and prevent further escalation of the conflict, thus maximizing the chances for rewards if both sides continue to collaborate.³¹

(c) Hybrid Processes:

Sequential and parallel ADR processes typically entail combinations of ADR processes in which the constituent component tools (e.g., negotiation, mediation, conciliation and arbitration) can still be easily identified and separate neutrals can be appointed for each of these phases, addressing separately at different moments in time the visible and invisible parts of the iceberg of conflict. In pure hybrid processes, however, the idea is to look at the iceberg of conflict as a single object and to generate outcomes that combine ADR tools in a way that the conflict continues to be seen as a whole and resolved with the same neutral or a panel of neutrals whose roles become intertwined, making difficult the distinction of one part of the process from the other.

– MEDALOA

MEDALOA is a hybrid that involves a combination of Mediation followed by ‘Last Offer Arbitration’ (MEDALOA). ‘Last Offer Arbitration’ has been extensively used in labour disputes and in the United States in the baseball industry

30. Named after Alexandre Dumas’ *The Three Musketeers* and their motto ‘All for one and one for all’. This is a collective bonus that will either be shared by all parties or that nobody will benefit from if conflicts cannot be resolved amicably and the project completed on time and within budget.

31. For a discussion of partnering by the UK Construction Industry Council (CIC) Industry Improvement Committee taskforce, see <www.cic.org.uk/activities/partnering.shtml>, upon which this description is partially based.

to settle salary disputes.³² It is sometimes referred to as ‘pendulum arbitration’ or ‘baseball arbitration’ accordingly.³³ Following the mediation process, if the parties have not been able to reach a settlement, they make a binding last offer to one another. The mediator at that stage swaps hats and takes on an evaluative role with the consent of the parties. The mediator is given the authority to decide which of these last binding offers is to be accepted. The mediator cannot deviate from the two offers and cannot split the difference between them or propose another outcome. He or she can select only one of these final binding offers, thus limiting his or her discretion. The mediator should clarify whether he or she may take into account information heard during private caucus sessions with the parties in deciding which of these final offers has been accepted, and if so, whether that information may be provided to the other party in case they may wish to rebut it before pronouncing a final decision as to which offer has been retained. This creates psychological pressure on the parties, when formulating their final offers, to provide an offer they hope will be perceived by the mediator as being the most reasonable one in view of the parties’ respective behaviour and compromises made during the mediation part of the process. It also creates an incentive to come closer to the other side in the final stages of the mediation. This process typically works well for quantum issues, in which there is a final number (e.g., an amount of damages, an interest rate or a salary rate) to be decided, and the parties can provide their offers in a final written form that will be adopted per se by the arbitrator. There are a number of possible variants to such MEDALOA processes, depending on whether the parties have exchanged or wish to show their last offers to one another or only to the neutral before the neutral chooses one of the final binding offers. ‘Night baseball arbitration’ or ‘blind baseball arbitration’ is a variation on baseball arbitration in which the final offers are not revealed at first to the arbitrator. The arbitrator first determinates the quantum of the claim or salary that remains in dispute using whatever norms have been agreed to by the parties or that the arbitrator has set. The arbitrator then compares the number to the two final offers and chooses the final binding offer closest to that set by the arbitrator. The parties agree to accept and be bound by the final offer that was made by either party that is closest to the arbitrator’s calculation. For international disputes, it is advisable to have the parties exchange their final offers and to even have the parties present them to the mediator (now sitting as a sole arbitrator) in a hearing session, presenting why their final offer should be accepted. It is also advisable for

32. An example of the use of MEDALOA can be found in Birgit Sambeth Glasner, *MEDALOA: A Recent Positive Experience in Switzerland Or Using Baseball Arbitration to Break a Mediation Impasse, Mediation Techniques* (Patricia Barclay (ed.), ISBN No. 978-0-948711-23-7 (2010), 173–175. For a more detailed discussion of Last Offer Arbitration, see H. Abramson, ‘Final Offer Arbitration’, in Cooley, *Creative Problem Solver’s Handbook For Negotiators and Mediators* (Washington, DC: American Bar Association, December, 2005).

33. The process is sufficiently well known to have its own website on Wikipedia: see <http://en.wikipedia.org/wiki/Pendulum_arbitration>.

the arbitrator to obtain explicit permission from the parties to use and explain any information obtained in caucus that will be taken into account or that may have affected his or her reasoning and to allow both sides to briefly rebut the reasons given by the other party or initially given by the mediator as to why one of the offers should be accepted. This can add credibility to the arbitrator's final award at the end of the procedure in regard to due process principles and assist in obtaining enforceability of the final award under the New York Convention if the final stages of the MEDALOA process were properly conducted. Such a process requires clear rules, clarified beforehand, however, and it may be advisable for the parties to sign a waiver agreement between the mediation and arbitration phase of a MEDALOA process, to expressly recognize the arbitrator's ability to rely on and describe certain information heard in private caucuses during the mediation phase of the proceedings on which he or she may be relying. The process is a hybrid in that the parties know early on in the process that this neutral will behave evaluatively if they cannot agree on a process. They also know that they control the final offers, so the mediator cannot be used competitively in the absence of the knowledge of the other side's final offer. Ultimately, the neutral has no discretion to deviate from the two binding final offers, which also limits the risk for bias or coalition and creates an incentive for the parties to provide what they think will be perceived as the most reasonable final offer.

– Dispute Boards

A Dispute Board (DB) generally comprises a panel of one or three experienced, respected and impartial members who are appointed early on when a long-term contractual project is first being set up, somewhat similar to a partnership process as described previously. DBs are most often used in the construction and engineering industries and are generally established at the commencement of the project. The members of the DB are selected as a team for their subject matter expertise and procedural skills and work as a team. They are kept informed of progress on the project and any matters pertaining to its development by receiving regular reports and making regular visits to the site, even when there are no disputes. This allows the neutrals to create relationships with people on the ground and to be identified early on as neutrals by all people involved in the project. The DB may first try to resolve any emerging disputes informally, for example by mediation or conciliation, to resolve any emerging disputes at an early stage before they can escalate. When a difference or dispute between the parties cannot be resolved through such an informal process, it is then formally given to the DB for resolution, which after conducting a hearing either acts as a Dispute Review Board (which issue recommendations binding only after a certain period of time has lapsed and these recommendations have not been challenged by a party), as a Dispute Adjudication Board (which issues binding decisions that must be immediately followed, possibly pending final arbitration), or sitting as a combined DB, able to issue recommendations

and decisions.³⁴ The DB can first sit as a review board, reviewing submissions and convening a hearing giving the parties an opportunity to state their case. The DB will then normally make a written, non-binding recommendation for resolving the dispute. Alternatively, it may be binding on an interim basis, subject to final ‘appeal’ in the form of an arbitration if it is sitting as an adjudication board. An unchallenged recommendation or a decision of the DB is only binding *intra-partes* until such time as the arbitral tribunal has been able to give its final award. The DB’s findings will not count as *res judicata*. The recommendation or decision granted by the DB should normally give the panel’s reasons for reaching its determination. Unlike a partnering ADR process, in which the neutrals normally do not act evaluatively (but may direct the process), the DB can and will act evaluatively at some stage and is expected to do so. The theory is that the parties are likely to be more willing to accept and not to appeal the recommendations or decisions of the DB after they have had the opportunity to get to know its members and gain confidence in its expertise, impartiality and process skills. This is also facilitated when the DB is perceived as combining deep technical knowledge and an understanding of the project as well as process expertise, and by the parties having had several prior opportunities to get to know the neutrals and allow them to demonstrate their fairness through informal early dispute resolution interventions before this matter arising for evaluative resolution in the form of a DR board or dispute adjudication board.³⁵

– Combined Neutrals

The use of Combined Neutrals in a single hybrid process is not common, but is gaining traction. It is occasionally used by the Weinstein Group at JAMS in the USA, and by Result ACB in The Netherlands, apparently with great success.³⁶

34. For a review of the ICC’s Dispute Board Rules in force as of 1 Sep. 2004, see <www.iccwbo.org/uploadedFiles/Court/DRS/dispute_boards/db_rules_2004.pdf>.

35. For more discussion on DBs, see <www.alway-associates.co.uk/alternative-dispute-resolution-n.asp>. The ICC also offers three model DB clauses depending on whether the parties wish the DB to only make recommendations or interim binding decisions before being referred to arbitration or combinations of both. See <www.iccwbo.org/court/dispute_boards/id4354/index.html>.

36. The Weinstein Group at JAMS, which includes Rebecca Westerfield, Jed Melnick, Lizbeth Hasse and Michelle Yoshida, utilizes the members of the Group to work as co-neutrals and as a team with Judge Daniel Weinstein (ret.) to resolve extremely complex commercial cases with very successful results. The co-neutrals can act as facilitative neutrals, enabling Judge Weinstein to act either evaluatively or non-evaluatively depending on the requirements of each case and how it evolves. The Group frequently employs outside neutrals with a relevant area of expertise (e.g., an economist in a matter with complicated damages issues) to serve as a neutral expert in an evaluative role to provide neutral evaluative feedback that the Group uses as a reference point for the mediation process. The process designed by Result ACB, called a ‘Pre-Court Assessment’, typically entails a non-evaluative mediator working closely with an evaluative conciliator (e.g., a retired senior judge), who will meet with the parties and the mediator separately and reality test the parties’ positions, possibly making proposals as well. The judge

The idea is to appoint a team of at least two neutrals, one of whom can act as a mediator (i.e., non-evaluatively) and the other as a conciliator or arbitrator (i.e., evaluatively). The mediator works closely with the conciliator or arbitrator to optimize the chances of reaching an amicable settlement. If so agreed by the parties, and depending on how the case evolves or the expertise required, the mediator may also act evaluatively. The neutrals can thus be viewed as a team of ‘co-medarbiters’ who have complementary views and expertise, one of whom can focus on process issues and the other on substantive issues. In addition to conferring the advantages of co-mediation (in that two brains are always better than one), the process also allows for outcome certainty in that the co-neutrals can design the process to provide a binding outcome if needed. It also means that the parties can appoint a team of neutrals who have complementary subject matter or professional skills (e.g., a lawyer and a doctor, or a judge and a financial analyst). Although this sort of process may seem unusual at first, it is a natural extension of co-mediation and the concept of collaborative law, whereby parties in a dispute instruct lawyers who have signed a participation agreement that precludes them from acting as trial counsel against the other party. Similarly, ‘co-medarbiters’ can be instructed to act as ‘counsel to the dispute’, doing everything possible to help the parties achieve a consensual outcome on both procedural and substantive issues within a certain time frame and for a fixed budget, without having to revert to a binding award by an external court or tribunal. To minimize any undue influence, however, the neutrals can make joint recommendations and split certain tasks, as well as jointly caucus with the parties to minimize undue bias or influence during private sessions with the parties and their counsel. Alternatively, the evaluative neutral, if he or she may be called upon to also act as a binding arbitrator, could be precluded from attending caucus sessions. There are multiple ways this emerging form of hybrid can be used. The neutrals can agree (with the consent of the parties) to start in different quadrants or to switch roles and move to different parts of a Riskin

gives each party a non-binding evaluation in a private meeting and works alongside the mediator, who can focus on mediating in a facilitative or directive way, depending on the case. The evaluative component of the hybrid process lowers the risk of overconfidence bias by the parties or their lawyers, and facilitates the job of selling the mediated outcome to their respective constituencies and stakeholders at the end of the case. Proceeding to court and having another judge give a similar but binding decision (which is not as favourable as the parties had hoped), is not such an attractive prospect anymore. Once both sides have heard the evaluative neutral’s views, the mediator can continue to work with the parties to reach an agreement. Based on discussions with Felix Merks and Manon Schonewille, this hybrid Pre-Court Assessment process seems to be highly satisfactory to the lawyers as well as the parties involved in the process. It offers both evaluative and a non-evaluative input, allows the parties to retain control of the dispute and permits the entire iceberg of conflict to be taken into consideration, leading to even higher settlement rates (somewhere in the 100% range as compared to 80% for mediation on its own, according to Result ACB’s estimates).

Grid at different times, according to their and the parties' perceived views of new circumstances that may require a modification of the process itself and the mandate of the neutrals. This is a new form of ADR that is likely to evolve in Europe in view of the new mediation directive.³⁷

– ??? (Three Question Marks)

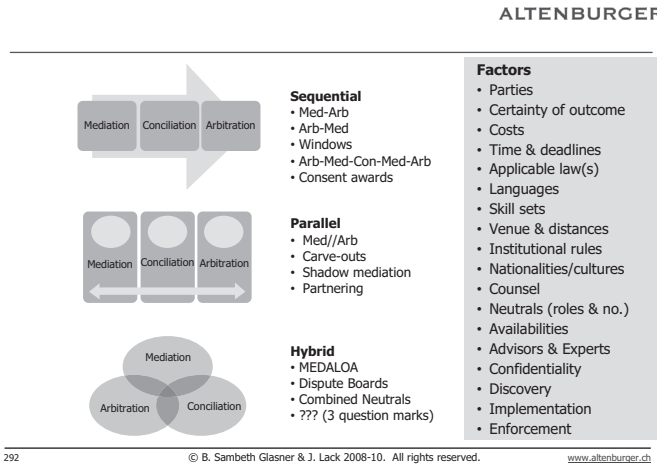
The examples presented earlier in this chapter are only indicative of known examples of hybrid processes. They are far from exhaustive of the full range of hybrids that are available, and it would be a mistake to view the examples listed in this article as a checklist of alternatives. By doing so, the reader will have already limited his/her horizons. New and better hybrid processes remain to be created, tested, used and discussed. This does not require taking undue risks. To some extent, structuring co-mediations, using two neutrals where each one focuses on different dimension of the dispute can generate a new hybrid. Having an even number of neutrals (e.g., a mediator and a conciliator, two mediators operating in the same or different quadrants, a mediator acting together with a conciliator and an arbitrator, two arbitrators and a conciliator, etc.) can provide the parties with new perspectives and provide processes that balance gender or cross-cultural issues in new ways that other processes cannot address without the process becoming part of the problem. Two brains are indeed invariably better than one. Having two ADR professional neutrals working together as equals, where neither's approach will take precedence over that of the other and no coalitions can be created, can further stimulate the parties to design their own tailor-made processes, remaining fully in control of the process and any outcome.

It can thus be seen that ADR, if seen as a collection of Appropriate Dispute Resolution tools, can be used sequentially, in parallel or in combination, to create a broad range of hybrid processes. The type of process used should depend on the parties' circumstances and needs. Figure 17-7 suggests a checklist of factors that can be taken into account when designing such combined processes.

A detailed review of these factors is beyond the scope of this chapter. There are many more hybrid processes and approaches to combining ADR processes than

37. The Panel of International Combined ADR Neutrals (PICAN) has recently been created to try and develop this practice, starting with a group of forty experienced international mediators and arbitrators from around the world, who will be seeking to work in teams of two to resolve complex cross-border disputes, addressing the iceberg of conflict as a whole. For more information, see <www.picanadr.org>.

Figure 17-7. Process Design: Combining ADR Options



this chapter can describe.³⁸ Suffice it to say for the moment that parties and their counsel should jointly discuss and consider (and if necessary, mediate) the procedural aspects of their dispute resolution process, to prevent the process becoming part of the problem itself. New breakthroughs in neurobiology and cognitive psychology, such as an understanding of mirror neurons and how to activate prefrontal cortical thinking in conflict resolution processes, are likely to shed new light onto dispute resolution processes, and how to shape ADR for better use in different contexts. Tailor-made processes will allow the parties and their counsel to have a sense of status, certainty (or predictability), autonomy, relatedness and fairness that is likely to achieve faster, less expensive and better outcomes than simply continuing down a path launched by an automatic legal process, or that was not sufficiently thought through to begin with.

Two more items are to be mentioned before completing this section. The International Mediation Institute (IMI) has created a decision tree to help parties select the most suitable neutrals to assist in resolving their dispute in mediation. Although IMI's database does not yet assist the parties in determining or setting

38. For an excellent approach on using Appropriate Dispute Resolution tools to break impasses in mediation, see the second edition of Harold Abramson's book entitled *Mediation Representation: Advocating as a Problem-Solver in Any Country or Culture*, published by the National Institute for Trial Advocacy (2010). Ch. 8 of the book ('Breaking Impasses with Alternatives to Mediation (ATM)', 363–387) analyses many of the above-listed hybrid processes by answering seven generic questions and includes several additional hybrid forms of ADR not discussed in this paper, such as Hi-Low Arbitration, Legal Neutral Evaluation, Expert Evaluation, and Mini-Trials.

competency criteria for managing hybrid processes, the decision tree provides a useful framework to assist parties and their counsel in jointly appointing neutrals, and the mediator profiles on its website provide ample information to identify combinations of neutrals capable of providing tailor-made dispute resolution services adaptable to the parties' needs. This is especially useful in cross-border or cross-cultural disputes, in which the parties may have different procedural preferences or expectations.³⁹ In addition to its decision tree, IMI has posted an Online Evaluation Form (called 'OLE!') that can be used by the parties and their counsel to work together to analyse the dispute, the stage of the conflict escalation phase they are in and the type of Appropriate Dispute Resolution process they may wish to design, based on a holistic analysis of the dispute.⁴⁰ These two IMI tools should already facilitate the parties' abilities to think of the process more broadly and the wide range of procedural choices available to the parties, as well as which neutrals to select as a result.

6. SPECIAL CONSIDERATIONS WHEN MOVING AROUND A RISKIN GRID (SWAPPING HATS)

The greatest issue that arises when combined ADR processes are considered is whether the same neutral can or should act as mediator, conciliator and/or arbitrator and swap hats during proceedings.⁴¹ It is clearly preferable for separate neutrals to be involved when caucuses (i.e., private sessions with the parties) will be used during the mediation process. The fact that a neutral may have had a private caucus with a party before acting as an arbitrator could have a possible impact on the arbitrator's perceived neutrality or impartiality or may disrupt due process by the neutral having participated in a private meeting in which another disputant was not able to participate. It would be advantageous in such cases to have a mediator and an arbitrator sit separately or for the arbitrator not to caucus without implementation of special measures or provisions. For parties and neutrals who have done this, however, and swapped hats as part of sequential or hybrid processes, there appear to be clear advantages and disadvantages. One of the advantages of using the same neutral is that there is no need to spend time and money on re-educating a new person on the issues involved in the case. On the other hand, there is a danger that the mediation process will be constrained by a party's concern that whatever it says to a mediator may be held and used against it by the same neutral who will be sitting later on as an arbitrator. A party is less likely to admit to the weakness of its arguments to the person who will have to adjudicate on them. This is primarily a matter to be left to party autonomy, because it is

39. The IMI's decision tree for the selection of mediators can be found at <www.imimmediation.org/decision-tree>.

40. See <www.imimmediation.org/ole>.

41. For an early discussion on this, see H. Abramson, 'Protocols for International Arbitrators Who Dare to Settle Cases', *American Review of International Arbitration* 10, no. 1 (1999).

possible for each party to discuss the respective pros and cons of swapping hats with its advisors and for each individual neutral to consider whether he or she is comfortable doing so. Some neutrals may also agree never to caucus or to keep caucuses to a minimum to try and resolve this issue or to caucus with only limited confidentiality undertakings.

One of the main concerns about switching hats is how an arbitrator is likely to treat information received in caucus while acting as a mediator. It would seem to contradict the *audi alteram partem* principle of natural justice for a tribunal to be able to take into account information the other party would not have received. However, this is something, that a party may be willing to waive, if it is aware of the risk, trusts the neutral to act equitably and still wishes the same person to act as arbitrator after having caucused separately with the parties. These issues can also be addressed pre-emptively by the mediators and the parties agreeing not to hold caucuses, but rather do everything in joint session. Although working only in joint sessions is not widely used in Anglo-Saxon mediations, it is quite common in other jurisdictions (e.g., in Austria, Germany and The Netherlands) and it is also growing in popularity in the United States (albeit remaining the exception rather than the rule).⁴² It should not create a problem, therefore, for a mediator who is trained in one of these ‘no-caucus’ schools, to act as a sole arbitrator subsequent to mediation in which the parties have agreed to the mediator taking on a new adjudicative role. This switching of hats is also commonly undertaken in MEDALOA proceedings, although it can be argued that there is less risk in these cases because the arbitrator has limited discretion and can only choose one of the two final offers that the parties have provided.

The Swiss Rules of Commercial Mediation (SRCM) referred to above were revised in 2008 to take into account emerging best practices internationally and to facilitate the use of mediation in combination with the Swiss Rules of International Arbitration (SRIA). The SRCM contain a general presumption at Article 18.1 SRCM (Confidentiality) that information heard in mediation cannot be heard in any another process without prior written agreement of all of the parties.⁴³ Article 22 SRCM goes on to state as follows:

Article 22 – Subsequent Proceedings

1. *Unless the parties expressly agree otherwise*, the mediator cannot act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation. (Emphasis added)

42. For an example of this form of commercial mediation, see *Challenging Conflict : Mediation Through Understanding* by Gary Friedman and Jack Himmelstein, a book published by the American Bar Association and the Harvard Law School Program on Negotiation in 2008 (ISBN 978-1-60442-052-4).

43. Article 18(1) SRCM (Confidentiality) reads as follows:

Mediation is confidential at all times. Any observation, statement or proposition made before the mediator or by him/herself cannot be used later, even in case of litigation or arbitration, *unless there is a written agreement of all the parties*. (Emphasis added.)

2. If the parties decide to designate the mediator as arbitrator, judge or expert in any subsequent arbitral proceedings, the latter may take into account information received during the course of the mediation.

The Swiss Rules of Commercial Mediation thus address this issue by stating that the mediator should not take on an evaluative role unless the parties have expressly agreed to this. When this happens, the neutral is allowed to take into account information received during the course of the mediation (e.g., in caucuses). The neutral should, however, also let the other side know of any such information taken into consideration, if possible, which is a consideration missing in the SCRM provisions, as pointed out by Alan Limbury, who comments on this issue in the context of Med-Arb in his contribution to this book. In order to avoid possible contradictions with Article 18 SCMR, however, it is recommended that the parties still sign written waivers to this effect.⁴⁴

Several other guidelines and institutional rules discuss this point. The September 2005 *Model Standards of Conduct for Mediators* issued by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution contain several sensible provisions to that effect, which any neutral considering changing roles should consider. It is clear that this should only be offered to clients who have demonstrated a sufficient understanding of the risks that switching hats may entail and the ability to manage them.⁴⁵

David Plant, in his book *We Must Talk Because We Can* (ICC 2008), suggests the following eight rules for an arbitrator who is willing to sit as a settlement facilitator.⁴⁶

First – Because the arbitrator’s role is defined by the parties, whether ad hoc or by way of agreed upon institutional rules, the parties must agree expressly and in writing as to the role of the arbitrator in settlement discussions between the parties.

Second – The arbitrator must agree to participate in settlement discussions only with the express written agreement of the parties and only in accordance with the terms and conditions of the parties agreement.

Third – In the event that the arbitrator must resume the arbitral role after participating in settlement discussions, the arbitrator should undertake to decide the matter only on the merits and only on the record. The arbitrator must take especial care not to add subconsciously to the arbitration record as a result of information acquired informally and off the record during settlement discussions.

44. As of the time of publication of this book, a subcommittee of the Chartered Institute of Arbitrators (CIArb) that is chaired by Mr. Limbury is considering issuing new rules and guidelines on how and when a neutral may swap hats. These rules and guidelines are likely to provide helpful best practices for the future.

45. See <www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>.

46. See Appendix G to that book.

Fourth – The parties must expressly agree in writing or on the record that the arbitrators 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 on information outside the record and learned by the arbitrator during settlement discussions).

Fifth – All aspects of the settlement discussions will be kept confidential unless all parties and the arbitrator expressly agree otherwise in writing.

Sixth – 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.

Seventh – The arbitrator must not judge the credibility of any witness on the basics of (a) the witness’s having been a party representative during settlement discussions or (b) anything said about or attributed to the witness during settlement discussions. This is important whether the settlement discussions occur before or after the evidentiary hearing where the witness testifies, or before or after filing of a written statement by witness.

Eighth – The arbitrator must not judge a party’s case in light of an intractable position of the party during settlement discussions – especially where the arbitrator perceives an apparently valid, objective basis for resolving the parties’ differences. In other words, the arbitrator must not permit his or her impartiality to be compromised.

The most recent thinking on this topic can be found in Appendix 2 of the 2009 Report of the CEDR Commission on Settlement in International Arbitration, entitled ‘Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement’.⁴⁷ This appendix was added to respond to paragraphs 2.4.3 and 2.5 of the CEDR Report on its Settlement Rules, which read as follows:

2.4 The Commission considers that the following three principles should apply to international arbitration proceedings and these three principles underpin the Recommendations:

2.4.1 An arbitral tribunal has a primary responsibility to produce an award, which is binding and enforceable.

2.4.2 Unless otherwise agreed by the parties, the arbitral tribunal, assisted by the arbitral institution where applicable, should also take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute.

47. See <www.cedr.com/about_us/arbitration_commission/Report10.pdf> (November. 2009). The Commission set up by CEDR comprises a large panel of international arbitrators and is linked with many leading international arbitration bodies. It was co-chaired by Lord Woolf of Barnes (United Kingdom) and Gabrielle Kaufmann-Kohler (Switzerland), with Dr Karl Mackie, CEDR’s Chief Executive, acting as Commission Director. For further information, see: <www.cedr.com/about_us/arbitration_commission/>.

2.4.3 In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the Parties separately, or obtain information from any Party which is not shared with the other Parties, 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.

2.5 The Commission recognises that by applying the third of these principles, an arbitrator will be discouraged from engaging in a med-arb process which involves meeting privately with each party as part of the mediation phase. The Commission has concluded that whilst this form of med-arb has been used successfully by some arbitrators, it carries significant risks to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase. In addition, this form of med-arb may result in a mediation phase which is less effective than would be the case if the mediation were to be conducted by a third party mediator. Whilst currently the Commission does not therefore specifically recommend a med-arb process which involves private meetings with the parties, it has considered safeguards that can be used in order to minimise the risks involved with such an approach. These are set out at Appendix 2 entitled Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement. (We welcome feedback on these principles.)

The Commission's recommendations at Appendix 2 are as follows:

7. The CEDR Commission recognises that parties will on occasion be willing to accept the risks identified . . . above and will want an arbitrator to engage in interest based mediation using private meetings. In such circumstances, it is recommended that the following steps be taken so as to minimise the risks.

7.1. The parties consent to the mediator/conciliator resuming as arbitrator recommended that the following steps be taken so as to minimise the risks. The 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 by the arbitrator 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.

7.2. Wherever the parties consent is required, that consent should be recorded in writing.

7.3. The parties should give their consent in writing before the mediation/conciliation phase. Where parties wish to adopt a more robust protection

against the risks inherent in the arbitrator acting as mediator, they should insert a requirement that consent is also required after the mediation/conciliation has concluded and prior to the mediator/conciliator resuming in the role of arbitrator. The consent given after the mediation/conciliation phase is particularly important because it is given in the knowledge of developments during the mediation. Consent which is given at an earlier stage (e.g., in a dispute resolution clause, or by reference to the arbitral rules of an institution) may be less effective. In addition, knowing that it can withhold consent, may encourage a party to be more open during the mediation/conciliation phase.

7.4. The consent should include a statement that the parties agree to the arbitrator meeting with each privately during the mediation/conciliation phase and either that [the arbitrator is under no obligation to disclose information obtained in confidence but should disregard it for the purposes of an arbitration award] or that [the arbitrator is under a duty to disclose any information obtained relevant to a potential arbitration award so that the other party may comment].

7.5. The consent should include a statement that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

7.6. If 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’.

There does not appear to have been any negative commentary or feedback to the CEDR Commission’s proposals.⁴⁸ Its recommendations appear to be sound and well thought through. They are also complementary to David Plant’s eight rules.

Finally, and to close on this point, it should not be forgotten that there are several published articles and examples (mentioned in this article) concerning the same neutrals switching hats with success, to the satisfaction of all concerned. Neutrals doing so tend to recommend asking the parties to sign a written waiver, accepting that the neutral may continue to act on a different basis at each stage of the process, as recommended by CEDR. Some ADR institutions (e.g., WIPO and the Swiss Chambers) have publicly expressed their willingness to administer such processes if the parties choose to do so and their legal advisors and neutrals are willing to do so as well.

The primary question in all of these combined processes, however, is not whether the neutral is competent or feels comfortable in switching hats, but whether the parties themselves are able to differentiate between the same person acting in different roles at different times. The issue should also be considered in

48. For a recent comprehensive review, see B. Ehle, *The Arbitrator as a Settlement Facilitator* (2010) at <www.lalive.ch/data/publications/Cepani_12_THILIN_Ehle.pdf>.

view of the parties' subjective perspectives and expectations. Signing written waivers from step to step within a mixed process may indeed be the best way to proceed to help anchor in the neutral's change of status as the proceedings evolve from one phase to another, but this focuses attention on the neutral at each stage and places the neutral instead of the parties at the centre of the process at each stage. Whether signed waivers disclosure of pertinent information heard in caucuses, or other measures may suffice will depend on the specific circumstances of each case and the parties' abilities and willingness to handle and understand these issues both at the beginning of the process and throughout the process. It will depend on the parties' ability to foresee the possible consequences of their choices, whose capability may vary from person to person. Swapping hats is a practice that is likely to be scrutinized closely in the future and on which much more remains to be discussed as the use of hybrid ADR processes grows. It can, however, be considered a viable option if it is properly understood and managed by the parties leading to faster and cheaper outcomes.

7. CONCLUSION

The dispute resolution landscape is changing, especially in the world of international business. Just as consumers are used to having more choice, so are disputants. New Appropriate Dispute Resolution rules are being issued, offering the ability to combine various processes and tools to achieve a broader spectrum of modern dispute prevention and resolution procedures for both international and domestic disputes. Parties and their counsel will need to know more about the pros and cons of these systems as they evolve. It is important, however, as this field evolves, that the parties, their counsel and the neutrals involved fully understand the procedures they subscribe to, their consequences and the issues and opportunities that combining ADR processes can present. It is also important for ADR institutions to examine and create more links between the different processes they offer. When ADR processes are combined properly, taking into account at what phase a dispute is at and providing a holistic view of the iceberg of conflict, they create greater choice and autonomy for the parties and are likely to lead to cheaper, faster and better outcomes, harnessing the best of evaluative and non-evaluative processes and minimizing the risk of the process itself becoming part of the problem.

