THE GUARANTEED RESOLUTION ON EFFECTIVE AND ADAPTED TERMS (THE GREAT PROCESS): A NEW HYBRID DISPUTE RESOLUTION PROCESS FOR GUARANTEEING A SOLUTION AND RESOLVING DISPUTES EFFICIENTLY

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I. Introduction

Over the past twenty years, innovative dispute resolution processes have emerged from practitioners who aimed to tailor them to the parties' process needs. Some of the most widely known processes include med-arb, arb-med, co-mediation with an evaluative and a non-evaluative mediator, baseball arbitration, last offer arbitration, and sealed-arbitration. The list and possible combinations are infinite, when one starts combining processes.[1] However, such spontaneity and adaptivity sometimes result in harmful

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[1] Thomas J. Stipanowich & Véronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 Fordham Int'l L. J. 839, 841–66, 869–77 (2017).

consequences. In the past, arbitral awards in numerous jurisdictions were refused to be honored on the basis that the process had infringed on fundamental procedural guarantees.[2] For that reason, it is preferable that new processes be designed and analyzed beforehand, in order to ensure that they account for procedural guarantees.

This Article, written by an experienced commercial mediator and a law professor who specializes in mixed modes dispute resolution, adds to the global discussion regarding hybrid dispute resolution and multi-step dispute resolution processes. It proposes a new process, called the Guaranteed Resolution on Effective and Adapted Terms (the "GREAT Process"), which aims to address common process preferences of commercial parties while also providing procedural safeguards.

The idea for the GREAT Process was derived from Amar's extended experience in mediating large commercial and industrial disputes, which led him to realize that a majority of parties share two similar concerns. First, the parties want the process to result in a solution (i.e., the finality of the dispute). Because mediation is a voluntary process, a mediator cannot guarantee the parties that they will come to a settlement agreement, which causes some parties to be reluctant about resorting to mediation. Second, parties want a clear indication on how long the mediation process will take, which is intrinsically contingent on the compromises and progress that the parties make in mediation. Considering these concerns, when the discussions would reach an impasse, Amar would propose to either make a non-binding evaluation, a mediator proposal, or proceed to "baseball arbitration." These evaluative

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2 *See* Véronique Fraser, *La Combinaison de la Médiation et de L'Arbitrage (med-arb et arb-med). Potentiel, Critiques et Garanties Procédurales* [*Combining Mediation and Arbitration (Med-Arb and Arb-Med). Potential, Critiques and Procedural Guarantees*], POUR UN DROIT DU RÈGLEMENT AMIABLE DES DIFFÉRENDS. DES DÉFIS À RELEVER POUR UNE JUSTICE DE QUALITÉ [FOR AN AMICABLE SETTLEMENT OF DISPUTES. CHALLENGES TO BE TAKEN UP FOR QUALITY JUSTICE] 327, 344–45 (Lise Casaux Labrunée & Jean-François Roberge eds., 2018); Trimble v. Graves, 947 N.E.2d 885, 889 (Ill. App. Ct. 2011) (vacating award); Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003); Wright v. Brockett, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991); U.S. Steel Mining Co. v. Wilson Downhole Servs., No. 02:00CV1758, 2006 WL 2869535, at *5 (W.D. Pa. Oct. 5, 2006); Estate of McDonald, No. BP072816, 2007 WL 259872, at *4 (Cal. Ct. App. Jan. 31, 2007); Rodriguez v. Harding, No. 04-0200093CV, 2002 WL 31863766, at *4 (Tex. Ct. App. Dec. 24, 2002). For a summary of these cases, *see* Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 346–50 (2011); Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219, 240–42 (2013).

processes would sometimes stimulate further negotiations, having created a form of reality check to the parties, or they would end the dispute through a binding evaluation, a proposal, or an arbitral award. Moving from one process to another has the advantages of being cost and time efficient and providing a guaranteed resolution. However, it also creates the risk of undermining parties' informed consent regarding the process and procedural guarantees. These findings led the authors to propose the GREAT Process, which aims to address commercial parties' frequent concerns, as assessed by Amar through his multiple years of mediation practice, while also safeguarding procedural guarantees that parties would expect from a quasi-judiciary process. This process adds to the global discussion regarding mixed modes—or hybrid—dispute resolution processes and multi-step dispute resolution processes.

Now more than ever, globalization, combined with a growing international expertise regarding a range of dispute resolution processes, has led to an increased variety in the methods used to resolve conflicts. There exists a wide array of dispute resolution mechanisms—litigation, arbitration, mediation, hybrid mechanisms—each of them offering specific advantages and drawbacks.[3] Some are favored in certain regions while others are preferred in certain industries, but they all ought to be selected based on the parties' needs and the specifics of each dispute.[4]

Hybrid mechanisms, also known as "mixed mode dispute resolution processes,"[5] have become increasingly important in resolving commercial disputes and are subject to significant attention from practitioners and scholars.[6] These dispute resolution processes take several forms, including the best known med-arb process, but they generally involve the "interplay between public and private adjudication (litigation, arbitration) and processes aimed at facilitating agreement of some kind."[7] Such processes include situations in which mediators, conciliators, or neutrals fulfilling a similar role make use of non-binding evaluation or otherwise guide the parties towards adjudicative proceedings. They also

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[3] Memorandum from the Int'l Task Force on Mixed Mode Disp. Resol. on the Task Force and Project 1 (2016), https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ [https://perma.cc/M424-NBDQ].

[4] Stipanowich & Fraser, *supra* note 1, at 883.

[5] *Id.* at 877.

[6] *See* notably the work of the International Task Force on Mixed Mode Dispute Resolution. *Mixed Mode Task Force*, INT'L MEDIATION INST., https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ [https://perma.cc/MB2G-7BSN] (last visited Mar. 7, 2021).

[7] Memorandum from the Int'l Task Force on Mixed Mode Disp. Resol., *supra* note 3, at 1.

comprise situations where judges or arbitrators intervene in the prehearing process, preliminary mediation, some forms of interplay between these neutrals (mediators/conciliators and arbitrators/judges), or relational platforms such as "project partnering."[8]

Each mechanism is a tool with clearly defined attributes, and like the incoterms, they should be selected based on a clear understanding of the benefits, limitations, obligations, costs, and risks involved. The different tools can be considered as part of a buffet from which to choose, based on one's needs and expectations. Although some of those tools are better known than others, one should be careful not to assume that hybrid mechanisms are simply the addition of the processes they combine. They are greater than the parts of which they are composed, and they have benefits and risks that are inherent to their unique nature.[9]

This Article puts forth a new process, the GREAT Process, aimed at combining the benefits of mediation with the binding force of arbitration, and designed to have the capacity to evolve according to the progress already reached by the parties in the nonbinding phases—such as mediation—within an adjustable process with an optimal efficiency. The Article will be divided in six parts. Part II presents an overview of the GREAT Process and details its advantages, relative to the individual processes of mediation, arbitration, and other forms of ADR. Part III offers insight on the six options available to parties using the GREAT Process, namely the

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[8] *Id.* at 1–2.

[9] Fraser, *supra* note 2, at 350; Stipanowich & Fraser, *supra* note 1, at 843–44, 883–85; Laura Lozano, *Can A Med-Arb Serve in Two Processes?*, MEDIATE.COM (May 2013), http://www.mediate.com/articles/LozanoL1.cfm [https://perma.cc/T4YT-ZC46]; Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RES. LAW. 71, 73 (2009) [hereinafter Sussman, *Developing an Effective Med-Arb/Arb-Med Process*]; John T. Blankenship, *Developing Your ADR Attitude: Med-Arb, A Template for Adaptive ADR*, 42 TENN. BAR J. 28, 35–37 (2006); Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 689 (1991); Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEG. L. REV. 265, 277–85 (2021) [hereinafter Stipanowich, *Arbitration, Mediation and Mixed Modes*]; Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, in 2 ADR IN BUS. PRAC. & ISSUES ACROSS COUNTRIES & CULTURES 381–83 (Arnold Ingen-Housz et al. eds., 2d ed. 2011) [hereinafter Sussman, *Combinations and Permutations of Arbitration and Mediation*]; Thomas J. Stipanowich, *Multi-Tier Commercial Dispute Resolution Processes in the United States*, in MULTI-TIER APPROACHES TO THE RESOL. OF INT'L DISPS.: A GLOB. & COMPAR. STUDY (Anselmo Reyes & Gu Weixia eds., 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601337 [https://perma.cc/C5GP-N9AU]; Deason, *supra* note 2, at 221–29; Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals,* 65 DISP. RESOL. J. 52, 61 (2010); Blankley, *supra* note 2, at 323–26.

No-Caucus, the Lifting-Caucus-Confidentiality, the Co-Mediation, the Sealed-Arbitration, the Last-Offer, and the Informed-Consent options. Part IV provides warning on the variety of risks associated with each option of the GREAT Process. Part V lays out a model dispute resolution clause for the GREAT Process, aimed at facilitating the drafting of future contracts. Finally, Part VI concludes.

II. The Guaranteed Resolution on Efficient and Adapted Terms and Its Advantages

The GREAT Process combines the flexibility, the value creation, and effectiveness of mediation with the binding nature of arbitration. It is designed to have the capacity to mature according to the progress already achieved in the non-binding phases, and it is within an adjustable process that maximizes cost efficiency and time-efficiency. The whole process is party-centered—based on their needs, choices, and expectations—and the terms of the process can be crafted so as to ensure the highest suitability and efficiency.[10] Furthermore, the process is guaranteed to lead to a resolution because it is designed to result in a mediation settlement agreement and/or an arbitral award, both of which will be enforceable. This enforceability comes on top of the expectation that the resolution will most likely be voluntarily complied with by the parties,[11] because the process, being based on parties' needs, aims at providing as satisfying a resolution as possible.

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[10] Self-determination and efficiency are goals and values that are consistently identified as criteria for shaping processes for the resolution of commercial disputes. In the United States, more specifically, a great emphasis is put on individualism, personal autonomy, and related concerns about assent and self-determination when assessing the use of mixed mode ADR. *See* Stipanowich & Fraser, *supra* note 1, at 877–81. Efficiency is the worldwide key priority of parties, as evidenced by the Global Pound Conference Series data, which indicates that "efficiency" is the factor that "has the most influence" "when parties involved in a commercial dispute are choosing the type(s) of dispute resolution process(es)" (received 65% of the allocated points). Global Pound Conference Series, Global Data Trends and Regional Differences 10, https://imimediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf [https://perma.cc/V8VB-7X7J] (last visited Apr. 22, 2021).

[11] Author Dorcas Quek highlights that several studies show a greater compliance rate for judgments resulting from mediation than litigation. Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 Cardozo J. Conflict Resol. 479, 482 (2010). For the detailed results of these studies, *see* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237 (1981); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law & Soc'y Rev. 11 (1984);

In the GREAT Process, parties will entrust their dispute to the Dispute Resolution Advisor ("DR Advisor"), who will efficiently guide the parties through the different steps based on the parties' needs and choices, as well as the progress achieved.[12] The DR Advisor is an independent and impartial third party who administers the entire process—tailored by the parties—and endorses all the possible roles required. The process is based on the principles of fairness, confidentiality, and party autonomy, as expressed by the will of the parties to work together to find a solution to their dispute.

In administering the process, the DR Advisor is granted by the parties a new form of authority,[13] which mainly translates into (1) steering the transition from one phase to another based on the progress achieved, (2) having the possibility of making an evaluation

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Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127 (1985); Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance,* 20 LAW & SOC'Y REV. 439 (1986); Neil Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987); *see also* Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ARB. & MEDIATION 152 (2013); *How Courts Work*, AM. BAR ASS'N (Dec. 30, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/ [https://perma.cc/F4RW-6788]; Mattie Robertson, *Compliance Success with Mediated Settlements in Small Claims*, MEDIATE.COM (June 2015), https://www.mediate.com/articles/RobertsonM1.cfm [https://perma.cc/76L5-27WV].

12 The DR Advisor in the GREAT Process holds duties similar to those of the mediator in the Guided Choice system. *See* Paul M. Lurie & Jeremy Lack, *Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement*, 8 DISP. RESOL. INT'L 167, 168 (2014); Paul M. Lurie, *Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes*, 9 CONSTRUCTION L. INT'L 18, 19 (2014); INTERNATIONAL TASK FORCE ON MIXED MODE DISPUTE RESOLUTION INAUGURAL SUMMIT 11 (Sept. 23–24, 2016), https://www.imimediation.org/wp-content/uploads/2017/11/Mixed_Mode_Pepperdine_Summit_Written_Summary_April_27_2017.pdf [https://perma.cc/NL22-NSPJ]. "Advice" is one of the priorities of parties in choice of dispute resolution processes, as supported by the Global Pound Conference Series data (received 46% of the allocated points). GLOBAL POUND CONFERENCE SERIES, *supra* note 10, at 10. Parties expect their advisors to work collaboratively with them to navigate the process. It is the role that "parties involved in commercial disputes typically want" advisors to take (received 61% of the allocated points). *Id.* at 11.

13 The authority exercised by the DR Advisor is essentially limited to control over the process, as opposed to the substantive aspects of the dispute. For a taxonomy on mediator's interventions, *see* Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 42–45 (2003); Véronique Fraser & Kun Fan, *Mediators Using Non-Binding Evaluations and Making Settlement Proposals,* 14(1) N.Y. DISP. RESOL. LAW. 21, 22–24 (2021); Véronique Fraser & Sèdjro Hountohotegbè, *Process and Substance Self-Determination or Subjection: A New Frame of Reference for Defining Mediators' and Conciliators' Interventions* (GPRD Research Paper No. 2020/1) (on file with authors).

or proposal, and (3) acting as an amiable compositeur,[14] if the process matures into some kind of arbitration. Having the DR Advisor judge in *ex-aequo bono* allows the parties to avoid the rigidity of the law at the arbitration phase of the GREAT Process.

The DR Advisor maneuvers within the framework crafted by the parties to ensure that the resolution is as efficient and as suited to the parties' needs as possible. It is not simply a functional role, but a much more engaged and involved one, and the DR Advisor is expected to contribute to reaching the most advantageous resolution possible in a time- and cost-efficient manner.

The parties determine the duration of the entire process. Within that determination they have two possibilities. The first possibility is that they choose a final end date for the entire process, and then entrust the DR Advisor with setting the deadlines to each phase, leaving the whole process management to the discretion of the DR Advisor. According to the progress made in each phase, and when deemed necessary to ensure that a final resolution is reached within the time limit initially set by the parties, the DR Advisor will give a written notice that the next step of the process will be initiated. The second possibility is that, when drafting the dispute resolution clause, the parties determine the duration of each phase they have included in the process. The triggers for each transition from one phase into another must be included in the dispute resolution clause to ensure a functional process, since the chances of agreement on those points are lower, once the dispute has arisen.

In both scenarios, parties can, during the process itself, jointly agree to amend the process by requesting either longer or shorter periods of time before the transition from one phase to another. Parties can extend the duration of any of the phases of the GREAT Process. Because the DR Advisor has a duty to ensure that the process provides a resolution before the deadline set by the parties, if these latter jointly agree to extend the duration of one phase, the total duration of the process must be extended accordingly. This is

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[14] The notion of amiable composition is a common concept in arbitration. It refers to the power of a neutral to decide the merits of a dispute according to his or her conception of equity (also referred to as *ex aequo et bono*), thus derogating from the law of the parties. Ahmet Cemil Yildirim, *Amiable Composition in International Arbitration*, 24 J. ARB. STUD. 33, 35–38 (2014). "The ancient concept *ex aequo et bono* holds that adjudicators should decide disputes according to that which is 'fair' and in 'good conscience.'" Leon Trakman, *Ex Aequo et Bono: De-Mystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 621 (2008). A decision rendered *ex aequo et bono* is therefore imputed to an extra-legal realm rather than to the applicable law chosen by the parties. *See id.* at 627.

to ensure the highest level of flexibility for the parties, while still granting the DR Advisor the power to efficiently administer the process and ensure resolution in a timely manner. Parties only have the possibility of shortening the duration of the non-binding phases by agreeing to more quickly transition from one phase into another. However, they cannot request that the DR Advisor shortens the arbitral hearings, which risks impacting the procedural justice of the process, nor can they request a faster drafting of the award.

The parties will jointly agree on the selection of the DR Advisor, and they must base that selection on the trust they have in the DR Advisor and on the type of expertise they want him or her to bring to the dispute resolution process.

The GREAT Process has been designed upon the assumption that the arbitral award would be based on *ex-aequo et bono* considerations.[15] Deciding the award on an *ex-aequo et bono* basis allows the DR Advisor to consider, and, if possible, integrate the parties' needs and interests into the award. It also maximizes cost efficiency by making the process less legalistic and reducing the procedural hurdles. This type of resolution is also more suitable to a hybrid process where the neutral has already familiarized himself or herself with the parties' needs and interests. Having started with a mediation, and possibly gone through a proposal or an evaluation, the entire process is centered around the parties' needs and interests, rather than their legal positions. Basing the adjudicating phase on the same considerations allows the process to remain centered on the parties' needs. It is nevertheless possible, like in a standard arbitration process, for the parties to decide that the award would be based upon their choice of applicable law. Legal considerations remain part of the process, and arguments on the application of the law are combined with the parties' needs and interests, the guiding principles of equity and fairness, practical business considerations, other social or trade norms, and the common sense of a trusted and experienced DR Advisor selected, according to the type of expertise valued by the parties.

The process is designed to enable parties to enjoy the highest level of involvement and creativity in the resolution of their dispute, along with the freedom of a voluntary process. And, if necessary and when desired by the parties, the process is designed to rely

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[15] See Trakman, *supra* note 14, and accompanying notes.

on the progress made in the non-binding phases, so as to expeditiously offer a binding and enforceable award.

The GREAT Process comes in six versions, called options, which will be detailed below. To introduce the general functions of the process, the following will discuss the GREAT Process' different phases: the initial mediation phase, a possible evaluation and proposal step and subsequent enhanced mediation, and a possible final arbitration phase. Thereafter, the Article will examine other general considerations, such as enforceability and the rights and duties entailed by the process.

A. *Mediation Phase*

The GREAT Process starts with a mediation phase. Mediation typically has the advantage of being a less costly and more expedited process, as compared to arbitration and court adjudication.[16] It also fosters creativity. Mediation puts the parties in command of the resolution; they have an unfettered space, enabling them to express themselves and to create a solution that answers their needs and aspirations. This means that the solution is no longer solely expressed in terms of, and limited to, the need of a legal confrontation.

Mediation also has the considerable advantage that it aims to "make the pie bigger."[17] Many aspects can be valued differently by each side, or put another way, have a different value/cost ratio. For example, something that has only a smaller cost to one party (e.g., short payable periods for a party with large cashflow) can be more valued by the other (e.g., a party with poor cashflow). Mediation is a process that allows for the full exploration of this potential and thereby maximizes both the total value of the resolution and the gains for each side.

Mediation also allows for an all-encompassing solution to the dispute, as the process is not limited to non-monetary aspects.

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[16] The accompanying website of the Singapore Convention on Mediation presents mediation as being, "in many instances, more cost and time efficient than other dispute resolution processes." *The Convention Text*, SING. CONVENTION ON MEDIATION, https://www.singaporeconvention.org/convention/text [https://perma.cc/AT6C-JXHQ] (last visited Jan. 30, 2022); Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61, 66–73 (2012); *Benefits of Mediation*, MEDIATE.COM (August 1998), https://www.mediate.com/articles/benefits.cfm [https://perma.cc/XZ72-TB9Q].

[17] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 58–59 (1981).

Whether it is the parties' emotions, their personal values, or their needs (the need to be understood, the need for an apology, etc.), all of these elements are included in the mediation and settlement agreement.[18] This is to be contrasted with an adjudicative process that only evaluates parties' legal claims. Finally, mediation is a constructive win-win process,[19] making it a powerful tool for parties aiming to keep a working relationship in the future.[20]

Approximately seventy-five percent (75%)[21] of mediations typically result in an agreement. The other steps of the GREAT Process ensure that there will be a resolution for those cases that were not settled in mediation.

B. *Evaluation or Proposal Phase*

If the parties reach an impasse during the mediation phase, they have the possibility of soliciting a non-binding evaluation or a proposal from the DR Advisor.[22] This requires a joint agreement

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18 Shana H. Khader, *Mediating Mediations: Protecting the Homeowner's Right to Self-Determination in Foreclosure Mediation Programs*, 44 COLUMB. J. L. & SOC. PROBS. 109, 120 (2010); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 869 (2008); MODEL STANDARDS OF CONDUCT FOR MEDIATORS PREAMBLE (AM. BAR. ASS'N 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf [https://perma.cc/A72Z-M853] [hereinafter "Model Standards of Conduct for Mediators"].

19 FISHER & URY, *supra* note 17, at 58–59.

20 Jean-François Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in 2 ADR IN BUS. PRAC. & ISSUES ACROSS COUNTRIES & CULTURES 13–47 (Arnold Ingen-Housz ed., 2011); *see also* Thomas J. Stipanowich, *Why Business Need Mediation*, in COM. MEDIATION IN EUROPE (Nancy Nelson & Thomas J. Stipanowich eds., 2005); Thomas J. Brewer & Lawrence R. Mills, *Combining Mediation & Arbitration*, 54 DISP. RESOL. J. 34, 34 (1999).

21 This statistic is based on data collected in 2017 from voluntary ADR proceedings conducted in the context of litigation in front of courts under the authority of the United States Department of Justice, which have had a success rate of 75%. *Alternative Dispute Resolution at the Department of Justice*, U.S. DEP'T JUST. (2017), https://www.justice.gov/archives/olp/alternative-dispute-resolution-department-justice [https://perma.cc/6B4L-PWZR].

22 Evaluations and proposals are techniques frequently used by neutrals in the context of mediation. This approach is often referred to as evaluative mediation. *See* A.B.A SECTION OF DISPUTE RESOLUTION, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 22, 24, 28 (2017); James A. Wall Jr., *Mediation: An Analysis, Review, and Proposed Research*, 25 J. CONFLICT RES. 157, 171 tbl. 1 (1981); Robert A. Baruch Bush, *A Pluralistic Approach To Mediation Ethics: Delivering on Mediation's Different Promises*, 34 OHIO ST. J. ON DISP. RESOL. 459, 510 (2019); CHRISTIAN BÜRHING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 178, 191 (2nd ed. 2006); Jens M. Scherpe & Bevan Marten, *Mediation in England and Wales: Regulation and Practice*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 405 (Klaus J. Hopt & Felix Steffek eds., 2013); Liane Schmiedel, *Mediation in the Netherlands: Between State Promotion and Private Regulation*, *in* MEDIATION:

from all parties. The DR Advisor can make a proposal for a settlement or provide an evaluation of the likely outcome of the situation in court or before an arbitral tribunal.[23]

There are two possible benefits from this step. A proposal has the potential of being directly accepted by the parties and resulting in a settlement agreement. Additionally, both the proposal and the evaluation can have the effect of a "reality check" aimed at fostering the deal, encouraging concessions from the parties, and enhancing the chances of a settlement.[24] Because an evaluation or a proposal has such potential to boost the subsequent mediation, this subsequent mediation will be referred to as "enhanced mediation" for the remainder of this Article.

PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 729 (Klaus J. Hopt & Felix Steffek eds., 2013); Harald Baum, *Mediation in Japan: Development, Forms, Regulation and Practice of Out-of-Court Dispute Resolution*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1059 (Klaus J. Hopt & Felix Steffek eds., 2013); STEFAN RÜTZEL ET AL., COMMERCIAL DISPUTE RESOLUTION IN GERMANY 164 (1st ed. 2005); Louise Otis & Eric H. Reiter, *Judicial Mediation in Quebec*, *in* NADJA ALEXANDER, GLOBAL TRENDS IN MEDIATION 116 (2nd ed. 2006); ALAIN PEKAR LEMPEREUR ET AL., MÉTHODE DE MÉDIATION 133, 188 (2008); Peter J. D. Carnevale, *Strategic Choice in Mediation*, 2 NEGOT. J. 41, 43–44 (1986); Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, *in* 2 ADR IN BUS. PRAC. & ISSUES ACROSS COUNTRIES & CULTURES 356 (Arnold Ingen-Housz ed., 2010); Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 45 (2000); Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—Or Would It: The Struggle to Define Mediation and its Various Approaches*, 26 CONFLICT RESOL. Q. 293, 301 tbl. 1 (2009); Kyle C. Beardsley et al., *Mediation Style and Crisis Outcomes*, 50 J. CONFLICT RESOL. 58, 66 tbl. 1 (2006); KENNETH KRESSEL ET AL., MEDIATION RESEARCH: PROCESS OF MEDIATION IN DISPUTE SETTLEMENT CENTERS 379, tbl. 17.3 (1989); Kenneth Kressel, *The Strategic Style in Mediation*, 24 CONFLICT RESOL. Q. 251, 255 (2007); Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 208 (2009).

23 This stage is similar to the early neutral evaluation, a process where a neutral examines the arguments of each party and gives an evaluation, aiming at motivating the parties to resume negotiations. *See* Stipanowich & Fraser, *supra* note 1, at 875. Alternative non-binding evaluation processes include the mini-trial, a process where each party pleads in front of a retired judge to know how this judge would have ruled on the case, once more, aiming at motivating parties to resume negotiation. *See* Stipanowich & Fraser, *supra* note 1, at 876, and summary jury trials (similar to the mini-trial but with a mock jury drawn from a pool of real jurors and a presiding judge or magistrate). *See Summary Jury Trial*, AM. BAR ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/summary_jury_trial/ [https://perma.cc/UHT4-C9R2] (last visited Jan. 30, 2022); *Summary Jury Trial*, MICH. CTS., https://www.courts.michigan.gov/administration/court-programs/jury-management/summary-jury-trial/ [https://perma.cc/6MXX-CW8J] (last visited Jan. 30, 2022).

24 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 44 (1996); James Allen Wall, Timothy C. Dunne, & Suzanne Chan-Serafin, *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFLICT RESOL. Q. 127, 142–44 (2011); Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. Disp. Resol. 309, 314 (2000); ROBERT M. NELSON, NELSON ON ADR 63 (2003).

In the cases where the non-binding steps have resulted in a partial settlement agreement or in no settlement agreement, the GREAT Process can evolve to include binding methods, while still empowering parties with the flexibility to choose the most appropriate one. Before detailing the different options, the following will address general considerations regarding the arbitration phase.

C. *Arbitral Phase*

As explained above, the GREAT Process has been designed with the presumption that the DR Advisor would adjudicate as an amiable compositeur, or what is also referred to as making *ex-aequo et bono* decisions,[25] but nothing excludes an arbitration ruling that strictly follows the law, if that is requested by the parties.

The arbitration phase should be conducted with significant consideration to the efficiency of the process. This entails that lengthy and extensive presentation of the parties' cases based, for example, on large discoveries, numerous witnesses, or extensive reports that have not already been relied on during the mediation phase, would not enable parties to make the best of what the GREAT Process has to offer.[26]

The arbitral phase under the GREAT Process shares similarities with "fast-track" or expedited arbitration proceedings, as provisioned in the rules of organizations.[27] Essentially, "fast-track"

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[25] See Trakman, *supra* note 14, and accompanying notes.

[26] It is generally possible for the parties to agree on a simplified set of rules for their ADR proceedings. *See, e.g.*, ADR INSTITUTE OF CANADA, ARBITRATION RULES § 6.2 (1992) (with amendments as adopted in 2016) [hereinafter "ADRIC Arbitration Rules"].

[27] *See, e.g.*, World Intellectual Property Organization ("WIPO"), *WIPO Expedited Arbitration Rules*, WORLD INTELL. PROP. ORG. (July 1, 2021), https://www.wipo.int/amc/en/arbitration/expedited-rules/ [https://perma.cc/AWA6-5VV7]; International Chamber of Commerce ("ICC"), *Expedited Procedure Provisions*, INT'L CHAMBER COM., https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/ [https://perma.cc/HPL3-TTE6] (last visited Feb. 26, 2022) [hereinafter "ICC Expedited Procedure Provisions"]; CPR International Institute for Conflict Prevention & Resolution, *Fast Track Administered Arbitration Rules*, CPR INT'L INST. (July 1, 2020), https://www.cpradr.org/resource-center/rules/arbitration/fast-track-administered-arbitration-rules [https://perma.cc/4Q3C-JXP5] [hereinafter "CPR Fast Track Administered Arbitration Rules"]; *Fast Track Non-Administered Arbitration Rules*, CPR INT'L INST. (July 1, 2021), https://www.cpradr.org/resource-center/rules/arbitration/fast-track-rules-of-procedure [https://perma.cc/3FDE-VMMR] [hereinafter "CPR Fast Track Non-Administered Arbitration Rules"]; COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES § E1-E10, AM. ARB. ASS'N, (amended and effective as of 2013) [hereinafter "AAA Commercial Arbitration Rules and Mediation Procedures"]; ADRIC Arbitration Rules, *supra* note 26, at § 6.2; Canadian Arbitration Association, *Expedited Arbitration Rules*, CAN. ARB. ASS'N (Mar. 29, 2017),

arbitration refers to alternative procedural frameworks for arbitration—with predetermined limitations regarding the time for rendering the award, the submission of documents, or the hearing—in order to induce quicker, cheaper, and simplified arbitration proceedings.[28]

"Fast-track" arbitration has been discussed for decades,[29] and many authors still document its use, some heralding it as one of the most promising and effective forms of arbitration.[30] UNCITRAL Working Group II is notably conducting work on the subject of expedited procedures of arbitration.[31] This enthusiasm for lighter arbitral proceedings answers the growing voice of discontent from the business community regarding arbitration, whose reputation as a fast alternative to judicial proceedings is now relegated to history.[32]

It should be noted, however, that the GREAT Process is meant to be crafted according to the parties' needs, and, where they feel it to be more appropriate, to provide for a possible so-

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https://canadianarbitrationassociation.ca/?page_id=27 [https://perma.cc/JB2X-8SXD] [hereinafter "CAA Expedited Arbitration Rules"]; ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER COMMERCE, RULES FOR EXPEDITED ARBITRATIONS (2017) [hereinafter "SCC Rules for Expedited Arbitration"].

28 *See* Eva Müller, *Fast-Track Arbitration—Meeting the Demands of the Next Millennium*, 15 J. INT'L ARB. 5, 8–9 (1998); Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 346–47 (2014).

29 *See generally* Müller, *supra* note 28; Benjamin Davis, *Fast-Track Arbitration and Fast-Tracking Your Arbitration*, 9 J. INT'L ARB. 43 (1992); Gabrielle Kaufmann-Kohler & Henry Peter, *Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution*, 17 ARB. INT'L 173 (2001); Jan Paulsson, *Fast-Track Arbitration in Europe (With Special References to the WIPO Expedited Arbitration Rules)*, 18 HASTINGS INT'L & COMPAR. L. REV. 713 (1995); Stephen Smid, *The Expedited Procedure in Maritime and Commodity Arbitrations*, 10 J. INT'L ARB. 59 (1993); Moses Silverman, *The Fast-Track Arbitration of the International Chamber of Commerce. The User's Point of View*, 10 J. INT'L ARB. 113 (1993).

30 *See generally* Hamish Lal & Brendan Casey, *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020*, 37 J. INT'L ARB. 325 (2020); Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 26 ARB. INT'L 103 (2010); Stipanowich, *supra* note 28; Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395, 434–36 (2015); Shannon R. Webb & Terry H. Wagar, *Expedited Arbitration: A Study of Outcomes and Duration*, *in* 73 RELATIONS INDUSTRIELLES / INDUS. REL. 146 (2018); Chan Leng Sun S.C. & Tan Weiyi, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief*, 6 CONTEMP. ASIA ARB. J. 349 (2013); Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317 (2010).

31 *See* Piotr Wójtowicz & Franco Gevaerd, *How Uncitral's Working Group II on Arbitration Is Analyzing the Field to Help Expedited Processes*, 37 ALTS. HIGH COST LITIG. 90 (2019).

32 Morton, *supra* note 30, at 104–05 (2010).

phisticated arbitral phase that can be detailed in the dispute resolution clause. Indeed, one benefit of arbitral proceedings is that the parties control the process.[33] But, as suggested above, the GREAT Process might not be the most appropriate tool in those cases, and the parties should evaluate the pros and cons of what each dispute resolution mechanism has to offer.

As a final consideration, it should be remembered that each of the options can result in a binding arbitral award, even if the award is the result of a lesser-known arbitral procedure, such as sealed-arbitration or last-offer arbitration. All of the awards will be enforceable, as explained below.

D. *Enforceability*

Another important consideration to be discussed is the guaranteed aspect of the process. Being fundamentally based on parties' needs, it is expected that the parties will voluntarily comply with the majority of the resolutions.[34] Nevertheless, the GREAT Process is designed to safeguard the enforceability of the mediation

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[33] Michael Butterfield, *Fast Track Arbitration,* ADR INST. CAN., https://adric.ca/adr-perspectives/fast-track-arbitration/ [https://perma.cc/4XEP-7N8N] (last visited Mar. 29, 2021).

[34] Because participants are actively involved in the process, they are more committed to upholding the settlement than if it was imposed by a judge. The negotiated outcome also has the benefit of representing the underlying interests of all parties. How Courts Work, *supra* note 11; Robertson, *supra* note 11; *see also supra* note 11 and accompanying notes.

settlement agreement (under the Singapore Convention[35]) and arbitral award (under the New York Convention[36]).

This is achieved through a clear procedural structure, careful attention paid to the parties' consent, as well as binding and validly formulated procedural notices. This entails that when the GREAT Process provides for joint agreements made by the parties, or a notice made by the DR Advisor, it assumes that it is a validly written document with express consent by the parties. Before the proceedings even begin, it is crucial that the DR Advisor and the parties agree on the ethics standards applicable to the DR Advisor for his or her role as mediator. This will allow the DR Advisor to be careful about behaviors that might constitute a breach, which could jeopardize the validity of the future agreement.[37] The DR Advisor will also inform the parties of the risks associated with hybrid processes.[38]

While the parties' autonomy regarding the dispute resolution agreement is paramount, the DR Advisor has the duty to make sure that the subject matter of the dispute is capable of settlement by mediation or arbitration under the applicable law and the Singapore Convention.[39] The DR Advisor shall also disclose to the par-

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35 G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018) [hereinafter "The Singapore Convention"]. The Singapore Convention has an objective to enforce mediated settlements to resolve international commercial disputes similar to the New York Convention for arbitral awards. At the time of writing this Article, fifty-four States have signed the Singapore Convention, including Brazil, the United States, China, and India. However, among the notable absentees are the United Kingdom, the European Union, and Canada. Moreover, only six States have ratified the Convention. *United Nations Convention on International Settlement Agreements Resulting from Mediation*, UNITED NATIONS TREATY COLLECTIONS, Chapter XXII.4 (Dec. 20, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en [https://perma.cc/CTU7-NTRS]. It is important to note that the Singapore Convention applies to any settlement agreements that have an international scope. This means that "[a]t least two parties to the settlement agreement have their places of business in different States" or "[t]he State in which the parties to the settlement agreement have their places of business is different from either: (i) [t]the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) [t]he State with which the subject matter of the settlement agreement is most closely connected." The Singapore Convention, *supra* note 35, at § 1.

36 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 (June 10, 1958) [hereinafter "The New York Convention"].

37 The Singapore Convention, *supra* note 35, at § 5(1)(c).

38 Fraser, *supra* note 2, at 350–51.

39 Under the legislation of several countries, some subject matters cannot be mediated or arbitrated because of the nature of the dispute; for example, if the dispute relates to criminal offenses, the public interest, or vulnerable individuals, mediation and arbitration would be considered inappropriate. The Singapore Convention provides that authorities may refuse to grant relief pursuant to the settlement agreement in these cases. The Singapore Convention, *supra* note 35, at § 5(2)(b).

ties any circumstances that may raise doubts about his or her impartiality or independence.[40] Throughout the process, as described in each option, the DR Advisor will conscientiously obtain the explicit consent from the parties—for example, during a transition from one phase to another, the DR Advisor would again ensure that the parties provide their informed consent.[41] It is equally important that the DR Advisor offers proper notice to the parties when the process progresses from one phase to another. The parties must know when the DR Advisor will make an evaluation or proposal, what part of the dispute will be adjudicated in the arbitral phase, and when the arbitral phase will begin. This is important, so that no party can subsequently claim that they were misled or that they were not provided with a proper chance to present their case. Those notices will also have an impact on the parties' right to end the process, as the non-binding phases are voluntary but the binding phases are not.[42] To alleviate eventual drawbacks, the parties must provide, in the dispute resolution clause, that they consent to the "change of hats" of the DR Advisor and that they waive their right to challenge the future arbitral award on this basis.[43]

If the mediation phase results in a settlement agreement, the DR Advisor must ensure that the parties' consent is valid. Indeed, the DR Advisor must verify that the parties to the settlement have the capacity to fully understand the implications of the agreement.[44] It is essential that the agreement explicitly states that it is final and binding, all in comprehensible terms, in order to avoid any uncertainties before the courts.[45] The content of the agreement must not be contrary to the public policy of the state(s) where the parties could eventually enforce it.[46]

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40 *Id.* at § 5(1)(f).

41 Fraser, *supra* note 2, at 350–51.

42 In *Trimble v. Graves*, the arbitral award was vacated because the third party rendered its decision based on an answer a party gave during what the latter thought to be the mediation phase. Self-determination was hurt, as the parties could not clearly identify if they were part of a mediation or an arbitration session. Trimble v. Graves, 947 N.E.2d 885, 889 (Ill. Ct. App. 2011) (vacating award).

43 JAMES M. GAITIS ET AL., COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 359 (3rd ed. 2014); Bernd Ehle, *The Arbitrator as a Settlement Facilitator*, *in* WALKING A THIN LINE WHAT AN ARBITRATOR CAN DO, MUST DO OR MUST NOT DO, RECENT DEVELOPMENTS AND TRENDS 77, 93 (Olivier Caprasse et al. eds., 2010); Fraser, *supra* note 2, at 353–54.

44 The Singapore Convention, *supra* note 35, at § 5(1)(a).

45 *Id.* at §§ 5(1)(b)(ii), 5(c)(ii).

46 *Id.* at § 5(2)(a).

The process is also designed to comply with the more technical requirements laid out in the Singapore Convention. Hence, the DR Advisor will need to provide evidence that the settlement agreement resulted from mediation and that the parties signed the settlement agreement, in order for it to be considered valid by competent authorities pursuant to the Singapore Convention.[47] It must be noted that these signatures may take an electronic form, as long as the method is reliable.[48]

While the signing of a final agreement brings the process to an end, the DR Advisor's role continues until all parties have fulfilled their obligations. Since the parties participated in the GREAT Process for its promise of a guaranteed, enforceable solution, it is essential that the DR Advisor offers support throughout this period. The DR Advisor's role at this moment is to ensure that the obligations remain valid and applicable in conformity with the chosen law and that the agreement is not subsequently modified.[49] The DR Advisor will also advise the parties against enforcing the settlement agreement if the obligations have already been performed.[50]

The GREAT Process also safeguards issues of enforceability of the arbitral award when the parties have chosen to hold an arbitral phase. At the arbitral phase, the DR Advisor should be very cautious to not make use of the personal and confidential information disclosed during the mediation phase, including during caucuses.[51] It is crucial that the DR Advisor be free of biases from previous phases when rendering the award, which must be based on additional evidence provided during arbitral hearings.[52] Thus, the DR Advisor must be very careful with the use of confidential

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47 *Id.* at § 4. Evidence that the settlement agreement resulted from mediation may include: "(i) [t]he mediator's signature on the settlement agreement; (ii) [a] document signed by the mediator indicating that the mediation was carried out; (iii) [a]n attestation by the institution that administered the mediation; or (iv) [i]n the absence of (i) . . . or (iii), any other evidence acceptable to the competent authority." *Id.* at § 4(1)(b).

48 *Id.* at § 4(2).

49 The Singapore Convention, *supra* note 35, at §§ 5(1)(b)(i), 5(1)(b)(iii).

50 *Id.* at § 5(1)(c)(i).

51 Deficiencies in this regard have led to arbitral awards being invalidated. Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003); Wright v. Brockett, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991); U.S. Steel Mining Co. v. Wilson Downhole Servs., No. 02:00CV1758, 2006 WL 2869535, *5 (W.D. Pa. Oct. 5, 2006); Estate of McDonald, No. BP072816, 2007 WL 259872, *4 (Cal. Ct. App. Jan. 31, 2007); Rodriguez v. Harding, No. 04-0200093CV, 2002 WL 31863766, *4 (Tex. Ct. App. Dec. 24, 2002). For a summary of these cases, *see* Blankley, *supra* note 2; Deason, *supra* note 2.

52 *See, e.g.*, Estate of McDonald, 2007 WL 259872, at *5; Deason, *supra* note 2.

caucuses,[53] a risk that can be partly defused by the No-Caucus or the Lifting-Caucus-Confidentiality options. Another solution is for the participants to agree on the particular evidence that the DR Advisor can rely on to render the award.[54]

E. *Rights and Duties Entailed by the Process*

The GREAT Process is a reciprocal commitment between the parties and the DR Advisor; they are bound by a contractual relationship, which entails all the various rights and duties.

The DR Advisor first has the discretion to decide whether he or she will accept the parties' mandate to assist in the resolution of their specific dispute.[55] When accepting the mandate, the DR Advisor endorses the responsibility of timely and efficient management of the process. On one side, this responsibility provides the DR Advisor with the right to lead and manage the process as they see fit, as long as this is done according to the framework crafted by the parties, including administering the different phases within the time allotted. The DR Advisor also has the right to suggest an adjustment to the process that he or she feels would be beneficial. This suggestion could be the addition of an evaluation or proposal step if this were not initially provided for, or it could be to recommend the parties to choose another option of the GREAT Process.

On the other hand, this authority to manage the process also includes the DR Advisor's duty to efficiently accompany the parties through all phases and, if needed, render a binding award. The DR Advisor's duty to lead the process to a resolution is only limited to the usual rights of a mediator and arbitrator to resign, for example, if there are suspicions of fraud or if it would be contrary to the Public Order (e.g., in the case of the violation of fundamen-

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53 Fraser, *supra* note 2, at 345–47.

54 Martin C. Weisman & Sheldon J. Stark, *Alternative Dispute Resolution: Is Med/Arb the Process for You?,* 94 MICH. B. J. 26, 27 (2015).

55 In the world of commercial arbitration, the individuals chosen by the parties are not bound to accept their respective appointments and it is common for arbitrators to refuse an arbitration mandate. *See Selection and Appointment of Tribunal Members – ICSID Convention Arbitration*, INT'L CTR. SETTLEMENT INV. DISPS., https://icsid.worldbank.org/services/arbitration/convention/process/selection-appointment [https://perma.cc/W8L5-TPVS] (last visited Mar. 15, 2021); INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION § 2(a) (2014); Crenguta Leaua, *Factors Taken into Consideration by the Parties When Appointing an Arbitrator*, 33 PROCEDIA SOC. & BEHAV. SCI. 925, 929 (2012).

tal human rights).[56] The DR Advisor has the duty to stay impartial and independent, as well as the duty to conduct the process fairly.[57] Furthermore, the DR Advisor has the duty to manage the process with the confidentiality required by the parties, subject, of course, to the limitations of the applicable law.[58] One should also note that the DR Advisor is entitled to limitations on his or her liability—generally referred to as his or her immunity—according to the provisions of the applicable law,[59] as well as the right to receive a payment. The DR Advisor's fees are considered to be accepted by the parties when hiring the DR Advisor.

Regarding the parties, they have the right, at the beginning of the process, to select the options most suited to their dispute. Additionally, they have the right to tailor the process so that it will enable them to reach the best possible resolution.[60] It is their right to have the DR Advisor follow the selected procedure, and the process management can only be carried out within the framework they have crafted. It is only the parties who have the right to approve any subsequent adjustment to the process.

The parties have the right to unilaterally end the non-binding phases of the process.[61] The non-binding phases of the process are

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56 Model Standards of Conduct for Mediators, *supra* note 18, at Standards VI (A)(9), (B), (C); *Code of Conduct for Mediators*, ADR Inst. Can. (Apr. 15, 2011), at §§ 7.5, 11.2, https://adric.ca/wp-content/uploads/2016/04/Code-of-Conduct-for-Mediators.pdf [https://perma.cc/8TUA-VW53] [hereinafter "ADRIC Code of Conduct for Mediators"].

57 UNCITRAL, UNCITRAL Model Law on International Commercial Mediation §§ 6(4)(5), 7(3), 13 (2002) (with amendment, as adopted in 2018) [hereinafter "UNCITRAL Model Law on International Commercial Mediation"]; Model Standards of Conduct for Mediators, *supra* note 18, at Standards II, III, VI; ADRIC Code of Conduct for Mediators, *supra* note 56, at §§ 4–5; *Code of Ethics*, ADR Inst. Can. §§ 3, 6, 8, https://adric.ca/rules-codes/code-of-ethics/ [https://perma.cc/3B98-MENL] (last visited Mar. 5 2021) [hereinafter ADRIC Code of Ethics]; ADR Inst. Canada, National Mediation Rules § 6 (1992) (with amendments as adopted in 2012) [hereinafter ADRIC National Mediation Rules]; ADR Institute Canada, Med-Arb Rules § 5.1 (June 1, 2020) [hereinafter ADRIC Med-Arb Rules].

58 UNCITRAL Model Law on International Commercial Mediation, *supra* note 57, at §§ 9–10; Model Standards of Conduct for Mediators, *supra* note 18, at Standard V; ADRIC Code of Conduct for Mediators, *supra* note 56, at § 6; ADRIC Code of Ethics, *supra* note 57, at § 9; ADRIC National Mediation Rules, *supra* note 57, at § 15.

59 ADRIC Arbitration Rules, *supra* note 26, at § 6.1.

60 This phase allows the parties to design, with the assistance of the DR Advisor, a process tailored to the parties' needs and interests. This process is analogous to what is known as "Guided Choice." *See* Lurie & Lack, *supra* note 12, at 167–68; Lurie, *supra* note 12, at 19; International Task Force on Mixed Mode Dispute Resolution Inaugural Summit, *supra* note 12, at 848–50.

61 This right is commonly provided for in standard mediation clauses and is recognized in mediation codes of ethics. *See* UNCITRAL Model Law on International Commercial Mediation, *supra* note 57, at § 12(d); Model Standards of Conduct for Mediators, *supra* note 18, at

voluntary; this is necessary to ensure that the settlement agreement is recognized as valid.[62] If the process evolves into the arbitral phase, the parties keep the right to terminate the arbitral process by a mutual agreement.[63] If any of those rights to end the process are used, the DR Advisor is relieved of all duties but keeps the right to be paid for the work already completed.[64]

Finally, the parties have the duty to work toward a resolution in good faith, and to refrain from employing deceitful tactics or unduly delaying the process.[65] Under no circumstances may the parties abuse the process or resort to it with the intent of laundering money, or use it for any other fraudulent purpose.[66]

Standard I (A); ADRIC Code of Conduct for Mediators, *supra* note 56, at § 11.1; ADRIC National Mediation Rules, *supra* note 57, at § 16.2(b).

62 Fraser, *supra* note 2, at 342–45; Blankley, *supra* note 2, at 321–22; Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 171 (2015); Ehle, *supra* note 43, at 86; Michael Collins, *Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 ARB. INT'L 333, 337 (2003); Deason, *supra* note 2.

63 *See* UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION § 32 (2)(b) (1985) (with amendment, as adopted in 2006) [hereinafter "UNCITRAL Model Law on International Commercial Arbitration"]; ADRIC Arbitration Rules, *supra* note 26, at § 5.5.1(b) (conclusion of the arbitration by abandonment).

64 ADRIC National Mediation Rules, *supra* note 57, at §§ 18.2, 18.3 (stating that the parties shall pay the agreed-upon fees for the mediator's service, who may require them to pay deposits, including proportionate shares of the costs of the mediation); ADRIC Code of Conduct for Mediators, *supra* note 56, at § 9.2 (stating that the mediator's fees shall not be based on the outcome of the process, or on whether the parties reached a settlement).

65 UNCITRAL Model Law on International Commercial Mediation, *supra* note 57, at § 2(1) (stating that the observance of good faith is to be regarded when interpreting the instrument); UNCITRAL Model Law on International Commercial Arbitration, *supra* note 63, at § 2(A)(1) (stating that the observance of good faith is to be regarded when interpreting the instrument); Model Standards of Conduct for Mediators, *supra* note 18, at Standard VI (A)(4) (stating that the mediator should promote honesty between all participants); ADRIC Code of Conduct for Mediators, *supra* note 56, at § 7.5 (stating that a mediator who considers that the mediation may raise ethical concerns, such as a deliberate deception, may take appropriate action); ADRIC Arbitration Rules, *supra* note 26, at §§ 1.1, 4.7.3 (stating that the rules aim to enable the parties to reach a just, speedy, and cost-effective determination of their dispute); *see generally* David C. Singer & Cecile Howard, *The Duty of Good Faith In Mediation Proceedings*, 244 N.Y. L. J. 1 (2010).

66 Model Standards of Conduct for Mediators, *supra* note 18, at Standard VI(A)(9); ADRIC Code of Conduct for Mediators, *supra* note 56, at § 7.5 (stating that a mediator who considers that the mediation may raise ethical concerns, such as the furtherance of a crime or a deliberate deception, may take appropriate action).

III. The Six Options for the GREAT Process

At the beginning of the GREAT Process, the DR Advisor will explain the six possible options from which the parties may choose.

A. *No-Caucus Option*

Under the No-Caucus Option, the process begins with a mediation phase in which the parties have expressly agreed not to have any confidential caucuses—or, in other words, a mediation phase conducted entirely as a joint meeting.[67] This is potentially followed by an evaluation or proposal by the DR Advisor, which could result in a settlement agreement or an enhanced mediation. This, again, will not allow for confidential caucuses. Finally, if needed, it will be followed by an arbitral phase, in order to adjudicate what has not already been settled.

This option could be considered as the "plain vanilla" option; it includes the most standard processes and minimizes the risks associated with holding caucuses.[68] It should be noted that abstention by the DR Advisor to resort to individual meetings with the parties does not prevent him or her from taking knowledge during the joint meeting, which would be inadmissible in a judicial process. However, removing the caucus has the advantage of guaranteeing to the parties that they will have known all of the elements that were disclosed to the third party in the mediation phase and that they will have the opportunity to directly respond to them during the arbitration phase.[69]

Whether from their own initiative or following a suggestion by the DR Advisor, if the parties feel that having confidential

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67 This approach goes hand-in-hand with article 2.1 of the Centre for Effective Dispute Resolution ("CEDR") Rules for the Facilitation of Settlement in International Arbitration. Centre for Effective Dispute Resolution, CEDR Commission on Settlement in International Arbitration: Final Report app. 1 at 14 (2009); Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *supra* note 9, at 71; Blankley, *supra* note 2, at 335.; Lozano, *supra* note 9; Ehle, *supra* note 43, at 92–93; Deason, *supra* note 2, at 246.

68 Indeed, the holding of caucuses during a mediation phase followed by an arbitration phase contains several procedural risks—notably, the potential creation of biases in the neutral's decision-making; the potential impairment of procedural justice; and the risk of hindering the enforceability of the agreement, due to procedural breeches. These risks are addressed in detail in Section IV below.

69 Deason, *supra* note 2, at 246.

caucuses would enable progress,[70] they can jointly agree throughout the process to adapt it by selecting another option.

Regarding procedural matters, the No-Caucus Option requires proper notice[71] to transition from the mediation phase to the evaluation or proposal step, if there is one, and from the non-binding phase to the binding phase.

B. *Lifting-Caucus-Confidentiality Option*

Under the Lifting-Caucus-Confidentiality Option, the mediation phase is conducted with the possibility of having confidential caucuses. However, at the onset of the process, the parties agree to lift the confidentiality of the caucuses in the case where the mediation phase would result in no—or a partial—settlement agreement, and the process would move to arbitration. Parties can also agree to have an evaluation or proposal, which would move the process into an enhanced mediation. If the mediation phase results in no—or only a partial—settlement agreement, the arbitral phase begins, meaning that the process is no longer voluntary.

The aim of lifting the confidentiality of the caucuses is to provide the parties with the opportunity to respond to elements communicated in these caucuses—during the arbitration phase—and provide the parties with the procedural guarantees that would be applicable to an adversarial process. While choosing this option means that any ex parte[72] elements will be disclosed to the other side, it also preserves the added-value benefit of the caucus during the mediation phase. One should note that the mediation process

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70 "The private caucus is often an important aspect of the mediation process because it allows the third-party neutral to explore options with each party separately and to provide a reality check for parties with unrealistic expectations." Bartel, *supra* note 9, at 687.

71 For example, the Med-Arb Rules of the ADR Institute of Canada require a clear distinction between the mediation phase and the arbitration phase, betwixt which the parties must confirm the issues that have been resolved and those that have yet to be resolved. ADRIC Med-Arb Rules, *supra* note 57, at § 6.4.

72 *Ex parte* is Latin for "from one party." *Ex parte* elements thus refer to all of the information, matters, or material that has been given by one party to a judge, arbitrator, or mediator outside of the presence of the other parties. In the context of a mediation, this includes elements of communication shared during *ex parte* confidential caucuses, and that have, therefore, been exchanged in a non-adversarial environment. *See Ex Parte*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/ex_parte [https://perma.cc/2G9U-BHAQ] (last visited Feb. 18, 2022); *Ex Parte*, THOMSON REUTERS PRAC. L., https://ca.practicallaw.thomsonreuters.com/5-508-0744?transitionType=Default&contextData=(sc.Default)&firstPage=true [https://perma.cc/EN8C-Y888] (last visited Mar. 5, 2021).

nevertheless remains bound by the confidentiality clause agreed-to by the parties, usually prohibiting the parties from disclosing to third parties any and all information relating to the mediation proceedings (e.g., the model clause in Section IV).[73]

It has been argued that parties may be more reluctant to disclose confidential information from caucuses, for fear of having it disclosed to the other side if no settlement agreement is reached.[74] That fear must be nuanced by the fact that the process remains voluntary until the arbitral phase begins. Parties, therefore, have the ability to make full use of the mediation phase and then assess, in their decision to end the process or continue with arbitration, the ex parte elements that would be disclosed in the arbitral phase.

As with the No-Caucus Option, for the procedural matters, proper notice is required for the transition from the mediation phase to the evaluation or proposal step, if there is one, and from the non-binding phase to the binding phase.

Lifting caucus confidentiality is already recognized. For example, the Hong Kong Arbitration Ordinance expressly allows arb-med or med-arb by the same person, but requires the mediator-arbitrator, in case of a mediation not reaching a settlement agreement, to disclose to all parties any confidential information obtained during the mediation that is considered to be "material to the arbitral proceedings."[75]

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73 Typical confidential clauses generally take the following form: "Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement." UNCITRAL Model Law on International Commercial Mediation, *supra* note 57, at § 10; *see also* NEW YORK CITY BAR, COMPILATION OF SAMPLE MEDIATION CLAUSES 2 (2016) ("The process shall be confidential based on terms acceptable to the mediator and/or mediation service provider."). "All information exchanged during this meeting or any subsequent dispute resolution process, shall be regarded as 'without prejudice' communications for the purpose of settlement negotiations and shall be treated as confidential by the parties and their representatives, unless otherwise required by law." *DR Model Clauses and Agreements*, DEP'T JUST. CAN. (Jan. 7, 2015), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/index.html [https://perma.cc/NU7B-YESX].

74 *See* Lozano, *supra* note 9; James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 86 (1997); Blankley, *supra* note 2, at 334–36; Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60 DISP. RESOL. J. 24, 27 (2005); Deason, *supra* note 2, at 226.

75 Arbitration Ordinance, (2010) Cap. 609, § 33(4) (H.K.), https://www.elegislation.gov.hk/hk/cap609 [https://perma.cc/6Y3V-LBJ5] [hereinafter "Hong Kong Arbitration Ordinance"]; *see* Blankley, *supra* note 2, at 366; Lozano, *supra* note 9*;* Deason, *supra* note 2, at 247.

C. *Co-Mediation Option*

The Co-Mediation Option essentially aims to preserve the option of using caucuses, while avoiding the risks associated with holding caucuses in a mediation phase that can then be followed by arbitration. This option consists of appointing two neutrals at the outset of the process: the DR Advisor and a caucus-mediator. Both co-mediators take part in the mediation, but only the caucus-mediator holds the confidential caucuses. If requested by the parties, there can be a proposal or evaluation, followed by an enhanced mediation phase. Depending on what has been requested by the parties, one or both co-mediators can make the proposal or evaluation. Both co-mediators also take part in the enhanced mediation, so that this phase can also benefit from the confidential caucuses. Having an evaluation or a proposal made by only one co-mediator contains the advantage of not altering the other co-mediator's capacity to arbitrate in a subsequent phase.

If only a partial agreement—or no settlement agreement—is reached after the mediation phase, the caucus-mediator's mandate terminates, and the DR Advisor begins administering the arbitral phase. It should be noted that if the parties jointly agree, after initiating the arbitral phase, the mediation phase can still continue with the caucus-mediator as the sole mediator. Often referred to as shadow mediation,[76] this process allows the parties to address, inter alia, the following topics during the mediation phase: procedural issues, possibilities of fast-tracking the process and reducing its costs, new alternatives, and difficult issues for which the arbitral phase may not be suitable.[77] The co-mediator may also receive a copy of the pleadings and audit the hearings with the DR Advisor, speak directly to the DR Advisor, or even actively participate in the arbitral phase by suggesting areas to be resolved by mediation.[78]

The cost of having a second mediator, the caucus-mediator, is to be weighed against several potential gains in the overall process. First, the use of caucuses might help to break a deadlock, where

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76 Lack, *supra* note 22, at 363–65; Michael E. Schneider, Report, *Combining Arbitration with Conciliation*, ICCA CONG. SERIES NO. 8: INT'L ARB. CONF. 1, 71–77 (1996), http://www.lalive.ch/data/publications/mes_combining_arbitration_with_conciliation.pdf [https://perma.cc/ADJ5-2L5G]; Renate Dendorfer & Jeremy Lack, *The Interaction Between Arbitration and Mediation: Vision vs. Reality*, 1 DISP. RESOL. INT'L 73, 91–92 (2007).

77 Lack, *supra* note 22, at 364–65; Dendorfer & Lack, *supra* note 76, at 91.

78 Lack, *supra* note 22, at 364–65; Dendorfer & Lack, *supra* note 76, at 77.

the mediator can employ several techniques to bring the parties closer, such as a reality check. The arbitration phase might also be shorter and less costly, due to the fact that the parties might agree, in the parallel mediation phase conducted with the co-mediator, to reduce the procedural requirements and evidence rules, as well as the number of issues to submit to adjudication. It is also expected that overall mutual value will be created for both parties in the mediation phase, because mediation is conducive to an integrative process addressing the parties' needs and interests beyond their strict legal positions. Even if the arbitral phase is initiated, the concomitant mediation phase remains voluntary, until the award is disclosed.

Compared to a traditional med-arb, which employs two different neutrals for the roles of mediator and arbitrator,[79] this option still enables the parties to enjoy the savings obtained from not duplicating the time needed to educate the arbitrator on the situation, since the DR Advisor has gained the necessary understanding during the mediation phase.[80] It also ensures that the *ex-aequo et bono* decision made by the DR Advisor will be based on a more comprehensive understanding of the situation than that arising from simple arbitral hearings. Regarding its duration, this option has the potential to be faster than others. First, it benefits from a mediation phase that has all the components to make it more effective minus the procedural risks that are eliminated using the co-mediator to intervene where the sole mediator could potentially impair his or her impartiality. And second, for the caucus-mediator's cost of fees, the parties can initiate the arbitral phase while the mediation phase is still underway.

Regarding the procedural matters, proper notice is required for the transition from the mediation phase to the evaluation or proposal step, if there is one, and from the non-binding phase to the binding phase. The latter notice, in cases where the parties

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79 *See*, for example, the simultaneous mediation and arbitration proceedings of the Centre de Médiation et d'Arbitrage de Paris ("CMAP"). *Le Règlement De Med-Arb Simultanés*, CMAP, https://www.cmap.fr/le-cmap/le-reglement-de-med-arb-simultanes/ [https://perma.cc/W9RU-WJ28] (last visited Mar. 28, 2021) [hereinafter "CMAP Simultaneous Med-Arb Rules]; *see also* Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons From* Microsoft *and Other Megacases*, 86 B.U. L. Rev. 1171, 1176–79 (2006); Deason, *supra* note 2, at 246; Thomas J. Stipanowich & Peter H. Kaskell, Commercial Arbitration at its Best: Successful Strategies for Business Users § 1.8 (2001).

80 Deason, *supra* note 2, at 219; Phillips, *supra* note 74, at 26; Blankley, *supra* note 2, at 326; Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *supra* note 9, at 71; Brewer & Mills, *supra* note 20; Blankenship, *supra* note 9, at 34; Ehle, *supra* note 43, at 85.

have jointly agreed to have the two phases running simultaneously, must clearly be given before disclosing the award, even if it can be given just before that disclosure.

D. *Sealed-Arbitration Option*

Under the Sealed-Arbitration Option, the mediation phase begins without any caucuses. In this option as well, the parties can choose to receive an evaluation or a DR Advisor proposal, which would move the process into an enhanced mediation. If the mediation or enhanced mediation leads to no—or only a partial—settlement agreement, the process moves to the arbitration phase, where the DR Advisor hears the parties' respective cases, and the parties respond to that of the other side. The DR Advisor then writes an award and seals it in an envelope so that its contents remain completely unknown to the parties. In the interest of clarity, this is the arbitral phase in the Sealed-Arbitration Option.[81]

Once the award is sealed, the mediation resumes with the presence of the unknown award on the table pressuring the parties into intensifying their involvement in the mediation, like a proverbial "Sword of Damocles," thereby further increasing the chances of reaching a settlement agreement.[82] Once the award has been sealed, the DR Advisor can take part in confidential caucuses, since the elements communicated ex parte have no influence on

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[81] The sealed-arbitration process is widely described in med-arb and arb-med literature. *See* Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *supra* note 9, at 71; Daniela Antona, *Med-Arb: A Choice Between Scylla and Charybdis*, 69 DISP. RESOL. J. 101, 110 (2014); GAITIS ET AL., *supra* note 43, at 359; Katie Shonk, *What is Med-Arb?*, HARV. L. SCH. PROGRAM ON NEGOT. DAILY BLOG (Nov. 8, 2021), https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ [https://perma.cc/4Z89-ZEKV]; Allan Barsky, "*Med-Arb": Behind the Closed Doors of a Hybrid Process*, 51 FAM. CT. REV. 637, 642 (2013); Richard M. Calkins, *Mediation: A Revolutionary Process that is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 27–28 (2011); Eunice Chua, *Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation*, 31 SACLJ 572, 590–91 (2019); ALAN L. LIMBURY, MED-ARB, ARB-MED, NEG-ARB AND ODR 6–8 (2005); CATHERINE MORRIS, ARBITRATION OF FAMILY LAW DISPUTES IN BRITISH COLUMBIA 3 (2004); John Wade, *Arbitration of Matrimonial Property Disputes*, 11 BOND L. REV. 395, 397 (1999); Mariana Hernandez-Crespo Gonstead, *Remedy without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process*, 88 FORDHAM L. REV. 2165, 2207 (2020).

[82] Donald E. Conlon, Henry Moon, & K. Yee Ng, *Putting the Cart Before the Horse: The Benefits of Arbitrating Before Mediating*, 87(5) J. APPLIED PSYCH. 978, 982–83 (2002) (stating that sealed-arbitration produces settlement in the mediation phase more frequently, with settlements of higher joint benefit than regular med-arb); *see also* Chua, *supra* note 81, at 590; LIMBURY, *supra* note 81, at 7–8.

the award. Because the arbitral decision has already been made, the participants may feel more willing to share sensitive information.[83] If the parties do not reach a settlement agreement—or only a partial one—the envelope is opened, and the award becomes binding. In cases where there is a conflict between a partial settlement agreement reached after the sealing of the envelope[84] and the eventual arbitral award, the DR Advisor has the responsibility to make the necessary correction and interpretation. An evaluation or proposal by the DR Advisor should only be made before the drafting of the award.

It can be argued that this option can be relatively faster than others, as the writing of the award happens before the mediation phase is completed. This means that the parties still expect to be able to resolve the dispute in the non-binding phase and will keep the arbitral hearings as condensed as possible.

Regarding the procedural matters, proper notice is required for the transition into the potential evaluation or proposal phase, when writing and sealing the award, and when unsealing the award to make it binding.

E. *Last-Offer Option*

Under the Last-Offer Option, the mediation phase begins with the possibility of having caucuses. In this option, as with others, the parties can choose to have an evaluation or proposal, which would move the process into an enhanced mediation. If there is no—or only a partial—settlement agreement, the process moves to the arbitral phase, where the arbitrator hears the parties' respective cases and the parties respond to that of the other side. Then, each party makes a final offer and seals it in an envelope, so that its contents remain completely unknown to the other side and the arbitrator. The sealed final offers are handed over to the last-offer arbitrator—i.e., the DR Advisor—who then unseals them and selects the one that will become the binding arbitral award. In the Last-Offer arbitration process, only two choices are available to the DR Advisor: choosing the proposal made by Party A or that

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[83] Barsky, *supra* note 81, at 642; Hernandez-Crespo Gonstead, *supra* note 81, at 2207.

[84] In case a partial award is reached after the sealing of the envelope and there were caucuses involved in reaching this partial settlement agreement, the parties will also need to sign an informed consent waiver, as required by the Informed-Consent Option.

made by Party B. The DR Advisor cannot make any amendments or revisions to the parties' proposals.[85]

Once the DR Advisor has made his or her choice, the mediation resumes. Because the final offers were made with the potential of becoming binding on both parties, the parties are pressured into an intense and *bona fide* mediation. This mechanism has a similar "Sword of Damocles" effect, as described in the Sealed-Arbitration Option. If, after resuming the mediation, a partial settlement agreement is reached and the parties jointly agree to do so, they can draft last offers that concern only the parts of the dispute that have not been settled. The DR Advisor then unseals the last offers that address these unsettled issues and selects the offer that will become the binding arbitral award.

One benefit of this option is that the parties will likely attempt to draft the fairest possible award, in the hopes that their proposal will be selected.[86] Further, another benefit of this option is that it protects against halfway compromises, or what is commonly referred to as "splitting the baby."[87]

The last offer should be drafted with the aim of producing an enforceable award. If the award is incomplete or subsequently needs clarification or interpretation, it will be the DR Advisor's duty to do so.

It should be noted that if the evaluation or proposal phase was performed before moving to the last-offer arbitration phase, it may have an impact on the parties' last offer. This is because an evaluation or proposal can provide some guidelines as to how aspects of the resolution will be weighted when selecting the option that will, ultimately, become an award.

In terms of speed and efficiency, this option is likely to be faster than most others, because the arbitral hearings will be kept

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85 STIPANOWICH & KASKELL, *supra* note 79, at §§ 2.0–2.4; Dendorfer & Lack, *supra* note 76, at 76, 82, 92–94.

86 Dendorfer & Lack, *supra* note 76, at 92; Horst Eidenmüller, *Hybride ADR-Verfahren bei Internationalen Wirtschaftskonflikten*, 1 RECHT DER INTERNATIONALEN WIRTSCHAFT 1, 9 (2002), https://online.ruw.de/suche/riw/Hybr-ADR-Verfah-bei-internationa-Wirtschaftskonfli-42d0338b2f0133d117b91cbd693d5cc1?crefresh=1 [https://perma.cc/CG55-FBY6].

87 This phrase has its roots in Jewish mythology. It refers to a story of two mothers who claimed to be the real mother of an infant son and argued their respective cases before King Solomon, who was acting as a conciliator. King Solomon ruled that the baby be split in two, with one-half of the baby given to each mother. This story is still relevant in the modern world to illustrate that a halfway compromise in dispute resolution (such as splitting the difference) is rarely a useful approach and fails to meet the parties' genuine interests.

short by the parties by having fewer procedural mechanisms.[88] Indeed, hearings are solely intended to influence the selection among the options, and not to convince the DR Advisor on how to draft the award.[89]

Regarding the procedural matters, proper notice is required for the transition into the potential evaluation or proposal phase, when writing and sealing the last offers, and when selecting and unsealing the offer that will become the binding award.

F. *Informed-Consent Option*

Contrary to the other options presented above, the Informed-Consent Option is not specifically designed to completely eliminate the risk of undermining the quality of procedural justice; instead, it relies on the parties' full understanding of the risks involved, hence its name, and includes a parties' waiver that can be used to challenge the award on this basis. In return, this option allows both the mediation phase and the arbitral phase to be as effective as possible. It also enhances the DR Advisor's ability to help the parties reach a satisfying resolution.

Under the Informed-Consent Option, the mediation phase begins with the possibility of having caucuses. The parties can choose to have an evaluation or proposal, which would move the process into an enhanced mediation. The enhanced mediation can also contain confidential caucuses. Finally, if needed, this will be followed by an arbitration, in order to adjudicate the issues that have not already been settled.

Regarding the procedural matters, proper notice is required for the transition from the mediation phase to the evaluation or proposal step, if there is one, and from the non-binding phase to the binding phase. It is also important that the DR Advisor clearly explains, in the pre-mediation phase, the risks associated with this

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88 Christian Borris, *Final Offer Arbitration from a Civil Law Perspective – How to Play Baseball in Soccer Country*, 24 J. Int'l Arb. 307, 315–16 (2007); Mark J. Sundahl, Baseball Arbitration, Game Theory and the Execution of Socrates 2 (2004); Edna Sussman & Erin Gleason, *Putting Final Offer/Baseball Arbitration to Use*, 37 Alts. High Cost Litig. 19, 19 (2019); *see also* Stipanowich & Kaskell, *supra* note 79, at §§ 2.0–2.4 (describing the process of MEDALOA and explaining its potential advantages and concerns); Dendorfer & Lack, *supra* note 76, at 76, 82, 92–94 (for an analysis of the implications, advantages, and disadvantages of MEDALOA).

89 Dendorfer & Lack, *supra* note 76, at 92; Borris, *supra* note 88, at 316.

option, as detailed in Section IV below, so that the parties can have informed consent.

Considering that the change of role (from mediator to arbitrator) carries a higher risk that the arbitral award will be contested, annulled, or refused to be approved—due to a procedural flaw—especially in the case where ex parte communications took place,[90] the parties must adopt an agreement and waive their right to challenge the award. Such agreement should be made in writing, prior to the beginning of the process, and specify that the parties agree that they: (1) consent to the change of role by the DR Advisor; (2) waive their right to challenge the arbitral award on this basis; and (3) consent to the fact that ex parte communications may take place during the mediation phase.[91] In addition, the arbitral award should mention that the parties have explicitly agreed that the DR Advisor could take on the roles of mediator, arbitrator, and, perhaps, evaluator. It should also state that the parties would waive their right to challenge the arbitration award on the basis that a change of role has taken place or that the mediator-turned-arbitrator held ex parte communications during the mediation.[92] In addition, the arbitral award should specify whether the parties have authorized the arbitrator to consider, for the purposes of his or her decision, the information that he or she learned during the mediation phase, including but not limited to the elements communicated during caucuses. Regardless of the parties' choice in this regard, the arbitral award should state that the third-party neutral has followed the procedure, as agreed-upon by the parties.[93] In addition, the legal advisors and the third-party neutral should be well-informed of the law of the jurisdiction where enforcement of the arbitral award will be sought, in order to ensure that recourse to a hybrid process will not pose obstacles to the homologation of the arbitral award.[94]

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90 Ehle, *supra* note 43, at 93.

91 GAITIS ET AL., *supra* note 43, at 359; Ehle, *supra* note 43, at 93. The *Marchese v. Marchese* case in Canada confirmed that parties could waive, by mutual agreement, the application of Section 35 of the Ontario Arbitration Act, prohibiting the court from using forms of mediation and conciliation. Marchese v. Marchese, [2007], 219 O.A.C. 257 (Can. Ont. C.A.).

92 GAITIS ET AL., *supra* note 43, at 359–60.

93 *Id.* at 359–60; Blankley, *supra* note 2, at 366.

94 GAITIS ET AL., *supra* note 43, at 359–60; Blankley, *supra* note 2, at 347.

IV. The Risks Associated with Each Option of the GREAT Process

Drawing from Professor Fraser's analysis of the six main risk categories,[95] associated with having a neutral third party conducting a process composed of both binding and non-binding mechanisms, this section of the Article will consider how those risks apply to each option of the GREAT Process.

A. *Six Main Risk Categories*

i. The Steering of the Adversarial Atmosphere Between Parties

Considering that the parties are aware that the DR Advisor is likely to take on the arbitral role if the mediation phase does not settle all aspects of the dispute, the parties might alter their engagement in the mediation phase. This change can range from simple abstention from disclosing some confidential information to exclusively sticking to their legal positions. In other words, the sole awareness of the fact that the process could move to arbitration might make the mediation phase more adversarial.[96]

The No-Caucus Option, as well as the Lifting-Caucus-Confidentiality Option, are especially exposed to that risk. The other options have a structure that is helpful in mitigating that risk. The parties should, therefore, select a particular option by gauging how much their dispute is likely to suffer from an adversarial atmosphere.

Nonetheless, the mediation phase, by facilitating or improving parties' communication, can help the parties evaluate facts that were initially considered risky to disclose. That being said, the parties are ultimately in control of exactly what they decide to dis-

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95 Fraser, *supra* note 2, at 337–45.

96 *Id.* at 340–41; Pappas, *supra* note 62, at 172–73, 179; Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 Law & Hum. Behav. 313, 327 (1993); Peter Lanka, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judge's Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 U. Wash. L. Rev. 71, 80 (2005) (explaining that the benefits of med-arb are often mitigated by the fact that parties have a tendency to withhold information during the mediation phase by fear that it will be used against them later in the process); *see also* Brewer & Mills, *supra* note 20, at 35; Phillips, *supra* note 74, at 30; Kari D. Boyle, *Med-Arb: From the Mediator Perspective*, Slaw (Mar. 4, 2013), http://www.slaw.ca/2013/03/04/med-arb-from-the-mediator-perspective/ [https://perma.cc/SX7B-KC3M]; Nolan-Haley, *supra* note 16, at 65.

close. Even if a mediation phase is not as efficient as it could theoretically have been because the parties are more adversarial, it can still bring a significant added value to the entire resolution process by: (1) increasing the parties' mutual understanding; (2) including elements in the resolution that are not only based on the legal claims but on the parties' needs and interests; and (3) reducing the number of aspects that need to be adjudicated.

ii. The Potential Bias Creation in the Adjudicating Neutral

The DR Advisor can be exposed to elements usually considered off-limits by an arbitral tribunal—such as the values, interests, needs, emotions, BATNAs, etc.—that are normally only expressed in a mediation phase.[97] Therefore, there is a risk that these elements will influence the way in which the DR Advisor will adjudicate.[98]

If an undesired influence arises from the DR Advisor's knowledge of ineligible elements, this is not considered a risk in the GREAT Process. This is because the process aims to arrive at a resolution that is not only based on traditionally admissible evidence, but rather, a resolution that includes all the other aspects. This is a choice made by the parties that is reinforced by the decision to have their dispute adjudicated in an *ex-aequo et bono* fashion. When selecting the process, the parties are understood to have considered and accepted this factor.

If the undesired influences come from unfair bias creation in the DR Advisor, this is a risk that will be considered part of the potential infringement on the quality of procedural justice, as described below in Section IV(A)(vi).

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97 Fraser, *supra* note 2, at 337–38; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 793 (1984) (analyzing the importance of the exchange of information for the amicable settlement of disputes); Deason, *supra* note 2, at 225–26; Bartel, *supra* note 9, at 686; Michael Erdle, *Med-Arb: The Debate Continues*, Slaw (Feb. 5, 2016), http://www.slaw.ca/2016/02/05/med-arb-the-debate-continues/ [https://perma.cc/7X5F-YUHG]; Pappas, *supra* note 62, at 180.

98 Fraser, *supra* note 2, at 337–40; Deason, *supra* note 2, at 228–29; Blankley, *supra* note 2, at 334–35; Phillips, *supra* note 74, at 27; Blankenship, *supra* note 9, at 35; Pappas, *supra* note 62, at 180; Bartel, *supra* note 9, at 686; Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 8–9 (2007); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1288–93 (2005); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 Duke L. J. 1477, 1495–520 (2009).

iii. The Neutral's Lack of Competencies

Conducting binding and non-binding mechanisms requires different sets of skills. Demanding that the DR Advisor master both sets of skills at, the very least, a respectable level, makes it more difficult to find a suitable DR Advisor. It also possibly reduces the availability of that person.[99] It can be argued that having a DR Advisor who is competent in both sets of skills reduces the chances that this person is highly qualified in either set of skills, due to the fact that the trainings for mediation and arbitration bear little resemblance to one another. This is on top of the fact that the DR Advisor is required to have the competencies to adequately run the mixed-modes process, not only the phases of which it is composed.[100]

For this risk, the best mitigating measure is for the parties to decide that the DR Advisor will adjudicate the potential arbitral phase as an amiable compositeur. This lifts the requirement that the DR Advisor be fully competent in the applicable law and arbitration proceedings. It also reinforces the principle that the entire process is based on elements like the parties' needs and interests, which go beyond their legal rights and obligations. The parties will therefore seek a DR Advisor who possesses common sense and a sense of fairness, which will guide him or her in the writing of an *ex-aequo et bono* decision.

iv. The Validity of the Arbitral Award

The potential invalidity of the arbitral award is a risk that affects all hybrid processes, namely those combining binding and non-binding mechanisms.[101] Common motives of award challenges have included: (1) the adjudication being based on confidential information disclosed during caucuses;[102] (2) the neutral not holding arbitral hearings and, therefore, basing the decision on the infor-

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99 Fraser, *supra* note 2, at 341–42; Phillips, *supra* note 74, at 30.

100 Fraser, *supra* note 2; Bartel, *supra* note 9, at 686; Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *supra* note 9, at 73.

101 Fraser, *supra* note 2, at 344–45; Blankley, *supra* note 2, at 321–22; Pappas, *supra* note 62, at 173; Ehle, *supra* note 43, at 93; Collins, *supra* note 62, at 337.

102 U.S. Steel Mining Co. v. Wilson Downhole Servs., No. 02:00CV1758, U.S. Dist. LEXIS 72737, *4–5 (W.D. Pa. Oct. 5, 2006); Estate of McDonald, No. BP072816, 2007 Cal. App. Unpub. LEXIS 828, *21 (Cal. Ct. App. Jan. 31, 2007); Rodriguez v. Harding, No. 04-0200093CV, 2002 Tex. App. LEXIS 9178, *4 (Tex. Ct. App. Dec. 24, 2002). For a short summary of these cases, *see* Deason, *supra* note 2, at 240 n. 126.

mation exchanged during the mediation phase;[103] (3) a bias being created in the neutral's opinion during the non-binding phase;[104] (4) the process becoming flawed because of procedural defects;[105] or (5) not having the explicit consent of the parties.[106]

The GREAT Process addresses those risks through several measures. Regarding the risks of procedural defects, such risks are mitigated by having the steps clearly defined in each option.[107] This is also the reason why the arbitral phase must allow each party to make a final convincing argument of their case, as well as the opportunity to respond to that of the other side. This also explains why it has been clearly emphasized that the DR Advisor's role is to meticulously make all the required notices as the process matures into new phases, in order that the parties are made fully aware that they are moving to a different phase of the process.[108] The clear definition of the respective steps in each option enables a settlement agreement or a partial settlement agreement to be recognized as valid because it is easy to prove that an agreement was reached during an entirely voluntary and non-binding phase.

The clear transition also protects against arguments that there were no—or insufficient—arbitral hearings. The clear transition from one phase to another also acts as a reminder to the DR Advisor about the requirements of the new phase. This can be helpful when the arbitral phase does not occur at the end of the process, as

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103 Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003); Wright v. Brockett, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991). For a short summary of these cases, *see* Blankley, *supra* note 2, at 346–48, 358; Deason, *supra* note 2, at 240 n. 125.

104 Estate of McDonald, 2007 Cal. App. Unpub. LEXIS 828, at *21. For a short summary of the case, *see* Deason, *supra* note 2, at 240 n. 127.

105 Aamot v. Eneboe, 352 N.W.2d 647, 649–50 (S.D. 1984) (vacating award). The tribunal considered the process flawed because the arbitrators did not allow the parties to be represented by counsel or to conduct cross-examinations. *See* Deason, *supra* note 2, at 241.

106 Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 848–49 (Cal. Ct. App. 2006) (refusing to enforce a "binding mediation ruling" because of a disagreement between the parties as to what that meant). For a short summary of this case, *see* Deason, *supra* note 2, at 245; Weddington Prods., Inc. v. Flick, 71 Cal. Rptr. 265, 267–68 (Cal. Ct. App. 1998) (refusing to enforce an order resulting from proceedings that one party regarded as a continuation of mediation, while the other party and the third party regarded it as binding).

107 Fraser, *supra* note 2, at 353–54; GAITIS ET AL., *supra* note 43, at 358; Ehle, *supra* note 43, at 93. The *Marchese v Marchese* case confirmed that parties could agree to waive the application of Section 35 of the Ontario Arbitration Act, prohibiting the Arbitral Tribunal from using forms of mediation and conciliation. Marchese v Marchese, [2007], 219 O.A.C. 257 (Can. Ont. C.A.).

108 Failing to do so can significantly hurt the parties' self-determination. *See* Fraser, *supra* note 2, at 342–44; Blankley, *supra* note 2, at 336–37.

is the case, for example, in the Last-Offer Option or the Sealed-Arbitration Option.[109]

Regarding the risk of there being insufficient consent from the parties, this is a problem in administering the process, not a problem inherent in the design of the process. The model clause provided in the last section of the Article is meant to guard against this risk, and it has already been emphasized that for any modification of the process, the DR Advisor's role is to collect the necessary consent from each party.

As for the impact of confidential information being disclosed during ex parte caucuses and potential bias creation in the neutral's opinion, this will be discussed in Section IV(A)(vi), along with the potential for infringement on the quality of procedural justice.

Hence, the GREAT Process is designed to contain all of the necessary safeguards against challenges to awards. The possible default on an award would be the result of negligence from the DR Advisor, and not from a faulty process.

v. The Infringement to Parties' Self-Determination

Self-determination requires that parties come to uncoerced and voluntary decisions, on a free and informed basis as to the process and outcome, and that they are able to take actions to follow through on those decisions.[110] The disputants must possess the ability to participate effectively in the process.[111] Hence, infringement on parties' self-determination includes the risk that parties have not fully understood the implication of the process—i.e., the

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[109] In *Trimble v. Graves*, the absence of a clear boundary between the mediation phase and the arbitral phase led to a procedurally defective award. The parties, thinking that they were in a mediation session, laid out an offer that was then used as the basis of the arbitral award. Trimble v. Graves, 947 N.E.2d 885, 883, 889 (Ill. App. Ct. 2011) (vacating award). For other similar cases where there were no arbitral hearings, *see* Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003); Wright v. Brockett, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991).

[110] Model Standards of Conduct for Mediators, supra note 18, at Standard 1(A); ADA Mediation Standards Work Group, ADA Mediation Guidelines § I(D)(1) (2000), https://static1.squarespace.com/static/60a5863870f56068b0f097cd/t/61ed918d8ea7530d9db370bc/1642959246098/ADA+Mediation+Guidelines+%28New+Copy%29.pdf [https://perma.cc/8646-XLJE] (last visited Jan. 30, 2022) [hereinafter "ADA Mediation Guidelines"]; ADRIC Code of Conduct for Mediators, *supra* note 56, at § 3.1; Susan Douglas, *Neutrality, Self-Determination, Fairness and Differing Models of Mediation*, 19 James Cook U. L. Rev. 19, 27 (2012); Marsha Lichtenstein, *Mediation and Feminism: Common Values and Challenges*, 18 Mediation Q. 19, 21 (2000); Nancy Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. Rev. 721, 726 (2017).

[111] Tim Hedeen, *Ensuring Self-Determination through Mediation Readiness: Ethical Considerations*, Mediate.com (July 2003), https://www.mediate.com/articles/hedeenT1.cfm [https://perma.cc/H2LV-5SXK].

risks of the process, which are explained in this section and that are not typically associated with a non-hybrid process, such as mediation or arbitration.[112] Several procedural safeguards are in place in the GREAT Process to mitigate this risk. The first safeguard is the use of an opening mediation phase at the beginning of the GREAT Process. During this phase the DR Advisor explains the GREAT Process, as well as the advantages and risks associated with it and each of its options, and opens the room for procedural questions. This phase ensures that the parties have the opportunity to validate their understanding of the process and fosters informed consent.

In addition, part of the risk is also mitigated by the use of legal counsels, who have the duty to fully understand the benefits and risks of the GREAT Process and all its options, and inform their client about them. They can hence assist their clients in making the best possible choice in light of their process preferences and substantive needs and interests.

vi. The Potential Infringement on the Quality of Procedural Justice

The potential infringement on the quality of procedural justice is a common risk in hybrid processes. This risk arises from the use of ex parte caucuses during the mediation phases because the information disclosed by a party during these separate meetings is not disclosed to the other party, except when provided otherwise. This may, therefore, result in a situation where the DR Advisor—who has become an arbitrator—bases his or her decision on facts for which a party has not had the opportunity to present its point of view and its counter-arguments,[113] thus going against the fundamental principle of the contradiction (i.e., *audi alteram partem*).[114] A second risk arising from the use of caucuses is that a party will

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112 Stipanowich, *Arbitration, Mediation and Mixed Modes*, *supra* note 9, at 288–89; Fraser, *supra* note 2, at 342–45; GAITIS ET AL., *supra* note 43, at 345; STIPANOWICH & KASKELL, *supra* note 79, at § 1.9; Bartel, *supra* note 9, at 679–85; Mark Batson Baril & Donald Dickey, *MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?*, MEDIATE 6, https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf [https://perma.cc/KJ5V-WDYT] (last visited Jan. 30, 2022).

113 Bartel, *supra* note 9, at 679; Pappas, *supra* note 62, at 184, 188; GAITIS ET AL., *supra* note 43, at 342; Fraser, *supra* note 2, at 339–40; Stipanowich, *Arbitration, Mediation and Mixed Modes*, *supra* note 9, at 288–89.

114 Fraser, *supra* note 2, at 339–40; Deason, *supra* note 2, at 226–27; Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 ARB. INT'L 387, 391–92 (2003); Collins, *supra* note 62, at 334; Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *supra* note 9, at 71.

use those confidential discussions to manipulate the DR Advisor—for example, by trying to show the DR Advisor that his or her behavior was faultless or by painting an unfavorable portrait of the other party.[115] Therefore, some authors argue that arbitrators should never hold ex parte communications.[116]

Another possibility is that the DR Advisor, by offering solutions during the mediation phase, creates reasonable expectations in the parties that the arbitral award will integrate the opinions that the DR Advisor put forward.[117] This concern is particularly significant if caucuses were held.[118] Thinking that the DR Advisor was favorable to its position, a party might later feel betrayed by an unfavorable decision.[119]

Both of those risks are accounted for in the first five options of the GREAT Process, as explained below. The risk of potential infringement on the quality of procedural justice in the sixth option will subsequently be considered.

In the **No-Caucus Option**, there is no risk of infringement on the quality of procedural justice, as the process does not allow for any confidential ex parte caucuses to be held. All of the elements are exchanged in the presence of all parties, meaning the elements can be contradicted, and no party has any opportunity to unfairly manipulate the DR Advisor.

The **Lifting-Caucus-Confidentiality Option** also prevents against any risk of infringement on the quality of procedural justice, because all ex parte elements are to be disclosed to all parties, providing the parties with the opportunity to contradict the elements and challenge anything considered as unfair manipulation.

The **Co-Mediation Option** also preserves against the risk of infringement on the quality of procedural justice, as the DR Advisor—who, if needed, will draft the binding award—has never been

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115 Stipanowich & Kaskell, *supra* note 79, at §§ 21–22; Batson Baril & Dickey, *supra* note 112, at 6; Pappas, *supra* note 62, at 179, 188 (2015); Gaitis et al., *supra* note 43, at 342; Phillips, *supra* note 74, at 26; Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb For Resolving Will Disputes*, 22 Ohio St. J. on Disp. Resol. 871, 896 (2007); Peter Berger, *supra* note 114, at 391; *see generally* Fraser, *supra* note 2.

116 *See* Peter Berger, *supra* note 114, at 392; Fraser, *supra* note 2, at 346–47.

117 Batson Baril & Dickey, *supra* note 112, at 6; Boyle, *supra* note 96; Peter, *supra* note 74, at 95; Stipanowich, *Arbitration, Mediation and Mixed Modes*, *supra* note 9, at 843–44; Fraser, *supra* note 2, at 339–40.

118 Fraser, *supra* note 2, at 339–40; Frances Bairstow, Arbitration Issues for the 1980s: Proceedings of the Thirty-Fourth Anniversary Meeting of the National Academy of Arbitrators 93 (J. Stern & B. Dennis eds., 1982); Pappas, *supra* note 62, at 179.

119 Stipanowich, *Arbitration, Mediation and Mixed Modes*, *supra* note 9, at 20–21; Fraser, *supra* note 2, at 339–40.

exposed to any ex parte elements. The DR Advisor is, indeed, prevented from assisting with the caucus held by his or her co-mediator (the caucus-mediator).

The **Sealed-Arbitration Option** precludes any risk of infringement on the quality of procedural justice, because the award is drafted before the mediation phase, and, therefore, before the DR Advisor is to be exposed to any ex parte elements.

The **Last-Offer Option** also guards against any risk of infringement on the quality of procedural justice, as, even if exposed to ex parte elements, the DR Advisor is not drafting the award but merely selecting the fairest award submitted by the parties. In cases where at least one party would have attempted to manipulate the DR Advisor during the caucuses, the influence of that action would be limited to having an impact on the selection of the fairest award, not the entire drafting.

B. *Informed-Consent Option*

The first five options are arrangements that allow for circumventing the issues arising from the confidential caucuses. The Informed-Consent Option requires a more detailed analysis because it includes the confidential caucuses and will deal directly with the objections arising therefrom, namely the potential infringement on the quality of procedural justice. The question to be answered is whether "the parties' explicit informed consent to the DR Advisor's exposition to ex parte elements before initiating the arbitral phase" reaches the minimum acceptable standard of procedural fairness. This subsection will first discuss some general considerations on procedural fairness and argue that the Informed-Consent Option fulfills all requirements of procedural fairness; the subsection will then explain how that is practically ensured.

Article V(1)(b) of the New York Convention[120] states that preventing parties from presenting their case is grounds for setting aside the award. There is no standard to be followed for procedural fairness. This means that any infringement of procedural justice

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[120] Article V(1)(b) reads: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. . . ." The New York Convention, *supra* note 36, at § V(1)(b).

must be contrary to the public policy of the country of enforcement to prevent the enforcement of the award. It is noteworthy that Article V(1)(d) states that an award may be denied enforcement if the procedure "was not in accordance with the agreement of the parties," which strongly supports the fact that a procedure crafted by the parties, even if it includes ex parte caucuses before the arbitral phase, is recognizable and enforceable.[121]

With respect to the possible infringement on procedural fairness being a violation of the public policy of the place of enforcement, it is beyond the scope of this Article to make a comprehensive evaluation of all domestic laws. Thus, this section addresses procedural fairness, in general.

Fairness is arguably an abstraction that can be qualified as anything between a hard-to-define concept, a quality or manner of treating people,[122] or a composite of legitimacy and distributive justice.[123] In discussing this notion, this Article relies on Article 6 of the European Convention on Human Rights,[124] which protects the right to a fair trial, and on the Guide on Article 6 of the European Convention on Human Rights[125] ("ECHR's Guide") by the European Court of Human Rights ("ECHR").

In Article 6, the word "fair" only appears in the first paragraph. The ECHR's guide provides the following discussion of the word "fair":

> 358. Secondly, there is often misunderstanding as to the exact meaning of the term "fair" in Article 6 §1 of the Convention. The "fairness" required by Article 6 §1 is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial court), but "procedural" fairness. Article 6 §1 only guarantees "procedural" fairness, which translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal

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121 *Id.* at § V(1)(d).

122 *See Fairness*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/fr/dictionnaire/anglais/fairness [https://perma.cc/2XT8-LGLS] (last visited Apr. 2, 2021); *Fairness*, LEXICO, https://www.lexico.com/definition/fairness [https://perma.cc/8CJT-P2ZT] (last visited Apr. 2, 2021).

123 *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26–27 (Oxford University Press, 1995).

124 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter "European Convention on Human Rights"].

125 EUROPEAN COURT HUM. RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO A FAIR TRIAL (CIVIL LIMB) (Aug. 31, 2021), https://www.echr.coe.int/documents/guide_art_6_eng.pdf [https://perma.cc/7DN3-HTDA] [hereinafter "ECHR's GUIDE ON ARTICLE 6"] (citations omitted).

> footing before the court. The fairness of proceedings is always assessed by examining them in their entirety, so that an isolated irregularity may not be sufficient to render the proceedings as a whole unfair.[126]

The Informed-Consent Option offers parties procedural equality and impartiality throughout all phases. In the arbitral phase, both parties have adversarial hearings, in which they are placed on an equal footing and have their submissions heard. Additionally, they also are on an equal footing in the mediation phase, where they are both provided with the opportunity to express themselves and to have ex parte caucuses with the DR Advisor.

The ECHR's Guide states that the "fairness of proceedings is always assessed by examining them in their entirety, so that an isolated irregularity may not be sufficient to render the proceedings as a whole unfair."[127] This is also very relevant in the Informed-Consent Option. The possible misuse of ex parte caucuses is arguably an isolated irregularity to the general principle of adversarial proceedings.

Regarding adversarial proceedings, the ECHR's Guide explains as to its content that "the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed . . . with a view to influencing the court's decision."[128] It then goes on to discuss its limits:

> 379. Limits: the right to adversarial proceedings is not absolute and its scope may vary depending on the specific features of the case in question. . . . In several cases with very particular circumstances, the Court found that the non-disclosure of an item of evidence and the applicant's inability to comment on it had not undermined the fairness of the proceedings, in that having that opportunity would have had no impact on the outcome of the case and the legal solution reached was not open to discussion."[129]

The relevance of paragraph 379 of the ECHR's Guide for the Informed-Consent Option is that it recognizes that the right to adversarial proceedings is not absolute, and this exception (i.e., the fact that the DR Advisor is to be exposed to ex parte elements before initiating the arbitral phase) must be considered in light of its im-

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126 *Id.* at § 358 (citations omitted).

127 *Id.* (citations omitted).

128 *Id.* at § 377 (citations omitted).

129 *Id.* at § 379 (citations omitted).

pact on the outcome of the case.[130] In the context of the GREAT Process, in order to prevent ex parte elements from having an impact on the outcome of the case in arbitration, the DR Advisor should base the arbitral award solely on the elements that have been exchanged openly between all parties during the arbitral phase. However, if the arbitral award is to be based on *ex-aequo et bono* considerations,[131] the DR Advisor could also consider the elements that have been exchanged in a joint session during a mediation phase.[132]

After having seen that the fairness of proceedings is not affected by isolated irregularities and that the right to adversarial proceedings is not absolute, this Article will now consider the link between the adversarial nature of the proceedings and the principle of "equality of arms." Article 6 of the ECHR interestingly reminds us that:

> 381. The principle of "equality of arms" is inherent in the broader concept of a fair trial and is closely linked to the adversarial principle. The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases.
>
> 382. Content: maintaining a "fair balance" between the parties. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis the other party.[133]

It is clear that the GREAT Process can provide "a fair balance between the parties," so long as the parties are afforded a reasonable opportunity to present their case, and none of them are placed at a substantial disadvantage. Adding to the above points on fairness, this Article now considers the current practice in arbitral proceedings, and the added value brought by the DR Advisor.

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[130] *Id.*; *see also* Fraser, *supra* note 2, at 337–39, 348–49; Deason, *supra* note 2, at 228–29; Blankley, *supra* note 2, at 334–35; Phillips, *supra* note 74, at 27; Blankenship, *supra* note 9, at 35; Pappas, *supra* note 62, at 180; Bartel, *supra* note 9, at 686.

[131] The CMAP Med-Arb rules notably allow the parties to grant the neutral amiable compositeur powers during the arbitral phase. CMAP Simultaneous Med-Arb Rules, *supra* note 79, at Article 11.11.2.

[132] Alice Dejollier, *La Med-Arb: Voie D'avenir en Droit Belge? Fondements et Perspectives D'une Justice Alternative* 48–50 (2015) (unpublished master's thesis in law, Université Catholique de Louvain), https://dial.uclouvain.be/memoire/ucl/en/object/thesis%3A3173/datastream/PDF_01/view [https://perma.cc/7SCL-TRGJ]. Binding mediation also allows the neutral to base their decision on the information provided during the mediation phase.

[133] ECHR's GUIDE ON ARTICLE 6, *supra* note 125, at §§ 381–82 (cases omitted).

Arbitration largely relies on the arbitral tribunal's ability to weigh evidence. This is based on the reality that parties come from different legal backgrounds, from different cultures, or have different abilities to present evidence. It is accepted in arbitration[134] that parties, or sometimes, if needed, the tribunal, can decide whether to have witnesses, whether to have cross-examination, whether to have an examination by the tribunal itself, whether to allow secondary evidence or hearsay, and whether to have discovery.[135] And the list of what is possible for the tribunal to decide upon is not limited to those points.

The DR Advisor needs to apply to any ex-parte element the same critical thinking used when adequately evaluating untested evidence from a witness that has direct interest in the case. The DR Advisor should consciously assess the weight to be accorded to the evidence he or she has been exposed to by keeping in mind the context in which it has been communicated (whether in caucus, in joint session, or in hearing).

The critical thinking applies not only when assessing the ex parte elements, but also when comparing what has been brought up in caucuses and what was brought up during the arbitral hearings. For example, the DR Advisor should be suspicious of an element that a party argues in caucuses as being crucial in the dispute but then completely ignores in the arbitral hearing. The DR Advisor should be as aware as the parties of the potential influence of ex parte elements, and evaluate and weigh those elements with the required precautions. There can be perfectly legitimate reasons as to why a party would only share elements in confidential caucus and not disclose them to the other side. The party is expected to explain those legitimate reasons to the DR Advisor, who will then evaluate the element according to the reasons provided.

In cases where the DR Advisor believes that an ex parte element plays a significant role in adjudicating the decision, and that

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134 The power of an arbitral tribunal to evaluate evidence is protected by many arbitration laws, including by Article 19(2) of the UNCITRAL Model Law, which reads, "(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." UNCITRAL Model Law on International Commercial Arbitration, *supra* note 63, at § 19(2).

135 *See* UNCITRAL Model Law on International Commercial Arbitration, *supra* note 63, at § 19; World Intellectual Property Organization, WIPO Arbitration Rules §§ 37 (a), 50 (a), 55 (a); American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures § R-34(a) (amended and effective as of 2013); ADRIC Arbitration Rules, *supra* note 26, at §§ 4.7.1, 4.9.1, 4.19.2, 6.2.

element has not been included in the arbitral hearing, the DR Advisor can convene another caucus with that party to discuss the choice to not disclose that element. Thereafter, the party can decide whether to disclose the element to the other side, who then has the opportunity to respond. If the party refuses to disclose the element, it will be evaluated according to the soundness of the explanation provided. This is evaluating ex parte elements with common sense. It is interesting to note that a commonsense approach in evaluating evidence in arbitration has already largely been documented, especially in the Iran-United States Claims Tribunal, and it is a powerful testimony to its complete compatibility with fair and efficient proceedings.[136]

It is also interesting to note that, in several cases, the common sense approach used by the tribunal is actually the application of an independent standard of fairness.[137] This skill and others—such as a reality check of the parties' positions and demands—are strong shields against the easy success of any unfair manipulation attempts, and are undeniable assets in maintaining critical objectivity to any ex parte element.

Finally, the argument will now turn to the parties' free will and, more specifically, to their rights to waivers. The parties' rights to waivers are expressed several times in the ECHR's Guide, but have been powerfully summarized in *Dilipak and Karakaya v. Turkey*:

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136 The Iran-United States Claims Tribunal routinely applied the following principles:

> (1) Contemporaneous written exchanges of the parties antedating the dispute are the most reliable source of evidence;
>
> (2) The actual course of conduct between the parties prior to the dispute arising constitutes the best evidence of the proper interpretation of their contract;
>
> (3) The failure of a party to object in writing to a writing (*e.g.,* an invoice) it has received at or shortly after the time of receipt is strong evidence of its acceptance;
>
> (4) Statements of a party contradicting the position it has taken in the proceedings are strong evidence against that position; and
>
> (5) When it reasonably should be expected that certain evidence exists and that it is in the control of a party, the failure of that party to produce such evidence gives rise to a justifiable inference that such evidence, if produced, would be adverse to that party.

Charles N. Brower, *The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 147, 150–51 (Richard B. Lillich ed., 1992).

137 For example, in *PepsiCo v. Iran,* the tribunal did not have access to the documents confirming the exact date of the shipment arrival in the port and had to establish whether late charges applied. The tribunal presumed that the goods had arrived in the average time usually necessary to ship goods from the United States to Iran. PepsiCo, Inc. v. Gov't of the Islamic Republic of Iran, 13 Iran-U.S. Cl. Trib. Rep. 3, 24 (1986).

> The Court also reiterates that while neither the letter nor the spirit of Article 6 of the Convention prevent a person from waiving, of his or her own free will, either expressly or tacitly, the safeguards on a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000), a waiver of the right to take part in the hearing must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A) nor must it not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A).[138]

This statement can be interpreted as allowing parties to have their dispute resolved by the Informed-Consent Option as long as the waiver is made with their free will, the minimum safeguards are commensurate to the waiver's importance, and the waiver does not run counter to any important public interest. The waiver—being expressly provided for in a dispute resolution clause, with the necessary assistance of the party's lawyer—constitutes an expression of the party's free will.

In order to assess whether or not the waiver would run counter to any important public interest, or that the minimum safeguards are commensurate with its impact, it is very helpful to compare that waiver with what is already widely accepted in arbitration. Depending on the applicable law and the chosen rules, parties can waive their right to any form of recourse against awards rendered,[139] waive their right to claim damages from an arbitrator's

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[138] Dilipak and Karakaya v. Turkey, nos. 7942/05 and 24838/05 Eur. Ct. H.R. at 10 (2014) (cases omitted).

[139] *See, e.g.*, Article 1522 of the French Code of Civil Procedure, Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1522 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000023430146 [https://perma.cc/C4VM-QRRS] (last visited Mar. 8, 2022); Article 192(1) of the Swiss Private International Law Act, LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP], [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291, art. 192(1) (Switz.), https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/fr [https://perma.cc/R629-USQ2] (last visited Mar. 8, 2022) [hereinafter "Swiss Private International Law Act"]; Chapter VII of the Belgian Judicial Code, C. JUD. (Belg.), art. 1718, http://www.ejustice.just.fgov.be/eli/loi/1967/10/10/1967101057/justel [https://perma.cc/9F6S-MQLZ] (last visited Mar. 8, 2022); Article 51 of the Swedish Arbitration Act, 51 § LAG OM SKILJEFÖRFARANDE (Svensk författningssamling [SFS] 1999:116) (Swed.), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1999116-om-skiljeforfarande_sfs-1999-116 [https://perma.cc/N89Z-GNNT] (last visited Mar. 8, 2022); Article 35(6) of the Rules of Arbitration of the ICC, ICC RULES OF ARBITRATION ART. 35(6) (2012, as amended in 2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/73RU-PJP9] (last visited Mar. 8, 2022) [hereinafter "ICC Arbitration Rules"]; Article 26.8 of the LCIA Arbitration Rules, LONDON COURT OF INTERNATIONAL ARBITRATION,

misconduct,[140] waive their right to challenge an award made in a consolidated proceeding,[141] or waive their right to make procedural objections, if the objections are not made in a timely manner.[142] It is also worth remembering that it is generally admitted that the arbitral tribunal has the power to continue the proceedings when a party fails to participate in the proceedings (refuses to take part, refuses to reply to communications, or creates an unreasonable delay[143]) and there is no sufficient cause for its absence.[144]

All the above practices that are largely accepted in arbitration are strong arguments in favor of considering that the Informed-Consent Option does not run against important public policy, and

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ARBITRATION RULES ART. 26.8 (2020), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx [https://perma.cc/R83J-7TCU], and the decision in *Lesotho Highlands Development Authority v Impregilo SpA* by the English courts that validated the parties' right to waive their right to any recourse to a court. Lesotho Highlands Development Authority v. Impregilo SpA [2005] UKHL 43 (appeal taken from Eng.). In some jurisdictions, parties can agree to waive their right to object on the inclusion of a matter in dispute. *See, e.g.*, Section 46(3) of the Ontario Arbitration Act, Arbitration Act, S.O. 1991, c-17, § 46(3) (Can.) [hereinafter "Ontario Arbitration Act"], Section 45(3) of the Alberta and Manitoba arbitration acts, Arbitration Act, R.S.A. 2000, c A-43, § 45(3) (Can.) [hereinafter "Alberta Arbitration Act"], The Arbitration Act, C.C.S.M. 1997, c A-120, § 45(3) (Can.) [hereinafter "Manitoba Arbitration Act"].

140 LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES, *supra* note 139, at art. 31.1; ICC Arbitration Rules, *supra* note 139, at art. 41; Article 16 of the PCA Arbitration Rules, PERMANENT COURT OF ARBITRATION, ARBITRATION RULES ART. 16 (2012); Article 16 of the UNCITRAL Arbitration Rules, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL ARBITRATION RULES 16 (2013). The validity of those exclusions of liability depends on the applicable national law.

141 Articles 32.2 and 28.1 of the 2018 HKIAC Rules, HONG KONG INTERNATIONAL ARBITRATION CENTER, ADMINISTERED ARBITRATION RULES art. 32.2 (2018); SIAC RULE 8.4 and Rule 8.9 clarify the consolidation provisions (as with the joinder provisions in Rule 7.4 and Rule 7.10), ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE, SIAC RULES ARTS. 7.4, 7.10, 8.4, 8.9 (6th ed. 2016), https://siac.org.sg/our-rules/rules/siac-rules-2016 [https://perma.cc/RTR2-9E54] (last visited Mar. 8, 2022); Article 10 of the 2021 ICC Rules, ICC RULES OF ARBITRATION, *supra* note 139, at art. 41; Article 15 of the 2017 SCC Rules, ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES ART. 15 (2017).

142 Article 182d of the Swiss Private International Law Act, Loi fédérale sur le droit international privé [LDIP], Dec. 18, 1987, SR 291, art. 182d (Swed.); Section 1297.41 of the California Code of Civil Procedure, CAL. CIV. PROC. CODE § 1297.41 (West 1988); Article 4 of the Canadian Commercial Arbitration Act, Commercial Arbitration Act, R.S.C. 1985, c-17, § 4 (Can.), Section 4 of the Ontario, Alberta and Manitoba Arbitration Acts; Section 3 of the British Columbia Arbitration Act, Arbitration Act, S.B.C. 2020, c-2, § 3 (Can.), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/20002 [https://perma.cc/7Z8E-727T] (last visited Mar. 8, 2022).

143 Those provisions, with the exception of unreasonable delay, are also found in the Model Law under Article 25. UNCITRAL Model Law on International Commercial Arbitration, *supra* note 63, at art. 25.

144 JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERICAL ARBITRATION 545 (2001).

that its safeguards are commensurate with the waiver's impact. This is also supported by case law.

The French courts have recognized that an arbitrator's impartiality is not affected because he or she had previously mediated between the parties.[145] The Hong Kong Court of Appeal has also established such precedent. In *Gao Haiyan and Xie Heping v. Keeneye Holdings and New Purple Golden Resources Development Limited*, the Court of Appeal enforced a med-arb award, despite the fact that (1) the mediation took place in the form of a private meeting over dinner at the Xian Shangri-la Hotel, (2) it was not held in the presence of both parties, and (3) the co-mediators appeared to make a settlement proposal on their own initiative. The court found that it was "not satisfied that a sufficient case of apparent bias, contrary to the fundamental conceptions of moral and justice in Hong Kong, has been established such that it would be right for [the] court to refuse to enforce the Award."[146] It was ruled that "a clear case of waiver" of the relevant party to challenge the award had been made.[147] While aware of "bias or impropriety, real or apparent, prior to the making of the Award," the relevant parties chose not to raise a challenge.[148] The judge concluded they "were hoping for a satisfactory conclusion but feared that, should they antagonise the Arbitral Tribunal by complaining, that might result in an unfavourable or less favourable result."[149]

All those precedents indicate that parties selecting the Informed-Consent Option are making a valid waiver to the adversarial principle, which does not infringe the procedural justice, and that the resulting award will be fully enforceable.

C. *Evaluation or Proposal*

As mentioned above, an evaluation or a proposal can be made by the DR Advisor during the mediation phase, upon a joint solicitation by the parties. Some commentators have raised concerns regarding the use of mediator (or DR Advisor) evaluations or

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145 Valentin Garcia, *L'arbitre Conciliateur, Améliorer la Qualité de L'arbitrage par la Conciliation*, POUR UN DROIT DU RÈGLEMENT AMIABLE DES DIFFÉRENDS. DES DÉFIS À RELEVER POUR UNE JUSTICE DE QUALITÉ 303, 317 (Lise Casaux-Labrunée & Jean-François Roberge eds., 2018).

146 Haiyan v. Keeneye Holdings Ltd., [2012] H.K.C.A 335, ¶ 106 (H.K.C.A.).

147 *Id.* at ¶ 69.

148 *Id.* at ¶ 59.

149 *Id.*

proposals during the mediation phase of a hybrid process containing an arbitration phase. First, the use of evaluative techniques in the mediation phase can give the impression to the parties in the arbitration phase that the opinion of the third party who has become the arbitrator is biased and preconceived.[150] This entails that the award is perceived by the parties as having been based only on the information that had been exchanged in the mediation phase, and that the award, therefore, did not take into account the contradictory arguments of the parties. There is also a risk that the evaluation or proposal would create what parties could consider reasonable expectations as to the substance of the future award.[151]

The GREAT Process accounts for the risks associated with an evaluation or proposal made by the DR Advisor in considering this step as opted out by default. The parties wishing to benefit from an evaluation or proposal must jointly agree to it. The parties' explicit addition of an evaluation or a proposal to the process entails that they have evaluated the pros and cons associated with these steps and have consented to the cons. Additionally, it should be restated that the evaluation or proposal is made in the non-binding phase, which means that the parties maintain the right to unilaterally end the process and not move to the arbitral phase. The DR Advisor can also minimize these risks by paying close attention to his or her choice of words and body language, in order to prevent the parties from discerning indications, erroneous or not, of his or her opinion.[152]

V. A GREAT Clause

This Article provides a model clause for the GREAT Process that the parties can insert into a new or preexisting contract. Alter-

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150 Lozano, *supra* note 9. However, some hold the opposite view: "Because the mediator's evaluative role resembles that of an arbitrator, changing hats in the middle of the process represents less of a shift than it would be in the broader interest-based approach to mediation." Batson Baril & Dickey, *supra* note 112, at 2.

151 Batson Baril & Dickey, *supra* note 112, at 5; Boyle, *supra* note 96; Peter, *supra* note 74, at 95.

152 Describing her experience as "med-arbitrator," Bairstow explains: "When you sit there with the parties, separately or together—listening, persuading, cajoling, looking dour or relieved—your responsibility is a heavy one. Every lift of your eyebrow can be interpreted as a signal to the parties as to how you might eventually decide an issue if agreement is not reached." Bairstow, *supra* note 118, at 93.

natively, it can be used as a dispute resolution agreement once a conflict has arisen.

A. *GREAT Process Model Clause*

A dispute, controversy, or claim arising out of, or in connection with, this Agreement, including, without limitation, any question regarding its existence, validity, or termination that cannot be settled through direct discussions, shall be finally and conclusively resolved by the Guaranteed Resolution on Effective and Adapted Terms Process. This duty survives the termination of the Agreement. Nothing herein shall preclude any Party from seeking injunctive relief in the event that the Party perceives that, without such injunctive relief, serious harm may be done to the Party. Written notice, containing a request to begin the process, shall be given by either Party to the other[s]. This notice shall be given promptly, in order to prevent further damages resulting from delay, and shall specify the issues in dispute. The parties agree that performance under this agreement shall continue during the resolution of a dispute under this clause.

The Dispute Resolution Advisor shall be appointed jointly by the Parties. He or she should be independent and impartial and have sufficient qualifications, experience, and training to act both as a mediator and an arbitrator. [The caucus-mediator shall be appointed jointly by the Parties]. The Parties have agreed that any proposed Dispute Resolution Advisor (mediator/arbitrator) must be experienced in the field of (*area of specialization*). [The Parties have agreed that any proposed caucus-mediator must be experienced in the field of (*area of specialization*)]. The costs of the Dispute Resolution Advisor [and the caucus-mediator] shall be shared equally by the Parties. The costs for the entire process shall not exceed (*amount*).

The process shall be held over a period of (*duration*). The place of the mediation, evaluation, or proposal phases, and the legal seat of the arbitral phase, shall be (*city*). The language to be used during the process shall be (*language*). This Agreement is governed by the laws of *(jurisdiction*).

Except as may be necessary in connection with a judicial challenge to an award or its enforcement, or unless required by law or judicial decision, neither a Party nor its representative may disclose

the existence, content, or results of any mediation or arbitration hereunder without the prior written consent of all Parties.

[The Parties entrust the Dispute Resolution Advisor with setting the deadlines to each phase and managing the process entirely. When the Dispute Resolution Advisor deems it necessary for the timely resolution of the dispute, he or she shall give notice to the Parties in writing that the [evaluation], [proposal], [and] arbitral phase will begin.]

[The mediation phase will be held over a period of (*duration*). [The evaluation/proposal phase will be held over a period of (*duration*).] The arbitral phase will be held over a period (*duration*).] [The Dispute Resolution Advisor shall give notice to the Parties in writing that the [evaluation] [proposal] [and] arbitral phase will begin.]

The Parties may, at any time during the process, jointly agree to extend the duration of a phase or shorten the duration of the [mediation] [evaluation] [proposal] phase[s].

The Dispute Resolution Advisor will propose that the parties choose between the following options during the Guaranteed Resolution on Effective and Adapted Terms Process, and he or she will guide their informed choice.

- No-Caucus Option;
- Lifting-Caucus-Confidentiality Option;
- Co-Mediation Option;
- Sealed-Arbitration Option;
- Last-Offer Option;
- Informed-Consent Option.

(A) Mediation phase. The Parties agree to attempt to first resolve their dispute through the mediation phase. [The Parties agree to participate in [confidential] caucuses]. The Parties agree to be bound by any settlement agreement reached during the mediation phase. At any moment during the mediation phase, the Parties may, by joint agreement, solicit a non-binding evaluation or a proposal from the Dispute Resolution Advisor. [In the case of the Co-Mediation Option, the Parties agree that [solely the caucus mediator] [both the caucus mediator and the Dispute Resolution Advisor] can make an evaluation or a proposal.]

(B) Evaluation or proposal phase. The Dispute Resolution Advisor shall give notice to the Parties in writing that the [evaluation] [or] [proposal] phase[s] should begin. The Dispute Resolution Advisor shall submit a proposal for a settlement, or an evaluation of the likely outcome of the situation in court or before

an arbitral tribunal. The Parties shall then resume the mediation phase.

(C) Arbitral phase. If the evaluation and/or proposal provided by the Dispute Resolution Advisor and the subsequent mediation do(es) not result in a full settlement agreement [or if the Parties failed to resolve their dispute within (*duration*) of the beginning of the mediation phase] [or if the parties failed to meet within (*duration*) of the written notice to mediate,] then, upon written notice of the Dispute Resolution Advisor to the Parties, any unresolved controversy or claim shall be settled by arbitration. [The Parties agree to continue the mediation phase with the caucus-mediator during the arbitral phase.] The arbitral tribunal shall consist of the Dispute Resolution Advisor appointed by the Parties. The arbitration shall be conducted in accordance with the (*applicable option/rules*) [annexed thereto for the time being in force, which rules are deemed to be incorporated by reference into this clause]. Judgment upon the award rendered by the Dispute Resolution Advisor acting as the arbitrator may be entered by any court having jurisdiction thereof. The decision arrived at during the arbitral phase shall be issued in writing within [*duration*] days of the closure of proceedings. Any award of the arbitral tribunal shall be final, non-appealable, and binding on the parties.

(D) Waiver. The parties explicitly consent to the change of role by the Dispute Advisor, who may act as a mediator and, subsequently, as an arbitrator. The parties waive their right to challenge the arbitration award on this basis [and on the fact that ex parte communications took place during the mediation phase].

VI. Conclusion

Today, more than ever before, parties to commercial disputes are seeking dispute resolution processes tailored to their needs and preferences. The Guaranteed Resolution on Effective and Adapted Terms Process (the "GREAT Process"), laid out in this Article, demonstrates how neutrals can design processes to address apparent irreconcilable process goals that are frequently expressed by parties to commercial disputes. These include maintaining the parties' relationships, rapidly resolving the disputes, having a guarantee that the process will result in a solution, and taking part in a process that respects standard procedural guarantees.

This Article demonstrated that mixing modes and process designs cannot be improvised by neutrals, due to the fact that several considerations come into play when combining processes, mainly relating to procedural risks that can affect the fairness of the process and the enforceability of the solution. Another key element to consider when combining processes is obtaining the parties' full, informed consent. The neutral must explain to the parties the risks and advantages of each process option.

The GREAT Process is a multi-step process containing six options, each providing for a rapid procedure with a guaranteed solution. Each option has its own advantages and disadvantages, and the neutral can guide the parties' choice based on the parties' risk tolerance and process preferences. Some options contain no risk of infringement on the quality of procedural justice, whereas other options rely on the parties' full understanding of the risks involved and include a parties' waiver, to challenge the award on this basis.

It is hoped that the GREAT Process will contribute to the global family of mixed modes processes and further encourage the design of elaborated dispute resolution processes adapted to parties' new realities and needs.