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# The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study

Dilyara NIGMATULLINA<sup>\*</sup>

*In a changing international commercial dispute resolution landscape, the combined use of mediation and arbitration has emerged as a dispute resolution approach offering parties a number of benefits. These include resolving parties' disputes cost-effectively and quickly and obtaining a binding and internationally enforceable decision. However, to date there has been little agreement on several aspects of the combined use of processes. The academic debate is ongoing about acceptable ways of combining mediation and arbitration. At the same time, there is little evidence to suggest that practitioners actually use a combination of mediation and arbitration. This article analyses the results of a recent empirical study of the current use of mediation in combination with arbitration in international commercial dispute resolution. The results reveal that the combined approach is used to a relatively low extent, which contrasts with widespread recognition of the benefits that it seems to offer. In vast majority of cases, the mediation and arbitration stages are conducted by different neutrals, while the mediation stage usually involves the use of caucuses. Surprisingly, as appears from the study, the absence of a unified enforcement mechanism for international mediated settlement agreements does not present any obstacle to recording the outcome of the combined use of processes in a mediated settlement agreement rather than in an arbitral award.*

## 1 INTRODUCTION

Everything changes and nothing stands still.<sup>1</sup> The dispute resolution landscape is no exception.<sup>2</sup> International commercial arbitration praised not so long ago for

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<sup>1</sup> Heraclitus, a Greek philosopher.

<sup>2</sup> The focus of this article is international (cross-border) commercial dispute resolution.

flexibility and expedition, has recently drawn criticism for becoming as slow and expensive as judicial proceedings, if not more so.<sup>3</sup> A number of empirical studies evidence the current discontent of users with the international arbitration process due to the escalated costs and protracted proceedings.<sup>4</sup> However, despite this discontent, arbitration continues to be the preferred means for resolving international commercial disputes.<sup>5</sup> This is because the anatomy of international arbitration is said to be better adapted to the special environment of international commercial disputes than litigation.<sup>6</sup> Neutrality and enforceability, and not so much high speed and low cost, appear to be the true drivers behind the use of arbitration for international disputes.<sup>7</sup> Nevertheless, parties are becoming increasingly focused on getting value from the arbitration process and expect that the modern system of international commercial dispute resolution will find a

<sup>3</sup> See, e.g., Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 29(3) *Arb. Intl.* 453, 453 (2013); Lucy Greenwood, *A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in order for Parties to Explore Settlement*, 27(2) *Arb. Intl.* 199, 199–200 (2011) (attributing the perceived increase in time and costs of international arbitration in recent years to a number of factors, including the increasing tendency to replicate court processes before the arbitral tribunal); but see Remy Gerbay, *Is the End Nigh Again: An Empirical Assessment of the 'Judicialization' of International Arbitration*, 25(2) *Am. Rev. Int'l Arb.* 223, 239 (2014) (observing in n. 76 that the concerns about arbitration's judicialization (that is believed to be a cause of increased costs and delay in arbitration) are not a recent phenomenon; these concerns have been raised since the mid-1980s, at a time that preceded the period of exponential growth of international arbitration).

<sup>4</sup> See, e.g., School of International Arbitration (Queen Mary, University of London), *2006 International Arbitration Study: Corporate Attitudes and Practices*, available at <[www.arbitration.qmul.ac.uk/research/2006/123975.html](http://www.arbitration.qmul.ac.uk/research/2006/123975.html)> (accessed 5 Sep. 2015) (where expense and the length of time to resolve disputes were the two most commonly cited disadvantages of international arbitration); School of International Arbitration (Queen Mary, University of London), *2013 International Arbitration Survey: Corporate Choices in International Arbitration: Industry Perspectives*, available at <[www.arbitration.qmul.ac.uk/research/2013/index.html](http://www.arbitration.qmul.ac.uk/research/2013/index.html)> (accessed 5 Sep. 2015) (finding that many corporations continue expressing concerns over costs and delays in arbitration proceedings; those respondents who considered arbitration not to be well suited to their industry, referred to costs and delay as the main reasons more than any other factors); School of International Arbitration (Queen Mary, University of London), *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at <[www.arbitration.qmul.ac.uk/research/2015/index.html](http://www.arbitration.qmul.ac.uk/research/2015/index.html)> (accessed 23 Oct. 2015) (finding that cost is seen as arbitration's worst feature, followed by, among others, lack of speed).

<sup>5</sup> Gary B. Born, *International Commercial Arbitration*, 93–97 (2d ed., Kluwer Law International 2014); *2006 International Arbitration Study: Corporate Attitudes and Practices*, *supra* n. 4 (finding that a significant majority of corporations prefer international arbitration to other dispute resolution mechanisms to resolve their cross-border disputes); *2013 International Arbitration Survey: Corporate Choices in International Arbitration: Industry Perspectives*, *supra* n. 4 (reporting that overall, businesses continue to show a preference for using arbitration over litigation for transnational disputes, although concerns remain about the costs of arbitration); *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, *supra* n. 4 (reporting that for 90% of respondents, international arbitration is the preferred dispute resolution mechanism).

<sup>6</sup> Tai-Heng Cheng, *International Mediation, Arbitration, and Innovation*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* 434–435 (Arthur W. Rovine ed., Brill 2011).

<sup>7</sup> Gerbay, *supra* n. 3, at 246–247; Greenwood, *supra* n. 3, at 204–205. The reasons why parties choose arbitration over litigation for international disputes differ from those for domestic disputes. See, e.g., Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 *Ohio St. J. on Disp. Resol.* 433, 451–452 (2010).

solution in parties' best interests. The use of stand-alone mediation<sup>8</sup> and integration of mediation into arbitration are among the proposed solutions.<sup>9</sup>

Parties are said to benefit from mediation because it offers them the possibility to control the process and to tailor their own solution in a setting that helps preserve their relationship.<sup>10</sup> Researchers and practitioners in some countries, however, argue that mediation is not a viable mechanism on its own and its likely future lies in integration in other dispute resolution mechanisms.<sup>11</sup> One of the most frequently cited impediments for a more widespread use of mediation as a stand-alone method of international commercial dispute resolution is the lack of any coherent enforcement mechanism for international mediated settlement agreements.<sup>12</sup> As explained in the next paragraph, the combined use of mediation and arbitration offers parties a possibility to remove this impediment.<sup>13</sup>

Interestingly, the use of mediation and arbitration in combination is not new<sup>14</sup> and its practice has ancient roots.<sup>15</sup> The combined use of mediation and arbitration may provide parties with a process that is more efficient than arbitration used on

<sup>8</sup> Throughout this article the term 'mediation' is used interchangeably with 'conciliation', though in some jurisdictions these terms may refer to different processes.

<sup>9</sup> Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, available at <[www.claytonutz.com/ialecture/2007/transcript\\_2007.html](http://www.claytonutz.com/ialecture/2007/transcript_2007.html)> (accessed 5 Sep. 2015) (expecting that arbitration will develop new less formal ways of resolving disputes: resorting to (separate) mediation may be one, having an arbitrator act as mediator may be another); Fan Kun, *The Risks of Apparent Bias When an Arbitrator Acts as a Mediator: Remarks on Hong Kong Court's Decision in Gao Haiyan*, 13 Y.B. Private Intl. L. 535, 549 (2011) (observing that because arbitration is now being criticized for becoming 'judicialized', due to the slowness and expensiveness of the procedure, practitioners are beginning to see the merits of integrating mediation and other ADR means into arbitration); Greenwood, *supra* n. 3, at 200–201 (referring to a solution proposed by a team of in-house counsel at the round table discussion on the issue of increased time and cost of international arbitration organized by Global Arbitration Review: rather than try to streamline the arbitration procedure, it has been suggested to 'switch to ADR').

<sup>10</sup> See, e.g., Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions in, ADR in Business: Practice and Issues across Countries and Cultures* vol II, 381–382 (Arnold Ingen-Housz ed., Kluwer Law International 2011).

<sup>11</sup> Barbara Baarsma & Maurits Barendrecht, *Mediation 2.0*, available at <[www.hiil.org/project/mediation-2-0?goback=%2Egmp\\_1863991%2Egde\\_1863991\\_member\\_123727192](http://www.hiil.org/project/mediation-2-0?goback=%2Egmp_1863991%2Egde_1863991_member_123727192)> (accessed 5 Sep. 2015).

<sup>12</sup> Geoff Sharp, *The Handbrake on Global Mediation*, available at <<http://kluwermediationblog.com/2012/08/31/the-handbrake-on-global-mediation/>> (accessed 5 Sep. 2015); see discussion at section 4.2[h] *infra*.

<sup>13</sup> Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole Which Is Less than, not Greater than, the Sum of Its Parts?*, 6(2) Contemp. Asia Arb. J. 249, 257 (2013).

<sup>14</sup> *Ibid.*; Mercedes Tarrazon, *Arb-Med: A Reflection a Propos of a Bolivian Experience*, 2(1) NYSBA New York Disp. Res. Law. 87, at 87 (2009) (noting that a combination of mediation and arbitration has been the customary practice in many jurisdictions throughout the world, including Latin America).

<sup>15</sup> Derek Roebuck, *The Myth of Modern Mediation*, 73(1) Arb. 105, 106 (2007) (observing that everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary: mediation was attempted first and a mediated settlement was preferred).

its own, as it can achieve a less expensive and faster resolution of a dispute.<sup>16</sup> In addition, it allows parties to convert their mediated settlement agreement into a consent arbitral award that is, arguably, enforceable worldwide pursuant to the New York Convention.<sup>17</sup>

Mediation and arbitration can be combined in different ways. Combinations include the use of processes in sequence (e.g., mediation-arbitration, arbitration-mediation, arbitration-mediation-arbitration), in parallel or otherwise.<sup>18</sup> ‘Med-arb’ appears to be the most common term used in the literature to denote the combined use of mediation and arbitration.<sup>19</sup> Though med-arb lacks a generally accepted definition,<sup>20</sup> most commentators agree that it stands for a sequential process, where mediation precedes arbitration.<sup>21</sup> Consequently, the

<sup>16</sup> This is particularly relevant to the combined use of mediation and arbitration by the same neutral. See, e.g., Michael E. Schneider, *Combining Arbitration with Conciliation*, 8 ICCA Congress Series 57, 77 (1996) (observing that the most efficient combination of arbitration and mediation is that in which the same person acts both as arbitrator and mediator). Cost and time efficiency is one of the most commonly cited advantages of the combined use of processes by the same neutral. Even if a dispute is not resolved in mediation, issues requiring decision by an arbitrator may be limited to those not resolved in mediation. If different neutrals are involved in the mediation and arbitration stages of the combined process, the benefits of the process will depend mostly on whether a dispute is resolved at the mediation stage.

<sup>17</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 Jun. 1958), E/CONF.26/8/Rev.1. At the moment of writing 156 countries are parties to this Convention, according to the UNCITRAL website, <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> (accessed 5 September 2015). See discussion at section 4.2[h] *infra*.

<sup>18</sup> On possible combinations see, e.g., Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, in *ADR in Business: Practice and Issues across Countries and Cultures* vol. II, 357–372 (Arnold Ingen-Housz ed., Kluwer Law International 2011) (distinguishing between sequential, parallel, and hybrid combination of mediation and arbitration and referring to a number of possible combinations within each group); Geoff Lawday, *Hybrid Dispute Resolution Processes*, paper presented at the Mediation in a Global Village – Cross-cultural and International Aspects of Mediation and Negotiation, 21–22 (Germany 2009) (identifying at least sixteen possibilities of combining mediation and arbitration).

<sup>19</sup> However, other terms are used as well. See, e.g., Toshio Sawada, *Hybrid Arb-Med: Will West and East Ever Meet?*, 14(2) ICC Intl. Ct. Arb. Bull. 29, at 29 (Fall 2003) (observing that the expressions ‘hybrid’, ‘arb-med’ and ‘med-arb’ are sometimes used synonymously to refer to any process in which arbitration and mediation are in some way interrelated); David A.R. Willams QC & Amokura Kawharu, *Arbitration and Dispute Resolution*, 2012 N.Z.L. Rev. 487, 490 (2012) (using the term ‘mediation/arbitration’).

<sup>20</sup> The major point of difference in definitions lies in whether med-arb is understood as a process where both mediation and arbitration stages are conducted by the same neutral only or whether the term encompasses situations where different neutrals are involved in each stage. See, e.g., Carlos De Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 Colum. J. Asian L. 149, 156 (2004) (defining med-arb as a process in which the same neutral serves as the mediator and the arbitrator if the matter is not settled in mediation); Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 Am. Rev. Int’l Arb. 411, 411–413 (2001) (defining med-arb as a process where, if parties do not settle in mediation, the mediator can continue as arbitrator or parties can decide to nominate a different neutral for the arbitration stage).

<sup>21</sup> Other views exist as well. See, e.g., Thomas Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 10, available at <<http://ssrn.com/abstract=2461839>> (accessed 20 Jun. 2015) (the authors’ understanding of med-arb appears to

common meaning of the term ‘med-arb’ does not encompass combination possibilities other than the use of mediation and arbitration in the indicated sequence. In view of the purposes of the author’s study<sup>22</sup> it was important to use a term that would encompass various possibilities of combining mediation and arbitration. Therefore, in this article the author uses the term ‘the combined use of mediation and arbitration’ to denote the actual use of the discrete processes of mediation and arbitration in combination. It includes any combination of processes in whatever order and whether conducted by the same or different neutrals.<sup>23</sup> Throughout this article, the combined use of processes means ‘the combined use of mediation and arbitration’, unless otherwise specified.

Notwithstanding the advantages that the combined use of mediation and arbitration seems to offer, commercial dispute resolution practitioners across the globe express different, if not conflicting, views regarding a number of aspects of this dispute resolution approach. Commentators often explain the stark divide in views by reference to the practitioners’ legal culture.<sup>24</sup> Legal culture in this context means the shared values, attitudes, standards, and beliefs that characterize members of the legal profession practising in a particular jurisdiction.<sup>25</sup> The most heated debate among commentators relates to whether it is appropriate for the same neutral to be in charge of both processes.<sup>26</sup> One’s attitude to this question appears to be strongly linked to the role of the judiciary in the jurisdiction of that

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encompass situations when the process starts with either mediation or arbitration).

<sup>22</sup> See section 2.2 *infra*.

<sup>23</sup> The same definition was used in the questionnaire, see section 2.3 *infra*.

<sup>24</sup> Schneider, *supra* n.16, at 78; Mark Goodrich, *Arb-med: Ideal Solution or Dangerous Heresy?*, 1 Intl. Arb. L. Rev. 12, 14 (2012); Jesus Almuquera, *Arbitration and Mediation Combined. The Independence and Impartiality of Arbitrators*, in *Liber Amicorum Bernardo Cremades* 111 (M A Fernandez-Ballesteros & David Arias eds., La Ley 2010); Bernardo M Cremades, *Overcoming the Clash of Legal Cultures: the Role of Interactive Arbitration*, 14(2) Arb. Intl. 156, 161–164 (1998); Nabil N Antaki, *Muslims’ and Arabs’ Practice of ADR*, 2(1) NYSBA New York Disp. Res. Law. 113, at 113 (2009); 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* 79 (Bruylant 2010); but see Cheng, *supra* n. 6, at 437 (cautioning against making generalizations about culture and referring to a case where a party from the Middle East, the region that is believed to have a cultural preference against conflict, had zero interest in conciliation or avoiding conflict); see discussion at section 4.2[f] *infra*.

<sup>25</sup> While the notion of the legal culture might be also linked to a particular industry sector, an inquiry into this is beyond the scope of this article.

<sup>26</sup> See, e.g., Donna Ross, *Med-Arb/Arb-Med: a More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012*, 352 (Arthur W. Rovine ed., Martinus Nijhoff 2013) (observing that some critics of the process where the role of mediator and arbitrator is assumed by the same neutral consider it not only an ethical disaster, but heretical, whereas some of its devotees believe it to be a panacea, encompassing the best of both worlds); Schneider, *supra* n. 16, at 77 (noting that the admissibility and appropriateness for an arbitrator to act as conciliator is among the most controversial issues debated by international arbitration practitioners).



person.<sup>27</sup> Overall, while promotion of settlement has been traditionally regarded as a duty of judges and arbitrators in some civil law systems, their common law counterparts have not been allowed to be actively involved in settlement facilitation.<sup>28</sup> When the same neutral conducts both the mediation and arbitration stages of the combined use of processes, caucuses (private sessions) become a primary concern.<sup>29</sup> It has been pointed out, however, that the traditional hostile common law attitude to mediating efforts by a judge and arbitrator is changing.<sup>30</sup> Several common law jurisdictions, such as Canada,<sup>31</sup> Hong Kong,<sup>32</sup> Singapore,<sup>33</sup> and Australia<sup>34</sup> have adopted legislation facilitating mediation by an arbitrator.<sup>35</sup>

Despite ongoing academic debate about acceptable and appropriate ways of combining mediation and arbitration, there is little evidence to suggest that these processes are actually used in international commercial dispute resolution in any combination and whether conducted by the same or different neutrals. Existing empirical studies either explore how particular questions related to the combined

<sup>27</sup> Goodrich, *supra* n. 24, at 15; Kaufmann-Kohler, *supra* n. 9 (observing that while one may doubt the merits of referring to the practice of the judiciary when dealing with international arbitration and transnational notions, this reference is justified by experience and empirical research which show that often arbitration practitioners approach the role of the arbitrator by referring to the rules applicable in their home courts).

<sup>28</sup> Ehle, *supra* n. 24, at 79–80; see also Schneider, *supra* n. 16, at 78; Andrew Burr, *Med-Arb: A Viable Hybrid Solution?*, 8 *Les Arbitres Internationaux* 57, 63 (2005). Some empirical studies confirm the existence of a divide in attitudes and practice. See, e.g., Tatsuya Nakamura, *Brief Empirical Study on Arb-Med in the JCAA Arbitration*, 22 *JCAA Newsletter* 10, 12 (June 2009) (finding that while arbitrators with the civil law background frequently mediated their cases, arbitrators with the common law background appeared to be unlikely to do so); Christian Bühring-Uhle et al., *Arbitration and Mediation in International Business*, 122 (2d ed., Kluwer Law International 2006) (reporting that in response to a question whether it was appropriate for an arbitrator to act as mediator, the German participants had very little objection to it, which stood in stark contrast to the common law respondents who had very rarely encountered this practice and who by a two-thirds majority regarded this as inappropriate).

<sup>29</sup> Ross, *supra* n. 26, at 357; Barry Leon & Alexandra Peterson, *Med-Arb in Ontario: Enforceability of Med-Arb Agreement Confirmed by Court of Appeal*, 2(1) *NYSBA New York Disp. Res. Law.* 92, 93 (2009). The major concerns relating to the use of caucuses are the danger for an arbitrator to appear or actually become biased because of the information received in caucuses, and the impossibility for parties to hear and respond to issues raised by each of them in caucuses with a mediator who later becomes an arbitrator, which may lead to a failure to adhere to the rules of due process. See discussion at section 4.2[f] *infra*.

<sup>30</sup> Cremades, *supra* n. 24, at 164 (n. 10); Schneider, *supra* n. 16, at 80; Kaufmann-Kohler, *supra* n. 9; Luke Nottage and Richard Garnett, *Top 20 Things to Change in or Around Australia's International Arbitration Act*, 6(1) *Asian Intl. Arb. J.* 1, 36 (2010).

<sup>31</sup> See, e.g., British Columbia International Commercial Arbitration Act, s. 30(1), R.S.B.C. 1996 Ch. 233. For the sake of accuracy, it should be noted that all provinces and territories in Canada, except for Quebec, are governed essentially by common law.

<sup>32</sup> Hong Kong Arbitration Ordinance (Cap. 609), ss 32–33 (1 Jun. 2011), L.N. 38 of 2011.

<sup>33</sup> Singapore International Arbitration Act, ss 16–17 (31 Dec. 2002), Ch. 143A.

<sup>34</sup> In Australia, a possibility for an arbitrator to act as a mediator is recognized under Commercial Arbitration Acts that govern domestic arbitration in Australian States and Territories. See, e.g., Commercial Arbitration Act 2012 (WA), s. 27D (7 Aug. 2013).

<sup>35</sup> It appears, however, that these legislative provisions have rarely been used in practice. See discussion at section 4.2[e] *infra*.

use of processes are dealt with in certain jurisdictions<sup>36</sup> or constitute part of broad-based inquiries into the practice of international dispute resolution.<sup>37</sup> These do not provide significant insight into the dynamics of the combined use of processes as a discrete dispute resolution approach.<sup>38</sup> Scholars expressly recognize the lack of empirical research related to the combined use of processes<sup>39</sup> and specifically invite researchers to conduct studies to remedy this deficit.<sup>40</sup>

Taking up these invitations, this article analyses the results of a recent study conducted by the author as part of her Ph.D. project. The study investigated the

<sup>36</sup> See, e.g., Donald E. Conlon, Henry Moon, K. Yee Ng, *Putting the Cart Before the Horse: the Benefits of Arbitrating Before Mediating*, 87(5) *J. Applied Psychol.* 978 (2002) (where the authors examine the impact of mediation-arbitration and arbitration-mediation and three disputant dyadic structures (individual v. individual, individual v. team, and team v. team) on various dispute outcomes; participants were undergraduate students from a large mid-western US university); Neil B. McGillicuddy, Gary L. Welton & Dean G. Pruitt, *Third-Party Intervention: a Field Experiment Comparing Three Different Models*, 53(1) *J. Personality & Soc. Psychol.* 104 (1987) (where the authors conducted a field experiment at a community mediation centre to test the impact on behaviour in mediation of three models of third-party intervention. Third parties and disputants were randomly assigned to one of three conditions: (a) straight mediation; (b) mediation-arbitration (same); or (c) mediation-arbitration (different); the data was collected at the Dispute Settlement Center of Western New York); Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication Is Mandatory*, 26(5) *Alternatives* 101 (2008) (where the author surveyed US commercial arbitrators and mediators; the survey questions addressed mostly practitioners' perceptions of the same-neutral med-arb).

<sup>37</sup> See, e.g., Bühring-Uhle et al., *supra* n. 28, at 105 (where the author surveyed in-house counsel, advocates and arbitrators/mediators from all over the world on the practice of international business dispute resolution; the survey included questions about the explicit integration of elements of mediation in arbitral proceedings); School of International Arbitration (Queen Mary, University of London), *2006 International Arbitration Study: Corporate Attitudes and Practices*, *2008 International Arbitration Study: Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards*, *International Arbitration Survey 2010: Choices in International Arbitration*, *2012 Current and Preferred Practices in the Arbitral Process*, *2013 International Arbitration Survey: Corporate choices in International Arbitration: Industry perspectives*, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at <[www.arbitration.qmul.ac.uk/research/index.html](http://www.arbitration.qmul.ac.uk/research/index.html)> (accessed 23 Oct. 2015); Thomas J. Stipanowich & J. Ryan Lamare, *Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations (2013)*, available at <<http://ssrn.com/abstract=2221471>> (accessed 5 Sep. 2015) (where the survey aimed to obtain current information regarding the use of mediation, arbitration, and other ADR approaches by major US corporations).

<sup>38</sup> Stipanowich & Lamare, *supra* n. 37, at 48.

<sup>39</sup> Richard P. Flake, *MED/ARB – a viable ADR vehicle? Nuances of Med/Arb—A Neutral's Perspective*, 2, available at <[www.cedires.com/index\\_bestanden/FLAKE\\_http-www.cbylaw.com-filebin\\_files\\_flake\\_rpf-AAA\\_Med-Arb.pdf](http://www.cedires.com/index_bestanden/FLAKE_http-www.cbylaw.com-filebin_files_flake_rpf-AAA_Med-Arb.pdf)> (accessed 5 Sep. 2015) (observing that '[w]hile there is more recent literature on the med-arb process, mostly from the theoretical perspective, field studies are still largely anecdotal').

<sup>40</sup> Stipanowich & Lamare, *supra* n. 37, at 48 (concluding that broad-based surveys offer a springboard for research on the performance and effectiveness of multi-step dispute resolution approaches, among other areas of interest); International Institute for Conflict Prevention and Resolution, *Attitudes Toward ADR In the Asia-Pacific Region: A CPR Survey*, available at <[www.cpradr.org/Portals/0/Asia-Pacific%20Survey.pdf](http://www.cpradr.org/Portals/0/Asia-Pacific%20Survey.pdf)> (accessed 5 Sep. 2015) (recognizing the need to develop and deploy a survey to achieve more detailed measurement of forms of mediation, including a combination of mediation and arbitration, in use, because the actual use of mediation appeared to lag behind positive attitudes toward mediation).

current use of mediation in combination with arbitration in international commercial dispute resolution. It employed a questionnaire to survey international dispute resolution practitioners from different parts of the world.<sup>41</sup> The article begins by describing the study's methodology<sup>42</sup> and the background of the questionnaire participants.<sup>43</sup> The article then presents and discusses the most significant results of the study,<sup>44</sup> after identifying several limitations.<sup>45</sup> In particular, it examines the results related to the extent to which mediation is currently used in combination with arbitration at an international level;<sup>46</sup> common triggers of the combined use of processes;<sup>47</sup> the way in which the processes are combined most frequently;<sup>48</sup> and the most common forms of recording the outcome of the combined use of mediation and arbitration.<sup>49</sup> The article concludes by summarizing the implications of this study for the future development of the combined use of mediation and arbitration.<sup>50</sup>

## 2 THE STUDY: METHODOLOGY

### 2.1 PROCESS

The study was conducted between February and June 2014. It involved the distribution of a questionnaire in paper and electronic form to a pool of participants as follows. The author distributed 280 paper copies of the questionnaire at two international conferences: the 2014 ICC Mediation Week<sup>51</sup> and the APRAG 2014 Conference.<sup>52</sup> These conferences brought together international practitioners and legal academics from different legal cultures. The 2014 ICC Mediation Week assembled key experts in mediation and arbitration predominantly from Europe. The APRAG 2014 Conference mostly gathered international arbitration and mediation practitioners from the Asia Pacific region. The author collected a total of thirty-three responses from both conferences, which represents a response rate of 12%. An invitation to complete the

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<sup>41</sup> A copy of the questionnaire is appended to the article at Appendix A.

<sup>42</sup> See section 2 *infra*.

<sup>43</sup> See section 3 *infra*.

<sup>44</sup> See sections 4.2–4.3 *infra*.

<sup>45</sup> See section 4.1 *infra*.

<sup>46</sup> See section 4.2 *infra*.

<sup>47</sup> See section 4.2[e] *infra*.

<sup>48</sup> See sections 4.2[f] and 4.2[g] *infra*.

<sup>49</sup> See section 4.2[h] *infra*.

<sup>50</sup> See section 5 *infra*.

<sup>51</sup> The 2014 International Chamber of Commerce (ICC) Mediation Week took place in Paris in February 2014.

<sup>52</sup> The 10th Anniversary Asia Pacific Regional Arbitration Group (APRAG) Conference took place in Melbourne in March 2014.

questionnaire online was published on LinkedIn<sup>53</sup> and circulated by the ICC and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).<sup>54</sup> The author received forty-eight online responses. The total number of completed questionnaires amounted to eighty-one.<sup>55</sup>

## 2.2 PURPOSE AND DESIGN

The overarching goal of the questionnaire was to gather data about the current use of mediation in combination with arbitration in international commercial dispute resolution.

The questionnaire contained 22 questions organized into three parts:<sup>56</sup>

- (i) Questions 1–4 gathered background information about the participants.
- (ii) Questions 5–19 enquired into the participants' professional experience (if any) in the combined use of mediation and arbitration in international commercial dispute resolution over the previous five years. Through questions asked in this part the study sought information on the following aspects of the combined use of processes:
  - To what extent is a combination of mediation and arbitration used?
  - Are there any regional variations in its use? Are there any variations in its use depending on the participants' legal background?
  - Are many practitioners with experience in the combined use of mediation and arbitration qualified to practise as lawyers?
  - How is the combined use of processes triggered? Are legislative provisions, where they are in place, relied upon? Do arbitration institutions<sup>57</sup> become involved?
  - What is the most popular way to combine mediation and arbitration? Are processes used in any particular sequence, or concurrently? Do neutrals have a single or dual role?
  - Are caucuses used in the mediation stage of the combined use of processes?

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<sup>53</sup> In particular, an invitation was posted to the author's contacts and several interest groups, including International Arbitration, ADR Resources, and Latin American International Arbitration.

<sup>54</sup> In particular, the ICC distributed the announcement and the link to the online questionnaire to its network, including through Facebook and Twitter pages. The SCC published the invitation to complete the questionnaire on its news webpage both in Russian and in English.

<sup>55</sup> The background of the participants is described in section 3 *infra*.

<sup>56</sup> As previously indicated, a copy of the questionnaire is appended to the article at Appendix A.

<sup>57</sup> An arbitration institution is an institution that organizes and provides services in connection with arbitration proceedings.

- Is enforceability of the dispute resolution outcome a concern for parties? Do parties use the possibility of incorporating their settlement agreement into a consent award?
- (iii) Questions 20–22 aimed at eliciting participants’ views on the main benefits of the combined use of processes and the use of this dispute resolution approach in the future, irrespective of the participants’ experience in this field.

### 2.3 KEY TERMS

The author was aware that ‘mediation’ and ‘the combined use of mediation with arbitration’ might mean different things to different academics and practitioners.<sup>58</sup> To minimize the possibility of confusion, the author defined these terms in the questionnaire and stated that:

‘Mediation’ is used interchangeably with conciliation. Evaluative and facilitative styles of mediation are distinguished. A mediator adopting a facilitative style will not suggest specific options for settlement, express a view as to the merits of the dispute, or be directive on the outcome.

‘The combined use of mediation and arbitration’ refers to the actual use of the discrete processes of mediation and arbitration in combination. It includes any combination of processes in whatever order and whether conducted by the same or different neutrals.<sup>59</sup>

## 3 THE STUDY: PARTICIPANTS

The pool of eighty-one participants comprised predominantly international commercial dispute resolution practitioners from twenty-eight countries of the world.

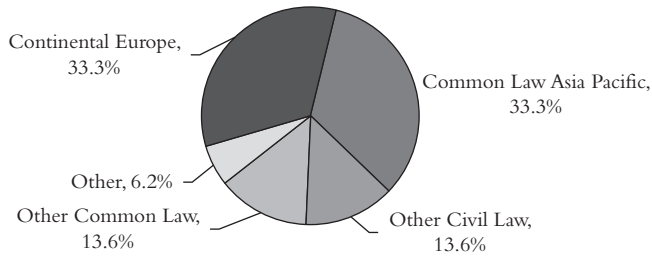
In segmenting the pool of the participants the author took into account their geographic distribution and legal background. The latter factor is important because, as mentioned in section 1 *supra*, practitioners’ attitude to the combined use of mediation and arbitration is often linked to their legal culture. The author segmented the participants into four main groups (see Figure 1). The largest two

<sup>58</sup> David W. Plant, *The Arbitrator as Settlement Facilitator*, 17(1) J. Intl Arb. 143, 144 (Kluwer Law International 2000); Nancy M. Thevenin, *Caucusing and the Cross-Cultural Divide*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012*, 367 (Arthur W. Rovine ed., Martinus Nijhoff 2013); see discussion regarding possible ways of combining mediation and arbitration, and various terms used to denote a combination of mediation and arbitration in section 1 *supra*.

<sup>59</sup> The same definition is used in this article, see section 1 *supra*.

groups of the participants practised in Continental Europe<sup>60</sup> and in common law countries in the Asia Pacific region (hereafter, ‘Common Law Asia Pacific’).<sup>61</sup> Two other groups comprised participants practising in common law and civil law countries that did not fall into the largest two groups.<sup>62</sup>

*Figure 1 Legal System/Region of Practice*



The participants consisted almost entirely of lawyers (88.9%): three-quarters indicated that they were qualified to practise as a lawyer (75.3%); about 14% were qualified but not in practice at the time of the survey (13.6%). Only about 11% of the participants had never been qualified to practise as a lawyer (11.1%).

When asked about their most frequent professional role in international commercial dispute resolution over the previous five years (see Figure 2), most often the participants referred to the role of a counsel (38.3%), about 15% of the participants chose the option of an arbitrator (14.8%), and about 12% of a mediator (12.3%).<sup>63</sup>

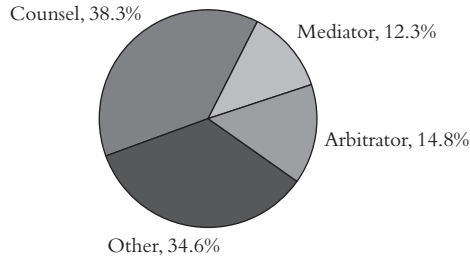
<sup>60</sup> In particular, the participants practised in Austria (2.5%), Belgium (4.9%), Czech Republic (1.2%), France (3.7%), Germany (3.7%), Greece (2.5%), Italy (4.9%), the Netherlands (1.2%), Russia (3.7%), Spain (1.2%), Sweden (1.2%), Switzerland (1.2%), and Ukraine (1.2%).

<sup>61</sup> In particular, the participants practised in Australia (14.8%), Hong Kong (9.9%), India (2.5%), New Zealand (1.2%), and Singapore (4.9%).

<sup>62</sup> ‘Other Civil Law’ group included participants practising in Argentina (2.5%), Brazil (3.7%), China (1.2%), Ethiopia (1.2%), Mexico (1.2%), Taiwan (1.2%), and Turkey (2.5%). ‘Other Common Law’ group included participants from the United Kingdom (7.4%) and the United States (6.2%). The smallest group ‘Other’ included those who either indicated more than one primary country of practice (e.g., one participant referred to three countries: Switzerland, the United Kingdom, and the United States) (3.7%); or referred to a country with a hybrid legal system (Philippines) (1.2%), or indicated something other than a country (e.g., Global Litigation Counsel) (1.2%).

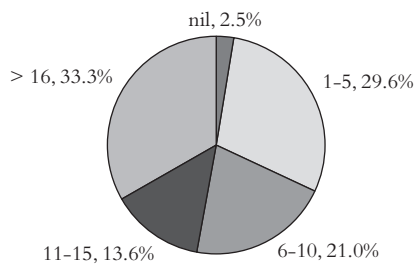
<sup>63</sup> The remaining participants (34.6%) included those who referred to a professional role other than as counsel, mediator or arbitrator, e.g., an academic, expert witness, institutional case manager, arbitral tribunal secretary, or arbitrator’s or mediator’s assistant (23.5%); or referred to more than one most frequent professional role (9.9%); or indicated that they had not had any professional role in international commercial dispute resolution over the previous five years (1.2%).

Figure 2 *The Most Frequent Professional Role in International Commercial Dispute Resolution Over the Last Five Years*



Almost all participants had been involved in international commercial disputes over the previous five years, though to varying degrees (see Figure 3). One-third of the participants had participated in more than sixteen international commercial disputes (33.3%). Some participants in this group specified the approximate number of disputes they had been involved in over the previous five years as varying from about 20 to 800. About 30% of the participants were involved in one to five international commercial disputes in the five-year period (29.6%).

Figure 3 *Approximate Amount of International Commercial Disputes Over the Last Five Years*



As explained in section 4.1 *infra*, the background of the questionnaire participants is an important factor to consider when interpreting the results of this study.

#### 4 THE STUDY: LIMITATIONS, RESULTS AND DISCUSSION

This section presents the key results of the study and discusses them in the context of the literature, after identifying several limitations to the study.

#### 4.1 LIMITATIONS

The author acknowledges several limitations to the study. First, from a statistical point of view, the pool of 81 participants is a relatively small sample.<sup>64</sup> Second, the response rate to the questionnaire in paper form was relatively low, only 12%. The response rate to the questionnaire in electronic form is impossible to calculate because of the way the electronic questionnaire data was collected.<sup>65</sup> Third, those who had some experience in the combined use of mediation and arbitration may have been more inclined to complete the questionnaire than those who did not have any experience in the combined use of processes. Fourth, the participants represented certain regions and legal cultures more than others. The majority of the participants reported practising either in Continental Europe or in Common Law Asia Pacific.<sup>66</sup> Also, the participants may have had a pre-existing interest in international commercial arbitration and mediation.<sup>67</sup> They may have been more supportive of their use, separately or in combination, than lawyers, in general, and in-house lawyers, in particular.<sup>68</sup> As a result, the questionnaire participants cannot be regarded as representative of dispute resolution practitioners worldwide. Finally, although the questionnaire defined the term ‘the combined use of mediation and arbitration’, it did so broadly.<sup>69</sup> Consequently, in completing the questionnaire each participant could have narrowed down the meaning of the term and used it to refer to a particular way of combining mediation and arbitration that he<sup>70</sup> had experience of or was familiar with. Experiences of the participants varied. Some

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<sup>64</sup> However, researchers who conducted other empirical studies on international arbitration that involved even fewer participants regarded their sample size as appropriate. See, e.g., Bühring-Uhle et al., *supra* n. 28, at 105 (stating that fifty-three respondents to a survey on international arbitration is not a small sample).

<sup>65</sup> An invitation to complete the questionnaire online was published on LinkedIn and circulated by the ICC and SCC. The author is not aware of the number of international dispute resolution practitioners and academics who saw the invitation to participate in the study and, consequently, is unable to calculate the response rate to the questionnaire in electronic form.

<sup>66</sup> For example, practitioners from China and Japan, Asian civil law jurisdictions that are believed to be the foremost proponents of the practice of the combined use of mediation and arbitration by the same neutral, participated in the study only minimally. Only one participant indicated China as a primary country of practice (1.2%); none of the participants indicated Japan as their primary country of practice.

<sup>67</sup> This comment is particularly relevant to those attending the two international conferences where the questionnaire was distributed in paper form.

<sup>68</sup> Although a choice of a dispute resolution mechanism is usually made by a party to the dispute in collaboration with in-house and external counsel, in-house counsel usually have the final say on this decision.

<sup>69</sup> See the definition of the term in section 2.3 *supra*.

<sup>70</sup> For the sake of brevity and readability of this article, the words ‘he’, ‘him’, or ‘his’ are used to include ‘she’ or ‘her’.



participants could have used the term as meaning a combination of mediation and arbitration involving only the same neutral or used only sequentially. At the same time, other participants could have extended the meaning of the term to encompass, for example, the potential use of this dispute resolution approach,<sup>71</sup> whereas the questionnaire definition referred only to 'the actual use'. In view of all the above limitations, it is suggested that the results of the study cannot be generalized.

#### 4.2 PARTICIPANTS' EXPERIENCE IN THE COMBINED USE OF MEDIATION AND ARBITRATION

The participants were asked about their experience as professionals in international commercial disputes involving the combined use of mediation and arbitration over the previous five years. Fifty-three participants stated that they had not had this kind of experience (65.4%), whereas twenty-eight reported on their participation in disputes involving the combined use of processes (34.6%). Though about one-third of the participants of this study claimed experience in the combined use of processes, the particular way of combining mediation and arbitration that each of these participants referred to remained unclear. That uncertainty stemmed from the fact that the questionnaire provided a broad definition of 'the combined use of mediation and arbitration'.<sup>72</sup> Nevertheless, follow-up questions revealed the most common way of combining mediation and arbitration as experienced by the participants: the sequential use of processes with different neutrals in charge of the mediation and arbitration stages.<sup>73</sup>

All following questions in the second part of the questionnaire<sup>74</sup> were answered only by those participants who had experience in the combined use of processes. Some participants from this group chose not to answer certain questions.

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<sup>71</sup> The potential combined use of mediation and arbitration can be illustrated by the following scenario. Parties incorporate into their contract a model multi-tiered clause of an arbitration institution. Once the dispute arises they resolve it in the mediation stage. The dispute never gets to the arbitration stage.

<sup>72</sup> See the questionnaire definition of 'the combined use of mediation and arbitration' in section 2.3 *supra* and discussion of its limitations in section 4.1 *supra*.

<sup>73</sup> See sections 4.2[f] and 4.2[g] *infra*. Interestingly, this result contradicts views expressed in the literature. See, e.g., Wolski, *supra* n. 13, at 260 (observing that med-arb (diff) does not seem to be used much).

<sup>74</sup> These are the questions presented and discussed in sections 4.2[a]–4.2[h] *infra*. On parts of the questionnaire see section 2.2 *supra*.

#### 4.2[a] *Professional Role in the Combined Use of Mediation and Arbitration*

The participants were asked to specify the professional roles they had in disputes involving the combined use of mediation and arbitration. In answering this question they could select from four options. The answers to this question were not mutually exclusive.<sup>75</sup> Most frequently the participants reported on their experience as counsel (see Table 1).

*Table 1 Professional Role in an International Commercial Dispute Involving the Combined Use of Mediation and Arbitration*

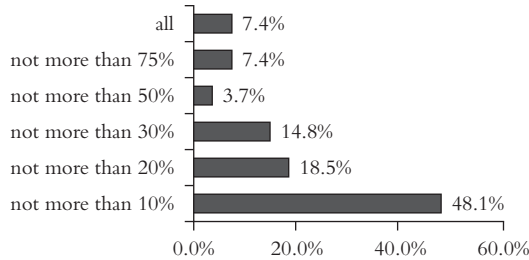
<i>Answer Options</i>	<i>Response %</i>	<i>Response Count</i>
As a counsel	57.1%	16
As a mediator in a dispute involving arbitration with a different neutral	32.1%	9
As an arbitrator in a dispute involving mediation with a different neutral	28.6%	8
As a mediator and an arbitrator in the same dispute	17.9%	5
<b>Total</b>		<b>28</b>

#### 4.2[b] *Proportion of Disputes Involving the Combined Use of Processes of the Overall Practice*

The participants were asked to indicate the approximate proportion of disputes involving the combined use of mediation and arbitration of their overall international commercial dispute resolution practice over the previous five years (see Figure 4). In answering this question the participants could select from six options. Twenty-seven participants answered this question. Almost half of them reported a minimal involvement in the combined use of processes, not more than 10% (48.1%).

<sup>75</sup> The participants were asked to circle/tick as many answers as were applicable.

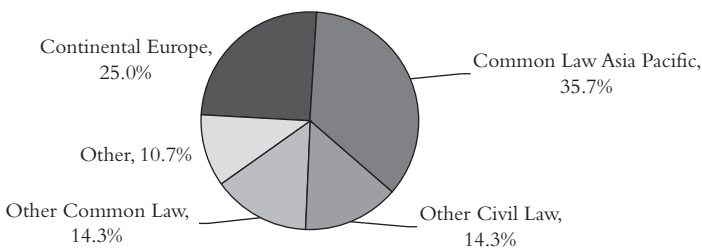
*Figure 4 Approximate Proportion of Disputes Involving the Combined Use of Mediation and Arbitration of the Overall International Commercial Dispute Resolution Practice Over the Last Five Years*



#### 4.2[c] *Regional Variations in the Combined Use of Mediation and Arbitration*

As reflected in Figure 1, overall the questionnaire participants evenly represented Common Law Asia Pacific and Continental Europe (33.3% each). However, a different picture emerged when the participants were asked about their experience with the combined use of mediation and arbitration. The questionnaire data revealed (see Figure 5) that the participants practising in Common Law Asia Pacific experienced the combined use of mediation and arbitration more often (35.7%) than their colleagues from Continental Europe (25%).<sup>76</sup>

*Figure 5 Legal System/Region of Practice (Participants with Experience in the Combined Use of Mediation and Arbitration)*



<sup>76</sup> Compared to the overall proportion of the participants depending on their country of practice (Figure 1), those who had experience with the combined use of mediation and arbitration constituted 37% of the overall number of Common Law Asia Pacific and 25.9% of Continental European participants.

#### 4.2[d] *Interrelation Between Participants' Qualification to Practise as a Lawyer and Their Experience in the Combined Use of Processes*

The data shows that a large majority of practitioners with experience in the combined use of mediation and arbitration, regardless of the region of their practice, were qualified lawyers (85.7%), whereas about 14% of the participants did not hold a qualification to practise as a lawyer (14.3%). This result is comparable to the overall proportion of participants with and without legal qualifications: almost 90% of all participants indicated that they were qualified to practise as a lawyer (88.9%).

This result is no surprise in light of the professional background of the participants with experience in the combined use of mediation and arbitration (Table 1). Most frequently these participants were involved in the combined use of processes as counsel (57.1%). More than one-quarter of the participants had been involved in the combined use of processes as arbitrators (28.6%), whereas about 18% had done so as both mediators and arbitrators in the same dispute (17.9%). About 32% of the participants had acted as mediators in a combination of mediation and arbitration, where a different neutral was involved for the arbitration stage (32.1%).

While it is logical to expect that most professionals acting as counsel are qualified lawyers,<sup>77</sup> the necessity of this qualification for arbitrators is not self-evident.<sup>78</sup> However, commentators point out the desirability of appointing a lawyer as a neutral in international arbitrations.<sup>79</sup> Indeed, in general, an arbitrator should use the facts and law to resolve the issues at stake.<sup>80</sup> While differences exist in the perception of the role of an arbitrator (whether it is confined to producing a binding award or whether it is to resolve a dispute, including by facilitating a settlement),<sup>81</sup> an arbitrator must be qualified to determine a dispute, if necessary.

<sup>77</sup> Though arbitration laws and rules almost never require formal legal qualifications for counsel, in practice, parties would rarely instruct as counsel an individual who is not qualified.

<sup>78</sup> Anyone can be appointed as an arbitrator. The choice of arbitrator usually depends on the subject matter of the dispute. For example, it is not unusual for parties to choose an engineer for a building dispute.

<sup>79</sup> Alan Redfern, J. Martin Hunter et al., *Redfern and Hunter on International Arbitration* 259 (Oxford University Press 2009) (observing that in international arbitrations before a sole arbitrator, it is usual to appoint a lawyer; where the arbitral tribunal consists of three arbitrators, at least one member should be a lawyer; a lawyer with suitable procedural and legal experience may better handle the frequently arising problems of procedure and of conflict of law rather than a person whose expertise lies in another area).

<sup>80</sup> Julian D. M. Lew, *Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 421, 425 (Albert Jan van den Berg ed., Kluwer Law International 2005). This, however, is not the case if parties authorize the arbitrator to decide *ex aequo et bono*.

<sup>81</sup> See, e.g., Christopher Newmark, *Controlling Time and Costs in Arbitration*, in *Leading Arbitrators' Guide to International Arbitration*, 87–88 (Lawrence W Newman & Richard D Hill eds, 2d ed., Juris Publishing

Similarly, neutrals having dual role (acting as mediators and arbitrators in the same international commercial dispute) might be expected to be lawyers, because of the arbitration component of the combined use of processes.

A mediator's role differs significantly from that of an arbitrator. A mediator assists parties in settlement, which may involve narrowing the issues in dispute, helping parties understand each other, and revising a contract for the future.<sup>82</sup> Jones argues that non-lawyers (e.g., psychologists, business consultants, counsellors, and others) can make valuable contributions to mediation.<sup>83</sup> By embracing a wide range of professions, mediation can be informed by a number of perspectives. This will increase the number of available tools in the toolbox, which will enable mediation practitioners best help parties come to a settlement.<sup>84</sup>

In this study, only a minority of the participants with experience in the combined use of mediation and arbitration reported being non-lawyers (14.3%). This result can be explained by the fact that the participants' involvement solely as mediators in the combined use of processes was quite limited (32.1%). As mentioned above, many participants had experience acting as counsel, arbitrators, or dual role neutrals in disputes involving the combined use of mediation and arbitration. The nature of these roles calls for, if not requires, a qualification to practise as a lawyer.

#### 4.2[e] *Triggers for the Combined Use of Mediation and Arbitration*

The participants were asked to indicate what triggered<sup>85</sup> the combined use of processes in the dispute they were involved in (see Table 2). In answering this question the participants could select from eleven options and specify any other trigger. The answers to this question were not mutually exclusive.<sup>86</sup>

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Inc. 2008); Gabrielle Kaufmann-Kohler and Victor Bonnin, *Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*, 1, available at <[www.arbitration-icca.org/media/0/12319144605970/00950003.pdf](http://www.arbitration-icca.org/media/0/12319144605970/00950003.pdf)> (accessed 5 Sep. 2015); Kun, *supra* n. 9, at 536–537.

<sup>82</sup> Lew, *supra* n. 80, at 425.

<sup>83</sup> Doug Jones, *Various Non-binding (ADR) Processes*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 367, 406 (Albert Jan van den Berg ed., Kluwer Law International 2005).

<sup>84</sup> *Ibid.*

<sup>85</sup> That is, what prompted the use of a combination of mediation and arbitration.

<sup>86</sup> The participants were asked to circle/tick as many answers as were applicable.

Table 2 *Triggers for the Combined Use of Mediation and Arbitration*

<i>Answer Options</i>	<i>Response %</i>	<i>Response Count</i>
One or both parties' counsel suggestion	66.7%	18
Specifically tailored contractual provision	51.9%	14
Initiative of one or both parties	40.7%	11
Model multi-tiered clause of an arbitration institute incorporated into parties' contract	25.9%	7
Your suggestion	14.8%	4
Arbitrator's suggestion	11.1%	3
Provision in the applicable legislation	11.1%	3
Provision in the rules of an arbitration institute	7.4%	2
Mediator's suggestion	7.4%	2
Combination of triggers	7.4%	2
Suggestion of an arbitration institute	3.7%	1
Other	11.1%	3
<b>Total</b>		<b>27</b>

The participants identified the suggestion of counsel as the most frequent trigger for the use of a combination of mediation and arbitration (66.7%). When asked about countries of practice of those counsel, the participants referred to countries from all over the world.<sup>87</sup> However, the United States and the United Kingdom appeared to be the countries most frequently referred to,<sup>88</sup> which might reflect a traditional common law trained approach, where the initiative to settle is usually taken by counsel or parties themselves.<sup>89</sup>

Contrary to views expressed by some commentators that parties are reluctant to suggest using mediation because of the fear to appear weak,<sup>90</sup> parties appeared to be relatively active in invoking the combined use of processes (40.7%).

A specifically tailored contractual provision requiring both the use of mediation and arbitration was the second most common trigger (51.9%). The

<sup>87</sup> They specified, in particular, the following countries: Argentina, China, France, Germany, Hong Kong, India, Italy, Malaysia, Switzerland, the United Kingdom and the United States.

<sup>88</sup> The United States and the United Kingdom were mentioned by three participants each, France and Hong Kong by two, and the rest of the listed countries were referred to by one participant each.

<sup>89</sup> Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, 264 (International Chamber of Commerce 2012).

<sup>90</sup> See, e.g., Bühring-Uhle et al., *supra* n. 28, at 262; Eric W. Fiechter, *Mediation - Timing Issues, When is the Right Time to Try Mediation, Before, During or After Arbitration or Court Proceedings?*, 15 *Croatian Arb. Y.B.* 263, 271 (2008); Jacob Grierson & Annet van Hooff, *Arbitrating under the 2012 ICC Rules*, 57 (Kluwer Law International 2012).

result is not surprising, given the benefits that this kind of provision may offer. These include creating the possibility of settlement by bringing parties to the negotiating table and eliminating parties' fear to appear weak in suggesting mediation. However, not all commentators commend contractual commitments in advance to attempt mediation.<sup>91</sup> Some warn against leaving the drafting of clauses to parties because then parties 'rely on home-cooked individual recipes, which can be toxic'.<sup>92</sup> While arbitration clauses alone offer myriad examples of pathologies, the possibility of drafting chaos is multiplied when several mechanisms are integrated. Arbitration institutions need to engage more actively in promulgation of multi-tiered dispute resolution clauses.<sup>93</sup>

The fact that only a limited number of arbitration institutes currently offer model multi-tiered clauses<sup>94</sup> may explain the result of the questionnaire that a model multi-tiered clause was relied upon to invoke the combined use of processes half as often as compared to a specifically tailored contractual provision (25.9%).

The combined use of processes rarely resulted from a suggestion of an arbitrator (11.1%) or a mediator (7.4%). Although Ehle calls for enhancing the arbitrator's mandate and transforming arbitrators into proactive settlement facilitators,<sup>95</sup> other commentators are more sceptical in this respect. For example, Greenwood considers that expectations that arbitrators would take a lead in suggesting the idea of a settlement are unrealistic.<sup>96</sup> Apart from requiring the making of certain assumptions about an arbitrator's role in the dispute resolution process,<sup>97</sup> these expectations place a heavy burden on the tribunal.<sup>98</sup> Naughton even doubts the wisdom of arbitrators who switch roles and recommends parties

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<sup>91</sup> See, e.g., Jones, *supra* n. 83, at 404–405 (observing that the disadvantage of a contractual commitment to mediation is that when a dispute arises, parties will generally know straight away whether there is any point in negotiating; and suggesting to insert a general clause requiring that each party consider settling the dispute through mediation or to designate in the contract that a mediation clause applies only to certain disputes).

<sup>92</sup> James H. Carter, *Part I – Issues Arising from Integrated Dispute Resolution Clauses* in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 446, 453–454 (Kluwer Law International 2005).

<sup>93</sup> *Ibid.* at 447.

<sup>94</sup> *Ibid.* (adding that even if a model multi-tiered clause has been promulgated by an arbitration institute, it might not be free from ambiguity).

<sup>95</sup> Ehle, *supra* n. 24, at 94.

<sup>96</sup> Greenwood, *supra* n. 3, at 204–206.

<sup>97</sup> *Ibid.* at 205–206 (observing that many international arbitrators still view their role as predominantly to render an enforceable arbitral award).

<sup>98</sup> *Ibid.* at 204–205 (specifying that arbitrators face competing issues: the need to issue a binding award, to observe due process and to maintain confidentiality; they also need to be mindful of the time taken to reach a final award and the cost of reaching that award; facilitation of settlement may not be a priority for the tribunal for more prosaic reasons, such as lack of appropriate skills as a negotiator necessary to reach a settlement).

to refrain from granting arbitrators the power to do so, despite the difficulties of saying ‘no’ to a suggestion coming from their arbitrators.<sup>99</sup>

Few participants had experienced the combined use of mediation and arbitration pursuant to a provision in the applicable legislation (11.1%). Practitioners in jurisdictions with legislation facilitating the combined use of processes by the same neutral for resolving international disputes, such as Singapore<sup>100</sup> and Hong Kong,<sup>101</sup> did not report any cases where this legislation applied in practice.<sup>102</sup> This result resonates with views of commentators who point out the paucity of the combined use of mediation and arbitration by the same neutral in Hong Kong and Singapore, despite its legislative recognition.<sup>103</sup> Notably, the legislative acts in both Singapore and Hong Kong expressly permit an arbitrator to act as a mediator (the same neutral arb-med-arb)<sup>104</sup> and a mediator to act as an arbitrator (the same neutral med-arb),<sup>105</sup> which will be jointly referred to as the same neutral (arb)-med-arb.

Commentators attribute the infrequent use of the same neutral (arb)-med-arb to various factors. The legislative obligation of an arbitrator to disclose all confidential information from mediation that is material to arbitration to all parties in dispute seems to raise major concerns among academics and practitioners.<sup>106</sup> This obligation is regarded as the main stumbling block to hinder the use of the

<sup>99</sup> Philip Naughton, *The Role of Arbitrators and Arbitration Institutions in the Use of Alternatives for the Settlement of Disputes*, 73(1) Arb. 31, 37 (2007).

<sup>100</sup> Singapore International Arbitration Act, ss 16–17.

<sup>101</sup> Hong Kong Arbitration Ordinance, ss 32–33. It appears that provisions encouraging arbitrators to act as mediators have been provided for in the Hong Kong Arbitration Ordinance since 1989. See Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28(6) J. Intl. Arb. 541, 549 (2011).

<sup>102</sup> Although, in Australia, the possibility for an arbitrator to act as a mediator is explicitly recognized by Commercial Arbitration Acts that govern domestic commercial arbitration in Australian States and Territories, the International Arbitration Act 1974 governing international arbitration is silent in this respect. Discussion of the Australian provisions that allow an arbitrator to act as a mediator in domestic commercial dispute resolution is beyond the scope of this article.

<sup>103</sup> See, e.g., Fan Kun, *The New Arbitration Ordinance in Hong Kong*, 29(6) J. Intl. Arb. 715, 720 (2012); Phillip Georgiou & Iain C.L. Seow, *Hong Kong Strengthens Position as Leading Jurisdiction for International Arbitration with Major Overhaul of Legislative Framework*, available at <[www.lexology.com/library/detail.aspx?g=24288c95-7f16-4ede-b7e7-41b1c8f8e1dc](http://www.lexology.com/library/detail.aspx?g=24288c95-7f16-4ede-b7e7-41b1c8f8e1dc)> (accessed 5 Sep. 2015); Claire Wilson, *The Arb-Med hybrid in Hong Kong – Much ado about nothing?*, available at <<http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/>> (accessed 5 Sep. 2015); Michael Hwang, *The Role of Arbitrators as Settlement Facilitators – Commentary*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 571, 574–575 (Albert Jan van den Berg ed., Kluwer Law International 2005); Mason, *supra* n. 101, at 549; Kun, *supra* n. 9, at 541.

<sup>104</sup> Singapore International Arbitration Act, s. 17; Hong Kong Arbitration Ordinance, s. 33.

<sup>105</sup> Singapore International Arbitration Act, s. 16; Hong Kong Arbitration Ordinance, s. 32.

<sup>106</sup> Justin D’Agostino, *Mediator-arbitrators: The Perfect Match or No Love Lost? (A Valentine’s Day Blog)*, <<http://kluwerarbitrationblog.com/blog/2011/02/15/mediator-arbitrators-the-perfect-match-or-no-love-lost-a-valentines-day-blog/>> (accessed 5 Sep. 2015); Georgiou & Seow, *supra* n. 103; Alexander Oddy, Sonya Leydecker, David Phillips et al., *Hong Kong Courts Consider the Mediation-arbitration Procedure*, available at <[www.lexology.com/library/detail.aspx?g=dade4ce7-f513-411e-b9bf-57471a20133f](http://www.lexology.com/library/detail.aspx?g=dade4ce7-f513-411e-b9bf-57471a20133f)> (accessed 5 September 2015); Mason, *supra* n. 101, at 549–550.



same neutral (arb)-med-arb because it prevents parties from being completely open in their discussions in mediation.<sup>107</sup> While a disclosure obligation may inhibit candid exchanges in mediation, it may be necessary to prevent offending Western notions of due process:<sup>108</sup> the ultimate decision-maker might know some material information of which one side is unaware and has had no opportunity to respond.<sup>109</sup> From a broader perspective, the scarce use of the legislative provisions might be due to the difficulty to ‘move the mindset of lawyers trained in the common law tradition towards that of those from other legal traditions’.<sup>110</sup> It may not be a coincidence that legislation supporting the use of the same neutral (arb)-med-arb is adopted most often in common law jurisdictions where practitioners and the courts are ‘culturally far less comfortable’ with these processes than in civil law jurisdictions.<sup>111</sup>

The questionnaire results demonstrate that arbitration institutions play a very insignificant role in encouraging the combined use of mediation and arbitration. Only two participants of the study experienced a combination of mediation and arbitration pursuant to a provision in the rules of an arbitration institution (7.4%) and only one pursuant to a suggestion of an arbitration institution (3.7%).

The rare use of mediation and arbitration in combination pursuant to a suggestion of an arbitration institution, as reported by the study’s participants, contrasts with the high demand for such initiatives, evidenced by empirical studies. For example, the 2013 IMI International Corporate Users ADR Survey found that arbitration providers are expected by about three-quarters of corporate users to be proactively encouraging parties to mediate their dispute.<sup>112</sup> In-house counsel, advocates, arbitrators and mediators who participated in Bühring-Uhle’s 2006 survey were of a similar opinion: three-quarters thought it was appropriate for an

<sup>107</sup> Wilson, *supra* n. 103 (speaking about the situation in Hong Kong).

<sup>108</sup> Due process, natural justice, and procedural fairness are terms used to describe the same principle in different countries.

<sup>109</sup> M. Scott Donahey, *Seeking Harmony: Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, 50(2) *Disp. Res. J.* 74, 77 (April–June 1995). Infrequent use of the same neutral (arb)-med-arb has been explained by other reasons. See, e.g., D’Agostino, *supra* n. 106 (explaining the paucity of this in Hong Kong by the failure rate of mediation in the context of court proceedings where many parties feel compelled to mediate pursuant to the Civil Justice Reforms); Wilson, *supra* n. 103 (attributing the infrequent use of the same neutral (arb)-med-arb in Hong Kong to a relatively novel culture of mediation in this jurisdiction: arbitrators do not yet feel comfortable with mediating; the attitude may change as more arbitrators and lawyers are receiving mediation training); Hwang, *supra* n. 103, at 577 (speaking about the caution of the actual implementation of the same neutral (arb)-med-arb in Singapore, until individual dual role neutrals develop their own case law with some guidance from courts in a suitable test case).

<sup>110</sup> Nottage & Garnett, *supra* n. 30, at 36 (speaking about the situation in Singapore).

<sup>111</sup> Campbell Bridge SC, *Med-Arb And Other Hybrid Processes – One Man’s Meat Is Another Man’s Poison*, Paper Presented at APRAG 2014 (10th Anniversary Conference), 4 (Australia 2014).

<sup>112</sup> International Mediation Institute, *IMI International Corporate Users ADR Survey (January-March 2013)*, available at <http://imimediation.org/imi-international-corporate-users-adr-survey-summary> (accessed 5 Sep. 2015).

arbitration institution to explicitly suggest, at its own initiative, the use of mediation to the parties.<sup>113</sup>

While some commentators commend procedures that are already available in some arbitration institutes for offering possibilities to facilitate settlement,<sup>114</sup> others point out that arbitrators and arbitration institutions could be doing more to assist parties in settling disputes.<sup>115</sup>

Many arbitration institutions offer both arbitration and mediation services. However, few, if any, appear to make a continued effort to encourage parties to use mediation before or during arbitration proceedings administered by the institution.<sup>116</sup> For example, arbitration institutions could incorporate in their rules a fixed settlement window whereby the arbitral proceedings are stayed for a short time so that parties can, if they want, negotiate or mediate.<sup>117</sup> This settlement window can form part of the procedural timetable, without any mandated discussions in this respect by the tribunal or the parties. Thereby, no one would bear the burden of suggesting it.<sup>118</sup> Arbitration institutions may otherwise encourage the use of mediation during arbitration proceedings.<sup>119</sup>

The recent initiative of the Singapore International Mediation Centre (SIMC) and the Singapore International Arbitration Centre (SIAC) illustrates how arbitration and mediation processes, even if administered by separate organizations, may be linked for the benefit of parties. The two institutions offer their combined services through an arb-med-arb clause<sup>120</sup> that entails the application of the SIAC-SIMC Arb-Med-Arb Protocol.<sup>121</sup> In accordance with this protocol, a party may start arbitration, proceed to mediation after appointment of the tribunal, and revert to the tribunal to incorporate a settlement agreement into a consent

<sup>113</sup> Bühring-Uhle et al., *supra* n. 28, at 126.

<sup>114</sup> See, e.g., Gerald Aksen, *Comments on Enforceability of Awards on the Role of Arbitrators as Settlement Facilitators*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 565, 566 (Albert Jan van den Berg ed., Kluwer Law International 2005) (observing that the ICC Terms of Reference present a unique opportunity to facilitate settlements).

<sup>115</sup> Newmark, *supra* n. 81, at 87.

<sup>116</sup> *Ibid.* at 89; Lack, *supra* n. 18, at 379 (noting that ADR institutions should examine and create more links between the various processes they offer).

<sup>117</sup> Greenwood, *supra* n.3, at 208.

<sup>118</sup> *Ibid.* at 209.

<sup>119</sup> See, e.g., Bühring-Uhle et al., *supra* n. 28, at 262–263 (quoting Bond who suggests to introduce the idea of a mediation window through a standard procedure at the arbitration institution: following the designated stage, the institution would send a letter to the parties stating ‘at this stage, as a matter of routine, we ask whether the parties would be interested in having a mediator appointed who is not the arbitrator and has nothing else to do with the case and will have nothing to do with it if the mediation fails’).

<sup>120</sup> Singapore International Mediation Centre, *The Singapore Arb-Med-Arb Clause*, available at <<http://simc.com.sg/the-singapore-arb-med-arb-clause/>> (accessed 5 Sep. 2015).

<sup>121</sup> Singapore International Mediation Centre, *SIAC-SIMC Arb-Med-Arb Protocol*, available at <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>> (accessed 5 Sep. 2015).

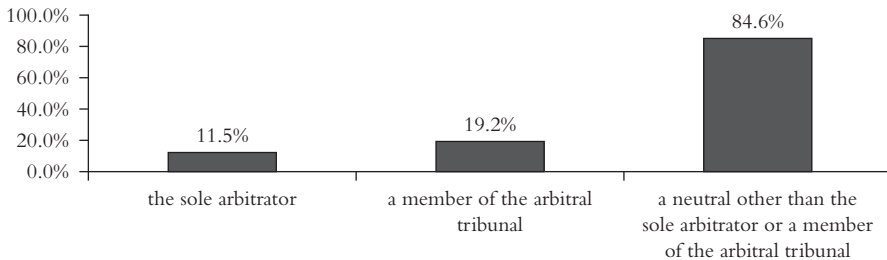
award.<sup>122</sup> Arbitration and mediation institutions in other parts of the world might wish to consider the SIAC-SIMC Arb-Med-Arb procedure to enhance dispute resolution services that they currently offer.

#### 4.2[f] *Single or Dual Role of a Neutral in the Combined Use of Mediation and Arbitration*

The participants were asked about the neutral who conducted mediation in the dispute involving the combined use of mediation and arbitration (see Figure 6). In answering this question the participants could select from three options: the sole arbitrator, a member of the arbitral tribunal, or a neutral other than the sole arbitrator or a member of the arbitral tribunal. The answers to this question were not mutually exclusive.<sup>123</sup> Twenty-six participants answered this question.

The data shows that the involvement of different neutrals for the mediation and arbitration stages of the process is the most common way of using mediation and arbitration in combination (84.6%).<sup>124</sup> The use of the sole arbitrator or a member of the arbitral tribunal as a mediator in the combined use of processes is limited (11.5% and 19.2%, respectively).<sup>125</sup>

Figure 6 *Who Conducted Mediation in a Dispute Involving the Combined Use of Mediation and Arbitration?*



<sup>122</sup> Under the SIAC-SIMC Arb-Med-Arb Protocol, unless otherwise agreed by the parties, the arbitrators and the mediators will generally be different persons. Singapore International Mediation Centre, *What is Arb-Med-Arb?*, available at <<http://simc.com.sg/arb-med-arb/>> (accessed 5 Sep. 2015).

<sup>123</sup> The participants were asked to circle/tick as many answers as were applicable.

<sup>124</sup> Interestingly, all but one participants with common law background who responded to this question (twelve out of thirteen) indicated their experience with this combination, whereas the participants with civil law background who responded to this question appeared to have experienced this combination less often (seven out of ten participants).

<sup>125</sup> The participants who experienced a sole arbitrator acting as a mediator practised in Belgium (3.85%), China (3.85%), and Hong Kong (3.85%). The participants who experienced a member of the arbitral tribunal acting as a mediator practised in China (3.85%), Hong Kong (3.85%), Italy (3.85%), and Mexico (3.85%). One participant in this group did not indicate primary country of practice (3.85%).

The approach where different neutrals are in charge of the mediation and arbitration stages of the combined use of processes finds support among commentators. Fiechter observes that there is much to gain in keeping the functions of a mediator and arbitrator separate.<sup>126</sup> Similar views have been expressed by Masood,<sup>127</sup> Lang,<sup>128</sup> Costa Braga de Oliveira,<sup>129</sup> and Ross.<sup>130</sup>

The involvement of different neutrals appears to be one of the ways to manage concerns related to the combined use of mediation and arbitration by the same neutral.<sup>131</sup> Notably, these concerns are said to arise whenever arbitration follows mediation and the same neutral performs functions of a mediator and an arbitrator and sees parties separately in the mediation stage.<sup>132</sup> This encompasses situations of the same neutral med-arb and the same neutral arb-med-arb, if parties do not settle in the mediation stage (jointly ‘the same neutral (arb)-med-arb’).

Though caucuses are invaluable in mediation,<sup>133</sup> their use becomes a fundamental concern in the context of the same neutral (arb)-med-arb.<sup>134</sup> While confidentiality is a cornerstone of mediation,<sup>135</sup> an arbitrator is only allowed to hold joint, but not private, sessions. These different approaches conflict in the same neutral (arb)-med-arb.<sup>136</sup>

Caucuses seem to be the cause of major criticisms of the use of the same neutral (arb)-med-arb. These criticisms can be broadly characterized as either behavioural or procedural.<sup>137</sup> Behavioural criticisms address such concerns as possible reluctance of the parties to be open in their discussions with the mediator knowing that at a certain point he might become an arbitrator; the use of mediation as a tactical tool; and the perception that a mediator’s suggestions are a threat to make an adverse decision if a mediator later becomes an arbitrator and a party has not agreed with his suggestions during mediation.<sup>138</sup>

<sup>126</sup> Eric W. Fiechter, *Mediation – Casting Issues – Can or Should the Same Person be Mediator, or Conciliator and Arbitrator?*, 15 *Croatian Arb.Y.B.* 255, 261 (2008).

<sup>127</sup> Ahmed Masood, *Settlement in International Arbitration: Comments on the CEDR Settlement Rules*, 76(2) *Arbitration* 269, 276 (2010).

<sup>128</sup> Jon Lang, *Med-Arb – An English Perspective*, 2(1) *NYSBA New York Disp. Res. Law.* 98, 102 (2009).

<sup>129</sup> Pedro Alberto Costa Braga de Oliveira, *Designing Effective Med-Arb and Arb-Med Processes in Brazil*, 2(1) *NYSBA New York Disp. Res. Law.* 89, 89 (2009).

<sup>130</sup> Ross, *supra* n. 26, at 358.

<sup>131</sup> These concerns can be managed otherwise. See discussion in section 4.2[g] *infra*.

<sup>132</sup> Wolski, *supra* n. 13, at 265.

<sup>133</sup> *Ibid.*; but see Thevenin, *supra* n. 58, at 368–369 (observing that the role of caucuses in mediation has been the subject of debate in recent years and pointing out that some commentators propose that mediation should be conducted in joint sessions only).

<sup>134</sup> Leon & Peterson, *supra* n. 29, at 93; Burr, *supra* n. 28, at 65; Bühring-Uhle et al., *supra* n. 28, at 262; Ross, *supra* n. 26, at 357.

<sup>135</sup> A mediator is encouraged to hear but not to reveal private information and to use it to assist parties in resolving their dispute.

<sup>136</sup> Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38(5) *Colorado Law.* 31, 33 (2009).

<sup>137</sup> Alan L Limbury, *Making Med-Arb Work*, 9(7) *ADR Bull.* 1, 1–2 (2007); Wolski, *supra* n. 13, at 259–260.

<sup>138</sup> Limbury, *supra* n. 137, at 1–2; Wolski, *supra* n. 13, at 259.

Procedural criticisms are directed at the danger of the arbitrator appearing or actually becoming biased because of the information received in caucuses.<sup>139</sup> What is more important, the impossibility of the parties to hear and respond to issues raised by each of them in caucuses with a mediator who later becomes an arbitrator leads to a failure to adhere to the rules of due process.<sup>140</sup>

Significant concerns are also raised regarding the capacity of a single individual to effectively handle both roles.<sup>141</sup> Commentators underline the difficulty, if not impossibility, for one person to be creative and apply the skills of a psychologist in helping parties resolve a dispute as a good mediator, on the one hand, and to be predictable and apply the skills of a judge as a good arbitrator, on the other hand.<sup>142</sup>

However, despite these criticisms, dispute resolution practitioners around the world do not unanimously disapprove of the same neutral (arb)-med-arb. While the process has its opponents, it has its supporters as well. The latter perceive it as a process that attempts to capture the independent strengths of both mediation and arbitration while limiting their perceived weaknesses.<sup>143</sup> Some even believe that linking the two techniques together makes the whole a more effective force than the sum of the two components used individually.<sup>144</sup> The most appealing attribute of the process appears to be the certainty that the dispute will come to an end in a relatively quick fashion.<sup>145</sup> Even if parties fail to reach an agreement in mediation, it should take much less time for the neutral, already fully familiar with the case, to render an award in the subsequent arbitration as compared to regular arbitral proceedings.

As mentioned in section 1 *supra*, the attitude of dispute resolution practitioners to the process where the same neutral performs the roles of a mediator and an arbitrator often depends on their legal culture, and particularly on

<sup>139</sup> Limbury, *supra* n. 137, at 2; Wolski, *supra* n. 13, at 260.

<sup>140</sup> Limbury, *supra* n. 137, at 2; Wolski, *supra* n. 13, at 259; Barney Jordaan, *Hybrid ADR Processes in South Africa*, 2(1) NYSBA New York Disp. Res. Law. 117, 117 (2009). Some commentators also observe that concerns about due process arise only in some countries. See, e.g., Wolski, *supra* n. 13, at 259; Lawday, *supra* n. 18, at 8 (referring to concerns about the breach of due process as understood in Anglo-American legal systems).

<sup>141</sup> See, e.g., Leon and Peterson, *supra* n. 29, at 92; Bühring-Uhle et al., *supra* n. 28, at 265; Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661, 679 (1991); Stipanowich & Ulrich, *supra* n. 21, at 25–26; Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l Arb. 1, 4 (1999).

<sup>142</sup> See, e.g., Edna Sussman, *Developing an Effective Med-Arb/ Arb-Med Process*, 2(1) NYSBA New York Disp. Res. Law. 71, 73 (2009); Fiechter, *supra* n. 126, at 261.

<sup>143</sup> Royden Hindle, *Mixing it up: Medarb Re-visited*, paper prepared for the AMINZ Seminar 'Current issues in Arbitration', 1 (March 2014); Wolski, *supra* n. 13, at 258; Bartel, *supra* n. 141, at 665.

<sup>144</sup> R.H. McLaren & J.P. Sanderson, Q.C., *Innovative Dispute Resolution: The Alternative*, 6-1 (Carswell 1994) cited in David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity*, 34 Alta. L. Rev. 163, 165 (1995–1996).

<sup>145</sup> Flake, *supra* n. 39, at 5.

the practice of a judiciary in their home jurisdiction. In accordance with the typical common law approach, a judge is not permitted to be actively involved in facilitation of settlement, which differs from the approach of some civil law countries where facilitation of settlement is part of the judge's role. The rules and practices in the courts of those civil law countries that are more favourable to mediation by a judge seem to find their reflection in a similar, if not even more favourable, attitude by arbitrators from these countries.<sup>146</sup> Though practices in civil law countries vary, Germany, Japan, and mainland China are often referred to as examples of civil law countries where the judges and arbitrators are eager to mediate cases that come before them.<sup>147</sup> The German approach is said to be followed in Austria and Switzerland.<sup>148</sup>

The questionnaire result showing that the most common way of using mediation and arbitration in combination is by involving different neutrals for the mediation and arbitration stages of the process (84.6%) may be explained by the legal background of the participants who reported experience with the combined use of mediation and arbitration.

The majority of these participants practised in Common Law Asia Pacific and in Continental Europe (see Figure 5). As discussed in section 4.2[e] *supra*, while legislative acts in Singapore and Hong Kong encourage arbitrators to act as mediators and mediators as arbitrators, these legislative provisions have rarely been used in practice. Dispute resolution practitioners trained in the common law tradition still seem to be uncomfortable with these practices. Among the participants with a civil law background, very few reported practising in civil law countries that are known for their favourable attitude to mediation by judges and arbitrators, namely, Germany, Austria, Switzerland, Japan, and mainland China.<sup>149</sup>

An obvious preference for involving different neutrals for the mediation and arbitration stages of the combined use of processes demonstrated by the participants of this study contrasts with the results of another empirical study, the

<sup>146</sup> Schneider, *supra* n.16, at 79.

<sup>147</sup> See, e.g., Goodrich, *supra* n. 24, at 15; Karl-Heinz Bockstiegel, *Past, Present, and Future Perspectives of Arbitration*, 25(3) *Arb. Intl.* 293, 299 (2009) (noting that in countries such as China, Germany, and Japan, at least in the domestic context, parties and their lawyers expect arbitrators to promote a settlement and make settlement proposals; in many other countries arbitrators are either not permitted to do so by law or at least reluctant to promote a settlement in practice); Nottage & Garnett, *supra* n. 30, at 35–36 (observing that authorizing an arbitrator to attempt mediation has been more popular among jurists familiar with the civil law tradition (especially German and Japanese law), the Scandinavian approach, and the socialist law tradition (especially Chinese law), where judges are expected to adopt a more pro-active approach to resolving disputes).

<sup>148</sup> Ehle, *supra* n. 24, at 81.

<sup>149</sup> Amongst participants with experience in the combined use of mediation and arbitration only one practised in China and one in Switzerland; none practised in Germany, Austria, Switzerland, or Japan. The participant from Switzerland did not answer the question about the neutral who conducted mediation in the dispute involving the combined use of mediation and arbitration.

International Academy of Mediators and Straus Institute Survey on Mediator Practices and Perceptions (the IAM-Straus Institute Survey).<sup>150</sup> One-hundred and thirty experienced mediators practising in different parts of the world, all fellows of the International Academy of Mediators, participated in this survey.<sup>151</sup> About 61% of the participants reported some experience in acting as both a mediator and an arbitrator in the same dispute (61.3%).<sup>152</sup> This result of the IAM-Straus Institute Survey indicating a relatively frequent involvement of mediators as arbitrators in the same dispute is difficult to explain.<sup>153</sup> However, it may be attributed to the fact that mediators participating in that survey were asked to report on their overall experience rather than that over any particular period of time (e.g., over the last five years). The participants of the IAM-Straus Institute Survey had, on average, over eighteen years of mediation experience, and had conducted, on average, about 1,500 mediations throughout their careers.<sup>154</sup> Considering this extensive professional mediation experience of the IAM-Straus Institute Survey's participants, their more frequent (as compared to the participants of this study) involvement as mediators and arbitrators in the same dispute is not surprising.

#### 4.2[g] *Mediation in the Combined Use of Processes: Timing and the Use of Caucuses*

*Timing.* The participants were asked to indicate when, in the combined use of processes, mediation had been used (see Table 3). In answering this question the participants could select from five options and specify any other timing of mediation. The answers to this question were not mutually exclusive.<sup>155</sup> About three-quarters of the participants had experienced mediation before arbitration (74.1%) and almost the same number reported the use of mediation after commencement of arbitration but before the hearing on the merits (70.4%). Those participants who selected more than one answer were asked to indicate the one that had applied most frequently. Nine participants answered this follow-up question and six of them referred to the use of mediation before arbitration.

<sup>150</sup> Stipanowich & Ulrich, *supra* n. 21, at 27–28.

<sup>151</sup> *Ibid.* at 27. The participants indicated that they 'regularly practised' in Africa; Asia, including the Middle East; Australia and New Zealand; Canada; Europe (both Western and Eastern, with a majority from the United Kingdom); Latin America; and the United States. About 90% (89.8%) of respondents indicated that they worked 'full-time' at the time the survey was administered, and devoted, on average, more than 70% of their work time to mediation practice.

<sup>152</sup> *Ibid.* at 28.

<sup>153</sup> Perhaps knowing the exact distribution of participants per countries could have provided a clue to this result. It would have been particularly interesting to know what proportion of the participants 'regularly practised' in China, Japan, Germany, Switzerland, and Austria.

<sup>154</sup> Stipanowich & Ulrich, *supra* n. 21, at 27.

<sup>155</sup> The participants were asked to circle/tick as many answers as were applicable.

Table 3 *Timing of Mediation*

<i>Answer Options</i>	<i>Response %</i>	<i>Response Count</i>
Before arbitration	74.1%	20
After commencement of arbitration but before the hearing on the merits	70.4%	19
After the hearing on the merits but before issuing the award	25.9%	7
At the same time as arbitration	14.8%	4
After issuing the award	11.1%	3
Other	7.4%	2
<b>Total</b>		<b>27</b>

The questionnaire results correspond to the views expressed by some commentators that the earlier mediation can be done, the better.<sup>156</sup> The process starting with mediation could potentially result in considerable savings of cost and time because only if all issues are not settled in mediation, parties move to arbitration.<sup>157</sup> Hence, mediation conducted before arbitration may allow parties to avoid arbitration proceedings altogether.<sup>158</sup>

However, if parties have reached the stage of preparing for arbitration, the moment immediately before the initiation of arbitration may be inappropriate for mediation because then parties focus more on how to win rather than how to reconcile their interests.<sup>159</sup> At that point, it may be preferable to formalize the dispute by initiating arbitration proceedings.<sup>160</sup>

After commencement of arbitration, mediation is said to have more potential for success once parties have exchanged information at the preparatory phase of

<sup>156</sup> Michael McIlwrath, *Anti-Arbitration: 10 Things To Do Before The Arbitration Gets Underway*, available at <<http://kluwerarbitrationblog.com/blog/2011/11/12/anti-arbitration-10-things-to-do-before-the-arbitration-gets-underway/>> (accessed 5 Sep. 2015); Stipanowich & Ulrich, *supra* n. 21, at 8 (noting that 'most business disputes are amenable to a negotiated resolution, and that there are multiple benefits associated with early, informal resolution of disputes'); but see Naughton, *supra* n. 99, at 31 (stating that the most difficult cases are often those referred to mediation before any proceedings have been commenced).

<sup>157</sup> Ross, *supra* n. 26, at 363.

<sup>158</sup> Bühring-Uhle et al., *supra* n. 28, at 251.

<sup>159</sup> *Ibid.* at 264, 252 (also, parties' view on the case may be too one-sided, pre-arbitral mediation may be exploited for delay tactics, and parties may simply lack the necessary information on the merits of the dispute).

<sup>160</sup> *Ibid.* at 264. Also, the initiation of arbitration is sometimes a deliberate settlement tactic, as it is supposed to create the necessary pressure on the other party to seriously negotiate. However, initiating arbitration may have an antagonizing effect and change the frame for parties' interaction. *Ibid.* at 118.

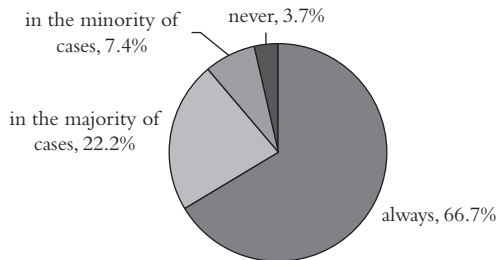


arbitration, which allows them to better estimate their respective strengths.<sup>161</sup> The chances of mediation being successful increase also because parties become aware of the costs and uncertainties of arbitration.<sup>162</sup> These arguments might explain the questionnaire result demonstrating frequent use of mediation after commencement of arbitration but before the hearing on the merits.

It appears from this study that most frequently the combined use of mediation and arbitration involves the use of its mediation and arbitration components in sequence. The reference to mediation is usually made in the early stages of this dispute resolution approach: either before arbitration or after commencement of arbitration but before the hearing on the merits. This result is understandable, as cost incentives exist for parties to resolve their dispute sooner rather than later.<sup>163</sup>

*Use of caucuses.* The participants were asked about the frequency of the use of caucuses in the mediation stage of the combined use of processes (see Figure 7). The data reveals that caucuses were used in mediation either in all (66.7%) or the majority of cases involving the combined use of processes (22.2%).

Figure 7 Use of Caucuses



These results are not surprising, given the fact that about 85% of the participants experienced the combined use of processes with different neutrals in charge of the mediation and arbitration stages (Figure 6). As discussed in section 4.2[f] *supra*, caucuses are problematic only in the context of the same neutral

<sup>161</sup> *Ibid.* at 264–265; Schneider, *supra* n.16, at 86 (pointing out that while many views exist about the best moment for raising the idea of settlement discussions after commencement of arbitration, normally parties should have been able to present the essence of their case).

<sup>162</sup> Pierre Lalive, *The Role of Arbitrators as Settlement Facilitators – A Swiss View*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 556, 563 (Albert Jan van den Berg ed., Kluwer Law International 2005); but see Arthur L. Marriott, *Arbitrators and Settlement*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 533, 543 (Albert Jan van den Berg ed., Kluwer Law International 2005) (noting that once fully involved in arbitration parties may switch to a more adversarial mode and become less inclined to compromise).

<sup>163</sup> Marriott, *supra* n. 162, at 542.

(arb)-med-arb. They raise no concerns if the mediation and arbitration stages are conducted by different neutrals, which is the case in this study. Consequently, there is nothing unusual in the result that caucuses were used in the mediation stage in all or the majority of cases.

In fact, the involvement of different neutrals appears to be merely one of the several ways to deal with concerns related to the same neutral (arb)-med-arb. These concerns can be mitigated otherwise.

For example, many commentators advocate for not using caucuses altogether, while keeping the same neutral as a mediator and an arbitrator.<sup>164</sup> This approach is suggested by the UK-based Centre for Effective Dispute Resolution.<sup>165</sup> However, as with other issues, the attitude to the issue of caucuses is largely influenced by one's legal culture.<sup>166</sup> While for the Chinese<sup>167</sup> and Japanese<sup>168</sup> caucusing is not a serious problem, experts from European civil law jurisdictions, let alone the Anglo-Australian variant of the common law tradition, appear to remain sceptical about caucuses due to concerns about due process and bias tainting arbitrators.<sup>169</sup>

If a dual role neutral does engage in caucuses, commentators suggest two solutions to avoid a breach of due process.<sup>170</sup> The first solution prohibits the arbitrator from using the disclosed facts if arbitration continues.<sup>171</sup> The second requires the arbitrator to disclose such facts to the other party if arbitration

<sup>164</sup> Ehle, *supra* n. 24, at 92–93; Kaufmann-Kohler, *supra* n. 9 (observing that it is the safest remedy because it will not only avoid a breach of due process but also will maintain the parties' confidence in the arbitrator); Luke Nottage, *Arb-Med and New International Commercial Mediation Rules in Japan*, available at <[http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed\\_and\\_new\\_international\\_c\\_1.html](http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html)> (accessed 5 Sep. 2015) [hereinafter, *Arb-Med in Japan*]; Luke Nottage, *International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia*, 29 JCAA Newsletter 3, 6 (December 2012) (observing that this approach is effectively practised by many well-known continental European arbitrators).

<sup>165</sup> CEDR Rules for the Facilitation of Settlement in International Arbitration (November 2009). Article 5(2) of the CEDR Settlement Rules prohibits arbitral tribunals from meeting with any party separately or obtaining information from any party that is not shared with the other party.

<sup>166</sup> Kaufmann-Kohler, *supra* n. 9; Final Report of the CEDR Commission on Settlement in International Arbitration, Safeguards for Arbitrators Who Use Private Meetings with Each Party As a Means of Facilitating Settlement (Appendix 2) Art. 8 (November 2009) (noting that concerns about caucuses may not arise where the arbitration takes place in jurisdictions where the courts consider caucuses to be a common and accepted practice).

<sup>167</sup> Gabrielle Kaufmann-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25(4) J. Intl. Arb. 479, 491–492 (2008).

<sup>168</sup> *Arb-Med in Japan*, *supra* n. 164 (referring to a conversation with Prof. Nakamura); Albert Monichino, *Inquiry into Commercial Arbitration Bill 2011(WA) – clause 27D mediation clause*, 3 (17 Oct. 2011) (pointing out that it is common in China and Japan for arbitrators to engage in caucuses with parties when facilitating settlement).

<sup>169</sup> *Arb-Med in Japan*, *supra* n. 164.

<sup>170</sup> See, e.g., Kaufmann-Kohler, *supra* n. 9; Ross, *supra* n. 26, at 364; Wolski, *supra* n. 13, at 262–263.

<sup>171</sup> Kaufmann-Kohler, *supra* n. 9; Wolski, *supra* n. 13, at 263. Kaufmann-Kohler and Wolski call this option the Chinese solution/approach.

proceeds.<sup>172</sup> However, both solutions have flaws. The first is often criticized for not avoiding the risk that the arbitrator may become influenced by what he has heard.<sup>173</sup> The second solution may, for example, deter parties from being open in caucuses and thereby inhibit the entire mediation process.<sup>174</sup>

#### 4.2[h] *Recording the Outcome of the Combined Use of Mediation and Arbitration*

The participants were asked to indicate how the outcome of the combined use of mediation and arbitration was recorded (see Figure 8). In answering this question the participants could select from four options: in a mediated settlement agreement; in a consent arbitral award incorporating a mediated settlement agreement; in a regular arbitral award;<sup>175</sup> or in a court judgment. The participants could also specify any other form of recording the outcome. The answers to this question were not mutually exclusive.<sup>176</sup> A mediated settlement agreement was used to record the outcome of the combined use of processes according to 18 of 27 participants who answered this question (66.7%). Those who selected more than one answer were asked to indicate the one that had been used most frequently. Eleven participants answered this follow-up question and seven of them selected recording the outcome of the combined use of processes in a mediated settlement agreement.

<sup>172</sup> Kaufmann-Kohler, *supra* n. 9; Wolski, *supra* n. 13, at 262–263. Kaufmann-Kohler calls this option the Hong Kong solution, whereas Wolski refers to it as the solution adopted in s. 27D, meaning s. 27D of Australia's new commercial arbitration legislation governing domestic arbitration in Australian States and Territories.

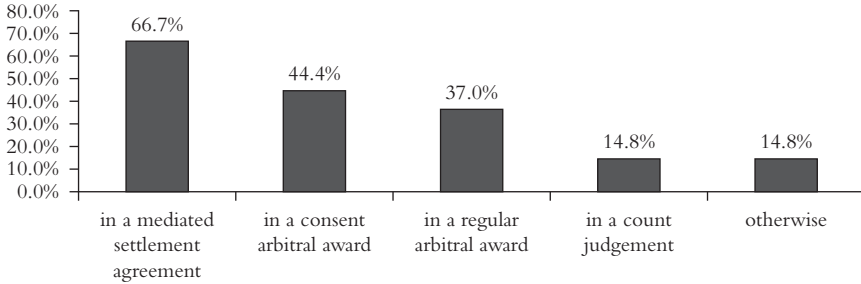
<sup>173</sup> See, e.g., Kaufmann-Kohler, *supra* n. 9; James T. Peter, *Note & Comment: Med-Arb in International Arbitration*, 8 *Am. Rev. Int'l Arb.* 83, 94 (1997) (observing that the dual role neutral may subconsciously and for whatever reason become more understanding and supportive of a particular party's position once becoming aware of certain facts); Lawrence Boo, *Commentary on Issues Involving Confidentiality*, in *New Horizons for International Commercial Arbitration And Beyond*, 12 ICCA International Arbitration Congress 523, 528 (Albert Jan Van den Berg ed., Kluwer Law International 2005) (referring to the idea of erasing things from one's mind as artificial: unlike a computer keyboard, one cannot simply press a 'delete' key).

<sup>174</sup> See, e.g., Kaufmann-Kohler, *supra* n. 9; Goodrich, *supra* n. 24, at 17; Wolski, *supra* n. 13, at 263.

<sup>175</sup> That is, awards resulting from an arbitral tribunal's deliberations. In the context of the combined use of mediation and arbitration, usually an arbitrator will need to decide on a dispute and render an arbitral award if the parties do not settle in mediation.

<sup>176</sup> The participants were asked to circle/tick as many answers as were applicable.

Figure 8 Recording the Outcome



Though mediation offers many advantages, the absence of a unified enforcement mechanism for international mediated settlement agreements is often seen as an obstacle to its greater use as a stand-alone method of international commercial dispute resolution.<sup>177</sup> The United Nations Commission on International Trade Law is considering the preparation of a convention on enforcement of settlement agreements resulting from international commercial mediation.<sup>178</sup> Some empirical studies confirm the desirability of an enforcement mechanism for international mediated settlement agreements.<sup>179</sup>

For the moment, a mediated settlement agreement can be the subject of a breach of contract or specific performance claim, as it represents a legally

<sup>177</sup> Sharp, *supra* n. 12; Wolski, *supra* n. 13, at 249; Jean Francois Guillemain, *Reasons for Choosing Alternative Dispute Resolution*, in *ADR in Business: Practice and Issues across Countries and Cultures* vol II, 34 (Arnold Ingen-Housz ed., Kluwer Law International 2011); see also Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 *UCLA L. Rev.* 1385, 1387 (2007) (explaining that in a perfect world, no enforcement mechanism is required for mediation because a voluntary agreement yields voluntary compliance; in the world of international business, imperfect circumstances affect the performance of mediation agreements; for instance, human rights abuses could make investors balk, the commodity in question could be subject to embargo, or the currency designated for payment could suffer devaluation).

<sup>178</sup> United Nations Commission on International Trade Law, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (A/CN.9/832)*, 4–11, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V15/011/54/PDF/V1501154.pdf?OpenElement>> (accessed 5 Sep. 2015).

<sup>179</sup> See, e.g., International Mediation Institute, *How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements*, available at <<https://imimediation.org/un-convention-on-mediation>> (accessed 5 Sep. 2015) (concluding that the results of a survey conducted in October–November 2014 show a strong interest among corporate disputants in the contemplated UN Convention on the enforcement of mediated settlements); S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, 41–45, available at <<http://ssrn.com/abstract=252630>>2 (accessed 5 Sep. 2015) (reporting overwhelming support among her October 2014 survey respondents for a suggestion that the existence of an international convention regarding enforcement of agreements to mediate international commercial disputes and settlement agreements arising out of an international commercial mediation would encourage parties in the respondent's home jurisdiction to use mediation in international commercial disputes).

enforceable contract.<sup>180</sup> However, a breach of contract is usually the reason why the parties decide to use mediation. Litigating a contract resulting from successful mediation is unlikely to be the outcome that the parties want.<sup>181</sup>

A mediated settlement agreement may be entered as a judgment,<sup>182</sup> though this kind of recognition procedure does not seem to be known in common law countries.<sup>183</sup> Even where it is possible to incorporate a mediated settlement agreement into a judgment, difficulties of its enforcement in foreign jurisdictions often diminish the judgment's value.<sup>184</sup>

The current problem with enforcement can be overcome if a mediated settlement agreement is incorporated into an arbitral award enforceable all over the world pursuant to the New York Convention.<sup>185</sup> The combined use of mediation and arbitration offers parties the possibility of converting their settlement agreement into a consent arbitral award, which is often regarded as one of the key advantages of this dispute resolution approach. Some commentators believe it to be the reason why parties use the combined process.<sup>186</sup> This possibility, according to Almoguera, by itself should help dissipate any mistrust about a combination of mediation and arbitration.<sup>187</sup> Arbitration laws of many countries equate the status and the effect of a consent award to any other award on the merits of the case,<sup>188</sup>

<sup>180</sup> Sharp, *supra* n. 12; Sussman, *supra* n. 10, at 392–393.

<sup>181</sup> Sharp, *supra* n. 12; Sussman, *supra* n. 10, at 393.

<sup>182</sup> Many EU Member States incorporated such a provision into their national legislation further to Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, Art. 6(1), (2) OJ L136/3 (May 21, 2008): '1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.'

<sup>183</sup> Charles Jarrosson, *Legal Issues Raised by ADR*, in *ADR in Business: Practice and Issues across Countries and Cultures* vol I, 133 (J C Goldsmith, Arnold Ingen-Housz & Gerald H Pointon eds., Kluwer Law International 2006); but see, e.g., Colorado Dispute Resolution Act 13–22–308 (2014), C.R.S.: 'If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.'

<sup>184</sup> Sussman, *supra* n. 10, at 393.

<sup>185</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* n. 17.

<sup>186</sup> Wolski, *supra* n. 13, at 249; Ross, *supra* n. 26, at 362.

<sup>187</sup> Almoguera, *supra* n. 24, at 129.

<sup>188</sup> See, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 30 (7 Jul. 2006), available at <[www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> (accessed 5 Sep. 2015); Arbitration Act 1996 (UK), s. 51(3), 1996 c. 23.

which is a strong argument in support of enforceability of consent awards pursuant to the New York Convention, though the Convention itself is silent in this respect.

The data shows that the absence of a coherent enforcement mechanism for international mediated settlement agreements is not an obstacle to recording the outcome of the combined use of processes in this kind of agreement. On the contrary, two-thirds of the participants had experienced the combined use of mediation and arbitration resulting in a mediated settlement agreement (66.7%). Notwithstanding the existence of the established international enforcement mechanism for arbitral awards, neither consent nor regular arbitral awards had been used, according to the questionnaire participants, to a similar extent (44.4% and 37%, respectively). Moreover, the majority of those participants who experienced various ways of recording the outcome of the combined use of processes referred to a mediated settlement agreement as the most frequently used option. This suggests that the importance of establishing a unified enforcement mechanism for international mediated settlement agreements might be overstated: even in the absence of this mechanism in the majority of cases the outcome of the combined use of processes is recorded as a mediated settlement agreement. The possibility offered by the combined use of mediation and arbitration to incorporate a mediated settlement agreement into a consent arbitral award, arguably enforceable worldwide pursuant to the New York Convention, is used only to a limited extent.

#### 4.3 MAIN BENEFITS AND THE FUTURE OF THE COMBINED USE OF MEDIATION AND ARBITRATION

All participants of the study were asked to share their views on the main benefits of the combined use of mediation and arbitration and the use of this dispute resolution approach in the future, regardless of their experience in this field. Although 77 and 79 participants answered these two questions, respectively, the particular way of combining mediation and arbitration that each of these participants referred to remained unclear. The author concludes that the uncertainty stemmed from the fact that the questionnaire provided a broad definition of 'the combined use of mediation and arbitration'.<sup>189</sup>

##### 4.3[a] *Main Benefits of the Combined Use of Mediation and Arbitration*

The participants were asked to identify the main benefits to parties of using a combination of mediation and arbitration (see Table 4). The participants could

<sup>189</sup> See the questionnaire definition of 'the combined use of mediation and arbitration' in section 2.3 *supra* and discussion of its limitations in section 4.1 *supra*.

select from six options, including ‘no benefits’, and specify any other benefit. The answers to this question were not mutually exclusive.<sup>190</sup>

The data shows that, overall, the participants had a positive attitude to the combined use of processes, with only 6.5% seeing no benefits to parties of using them. The benefits of the combined use of processes were attributed mostly to the mediation rather than to the arbitration component. The ability to preserve business relationship, faster resolution of the dispute and its lower cost were rated as the top three benefits of the combined use of processes (72.7%, 67.5%, and 63.6%, respectively).<sup>191</sup> Taking into account the fact that a common concern related to arbitration is increased costs and protracted proceedings, the questionnaire participants seemed to regard the combined use of processes as a remedy against these disadvantages. About half of the participants perceived high quality of the outcome<sup>192</sup> as a benefit of the combined use of processes (50.6%), whereas the possibility of obtaining an enforceable arbitral award was regarded as a benefit by about 31% of the participants (31.2%).

*Table 4 Main Benefits to Parties of Using a Combination of Mediation and Arbitration*

<i>Answer Options</i>	<i>Response %</i>	<i>Response Count</i>
Ability to preserve business relationship	72.7%	56
Faster resolution of the dispute (as compared to arbitration only)	67.5%	52
Lower cost of resolution of the dispute (as compared to arbitration only)	63.6%	49
High quality of the outcome, i.e., the outcome of a dispute resolution process is more in line with parties’ needs (as compared to arbitration only)	50.6%	39
Possibility of obtaining an enforceable arbitral award	31.2%	24

<sup>190</sup> The participants were asked to circle/tick as many answers as were applicable.

<sup>191</sup> As discussed in section 1 (particularly in n. 16) *supra*, cost and time efficiency are often regarded as key advantages of the combined use of mediation and arbitration by the same neutral. If different neutrals are involved in the mediation and arbitration stages of the combined process, the efficiency of the process will depend mostly on whether a dispute is resolved in the mediation stage. As discussed in section 4.1 *supra*, the questionnaire defined ‘the combined use of mediation and arbitration’ broadly. In answering the questionnaire questions, the participants could have narrowed down or extended the meaning of the term, depending on their personal experience and familiarity with the combined processes.

<sup>192</sup> As specified in the questionnaire, a high quality outcome means that the outcome of a dispute resolution process is more in line with parties’ needs (as compared to arbitration only).

<i>Answer Options</i>	<i>Response %</i>	<i>Response Count</i>
Other	13%	10
No benefits	6.5%	5
<b>Total</b>		<b>77</b>

The quality of the outcome resulting from the use of mediation and arbitration in combination is an issue that has been addressed by several commentators. Kaufmann-Kohler and Kun believe that the ultimate arbitral award often is better because previous negotiations will have narrowed down the issues and resulted in procedural measures that could lead to more predictable and acceptable solutions.<sup>193</sup> Similar views have been expressed by Ready<sup>194</sup> and De Vera.<sup>195</sup> It should be noted, however, that these commentators have discussed the quality of the outcome in reference to the combined use of processes by the same neutral. As mentioned above, the particular way of combining mediation and arbitration that each participant of this study referred to remained unclear to the author.

Only about 31% of the participants perceived the possibility of obtaining an enforceable arbitral award as a benefit of the combined use of mediation and arbitration. This result is surprising because it contradicts the prevalent view among commentators that the possibility of incorporating a mediated settlement agreement into a consent arbitral award is a major advantage of using mediation and arbitration in combination.<sup>196</sup> There is wide consensus that consent awards can be enforced as regular arbitral awards under the New York Convention.<sup>197</sup> The possibility of converting a mediated settlement agreement into an internationally enforceable consent award is often seen as a remedy against the key impediment to a more widespread use of mediation as a stand-alone method of international commercial dispute resolution: the absence of a coherent enforcement mechanism for international mediated settlement agreements.

<sup>193</sup> Kaufmann-Kohler & Kun, *supra* n. 167, at 491.

<sup>194</sup> David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity*, 34 *Alta. L. Rev.* 163, 171 (1995–1996) (referring to a speech of a leading British Columbia labour relations mediator and arbitrator, Vince Ready, who sees the primary advantage to the combined use of mediation and arbitration by the same neutral in the quality of the settlement, either because it is entirely or partially resolved through the mediation part of the process, or because the award is more likely to be in line with the needs of the parties as a result of the enhanced knowledge that the neutral has by participating in the mediation process).

<sup>195</sup> De Vera, *supra* n. 20, at 156–157 (observing that the strongest point in favour of the combined use of processes is that the neutral will find an adequate resolution in the arbitration stage of the process, by using his understanding of the relationship between the parties during the mediation stage, or prior knowledge of their respective underlying interests).

<sup>196</sup> See discussion in section 4.2[h] *supra*.

<sup>197</sup> Wolski, *supra* n. 13, at 261.



#### 4.3[b] *Future of the Combined Use of Mediation and Arbitration*

The participants were asked whether they wanted to see more use of a combination of mediation and arbitration for resolving international commercial disputes in the coming years. More than three-quarters of seventy-nine participants answered 'yes' to this question (78.5%), whereas about 11% said 'no' (11.4%), and about 10% were not sure about their answer and selected the 'don't know' option (10.1%). Although all participants were asked to comment on their answer, only thirty-five did so.

Most often the participants qualified the combined use of mediation and arbitration with reservations related to the conduct of both processes by the same neutral or the use of caucuses. These reservations were reiterated in the comments of those participants who were against or uncertain about the desirability of a wider use of this dispute resolution approach in the future.<sup>198</sup> The participants frequently attributed benefits of the combined use of processes and its drawbacks to its mediation component.

## 5 CONCLUSION

This article presents and discusses the results of a study about the current use of mediation in combination with arbitration in international commercial dispute resolution. The study involved the distribution of a questionnaire in paper and electronic form and was conducted between February and June 2014. The eighty-one participants in the study comprised predominantly international commercial dispute resolution practitioners from twenty-eight countries. The largest two groups of the participants practised in Continental Europe and Common Law Asia Pacific.

The most significant result to emerge from this study is that a combination of mediation and arbitration, in whatever sequence and regardless of whether conducted by the same or different neutrals, is used to a relatively low extent in international commercial dispute resolution. Only about one-third of the targeted questionnaire participants had experience with this dispute resolution approach over the previous five years. Moreover, almost half of those participants who had experience with the combined use of processes reported that disputes involving this dispute resolution approach had constituted a very small part of their overall international commercial dispute resolution practice (not more than 10%).

The study found that the majority of those who had acted as professionals in disputes involving the combined use of processes were qualified lawyers.

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<sup>198</sup> These concerns are addressed in section 4.2[f] *supra*.

Professionals from Common Law Asia Pacific appeared to use this dispute resolution approach more frequently than those from Continental Europe.

The questionnaire participants clearly identified the most common way of combining mediation and arbitration. It is the sequential use of processes with different neutrals in charge of the mediation and arbitration stages. In most cases the mediation stage involves the use of caucuses. The questionnaire data does not appear to support the assumption that those trained in the common law tradition have started to become used to mediation by an arbitrator, at least not in practice.

The data also reveals that the combined use of processes is most often triggered by a suggestion of one or both parties' counsel or a specifically tailored contractual provision. It is rarely invoked by a provision in the applicable legislation. Arbitration institutions almost never suggest parties to use a combination of mediation and arbitration, despite high demands for such propositions.

Various authors have discussed the incorporation of a mediated settlement agreement in an arbitral award as a key advantage of the combined use of processes.<sup>199</sup> However, according to the participants in the study, this occurred only to a limited extent. The combined use of processes most often resulted in a mediated settlement agreement. The absence of a coherent enforcement mechanism in respect of international mediated settlement agreements does not appear to hinder those involved in international dispute resolution from choosing to record the outcome of the combined use of mediation and arbitration in an agreement rather than in a consent award.

Almost all participants recognized some benefits of the combined use of processes. The ability to preserve business relationship, and faster and less expensive resolution of the dispute (as compared to arbitration only) were regarded as the three key benefits. More than three-quarters of the participants supported the wider use of this dispute resolution approach in the coming years. Hence, positive perceptions of the combined use of processes contrast with the relatively low extent of its actual use. Professionals acknowledge the benefits that the combined use of processes offers, but rarely use this dispute resolution approach. The results of this study are similar to those of the Bühring-Uhle's survey: that despite a growing acceptance of explicit mediation elements in arbitration, these mediation elements are used less frequently than their general acceptance by practitioners might suggest.<sup>200</sup>

The results of this study add substantially to our knowledge about the combined use of processes in international commercial dispute resolution. They

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<sup>199</sup> See discussion in section 4.2[h] *supra*.

<sup>200</sup> Bühring-Uhle et al., *supra* n. 28, at 128.

contribute to the international mediation and arbitration fields, and create avenues for further research. In particular, the study's result that the combined use of processes seems to offer benefits that are not widely used invites future enquiry. This enquiry could provide insights into ways of increasing the use and efficiency of the combined use of processes, and realizing the potential of this dispute resolution approach in international commercial dispute resolution.

## APPENDIX A

QUESTIONNAIRE ON THE COMBINED USE OF MEDIATION  
AND ARBITRATION IN AN INTERNATIONAL COMMERCIAL  
CONTEXTINFORMATION REGARDING THE QUESTIONNAIRE THAT  
YOU ARE ABOUT TO COMPLETE

This questionnaire relates to your experience as an international commercial dispute resolution practitioner over the last 5 or fewer years as applicable. Its particular focus is your experience, if any, in the combined use of mediation and arbitration in international commercial dispute resolution. Experience in the combined use of mediation and arbitration, however, is ***not*** a prerequisite for participation in this study.

The questionnaire has 22 questions and it should take you not more than 10-15 minutes to complete it.

You will remain anonymous, unless you indicate that you are interested to participate in a follow up interview and you provide your contact information. Any contact information will be used for the purposes of research only.

Completion of this questionnaire will be considered evidence of your consent to take part in this research project.

Please note in this questionnaire:

**Mediation** is used interchangeably with conciliation. Evaluative and facilitative styles of mediation are distinguished. A mediator adopting a facilitative style will not suggest specific options for settlement, express a view as to the merits of the dispute, or be directive on the outcome.

**The neutral** means either a mediator or an arbitrator in an international commercial dispute resolution process.

**The combined use of mediation and arbitration** refers to the actual use of the discrete ***processes*** of mediation and arbitration in combination. It includes any combination of processes in whatever order and whether conducted by the same or different neutrals.

**Q1-4 PROVIDE BACKGROUND INFORMATION ABOUT YOUR  
INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION  
PRACTICE**

<b>1. What is your primary country of practice?</b>	Country .....
<b>2. Are you qualified to practise as a lawyer?</b>	a) Yes b) No c) Yes, but not currently in practice
<b>3. Over the last 5 years what has been your most frequent professional role in international commercial dispute resolution?</b>	a) counsel b) mediator c) arbitrator d) other. Please specify: .....
<b>4. Over the last 5 years, approximately how many international commercial disputes have you been involved in as a professional?</b>	a) 1-5 b) 6-10 c) 11-15 d) > 16. Please specify the approximate amount: .....
<b>Q5-19 RELATE TO YOUR PROFESSIONAL EXPERIENCE IN THE COMBINED USE OF MEDIATION AND ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION</b>	
<b>5. Over the last 5 years have you acted as a professional in any international commercial dispute resolution that involved the combined use of mediation and arbitration?</b>	Please circle as many answers as are applicable a) Yes, I have acted as a counsel b) Yes, I have acted as a mediator in a dispute that involved arbitration with a different neutral c) Yes, I have acted as an arbitrator in a dispute that involved mediation with a different neutral d) Yes, I have acted as a mediator and an arbitrator in the same dispute e) No, I have not acted as a professional in any dispute involving the combined use of mediation and arbitration <b>(Go to question 20)</b>

<p><b>6. Over the last 5 years, what is the approximate proportion of disputes involving the combined use of mediation and arbitration of your overall international commercial dispute resolution practice?</b></p>	<p>Please circle one answer</p> <p>a) not more than 10 %  b) not more than 20 %  c) not more than 30 %  d) not more than 50 %  e) not more than 75 %  f) all</p>
<p><b>7. What triggered the combined use of mediation and arbitration?</b></p>	<p>Please circle as many answers as are applicable</p> <p>a) specifically tailored contractual provision  b) model multi-tiered clause of an arbitration institute incorporated into parties' contract  c) initiative of one or both parties  d) one or both parties' counsel suggestion  e) mediator's suggestion  f) arbitrator's suggestion  g) your suggestion. Please specify in which capacity you were acting:  .....  h) provision in the rules of an arbitration institute  i) suggestion of an arbitration institute  j) provision in the applicable legislation. Please specify the country of the legislation:  .....  k) combination of triggers. Please specify which ones (f.e. c &amp; d):  .....  l) don't know  m) other. Please specify:  .....  .....</p>
<p><b>8. If in Q7 you circled more than one answer, is there any that applied most frequently?</b></p>	<p>a) Yes. Please specify by writing the letter (f.e. i):  .....  b) No</p>

<p><b>9. If in Q7 you circled a participant in the process other than you, please specify the country of origin or practice of such participant.</b></p>	Trigger	Country	Don't know
	a party/parties		
	a counsel/ counsel		
	mediator		
	arbitrator		
<p><b>10. When in the combined process has mediation been used?</b></p>	<p>Please circle as many answers as are applicable</p> <p>a) before arbitration</p> <p>b) after commencement of arbitration but before the hearing on the merits</p> <p>c) after the hearing on the merits but before issuing the award</p> <p>d) after issuing the award</p> <p>e) at the same time as arbitration</p> <p>f) other. Please specify: ..... .....</p>		
<p><b>11. If in Q10 you circled more than one answer, is there any that applied most frequently?</b></p>	<p>a) Yes. Please specify by writing the letter: .....</p> <p>b) No</p>		
<p><b>12. Who conducted mediation in the combined process?</b></p>	<p>Please circle as many answers as are applicable</p> <p>a) the sole arbitrator</p> <p>b) a member of the arbitral tribunal</p> <p>c) a neutral other than a) or b)</p>		
<p><b>13. If in Q12 you circled more than one answer, is there any that applied most frequently?</b></p>	<p>a) Yes. Please specify by writing the letter: .....</p> <p>b) No</p>		
<p><b>14. If you conducted mediation in a dispute involving the combined use of mediation and arbitration how would you best characterise your mediation style?</b></p>	<p>Please circle one answer</p> <p>a) facilitative</p> <p>b) evaluative</p> <p>c) not applicable</p> <p>d) other. Please specify: ..... .....</p>		

<p><b>15. Were caucuses (private meetings) used in mediation?</b></p>	<p>Please circle one answer</p> <p>a) always  b) in the majority of cases  c) in the minority of cases  d) never  e) don't know</p>
<p><b>16. How was the outcome of a dispute resolution process recorded?</b></p>	<p>Please circle as many answers as are applicable</p> <p>a) in a mediated settlement agreement  b) in a consent arbitral award incorporating a mediated settlement agreement  c) in a regular arbitral award  d) in a court judgement  e) other. Please specify:  .....  .....</p>
<p><b>17. If in Q16 you circled more than one answer, is there any that applied most frequently?</b></p>	<p>a) Yes. Please specify by writing the letter:  .....  b) No</p>
<p><b>18. What types of disputes were resolved by using a combination of mediation and arbitration?</b></p>	<p>Please circle as many answers as are applicable</p> <p>a) complex commercial disputes  b) specialised industry disputes. Please specify the industry:  .....  c) other. Please specify:  .....  .....</p>
<p><b>19. If in Q18 you circled more than one answer, is there any that applied most frequently?</b></p>	<p>a) Yes. Please specify by writing the letter:  .....  b) No</p>



<b>PLEASE ANSWER Q20-22 EVEN IF OVER THE LAST 5 YEARS YOU            HAVE NOT HAD ANY EXPERIENCE AS A PROFESSIONAL IN            THE COMBINED USE OF MEDIATION AND ARBITRATION</b>	
<b>20. In your opinion, what are the main benefits to parties of using a combination of mediation and arbitration?</b>	Please circle as many answers as are applicable a) faster resolution of their dispute (as compared to arbitration only) b) lower cost of resolution of their dispute (as compared to arbitration only) c) ability to preserve business relationship d) high quality of the outcome, i.e. the outcome of a dispute resolution process is more in line with parties' needs (as compared to arbitration only) e) possibility of obtaining an enforceable arbitral award f) no benefits g) other. Please specify: ..... .....
<b>21. Would you like to see more use of mediation and arbitration in combination for resolving international commercial disputes in the coming years?</b>	a) Yes b) No c) Don't know  Please provide a brief reason for your answer: ..... ..... ..... .....
<b>22. Would you be willing to participate in a follow up interview or survey?</b>	a) Yes. Please provide the following information: Name: ..... Email address: ..... Phone number: ..... b) No

THANK YOU VERY MUCH FOR YOUR PARTICIPATION!

**[A] Aim of the Journal**

Since its 1984 launch, the Journal of International Arbitration has established itself as a thought-provoking, ground-breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in-depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

**[B] Contact Details**

Manuscripts as well as questions should be submitted to the Editor at EditorJOIA@kluwerlaw.com.

**[C] Submission Guidelines**

- [1] Final versions of manuscripts should be sent electronically via email, in Word format; they must not have been published or submitted for publication elsewhere.
- [2] The front page should include the author's name and email address, as well as an article title.
- [3] The article should contain an abstract of about 200 words.
- [4] Heading levels should be clearly indicated.
- [5] The first footnote should include a brief biographical note with the author's current affiliation.
- [6] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [7] For guidance on style, see the House Style Guide available on this website: <http://www.wklawbusiness.com/ContactUs/>

**[D] Review Process**

- [1] After review by the Editor, manuscripts may be returned to authors with suggestions related to substance and/or style.
- [2] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

**[E] Publication Process**

- [1] For accepted articles, authors will be expected to execute a Consent to Publish form.
- [2] Each author of an accepted article will receive a free hard copy of the journal issue in which the article is published, plus an electronic version of the article.