

2013

Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review

Ellen E. Deason

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 *Y.B. Arb. & Mediation* 219 (2013).

This Symposium is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

COMBINATIONS OF MEDIATION AND ARBITRATION WITH THE SAME NEUTRAL: A FRAMEWORK FOR JUDICIAL REVIEW

Ellen E. Deason*

I. INTRODUCTION

A dispute resolution process that combines mediation with arbitration is not new, but is reportedly growing in popularity in the United States.¹ The combined process typically takes the form of mediation followed by arbitration (“med-arb”), arbitration followed by mediation (“arb-med”), or arbitration with the possibility of a break in the proceedings for mediation (“mediation window”). A major advantage of these combinations is that they offer parties not only the opportunity to structure and control their own resolution, but also the certainty that if the parties do not agree to a settlement in mediation their dispute will be resolved in a final and binding award.² The processes can be fully separated and conducted by the different neutrals, but using the same neutral is an attractive way for parties to reduce costs. It eliminates the need for the parties to identify and appoint an additional neutral, and they can start the second process without having to educate a new neutral about the case.³

While there is much enthusiasm for these hybrid processes,⁴ many lawyers and scholars have tended to view the combination with skepticism when the parties employ the same neutral.⁵ Often the doubt has concerned how well the combination can function.

*Joanne Wharton Murphy/Classes of 1965 & 1973 Professor of Law, The Ohio State University Moritz College of Law. I gratefully acknowledge able research assistance from Kelly Savel and Keith Darsee and helpful discussions with Nancy Welsh, Sarah Cole, Jim Coben, and Phil McConnaughay. Thank you very much to the students who organized the Penn State Law *Yearbook on Arbitration and Mediation* 2013 Symposium: *The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement Agreements*.

¹ Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, SOCIAL SCIENCE RESEARCH NETWORK at 28, Chart E (2013) available at <http://ssrn.com/abstract=2221471> (reporting an increase in the percentage of counsel who responded that their corporation had used “mediation-arbitration” in the prior three years from 40% in 1997 to 51% in 2011); see also David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63-OCT. DISP. RESOL. J. 28, 30 (Aug.-Oct. 2008) (reporting expansion in the use of med-arb); Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAW. 71, 71 (Spring 2009) (describing increased attention to hybrid processes). See generally Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 664 nn. 16-17, 669-78 (1991) (tracing the growth of med-arb from its roots in labor arbitration and grievance procedures).

² Thomas J. Brewer & Lawrence R. Mills, *Med Arb: Combining Mediation and Arbitration*, 54-NOV. DISP. RESOL. J. 32, 34 (Nov. 1999); McLean & Wilson, *supra* note 1, at 28, 30.

³ Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?*, 60-JUL. DISP. RESOL. J. 24, 28 (May-July 2005).

⁴ See e.g., Kristen M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011); McLean & Wilson, *supra* note 1; Phillips, *supra* note 3.

⁵ See e.g. THOMAS J. STIPANOWICH & PETER H. KASKELL, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 20 (2001) (reporting that members of a panel convened by the American Arbitration Association and CPR “generally oppose” arrangements for a single individual to function as both mediator and arbitrator because the roles are different in focus and “in some respects

Even more fundamentally, a combination of mediation and arbitration can also depart from some of the central values that we associate with the separate processes. The principles underlying the legal system's protection for confidentiality in mediation are undermined if the neutral learns information in mediation that she carries over to affect her decision in arbitration. Additionally, when the neutral learns that information in a mediation caucus, this *ex parte* contact erodes adjudicative process norms. Neutrals are often confident that they can ignore information in a way that avoids harm to confidentiality or adversarial norms. But, to the contrary, cognitive psychology teaches that even when a neutral thinks that she is setting aside this information it becomes incorporated into her thinking.

This article considers the appropriate role of judicial review and the approaches courts have taken when the processes of mediation and arbitration are combined using the same neutral. Mediation and arbitration both have their essential features.⁶ This article treats their combination as a mixture of two separate processes, not as a new and separate *sui generis* form of dispute resolution. Under this conception, judicial review of the combination must grapple with a variety of issues that stem from the essential features of both mediation and arbitration, and from the process principles associated with them. The nature of the issues on review will depend on the stage of the combination at which the parties terminate the process.

Judicial review occurs in two primary postures. First, the parties may reach an agreement in the mediation portion of the process. It may take the form of an ordinary settlement agreement or, more likely, it may be entered as an arbitral award. If one party challenges the agreement or objects to its enforcement, the entry of an award raises several questions. Should standards for review of an agreement from a same-neutral combined process be any different from those applied to an agreement reached in stand-alone mediation, which would typically be reviewed under contract principles? Does a mediation process that ends in an award constitute "arbitration" and thus bring the review under the deferential standards of the Federal Arbitration Act (FAA)? If the existence of an award following mediation does not convert the standards of review to those of the FAA by operation of law, should parties be able to accomplish this by agreement?

Second, when the parties do not reach agreement, the process culminates in an award based on an arbitral proceeding. The limited review of that award under the FAA, which largely excludes review for errors of law, raises the same issues discussed in other papers in this volume.⁷ This article will focus on the special issues that arise from the combination of arbitration with mediation. The information flows from mediation to arbitration that occur when a single individual acts as the neutral in both processes raise unique issues due to the combination of the processes. As an arbitrator, the individual may breach the principle of confidentiality that is deemed important in mediation. As a

mutually incompatible"); Bartel, *supra* note 1, at 678-79; Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65-OCT. DISP. RESOL. J. 52, 61 (May-Oct. 2010) (concluding that all of the combinations of arbitration and mediation pose ethical issues).

⁶ Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 23 (noting key distinctions between mediation and arbitration and expressing doubts about combining them).

⁷ See Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 PENN ST. Y.B. ARB. & MEDIATION 1 (2013); Allen Blair, *Is Less Really More?* Hall Street Associates, *Private Procedural Ordering and Expanded Review of Arbitral Awards in State Courts*, 5 PENN ST. Y.B. ARB. & MEDIATION 74 (2013).

mediator, the individual may engage in communications that can impair the adjudicative process norms of equal treatment and the opportunity to present one's case. How well do the FAA's arbitral standards of review address these issues? What design features might the parties employ to mitigate them? And what indicia of consent should courts look for if parties want to waive their rights and accept the risks associated with a same-neutral combined process?

In both review postures, an agreement by the parties to use a combined process can be consistent with principles of party autonomy and self-determination. The challenge for courts when the process involves a neutral with a dual role is to fashion standards of review that ensure the parties reached a knowing and voluntary agreement to employ that process. This article concludes that parties should be able to opt out of an agreement to use the same neutral after mediation, and that courts should carefully scrutinize the parties' consent to waive the process protections normally afforded in mediation and arbitration.

Section II introduces the variation in the ways mediation and arbitration are combined and discusses how these combinations can challenge mediation and arbitration norms. Section III analyzes standards of review when a combined process culminates in a settlement agreement in the mediation phase. Section IV considers the review of arbitral decisions when the parties have first engaged in mediation with the same neutral. The article concludes that parties may consent to deferential standards of review for their mediated agreements, and to procedures in a combined process that pose risks to confidentiality and adjudicative norms, but that courts should scrutinize that consent carefully.

II. ISSUES POSED BY THE COMBINATION OF MEDIATION AND ARBITRATION

Many of the concerns raised by combining mediation and arbitration depend to a large extent on the structure of the combination. Part A of this section briefly describes the possible structures. Part B introduces concerns about the functionality of the combined processes. Part C explores the process concerns that are relevant to standards for judicial review when the process culminates in a mediated agreement. Part D examines concerns that arise when the outcome of the process is instead an arbitral decision.

A. *Structures for the Combination of Mediation and Arbitration*

The most common combination of mediation and arbitration is med-arb, in which the parties attempt to resolve their dispute using mediation and proceed to arbitration only if they are not successful in reaching a settlement. Commentators praise this combination as offering the parties flexibility and efficiency.⁸ The mediation may be timed to occur immediately before arbitration or earlier in the life of the dispute as a step in a tiered or multi-step dispute resolution plan.⁹ The particular advantage of the med-arb

⁸ Blankley, *supra* note 4, at 326; Brewer & Mills, *supra* note 2, at 34; Phillips, *supra* note 3, at 32.

⁹ CHRISTIAN BÜHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 251 (2006).

format is that if mediation is successful as the first phase of the process, this means the parties can dispense with adversarial proceedings and entirely avoid the expense of arbitration.¹⁰

In arb-med, the order of the processes is reversed. After a hearing, the arbitrator formulates an award, but does not share it with the parties. A common procedure is to place it in a sealed envelope. The parties then proceed to mediate their dispute. If they are successful, their agreement is the outcome of the process. If they are unable to agree, the envelope is opened and the award becomes binding.¹¹ With this sequence, the parties can draw on the development of the case in adjudication to assess its strengths and weaknesses and thus inform their settlement process.¹² Notably, this process can avoid many of the concerns associated with med-arb (discussed below) in that the neutral can conduct the mediation without fear that information he learns will contaminate the arbitration process.¹³ But it is not a cost-saving device; the parties must bear the expense of both an arbitral hearing and mediation even if they are able to settle the dispute. As a result, while some neutrals favor arb-med,¹⁴ the process is less popular than med-arb due to the practical cost barriers.

Mediation may also be conducted in the midst of an ongoing arbitration. Termed “mediation windows” or “arb-med-arb”, this procedure (using separate neutrals) is authorized by the American Arbitration Association (AAA) Commercial Arbitration Rules,¹⁵ and is a feature of some international commercial arbitrations.¹⁶ In a multi-hearing arbitration, mediation can take place during a period when no hearings are scheduled, so it need not disrupt the arbitration process.¹⁷ It offers both flexibility to schedule the mediation at the time most conducive to settlement and the prospect of substantial savings in arbitration fees.¹⁸

In Asian legal cultures, combining arbitration and mediation with the same neutral is more common than in the West.¹⁹ China’s arbitration law and institutions are especially known for encouraging the combination, drawing on the practices in Chinese courts, which are in turn heavily influenced by China’s philosophical and historical emphasis on resolving disputes by moral persuasion rather than legalistically.²⁰ China practices a

¹⁰ Harold I. Abramson, *Protocols for International Arbitrators who Dare to Settle Cases*, 10 AM. REV. INT’L ARB. 1, 3 (1999).

¹¹ Arnold M. Zack, *The Quest for Finality in Airline Disputes: A Case for Arb-Med*, 58-JAN. DISP. RESOL. J. 34, 37 (Nov. 2003/Jan. 2004).

¹² Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity* 1 HASTINGS BUS. L.J. 159, 176 (2005); Fullerton, *supra* note 5, at 59.

¹³ Fullerton, *supra* note 5, at 59.

¹⁴ See, e.g., Zack, *supra* note 11.

¹⁵ AAA Commercial Arbitration Rules R-8 (effective June 1, 2009), available at <http://www.adr.org> (the rule does not permit an arbitrator appointed for the case to serve as the mediator).

¹⁶ BÜHRING-UHLE ET AL., *supra* note 9, at 259.

¹⁷ *Id.*

¹⁸ *Id.* at 260.

¹⁹ M. Scott Donahy, *Seeking Harmony: Is the Asian Concept of Conciliator/Arbitrator Applicable in the West?*, 50-JUN. DISP. RESOL. J. 74 (Apr.-June 1995).

²⁰ Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why it Works in China*, 25 J. INT’L ARB. 479, 480-86 (2008); see also 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, 162-78 (discussing cultural influences on dispute resolution in China). In addition, under China’s planned economy a dearth of laws applicable to commercial transactions before

particularly strong integration of the two processes. While the practice in some other Asian countries is to suspend arbitration hearings during mediated settlement attempts, in China mediation may occur during the ongoing process of arbitration with no clear distinction between an arbitration and mediation phase of the process.²¹

There are also a number of domestic variations on med-arb. In one model, following an unsuccessful mediation the mediator-turned-arbitrator issues a decision without any additional arbitral adversary proceedings. This process is sometimes assigned the confusing and inconsistent label “binding mediation,”²² although there are also other interpretations of that term.²³ In another version of the med-arb combination, the mediation is followed by final offer arbitration (which is also called “baseball” or “last best offer” arbitration); the combination sometimes carries the label “MEDALOA” (mediation and last offer arbitration).²⁴ Here the mediator-turned-arbitrator is constrained to award the final settlement offer of one of the parties.²⁵ Finally, in the public labor bargaining context, state statutes specify a rich array of varied sequences for the combination of mediation and arbitration.²⁶

In contrast to these relatively defined processes that bear labels, other processes are harder to characterize because the procedural elements are blurred and blended. For example, sometimes a process may gradually transform from mediation to arbitration

the 1980s created a legal vacuum in which arbitral tribunals encouraged parties to resolve their disputes using mediation. *See* Wang Wenying, *The Role of Conciliation in Resolving Disputes: A PRC Perspective*, 20 OHIO ST. J. ON DISP. RESOL. 421, 443-46 (2005).

²¹ Kaufman-Kohler & Kun, *supra* note 20, at 487; Vera, *supra* note 20, at 181.

²² *See, e.g.*, Bowers v. Raymond J. Lucia Cos., Inc., 142 Cal. Rptr. 3d 64, 68-69 (Cal. Ct. App. 2012).

²³ *See, e.g.*, Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 853 (Cal. Ct. App. 2006) (Sills, P.J., concurring) (concluding that contract using term “binding mediation” is “unenforceably vague”).

²⁴ STIPANOWICH & KASKELL, *supra* note 5, at 25-26.

²⁵ The context for this particular combination is frequently “interest arbitration,” in which the process produces terms to be included in an employment or collective bargaining agreement. For example, Indiana mandates mandatory mediation followed if necessary by final offer arbitration when a teachers’ union and school employer reach a bargaining impasse. IND. CODE ANN. § 20-29-6-13 (West 2012). *See generally* Martin H. Malin, *Two Models of Interest Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 145 (2013). For thorough descriptions and considerations for selecting the final offer arbitration process, *see* Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J. ON DISP. RESOL. 1 (2013); Benjamin A. Tulis, *Final Offer “Baseball” Arbitrations: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85 (2010). In the typical labor context, the parties submit evidence to the arbitrator to support their offers. *See* Tulis, *supra*, at 116-30 (discussing the appropriate criteria to be considered in the arbitral decision). Alternatively, the process may be structured so that the arbitral decision is based directly on offers made in the mediation, without additional argumentation or submissions to the neutral. *See, e.g.*, U.S. Steel Mining Co., LLC v. Wilson Downhole Servs., No. 02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006).

²⁶ In Ohio, for example, if the parties do not have their own mutually agreed alternative dispute resolution procedure in place, after bargaining impasse involving a public employee union the first step is mediation. If the parties fail to settle, the second step is fact-finding. It is common practice for the factfinder to first make an attempt to mediate the dispute. If the parties do not settle, the factfinder issues a nonbinding recommendation. If the parties do not accept this recommendation, the case proceeds to binding arbitration before a different neutral (called, confusingly, “conciliation”). OHIO REV. CODE ANN. § 4117.14 (C), (D), (G) (West 2012). *See* Malin, *supra* note 25, at 157-65 (describing contrasting state approaches to interest arbitration as a quasi-judicial adjudicatory process versus a continuation of the collective bargaining process); Tulis, *supra* note 25, at 97-101 (describing state approaches involving final offer arbitration).

without a clear distinction between the stages.²⁷ Or, a neutral may blend elements of mediation and arbitration rather than deploying discrete processes in a sequence. Examples of such blending from litigated cases include arbitrators who entered an award drawn from a settlement proposal in mediation²⁸ or based their award on mediation-type evidence or considerations.²⁹

B. Concerns for the Functionality of Combinations of Mediation and Arbitration

All of the combinations of mediation and arbitration offer an advantage over either process alone in that they allow the parties to find their own solution (in mediation), while ensuring that the dispute will be resolved even if the parties fail to reach an agreement (through arbitration). While this is advantageous, there are practical difficulties that parties should be aware of when they select a combined process. One is that not all neutrals are qualified for both roles.³⁰ The appropriate skills are very different; a judicious decision-maker who runs an efficient adversary evidentiary hearing may not be effective in working directly and more informally with the parties to facilitate their own agreement, and vice versa.³¹ Some even regard these roles as “fundamentally incompatible” because they are so diametrically opposed.³²

Moreover, whenever arbitration follows mediation, there is an inherent functional limitation on the potential effectiveness of the mediation step. In med-arb or arbitration windows, the knowledge that the mediator may become a decision-maker may make parties less willing to share information with the neutral during the mediation.³³ Because revealing interests or a bottom-line might influence the neutral’s decision, parties may strategically hesitate to provide any information they think could hurt their position in arbitration.³⁴ For some parties, there may also be a tendency to use mediation to lay the groundwork for arbitration by trying to shape the views of the person who will become the ultimate fact finder.³⁵ Both of these approaches to mediation will limit the effectiveness of the neutral and of the parties’ ability to interact productively during the process to the detriment of prospects for reaching an agreement.

Given the consensual nature of mediation and agreements to engage in arbitration, and the flexibility afforded parties to design their own settlement processes, parties are free to elect a combined process despite these practical and functional limitations. Parties may be willing to accept these shortcomings as a trade-off for the efficiency, the

²⁷ See, e.g., *Hallam v. Fallon*, No. 134145, 2003 WL 21143014 (Cal. Super. Ct. May 16, 2003).

²⁸ See, e.g., *Bowden v. Weickert*, No. S-02-017, 2003 WL 29419175 (Ohio Ct. App. June 20, 2003).

²⁹ See, e.g., *Trimble v. Graves*, 947 N.E.2d 885 (Ill. App. Ct. 2011) (refusing to enforce award based on evidence of one party’s perception of a fair outcome); *Aamot v. Eneboe*, 352 N.W.2d 647 (S.D. 1984) (refusing to enforce award that equitably divided property in accordance with Christian reconciliation principles).

³⁰ Bartel, *supra* note 1, at 688.

³¹ Sussman, *supra* note 1, at 73.

³² STIPANOWICH & KASKELL, *supra* note 5, at 20.

³³ Brewer & Mills, *supra* note 2, at 35.

³⁴ Phillips, *supra* note 3, at 27.

³⁵ STIPANOWICH & KASKELL, *supra* note 5, at 21-22 (describing parties “putting on a performance” for the mediator to influence his later decision).

opportunity to structure their own outcome, and the assured finality offered by combining mediation with arbitration. Other aspects of the combination, however, create process concerns that are relevant to the question of judicial review. The decided cases discussed latter in this article suggest that these are not merely theoretical concerns. Their nature depends on whether the process ends with a mediated agreement or an arbitral decision.

C. Process Concerns for a Mediated Agreement from a Combined Process

When the parties are able to reach an agreement in the mediation phase of a combined process, the availability of judicial review is necessary to provide a check on the process for the same reasons that apply in any mediation. One reason is to protect self-determination by ensuring that the parties actually entered into a valid settlement agreement. Another is to safeguard mediation process norms that promote the fair conduct of mediation by protecting against mediator misconduct.

In addition to these usual concerns, the combination of mediation with arbitration creates an additional potential source of pressure on mediation norms. Because the parties are aware that the neutral will render an award if they cannot resolve the dispute themselves, it is thought that they have an additional impetus to settle in mediation. While this can be considered a strength of the combined process, if mishandled, the impetus may become coercion. There is a fear that if a neutral wields his decision-making authority as a “big stick,” it can undermine party self-determination. Particularly if the neutral has signaled his perspective on the issues, the neutral’s ultimate power can lead to an agreement that does not truly represent the will of the parties.³⁶

D. Process Concerns for an Arbitral Decision from a Combined Process

When a combined process moves from mediation to an arbitral decision with the same neutral, the potential for information flows within the structure poses additional risks to process norms. The concerns fall into two categories: mediation process norms reflected in confidentiality principles and adjudicative process norms for arbitral decision-making. These process protections promote important goals: to help the parties trust the mediation process (and thus make it more effective) and to protect the integrity of the adjudicatory process.

Mediation confidentiality principles are at stake with combined processes because in an effective mediation phase the neutral will learn information that would not ordinarily be introduced in the arbitration phase.³⁷ The discussions may include bottom lines, the degree of flexibility in demands or offers, or self-evaluations of weaknesses in the merits of the case. This information may be irrelevant or, more seriously, prejudicial

³⁶ *Id.* at 21; Bartel, *supra* note 1, at 679-85.

³⁷ See *Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846, 852-53 (Cal. Ct. App. 2006) (Sills, P.J., concurring) (“[A] lawyer might tell a mediator that his client doesn’t recognize his exposure and [he] cannot get him to understand the downside of his case. The lawyer will ask, ‘You can help I think he will listen to you.’ Another lawyer might tell a mediator that he can possibly get another \$50,000 if the other party will only come down another \$100,000 on their demand. Or, both lawyers might tell a mediator what they candidly think their case is worth but ask the mediator to explain to each party the exposures they face so as to get movement toward settlement.”).

to a decision about the dispute.

Mediation confidentiality serves to insulate participants from disclosures that could affect them in later proceedings and is thus an important principle embodied in procedural rules, statutes, and ethical guidelines for mediators. The Federal Rules of Evidence bar evidence of settlement offers (made in mediation or otherwise) on the ground that they are irrelevant and can be prejudicial.³⁸ This principle has been expanded for mediation through state statutes establishing privileges that parties (and often mediators) can invoke to protect against disclosure of mediation communications.³⁹ The theory (and experience) is that settlement will be more effective if the parties feel free to explore “trial balloons” and express their interests, needs, and priorities.⁴⁰ In a process involving one’s adversary, confidentiality protections are necessary if parties are to express themselves freely without fear that information they share will be used against them if the dispute is not resolved in mediation.⁴¹

Arbitral adjudicative principles are also at stake. Our conception of arbitration as an adjudicative process includes at its core an opportunity for parties to be heard and the right to be treated equally.⁴² This principle of equality is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and many national laws.⁴³ It makes combinations of mediation and arbitration problematic in that a party who is not privy to communications between the neutral and the adversary in a mediation may have no knowledge of those communications and thus no opportunity to be heard on issues they raise.⁴⁴ Moreover, the knowledge the neutral gains in mediation may lead a party to doubt that neutral’s ability to maintain impartiality as a decision-maker. These doubts can be especially strong when the parties have met separately with the neutral in caucuses during the mediation phase. Because of the confidentiality of caucuses, neither party knows what

³⁸ FED. R. EVID. 408.

³⁹ See, e.g., UNIF. MEDIATION ACT § 5 (establishing privileges for parties, the mediator, and other participants in mediation); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 259-69 (2002) (describing variations in state and federal mediation statutory and common-law privileges).

⁴⁰ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 793 (1984) (analyzing the importance of information exchange for resolving disputes).

⁴¹ Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQUETTE L. REV. 79, 80-82 (2001).

⁴² Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: ‘Hybrid’ Procedures and ‘Intuitive’ Mediation by International Arbitrators*, 19 ARB. INT’L 387, 391 (2003); Michael Collins, *Do International Arbitral Tribunals Have any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 ARB. INT’L 333, 334 (2003).

⁴³ For example, article 33 of the English Arbitration Act of 1996 provides that the tribunal shall “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.” Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides, “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” The UNCITRAL Model law has been adopted in more than 60 countries. See United Nations Commission on International Trade Law (2013), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. In the United States, some states have incorporated this principle in their laws on international commercial arbitration. See, e.g., CAL. CIV. PROC. CODE § 1297.181; FLA. STAT. ANN. § 684.0029; N.C. GEN. STAT. § 1-567.48; TEX. CIV. PRAC. & REM. CODE ANN. § 172.101.

⁴⁴ Some commentators go so far as to conclude that the right of equal treatment prevents an arbitrator from ever caucusing separately with the parties. Berger, *supra* note 42, at 392.

the other side conveyed and thus does not have an effective opportunity to counter that information or cross-examine its source.

In addition to the evidentiary rules that restrict the flow of information from mediation to adjudicatory processes, there are also prohibitions in many court rules and in the Uniform Mediation Act designed to prevent an adjudicator from being influenced by communications or events in mediation. The Uniform Mediation Act prohibits the mediator from making a report about the mediation to the judge or arbitrator who may make a decision on the dispute.⁴⁵ It is obviously impossible to honor the principle underlying this prohibition in the context of same-neutral med-arb because the mediator and the arbitrator are the same person. Under these circumstances, the final provision of the UMA's prohibition on mediator reports is especially relevant. It prohibits the decision-maker from considering the prohibited information from the mediation.⁴⁶

The procedures and prohibitions found in some national laws of other countries are another expression of these process norms. Like the domestic U.S. rules applicable in court, a number of foreign arbitration statutes erect an evidentiary barrier that prohibits parties from referring during arbitral proceedings to any statement made during mediation.⁴⁷ Others entirely ban combinations of same-neutral mediation and arbitration. For example, the Ontario Arbitration Act prohibits members of an arbitral tribunal from conducting any part of the arbitration as a mediation.⁴⁸ The reasoning is apparent on the face of the statute, which also prohibits any similar process that "might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially."⁴⁹

⁴⁵ UNIF. MEDIATION ACT § 7. The decision-maker may not learn anything about the mediation except that it was held; that an agreement was, or was not, reached in the process; or information that the statute excepts from the privilege. Section 7 provides:

Prohibited Mediator Reports

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose: (1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; (2) a mediation communication as permitted under Section 6 [providing for exceptions to the privilege]; or (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

⁴⁶ *Id.* at § 7(c).

⁴⁷ See generally Belarus International Arbitration Court Law art. 18 (1990), available at http://www.gbci.net/belarus_arbitrationin.shtml; Bermuda International Conciliation and Arbitration Act § 10 (1993), available at <http://www.ciarb.bm/arbitration-act-1993/>; Costa Rica Law on Alternative Dispute Resolution of Disputes and Promotion of Freedom from Social Unrest art. 14 (2000); Croatia Law on Conciliation art. 13 (2003), in INT'L HANDBOOK ON COMM. ARB. SUPP. 57, Croatia, Annex II, available at http://alanuzelac.from.hr/pubs/B27_ICCA%20HB%20Suppl.%2057%20Offprint%20Croatia.pdf; India Arbitration and Conciliation Act § 81 (1996), available at <http://www.indiankanoon.org/doc/1306164/>; Uganda Arbitration and Conciliation Act § 66 (2000), available at http://www.wipo.int/wipolex/en/text.jsp?file_id170036.

⁴⁸ Ontario Arbitration Act § 35 (1991), available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK42.

⁴⁹ *Id.* Other laws similarly prohibit a conciliator from acting as an arbitrator for a dispute that was the subject of conciliation, or in any related dispute arising from the same or a related legal relationship. See Croatia Law on Conciliation art. 13 (2003), in Int'l Handbook on Comm. Arb. Supp. 57, Croatia, Annex II, available at

Such prohibitions are by no means a universal response, however, and other jurisdictions explicitly permit the combination.⁵⁰

Finally, both confidentiality norms and adjudicative process norms are expressed as ethical principles. In the mediation context, the principle of confidentiality has been incorporated into ethical guidelines for mediators.⁵¹ Few ethical codes for mediators consider the extension of this principle in the med-arb combination, but those that do judge the combination unacceptable.⁵² Ethical codes for arbitrators also disapprove of a single neutral serving as both mediator and arbitrator in the same process. Both the AAA/ABA Code of Ethics for Commercial Arbitrators and the International Bar Association (IBA) Rules of Ethics for International Arbitrators counsel arbitrators to avoid the type of *ex parte* communications with parties that are a common aspect of mediation.⁵³ The IBA Rules are explicit concerning arbitrators' role in settlement. Although an arbitrator may make settlement proposals with the parties' consent, he is to inform the parties that it is undesirable for an arbitrator to discuss settlement terms in the absence of a party, and that this normally will lead to disqualification of the arbitrator.⁵⁴

The adjudicative norms that underlie the concern with information flows from mediation to arbitration are supported by scientific understandings of the process of decision-making.⁵⁵ Cognitive psychologists use a model that differentiates between two brain systems: System 1 processes are "spontaneous, intuitive, effortless, and fast;" System 2 processes, in contrast, are "deliberate, rule-governed, effortful, and slow."⁵⁶ Decision-makers such as judges and arbitrators combine these two systems. They

http://alanuzelac.from.hr/pubs/B27_ICCA%20HB%20Suppl.%2057%20Offprint%20Croatia.pdf; Uganda Arbitration and Conciliation Act § 65 (2000), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id170036; Costa Rica Law on Alternative Dispute Resolution of Disputes and Promotion of Freedom from Social Unrest art. 16 (2000) (disqualifying mediator from participating as an arbitrator in subsequent proceedings related to the dispute).

⁵⁰ See *infra* note 142.

⁵¹ The Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution in 2005 provide in Standard V that "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law." MODEL STANDARDS OF CONDUCT FOR MEDIATORS STANDARD V(A) (2005).

⁵² The Ethical Guidelines developed by the Alternative Dispute Resolution Section of the State Bar of Texas and the Supreme Court of Texas state that "[a] person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation." Tex. Sup. Ct., Approval of Ethical Guidelines for Mediators, Misc. Docket No 05-9107 (June 13, 2005), *available at* <http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf>. See also *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 857-58 (2005) (discussing the guidelines).

⁵³ Canon III of the AAA/ABA Code of Ethics for Commercial Arbitrators (Rev. 2004), *available at* <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p123778.pdf> (prohibiting discussions of a proceeding in the absence of the other party and providing that written communications shall be sent to all the parties); IBA Rules of Ethics for International Arbitrators, R. 5.3 (1964) (requiring arbitrators to avoid unilateral communications regarding the case with any party and, if such communications occur, to inform the other party and the arbitrators of its substance).

⁵⁴ IBA Rules of Ethics for International Arbitrators, R. 8 (1986).

⁵⁵ For a more complete discussion, see Ellen E. Deason, *Limiting Judicial Discretion: Distinguishing "Managing" from "Settling" Under Rule 16* (unpublished manuscript).

⁵⁶ Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

typically “make initial intuitive judgments (System 1), which they might (or might not) override with deliberation (System 2).”⁵⁷

Experimental work with judges shows that they, like the rest of the human population, are prone to using heuristics (mental shortcuts) associated with System 1 thinking.⁵⁸ Some of these shortcuts are particularly problematic for a judge or arbitrator who has presided over mediation in a case that he will decide. Arbitrators who work directly with parties in an informal setting learn settlement demands and other information that can influence the way they later decide the case. When judges participating in an experiment were provided with settlement demands, the numbers served as “anchors” that increased or decreased a judge’s award, depending on whether the settlement demand was high or low.⁵⁹ And while an arbitrator may be confident that she can set aside things that are not relevant to her decision, such as what she has learned about a party’s interests and goals or her impressions of the party’s willingness to cooperate, the evidence suggests otherwise. Despite their confidence that they can set aside what happened in mediation, judges have great difficulty disregarding inadmissible evidence and they are often unable to ignore it in making legal decisions.⁶⁰ Moreover, because information is stored in the brain very quickly, and in a holistic manner, initial information can influence the way later information is interpreted. Thus, even if an arbitrator can ignore the information, that is not enough. It will not prevent what she learned during an earlier mediation phase of the process from directly affecting her judgment because the attitudes and inferences that she associates with that information can still influence her decision indirectly.⁶¹

In sum, the combination of mediation and arbitration can pose significant risks. These risks are not only to the effectiveness of the process, but also to norms that are regarded as important in the context of the separate processes.

III. REVIEW OF AGREEMENTS FROM COMBINED PROCESSES

One of the features of combining mediation with arbitration in a single process is that if an agreement is reached during the mediation phase, it is often entered as an arbitral award. This section examines the significance of that choice with regard to judicial review. Part A considers a preliminary question: whether it makes any difference if the outcome of the mediation phase of the process is reviewed as a settlement agreement or as an arbitral award. Part B explores whether more deferential standards or

⁵⁷ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 8-9 (2007).

⁵⁸ *Id.* at 19-27; Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1495-1520 (2009).

⁵⁹ Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Disregarding*, 153 U. PA. L. REV. 1251, 1288-93 (2005).

⁶⁰ *Id.* at 1286-1322 (reporting situations in which judges’ rulings showed they were unable to disregard what they knew about a case). Judges’ and arbitrators’ confidence in their ability to disregard what they learned in mediation can reflect another cognitive error called “egocentric bias.” Individuals routinely make self-serving judgments about themselves and overestimate their abilities, but this is often overconfidence. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 813-16 (2001) (discussing research on egocentric biases).

⁶¹ Wistrich et al., *supra* note 59, at 1269-70.

summary procedures are appropriate as a policy matter. Part C argues that a consent award does not by itself bring a mediated agreement under the FAA for purposes of review and Part D discusses whether parties can agree to waive contractual review in favor of FAA standards.

A. *Standards of Review for Agreements versus Awards*

Under section 10 of the FAA, a court may vacate an arbitral award based only on narrow procedural grounds:

- 1) Where the award was procured by corruption, fraud, or undue means;
- 2) Where there was evident partiality or corruption in the arbitrators, or either or them;
- 3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- 4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁶²

In contrast, to evaluate the enforceability of a mediated settlement agreement, courts tend to apply contract law principles, augmented by a developing law that is specific to mediation.⁶³ The traditional contract issues that arise represent the range of contract formation issues and contract defenses such as fraud, duress, and mistake.⁶⁴ Much of the additional new law applicable to mediation concerns confidentiality, which can affect enforcement indirectly by limiting the evidence a party may present to prove or to challenge an agreement.⁶⁵ In addition, some jurisdictions have created special rules for the enforcement of settlement agreements that arise in mediation. When compared to enforcement of settlements negotiated without a mediator, many of these rules make enforcement more challenging. A number of jurisdictions require special formalities, such as a writing, signatures, or special statements endorsing enforcement,⁶⁶ or they recognize special defenses to enforcement of a mediated agreement such as mediator

⁶² 9 U.S.C. § 10 (2006). Some U.S. jurisdictions will also review an award under the non-statutory ground of manifest disregard of the law. Since *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), raised doubt about the validity of this ground for review, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have found that manifest disregard of the law is still a valid ground for vacatur. See *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121-22 (2nd Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); *Abbott v. Law Office of Patrick J. Mulligan*, 440 Fed. Appx. 612, 620 (10th Cir. 2011); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2nd Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010); *Coffee Beanery Ltd. v. WW, LLC.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009).

⁶³ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 7.1 (2012).

⁶⁴ *Id.* at §§ 7.2-7.9.

⁶⁵ See generally Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

⁶⁶ *Id.* at 52-53; COLE ET AL., *supra* note 63, at § 7:19.

misconduct.⁶⁷ In contrast, other rules ease the process of enforcing a mediated agreement.⁶⁸

The FAA standards are designed for review of decisions and, as such, are not written to be relevant for agreements. The principles underlying them, however, could be adapted to apply to many of the contractual issues that arise in review of mediated agreements. The authorization to vacate an award procured by corruption, fraud, or undue means in Section 10(1) could be interpreted as protection that is parallel to the contract defenses of fraud and duress. The grounds concerning arbitrator partiality, corruption, and misconduct in Section 10(2) and (3) could cover defenses based on mediator misconduct (although the offending behavior might not be identical in the two contexts). Section 10(4)'s prohibition on arbitrators exceeding their power could provide grounds for a party to object to procedures used in mediation that were not authorized in the parties' agreement. What is entirely missing under the arbitral grounds for review are contract formation principles,⁶⁹ the contract defense of mistake,⁷⁰ and mediation confidentiality protections. Thus, although the standards for review of mediated agreements and arbitral awards overlap, review under contractual standards is somewhat broader.

In addition to these differences in the articulated standards, there may also be differences in the rigor and attitudes courts bring to review in the two contexts. It is well established that judicial review of arbitral awards is always to be constrained and deferential.⁷¹ In comparison, judicial review of mediated agreements is not subject to the

⁶⁷ See, e.g., MINN. STAT. ANN. §§ 572.35-.36 (making mediator malfeasance a defense to an enforcement action); *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1098-99 (Fla. Dist. Ct. App. 2001) (permitting an attack on a mediated settlement on the ground of mediator misconduct); *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954 (Tex. Ct. App. Aug. 8, 1996) (sending claim of mediator duress to the jury). Some jurisdictions even allow a party to avoid enforcement entirely during a rescission period. See e.g., Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 539 n.170 (2004).

⁶⁸ Some states have special procedural avenues for enforcement by motion and, in others, courts have set more stringent standards for setting aside an agreement resulting from mediation. See Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation — Worldwide*, 80 NOTRE DAME L. REV. 553, 581, 582 n.147 (2005).

⁶⁹ Formation issues arise with regard to mediated settlement agreements because parties often reach an agreement in principle during mediation, but leave the session without completing a full, formal documentation of the details of the agreement. When subsequent negotiations break down, a party may try to enforce the preliminary agreement and the issue becomes whether the parties entered into an enforceable agreement or an agreement that is incomplete and unenforceable. See, e.g., *Chappell v. Roth*, 548 S.E.2d 499, *reh'g denied*, 553 S.E. 2d 36 (N.C. 2001) (refusing to enforce an alleged agreement that contemplated later agreement on a release); *Meyer v. Alpine Lake Prop. Owners' Ass'n, Inc.*, No. 2:06CV59, 2007 WL 709304 (N.D. W. Va. Mar. 5, 2007) (refusing to enforce an alleged agreement after disagreement over terms led court to conclude there was no meeting of the minds); *Am. Network Leasing Corp. v. Corporate Funding Houston, Inc.*, No. 01-00-00789-CV, 2002 WL 31266230 (Tex. Ct. App. Oct. 10, 2002) (refusing to enforce an alleged agreement when the writing did not contain all of the material elements).

⁷⁰ Mistake provides a ground to void a contract when it is possible to establish a mistake concerning a material fact that serves as a basic assumption of the agreement, if the proponent did not bear the risk of mistake in the contract. RESTATEMENT (SECOND) OF CONTRACTS, §§ 152-154 (1979).

⁷¹ Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99, 104 (2007) ("The bottom line is that awards are rarely vacated by courts on any grounds.").

statutory constraints that apply to arbitration, and principles of judicial deference to the process are not articulated as strongly. Nevertheless, there has long been concern that mediation values may suffer in enforcement proceedings. An adjudication policy that favors settlement tends to emphasize judicial efficiency over mediation principles such as party self-determination, voluntariness, and mediator neutrality.⁷² The bottom line is that “[c]ourts police the private bargaining process through common law defenses only in extreme cases,”⁷³ and a mediated settlement agreement is likely to be enforced.

Yet, the distinctions between the frameworks for review in mediation and arbitration may make a difference. Although the “courts are willing to enforce mediated settlements, even in the face of serious challenges,” they did refuse to enforce alleged agreements in 18% of lawsuits that raised the issue of enforcement of mediated settlements over a seven-year period.⁷⁴ It is difficult to find comparable data for court dispositions with regard to arbitral awards and even more difficult to assess the significance of such data in the absence of information on the extent to which parties challenge either mediated agreements or awards. However, a study limited to treatment of awards in employment arbitration cases found confirmation rates in federal courts ranging from 85.7% to 93.7%.⁷⁵ When the data for district courts and courts of appeals are aggregated, the overall award confirmation rate in the federal courts was 91.5%.⁷⁶ This article will proceed on the assumption that the rate of rejection for arbitral awards may be lower than that for mediated agreements and that in any event the legal framework applicable to review does make a difference.

B. *The Appropriateness of Using Arbitral Review for Mediated Agreements*

The ability to convert from mediation to arbitration enforcement structures and take advantage of the FAA provisions on enforcement of arbitral awards is seen as part of the benefit of combining mediation and arbitration. There may be some basis for this perception: a high proportion of litigated cases about mediation concern the enforcement of mediated agreements.⁷⁷ Although that says nothing about the overall extent of compliance problems with mediated agreements, it suggests that enforcement can be problematic in some cases. A summary process that standardizes and streamlines enforcement of mediated agreements that result from combined processes could promote

⁷² James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of Emerging Case Law*, 54 ARK. L. REV. 171, 205-06 (2001).

⁷³ COLE ET AL., *supra* note 63, at § 7:6.

⁷⁴ *Id.* at § 7:4. Courts also modified the judgment in 2% of the enforcement opinions and remanded the issue to a lower court in another 10%, *id.* at n.11. The dataset consisted of all the opinions reported by Westlaw that raised mediation issues from 1999 to 2005, *see* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARB. & MED. REV. 395 (2007).

⁷⁵ The data included opinions from 1975 to March 2010. Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 178-79 (2011).

⁷⁶ *Id.* at 179. Confirmation rates were initially lower in state court cases, but rose to rates similar to those in the federal courts following the decision in *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁷⁷ COLE ET AL., *supra* note 63, at § 7:1 (noting that 43% of the opinions in mediation cases addressed enforcement issues).

the use of hybrids by reducing this practical barrier.

The problem from a policy perspective is that contract rules set standards that we have come to identify as minimum indicia of a fair mediated agreement. Contract rules, with their focus on objective manifestations to show an agreement was reached through free will, may not fully express mediation's concept of self-determination,⁷⁸ but they come closer than statutory arbitral standards of review. The use of arbitral standards could enable sophisticated parties to use combinations of mediation and arbitration – perhaps as a seemingly more acceptable alternative to consumer or employment arbitration – in ways that take advantage of weak or uninformed parties.

The arbitral enforcement scheme in the FAA is designed to provide “expeditious judicial review” of decisions made by a neutral arbitrator.⁷⁹ The sections on vacating and modifying an award address only “egregious departures from the parties' agreed-upon arbitration.”⁸⁰ This limited review may fail to take into account infirmities in a bargaining setting that could make an agreed solution unfair. Both arbitral awards and mediated agreements draw their authority from the consent of the parties, but the parties have consented to different things in the two settings. In arbitration, they consent to a process in which a neutral makes a decision, whereas in mediation they consent to the outcome itself. This means that it is especially important to safeguard the bargaining process in mediation, something that arbitration, with its acceptance of adhesion agreements to arbitrate, is not known for doing well.

The drafters of the Uniform Mediation Act considered and rejected multiple approaches to expedited enforcement, among them treating agreements as arbitral awards.⁸¹ Based on their deliberations, they recommended against adopting any comprehensive enforcement provision. They concluded that if the provision contained adequate protection for rights, it would not offer significant improvement over existing contract enforcement mechanisms.⁸²

A narrower approach might be to tailor arbitral enforcement for agreements and allow it only in situations in which there is less concern with imbalance of power. Proposals have been made to allow summary enforcement if the mediated agreement contains a statement that the parties intend such enforcement, or if both parties are represented by attorneys.⁸³ An alternative would be to allow an agreement from a combined process to be treated as an arbitral award for limited categories of cases that are considered the least prone to abuse, such as the international commercial setting where parties are likely to be relatively sophisticated and represented by counsel.⁸⁴ Some states already allow parties to an international commercial arbitration to enter their settlement as an award.⁸⁵

⁷⁸ See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 60-64 (2001).

⁷⁹ Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008).

⁸⁰ *Id.* at 586.

⁸¹ Deason, *supra* note 68, at 584-85 & nn.158-159. They also considered several stipulated judgment models and a registration provision that would allow parties and their lawyers to move jointly for a court to enter judgment in accordance with the agreement, *id.*

⁸² *Id.* at 585.

⁸³ *Id.* at 587.

⁸⁴ *Id.*

⁸⁵ See, e.g., CAL. CIV. PROC. CODE § 1297.401; FLA STAT. ANN. § 684.0041; N.C. GEN. STAT. § 1-567.60(b); TEX. CIV. PRAC. & REM. CODE ANN. § 172.211.

C. Applicability of the FAA to a Med-Arb Mediated Agreement

It may be, however, that whatever the policy considerations, the FAA already governs enforcement of a mediated agreement that is entered as an arbitral award. The FAA states that it applies to “a written provision . . . to settle by arbitration” a controversy that arises or has arisen out of a contract or transaction involving commerce,⁸⁶ but it does not define “arbitration.” That indeterminacy in the statute’s coverage raises the question of whether the outcomes of a combined process – either an agreement entered as an award or an award from an arbitral process that was preceded by mediation – are subject to review under the FAA.⁸⁷

The question of FAA coverage has been examined more thoroughly in the context of requests for court stays and attempts to compel a party to participate in arbitration than at the review stage, so this section will draw on lessons from those cases. There are courts that have read the FAA expansively and enforced a med-arb agreement,⁸⁸ or even a stand-alone mediation clause,⁸⁹ as if it were an agreement to arbitrate. Because of the FAA’s reference to settling disputes, the classic reasoning for this outcome is that it does not matter what a process is called; if a controversy is likely to be settled by a particular ADR process, then that process is covered by the FAA.⁹⁰

As courts have come to better understand the distinction between arbitration and mediation, however, they have trended away from this all-inclusive approach. In an influential opinion, the First Circuit agreed that the label used by the parties is not dispositive, but took a functional approach to whether the parties’ process should be characterized as arbitration.⁹¹ In *Fit Tech, Inc. v. Bally Total Fitness Holding Corporation*, the court asked how closely the parties’ procedure resembled “classic arbitration” and whether “treating the procedure as arbitration [would serve] the intuited purposes of Congress.”⁹² It found that the accounting remedy at issue exhibited “common incidents of arbitration of a contractual dispute” – finality, an independent adjudicator, substantive standards, and an opportunity for each side to present its case – and

⁸⁶ 9 U.S.C. § 2 (2006).

⁸⁷ Courts are split on whether federal or state law controls if a process constitutes arbitration for purposes of the application of the FAA. *Compare* *Evanston Ins. Co. v. Cogswell Prop.*, 683 F.3d 684, 693 (6th Cir. 2012); *Salt Lake Tribune Pub. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (concluding that federal law controls) *with* *Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058 (5th Cir. 1990); *Waysl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (concluding that state law controls).

⁸⁸ *See, e.g., Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200, 206 (N.D. Ill. 1996).

⁸⁹ *See, e.g., Sekisui Ta Indus., LLC v. Quality Tape Supply, Inc.*, No. DKC-08-2634, 2009 WL 2170500 (D. Md. July 17, 2009); *Fisher v. GE Medical Sys.*, 276 F. Supp. 891 (M.D. Tenn. 2003); *CB Richard Ellis, Inc. v. Am. Environ. Waste Mgmt.*, No. 98-CV-4183(JG), 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998); *see also* *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997) (compelling mediation under the Illinois Arbitration Act rather than the FAA because the contract did not involve a maritime transaction or interstate commerce).

⁹⁰ *AMF, Inc. v. Brunswick*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985) (enforcing agreement to submit dispute for a non-binding opinion from an advisory third party).

⁹¹ *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004).

⁹² *See id.* While not fully characterizing a definition of arbitration, the Supreme Court has held that not all processes related to arbitration fall within the FAA’s scope. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (holding that class arbitration “is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law”).

concluded that it was “arbitration in everything but name.”⁹³ Other courts have applied the *Fit Tech* test to conclude that a particular process was *not* arbitration and thus declined to apply the FAA to enforce the parties’ agreement.⁹⁴

The same functional approach can be used to determine whether the FAA standards of review apply to the outcome of an ADR process. For example, in *Evanston Insurance Company v. Cogswell Properties, LLC*,⁹⁵ the Sixth Circuit analyzed the appropriate standard of review for an appraisal decision. The district court had vacated the award for a manifest mistake that constituted an error of law,⁹⁶ a ground that is not available under the FAA. Applying the *Fit Tech* test, the court found that the appraisal process contained in the property insurance policy was not controlled by FAA standards of review because the process differed significantly from arbitration. The appraisal was not binding in that the insurance company could nonetheless deny the claim, and the insurance policy did not require a hearing as part of the process.⁹⁷ The court affirmed the decision below to vacate the award under the less deferential standards of review applicable to state common-law arbitration.

The *Fit Tech* functional criteria easily distinguish mediation from arbitration. Courts have stressed mediation’s nonbinding nature and the absence of an award that declares the rights and duties of the parties.⁹⁸ In addition, the other characteristics of classic arbitration are also absent. There is no independent adjudicator who considers the parties’ evidence or applies substantive standards to the dispute. Moreover, as Professor Stipanowich has stressed in arguing that arbitration law should not be applied by analogy

⁹³ *Fit Tech*, 374 F.3d at 7.

⁹⁴ In excluding the processes at issue from the category of arbitration, these courts placed central emphasis on the lack of a final, binding decision by a third party. *See* *Advanced Bodycare Solutions, LLC v. Thione Int’l Inc.*, 524 F.3d 1235, 1238-40 (11th Cir. 2008) (refusing to compel parties to engage in choice of non-binding arbitration or mediation because mediation did not constitute arbitration under the FAA); *Salt Lake Tribune Publ. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689-91 (10th Cir. 2004) (holding appraisal process was not arbitration); *see also* *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997) (“the essence of arbitration” is that parties “agreed to arbitrate [their] disputes through to completion, i.e., to an award made by a third-party arbitrator”). *But see* *Eichinger v. Kelsey-Hayes Co.*, No 09-14092, 2010 WL 2720931 (E.D. Mich. July 8, 2010) (enforcing agreement for non-binding arbitration).

Conversely, courts have applied the FAA to compel parties to use processes when they do result in a binding determination, regardless of the label used by the parties in their agreement. *Cummings v. Consumer Budget Counseling, Inc.*, No. CV-11-3989(SJF)(ETB), 2012 WL 4328637 (E.D.N.Y. Sept. 19, 2012) (staying litigation pursuant to the FAA when parties agreed to “abide by the decision of the mediator”); *Harrell’s, LLC v. Agrium Advanced Tech., Inc.*, 795 F. Supp. 2d 1321 (M.D. Fla. 2011) (compelling process in which mediators will make binding decision); *Dobson Bros. Constr. Co. v. Ratliff, Inc.*, No. 4:08CV3103, 2008 WL 4981358 (D. Neb. Nov. 6, 2008) (finding that agreement to submit dispute to mediator or arbitrator for hearing and decision is an agreement to arbitrate). *But see* *Advanced Bodycare Solutions*, 524 F.3d at 1239 n.3 (“the presence of an award does not by itself make a procedure ‘arbitration’ if the procedures that produce the award bear no resemblance to classic arbitration”).

⁹⁵ *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684 (6th Cir. 2012).

⁹⁶ *Id.* at 689-90.

⁹⁷ *Id.* at 693-94. The court reached the same conclusion under an alternative state-law analysis, *id.* at 694-96.

⁹⁸ *Advanced Bodycare Solutions*, 524 F.3d at 1239; *Lynn v. General Elec. Co.*, No. 03-2662-GTW-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) (refusing to stay case for mediation, which is not subject to enforcement under the FAA); *see also* *Gate Precast Co. v. Kenwood Towne Place, LLC*, No. 1:09-CV-00113, 2009 WL 3614931, at *5 (S.D. Ohio Oct. 28, 2009) (finding that ordinary contract principles, not the FAA, determine that party is required to mediate).

to mediation, the process offers no sure resolution. The parties can be required to discuss their dispute, but not to settle it.⁹⁹ Under this analysis, mediation is not “arbitration” for purposes of bringing it under the umbrella of the FAA.

Nor is the functionality of mediation changed by entry of the parties’ agreement as a consent award. The process is still one that lacks the characteristics of classic arbitration. And this characterization should not be changed – at least for purposes of review – if the parties have agreed to use a classic arbitration process following mediation when their efforts to reach an agreement have failed. Arguments have been made that the FAA requires courts to enforce parties’ agreements to use med-arb.¹⁰⁰ If the med-arb process is regarded as a unified whole rather than a combination of two separate processes, this position can be supported. Functionally, the process the parties selected does include an opportunity to have a neutral third party apply substantive standards to make a final and binding decision based on a hearing in which each side can present their arguments.¹⁰¹ But when the process terminates in an agreement without proceeding to arbitration, the functions subject to review bear no resemblance to arbitration. Nor is there any indication that Congress intended to extend review under the FAA to mediated agreements. Accordingly, FAA review should not be imposed as a matter of law on settlement agreements from the mediated phase of a combined process.

D. Review of the Mediated Agreement under Arbitral Standards by Party Agreement

The question remains whether the parties can, by agreement, select the more deferential FAA standards of review for the settlement agreement they reach in mediation. Allowing this option would be consistent with party autonomy and with the flexibility that makes it possible for parties to tailor dispute resolution processes to their needs and circumstances.

The law on the limitation of judicial review is sparse in the context of arbitration, and that law is of limited relevance to review of a mediated agreement.¹⁰² One might be

⁹⁹ Thomas Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 863 (2001).

¹⁰⁰ McLean & Wilson, *supra* note 1, at 33. *See, e.g.*, *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200, 202-06 (N.D. Ill. 1996) (applying the FAA to grant motion to compel parties to participate in med-arb).

¹⁰¹ *But see* *HIM Portland, LLC v. Devito Builders Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (treating the mediation phase of med-arb as a separate process that is a condition precedent to arbitration so that the arbitration phase of the med-arb process is not triggered and the FAA cannot be invoked to compel arbitration until a party satisfies the condition precedent and attempts mediation); *Kemiron Atlantic, Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).

¹⁰² *See generally* Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 758-64 (2007) (discussing caselaw). The Revised Uniform Arbitration Act prohibits parties from waiving their right to seek vacatur or modification of an arbitral award in court. RUA § 3(c). There is, however, precedent in international commercial arbitration for parties to reduce their options for judicial review by agreement. Foreign parties arbitrating in Belgium or Switzerland can agree to forgo challenges to an award in a set aside proceeding in national court. *See* MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 61 (2d ed. 2012). This provision does not, however, entirely preclude these parties from presenting their objections to the award. They may raise them in a defense against an enforcement action under the New York Convention.

tempted to think that party agreement on standards of review is precluded by *Hall Street Associates, LLC v. Mattel, Inc.*,¹⁰³ which held that parties may not agree to expanded review under the FAA. The holding in *Hall Street*, however, rested on the exclusive application of the provisions of a statute governing *arbitration*.¹⁰⁴ In contrast, no comparable statute governs review of mediated agreements. Moreover, the outcome in *Hall Street* was bolstered by a view that the parties' choice of alternative standards would decrease arbitration efficiency, contrary to the purposes of the statute.¹⁰⁵ In contrast, if parties to med-arb contract for reduced review of their mediated agreement, that would arguably reduce requests to vacate consent awards, decrease the necessity for judicial review, and therefore increase the efficiency of enforcement. Finally, the opinion also contemplates alternative paths for enforcement, suggesting that review of a different scope is available under state statutory or common law.¹⁰⁶ Thus, while *Hall Street* does represent a limit on the principle that arbitration is a matter of contract in that parties cannot expand grounds for arbitral review, it is best read as not preventing parties from agreeing to limit review of a mediated settlement agreement reached in a process that combines mediation with arbitration.

Under this analysis, parties can agree to waive the contractual standards of review that would normally apply to a mediated settlement agreement. When the parties have agreed to have their mediated agreement entered by a tribunal as an arbitral award, that can limit the level of judicial review to the deferential FAA standards. However, a reviewing court should consider the nature of the parties' consent before proceeding with these narrow standards for review. It should not rest on a pre-dispute agreement to use a combined process.

Entering a settlement agreement as an arbitral award provides an expedited process under the FAA for enforcing the settlement agreement that is distinct from the normal contract suit for enforcement. This treatment of a settlement agreement is analogous to the summary procedures provided by some states for enforcing settlement agreements by converting them into judgments. In California, for example, parties may stipulate to entry of a judgment pursuant to the terms of a settlement and ask the court to retain jurisdiction over the case to enforce the settlement until performance is complete.¹⁰⁷ This provision was enacted to provide an expeditious means of enforcing a settlement without the need for a separate lawsuit.¹⁰⁸

There are two aspects of this process that should inform how courts treat a settlement entered as an award by consent. First, parties do not stipulate to summary enforcement of litigation settlement in a pre-dispute agreement. They do so only after they have settled the case and determined that they are comfortable with summary

¹⁰³ *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹⁰⁴ *Id.* at 586-88.

¹⁰⁵ *Id.* at 588 (“[I]t makes more sense to see the [FAA’s] three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,’ and bring arbitration theory to grief in post-arbitration process.”) (citation omitted).

¹⁰⁶ *Id.* at 590. See Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009).

¹⁰⁷ CAL. CODE CIV. PRO. § 664.6.

¹⁰⁸ *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 265, 276 (Cal. Ct. App. 1998).

enforcement. They do not consent to waive their contract defenses to the settlement agreement until they can do so knowing that they do not wish to raise them. Similarly, with a consent award, the parties should agree to enter it, or affirm a prior agreement, after the settlement. A pre-dispute agreement to use a combined process that includes arbitration should not be sufficient.

Second, before judgment can be entered based on a settlement, there must be contract formation.¹⁰⁹ If no contract formation has occurred, no judgment can be entered “pursuant to the terms of the settlement.”¹¹⁰ This means that a court can examine the settlement for formation issues. Similarly, with a settlement agreement entered as an award, a reviewing court should consider contract formation issues, subject to applicable confidentiality rules, even though a flaw in contract formation is not an explicit statutory ground to vacate an award under the FAA.

In the absence of direct statutory authorization to use FAA procedures to enforce settlement agreements, the limitations associated with entry of judgment procedures in court should be applied to consent awards.

IV. REVIEW OF ARBITRAL DECISIONS FROM COMBINED PROCESSES

The second posture in which the results of combined processes are reviewed in court is when a party challenges or seeks to enforce an award rendered in the arbitration phase. With an arbitral decision at issue, this review normally proceeds under the FAA. Part A considers review in light of the issues that can arise from a combined process. Part B examines the parties’ ability to structure their own processes and asks whether there should be any limits imposed through judicial review. Part C discusses design remedies for issues arising from same-neutral combinations. It then proposes a framework for review of a party’s consent to a combined process and a party’s waiver of confidentiality and adjudicative process norms.

A. Issues for Review of Combined Processes and Applicable FAA Grounds

Review of an award from the arbitration phase of a combined process generates special issues that stem from the information flows between mediation and arbitration. There may be allegations that confidentiality law has been violated, objections to the dual role of the mediator/arbitrator, claims of adversarial process violations, or claims that raise questions of consent based on confusion about the process. The decided cases on challenges to combined processes provide a survey of the issues that can stem from these hybrids and suggest how the FAA statutory grounds for review are relevant to some of these problems.

Courts that have faced the issue of mediation confidentiality in combined processes have uniformly found that confidentiality rules apply.¹¹¹ In states that have

¹⁰⁹ *Id.* at 268.

¹¹⁰ *Id.*

¹¹¹ *See, e.g.,* Soc’y of Lloyd’s v. Moore, No. 1:06-CV-286, 2006 WL 3167735, *2 (S.D. Ohio Nov. 1, 2006) (holding that Ohio’s Uniform Mediation Act applies to arb-med); Town of Clinton v. Geological Servs. Corp., No. 04-0462A, 2006 WL 3246464 (Mass. Super. Ct. Nov. 8, 2006) (applying Massachusetts’

adopted the Uniform Mediation Act, evidentiary restrictions on admissibility of mediation communications apply in arbitration as well as in court proceedings¹¹² and the prohibition on mediator reports to an authority that may make a decision on the matter likewise applies in both settings.¹¹³ In other states, confidentiality protections vary greatly, but statutes do not make an exception for arbitration.¹¹⁴

One basis to challenge a combined process on confidentiality grounds is the inherent role conflict created when an individual obtains information while serving as a neutral in both processes. For example, a Texas trial court appointed, over a party's objection, the same individual to arbitrate property issues in a divorce proceeding who had previously mediated child custody issues.¹¹⁵ The appellate court vacated this appointment because of the possibility that information from the mediation could affect the arbitration, reasoning that:

A mediator is in the position of receiving the parties' confidential information, which may not be revealed to the court or to any other person. If the mediator is later appointed to be arbitrator between the same parties, he or she is likely to be in the possession of information that either or both of those parties would not have chosen to reveal to an arbitrator. . . . The mediation process encourages candid disclosures, including disclosures of confidential information to a mediator. It is the potential for use of that confidential information that creates the problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or related dispute without the express consent of the parties.¹¹⁶

The objection of a party was a key part of this holding, and this prohibition on a dual role can give way when all the parties consent to the arrangement.¹¹⁷ Some courts have stated a more categorical prohibition, however, on the dual role of mediator and guardian *ad litem*, which includes fact finding.¹¹⁸ Stressing the importance of confidentiality for instilling trust in the mediation process, a New Jersey court held that the "inherent conflict between a mediator's obligation to respect the confidences of the parties and her concomitant responsibility as guardian *ad litem* to serve as an officer of the court in the interest of the children precludes the same individual from serving in both roles."¹¹⁹

mediation privilege to deny request for documents from mediation phase of med-arb); *see generally* Blankley, *supra* note 4.

¹¹² The UMA mediation privileges apply in a "proceeding," which is defined as "a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery;" *see* UNIF. MEDIATION ACT § 2(7)(A).

¹¹³ UNIF. MEDIATION ACT § 7.

¹¹⁴ Blankley, *supra* note 4, at 342-46.

¹¹⁵ *In re Cartwright*, 104 S.W.3d 706, 710 (Tex. Ct. App. 2003).

¹¹⁶ *Id.* at 714.

¹¹⁷ *See* Gaskin v. Gaskin, No. 2-06-039-CV, 2006 WL 2507319 (Tex. Ct. App. Sept. 21, 2006).

¹¹⁸ *See* Isaacson v. Isaacson, 792 A.2d 525 (N.J. Super. Ct. 2001).

¹¹⁹ *Id.* at 535-36. *See also* Bell v. Bell, 2009 WL 2426333 (N.J. Super. Ct. Aug. 10, 2009).

Confidentiality grounds also provide a basis for challenging an arbitral award from a combined process when there is an allegation that the neutral improperly used information he obtained during mediation in his role as arbitrator.¹²⁰ This improper use has included basing an award on the terms of a proposed settlement that the parties rejected in mediation¹²¹ and relying in the award on information obtained in mediation.¹²² The extent of the confidentiality protection can be important to this analysis. In California, for example, the evidence code calls for vacating a decision in a noncriminal proceeding if there has been any reference to mediation during the proceeding that “materially affected the substantial rights of the party requesting relief.”¹²³ This limitation can lead a court to reject a challenge to an award, even when it contains information from a mediation, on the ground in that the information did not materially affect the outcome of the arbitral decision.¹²⁴

Claims of adjudicative process violations in a combined process often concern departures from classic arbitration procedures. Parties have objected to awards rendered on the basis of the information presented in mediation when the arbitrator did not conduct a hearing and failed to take any additional evidence.¹²⁵ They have objected to awards based on ex parte evidence that the arbitrator received during mediation.¹²⁶ They have also argued that the mediator failed to remain neutral when he became an arbitrator.¹²⁷

¹²⁰ Confidentiality can also operate to insulate an award from combined process from attack. During the course of the mediation phase in arb-med, the neutral sent an email stating his opinions about the strengths and weaknesses of the case. The mediation did not lead to settlement and the losing party sought to vacate the arbitral award based on information in the email, arguing that it revealed that the neutral had based the award on matters outside the scope of the agreement. The court struck the email as a confidential mediation communication. *Soc’y of Lloyd’s v. Moore*, No. 1:06-CV-286, 2006 WL 3167735 (S.D. Ohio Nov. 1, 2006).

¹²¹ See *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003) (vacating award for violation of Ohio mediation privilege).

¹²² See *Twp. of Aberdeen v. Patrolmen’s Benevolent Ass’n, Local 163*, 669 A.2d 291, 292-94 (N.J. Super. Ct. App. Div. 1996) (vacating award that cited party’s changing positions and withdrawal of its settlement proposal during mediation); see also *Allied Erecting & Dismantling Co., Inc. v. Qwest Commc’ns Int’l*, No. 08MA212, 2010 WL 4927617 (Ohio Ct. App. Dec. 2, 2010) (rejecting challenge to award brought based on argument that arbitrator’s reliance on information he obtained in mediation violated confidentiality requirements).

¹²³ CAL. EVID. CODE § 1128.

¹²⁴ See *Logan v. Logan*, No. F051606, 2007 WL 2994640 (Cal. Ct. App. Oct. 16, 2007) (affirming confirmation of arbitral award, despite its description of the process by which the parties included a term in their mediated agreement, when the dispute was about the meaning of the term, not its inclusion).

¹²⁵ *Bowers v. Raymond J. Lucia Co., Inc.*, 142 Cal. Rptr. 3d 64, 70 (Cal. Ct. App. 2012) (enforcing award from “binding mediation” without an arbitral hearing); *Wright v. Brockett*, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991) (refusing to enforce award when arbitrator, in violation of statute, did not hear evidence or conduct arbitration hearing).

¹²⁶ *U.S. Steel Mining Co., LLC v. Wilson Downhole Servs.*, No. 02:00CV1758, 2006 WL 2869535, at *5 (W.D. Pa. Oct. 5, 2006) (confirming award despite evidence that the arbitrator relied on evidence presented only during the mediation, when the parties had agreed arbitrator could rely on ex parte evidence); *Estate of McDonald*, No. BP072816, 2007 WL 259872, at *4 (Cal. Ct. App. Jan. 31, 2007) (rejecting challenge to decision in binding mediation brought on the ground that the neutral considered ex parte communications); *Rodriguez v. Harding*, No. 04-0200093CV, 2002 WL 31863766, at *4 (Tex. Ct. App. Dec. 24, 2002) (rejecting challenge to med-arb award brought on the ground that the neutral engaged in ex parte contact with the parties prior to arbitration).

¹²⁷ *Estate of McDonald*, No. BP072816, 2007 WL 259872, at *5 (Cal. Ct. App. Jan. 31, 2007) (rejecting challenge to decision in binding mediation brought on the ground that the mediator failed to

Process concerns seem especially likely when elements of arbitration and mediation are blended without a clear delineation. In one arbitration, the neutrals asked a party what it would offer as a fair resolution to the dispute and then entered this amount as the award.¹²⁸ The court condemned this “apparent attempt to reach a diplomatic result” as the type of inquiry that is acceptable in mediation, but not in arbitration.¹²⁹ This approach fell outside the acceptable norms for arbitration; according to the court, it resulted in evidence that was prejudicial and irrelevant and represented an impermissible delegation of the arbitrators’ duty to adjudicate that exceeded their powers.¹³⁰ Another example of a process that blended elements of mediation and arbitration comes from a med-arb process that called for Christian reconciliation between the parties.¹³¹ After mediation failed, the arbitrators divided the property rather than determining whether the parties’ contract for sale was binding. The award may have been consistent with the Christian reconciliation principles appropriate in mediation, but was inconsistent with the arbitration agreement.¹³²

A process may also blend elements because of a vague transition between mediation and arbitration. One party objected to an award on process grounds when the process underwent a “gradual transformation from mediation to arbitration,” which was conducted without a hearing, so that the party purportedly believed it was still participating in mediation.¹³³ A problematic transition can also happen when the parties reach an agreement in mediation that is incomplete or needs formalization. At this point, parties sometimes vest authority in the mediator to resolve disputes that arise in the implementation of the settlement. Confusion can result when the parties’ agreement is not clear about the extent to which this process is binding, leading to lack of consent for the outcome.¹³⁴

Normal deferential FAA review is not tailored to address these issues, although the statute does provide grounds that are relevant for analyzing some of the issues that can accompany a combined process. Section 10(3), which authorizes a court to vacate an award for misbehavior by which the rights of any party have been prejudiced, would seem applicable if a party can show that an arbitrator relied on *ex parte* evidence from mediation that the party was unable to counter in the arbitration phase. Section 10(4)

remain neutral in the adjudication role); *see also* Zhuang-Hui Wu, *Enforcement of an Arbitral Award Rendered Following Arb-Med Proceedings*, 27 MEALEY’S INT’L ARB. RPT. 1, 4 (Jan. 2012) (discussing the Hong Kong *Keeneye Holdings* case in which the court upheld enforcement of an award despite allegations of apparent bias of the arbitrator based on actions during the “mediation” phase of a combined process).

¹²⁸ Trimble v. Graves, 947 N.E.2d 885, 889 (Ill. Ct. App. 2011) (vacating award).

¹²⁹ *Id.*

¹³⁰ *Id.* at 889-93.

¹³¹ Aamot v. Eneboe, 352 N.W.2d 647, 648-49 (S.D. 1984) (vacating award).

¹³² *Id.* at 649-50. The trial court found the process was also flawed because the parties presented their case in a hearing at which the arbitrators did not allow them to be represented by counsel or to engage in cross-examination, *id.* at 650.

¹³³ Hallam v. Fallon, No. H023424, 2003 WL 21143014, at *10 (Cal. Ct. App. May 16, 2003) (confirming arbitral award when transformation from mediation to arbitration was proposed by party that later objected).

¹³⁴ Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 848-49 (Cal. Ct. App. 2006) (refusing to enforce “binding mediation ruling” when parties did not agree what that meant); Weddington Prods., Inc. v. Flick, 71 Cal. Rptr. 265, 267-68 (Cal. Ct. App. 1998) (refusing to enforce an order resulting from a process one party regarded as a continuation of mediation but which the other party and the neutral regarded as binding).

allows a court to vacate an award if it finds that the arbitrators exceeded the powers granted to them by the parties. Courts have analyzed claims using this ground when the arbitrators took a mediation-type approach that the parties had not authorized¹³⁵ or based their award on information from the settlement phase of a combined process.¹³⁶ Consent problems that arise either because the parties did not understand the consequences of a combined process or because the nature of the process was not clear could, at least in theory, also place the arbitrators' actions beyond their granted authority. The FAA is not, however, particularly well-suited to dealing with confidentiality violations or the absence of consent to a summary process based on ambiguity about the contours of the process.

B. The Role of Party Consent

Consent by the parties to use a combined process is a key factor in judicial review. The parties' expectations are a central emphasis in review of a process that takes its authority from the parties' agreement,¹³⁷ and the parties' ability to structure arbitration procedures is well accepted.¹³⁸ Parties can waive a hearing and cross-examination in arbitration¹³⁹ and even cede control entirely by granting the arbitrator authority over procedural decisions. Mediation is also a process that prominently values party autonomy and parties can usually waive their confidentiality privilege.¹⁴⁰ Indeed, courts have held that although the neutral's dual role in a combined process is controversial enough to disallow med-arb when a party objects, it becomes completely acceptable with party consent.¹⁴¹ A consent requirement is also the norm in the national laws that authorize combinations of mediation and arbitration in private dispute resolution.¹⁴²

¹³⁵ Trimble v. Graves, 947 N.E.2d 885, 890 (Ill. Ct. App. 2011); Aamot v. Eneboe, 352 N.W.2d 647, 649 (S.D. 1984).

¹³⁶ See Bowden v. Weickert, No. S-02-017, 2003 WL 21419175, at *7 (Ohio Ct. App. June 20, 2003).

¹³⁷ See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (“Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.”).

¹³⁸ See Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 586 (2008) (“[T]he FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.”); see also UNCITRAL Model Law art. 19 (“Subject to the provisions of the Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

¹³⁹ See AMF, Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (noting that “submission of evidence, witnesses and cross-examination are not essential elements of arbitration”).

¹⁴⁰ UNIF. MEDIATION ACT § 5. Statutes in states that have not adopted the UMA may also provide for waiver. Blankley, *supra* note 4, at 342-45. But not all statutes do so. See Town of Clinton v. Geological Servs. Corp., No. 04-0462A, 2006 WL 3246464, at *2-3 (Mass. Super. Nov. 8, 2006) (concluding that the Massachusetts mediation privilege does not contain an exception for waiver).

¹⁴¹ See, e.g., *In re Provine*, 321 S.W.3d 824, 830 (Tex. Ct. App. 2009); *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. Ct. App. Sept. 21, 2006); see also *Conkle & Olesten v. Goodrich, Goodyear & Hinds*, No. G033972, 2006 WL 3095964 (Cal. Ct. App. Nov. 1, 2006) (rejecting motion to set aside an award on the ground that the arbitrator had previously mediated a related case when the parties had waived disclosures of conflict of interest by the neutral). In contrast, the guardian ad litem situation, in which some courts have flatly prohibited a dual role, see *supra* notes 118-119 and accompanying text, is not a fully private dispute resolution process because the guardian is an officer of the court who is appointed to protect the best interests of the child.

¹⁴² See Alberta Arbitration Act § 35 (1991, amended 2007), available at <http://www.qp.alberta.ca/documents/Acts/A43.pdf>; Australia New South Wales Commercial Arbitration Act § 27 (1984, amended

Some courts have made broad statements about the effect of an agreement to engage in a combined process. For example, one court asserted that by signing a stipulation for med-arb a party “waive[s] any due process rights attendant on the mediation and arbitration.”¹⁴³ This begs the questions whether there are any limits to waiver, and what standards a reviewing court should use to find that the parties did waive their rights by consenting to use a combined process.

The Uniform Mediation Act does not contemplate that the parties can waive its prohibition on mediator reports to a decision-maker. While the parties can agree in a particular instance to waive the Act’s privilege,¹⁴⁴ or even agree in advance that the privilege is not applicable to their mediation,¹⁴⁵ the Act’s prohibition on a mediator providing information to the decision-maker is phrased as mandatory law, not a default rule that the parties can alter.¹⁴⁶ This includes the requirement that if a decision-maker does obtain information about communications made during a mediation, she is not to consider it in making her decision.¹⁴⁷

Similarly, in statutes such as the UNCITRAL Model Law that guarantee the parties’ right to equal treatment and an opportunity to present their case, the provision is not written as a default that can be altered by the parties.¹⁴⁸ In the United States, the FAA is silent on this score, but courts have emphasized the essential nature of “an opportunity for each side to present its case.”¹⁴⁹ In a different context, the French Cour de cassation has established limits on the extent to which parties can waive their basic procedural rights in advance of arbitration, holding that such a waiver may not be implemented unless all parties confirm their earlier agreement after the dispute arises.¹⁵⁰ The process

2005), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/caa2010219/; Belarus International Arbitration Court Law, *supra* note 47, art. 18; Bermuda International and Conciliation Act, § 10; British Columbia International Commercial Arbitration Act § 30(1) (amended 1988), available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96233_01; Hong Kong Arbitration Ordinance § 33(Cap 69 2011), available at http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075?OpenDocument&bt=0; India Arbitration and Conciliation Act §§ 30(1), 80 (1996), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=207822; Japan Arbitration Law art. 38(4) (2003); Nova Scotia Commercial Arbitration Act § 38 (1999), available at <http://nslegislature.ca/legc/statutes/comarbit.htm>; Singapore Arbitration Act § 63 (2002 as amended), available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=0fa3b67d-2786-4479-a1d6-5d38094162ee;page=0;query=CompId%3Ad806f86c-be56-471b-b418-bdfa342deb3c;rec=0#pr63-he->. See also UNCITRAL Model Law on International Commercial Conciliation art. 12 (2002) (including a default rule prohibiting the combination that parties may alter by agreement), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

¹⁴³ Peterson v. Peterson, No. 99-P-366, 2002 WL 518481, at *1 (Mass. Ct. App. Apr. 5, 2002).

¹⁴⁴ UNIF. MEDIATION ACT § 5.

¹⁴⁵ *Id.* at § 3.

¹⁴⁶ *Id.* at § 7.

¹⁴⁷ *Id.* at § 7(c).

¹⁴⁸ See *supra* note 43 and accompanying text.

¹⁴⁹ Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 7 (1st Cir. 2004).

¹⁵⁰ Sociétés BKM et Seimens v. Société Dutco, Cour de cassation, Judgment of Jan. 7, 1992, 1992 REV. ARB. 470, 18 Y.B. COM. ARB. 140 (1993) (English translation). The parties’ pre-dispute arbitration agreement set out a procedure for selecting an arbitral tribunal that did not ensure the equality of the parties in a multi-party dispute. See Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multi-Party Arbitration: An Update on the Governing Provisions*, 27 J. INT’L

concerns implicated by combinations of mediation and arbitration – potential coercion to agree in mediation, impairment of mediation confidentiality, decision-making based on ex parte contacts, and compromised impartiality¹⁵¹ – may justify a similar limitation on parties’ discretion to waive basic rights in designing their own dispute resolution process.

Given the flexibility accorded to parties to design their own settlement processes,¹⁵² however, it seems undesirable to strictly prohibit waiver of confidentiality and equality principles. A departure from the letter of the law to allow such waivers may be justified in the case of combined processes because they are neither mediation nor arbitration. Nonetheless, because such waivers take the process outside the classic definition of arbitration, deferential FAA review should not necessarily apply.¹⁵³

Courts vary greatly in the extent to which they examine the parties’ consent to use med-arb and in their willingness to find a waiver that accepts procedures with process risks. At one end of the spectrum, some courts are quick to find waiver and are not sympathetic to claims that same-neutral combined processes justify special scrutiny of consent.¹⁵⁴ This attitude is illustrated by a decision easily rejecting a claim that a mediator-turned-arbitrator who relied on information he obtained in the mediation process had violated the state’s mediation confidentiality provisions,¹⁵⁵ which instruct a decision-maker not to consider reports on the content of mediation.¹⁵⁶ The court simply observed, “it appears that the parties chose [the mediator] to arbitrate any future issues due to his familiarity with the facts of the case” and found that consequently he could not have violated the mediation act.¹⁵⁷ Thus the parties’ designation of the mediator to resolve issues relating to the interpretation of their settlement agreement was enough to waive their confidentiality protections.

In contrast, other courts have set forth more thorough requirements for the parties’ agreement to use a combined process.¹⁵⁸ In the face of undisputed claims that the arbitrator relied on information he had gained in mediation in rendering his award, the court in *Bowden v. Weickert* cited “the confidential nature of mediation and the high degree of deference enjoyed by an arbitrator” as reasons why it is essential that the parties reach an agreement on med-arb ground rules at the outset.¹⁵⁹ It required that the

ARB. 9, 10-11 (2010).

¹⁵¹ See *supra* Parts II. C. & D.

¹⁵² See Richard Chernick & Kimberly Taylor, *Ethical Issues Specific to Arbitration, in DISPUTE RESOLUTION ETHICS – A COMPREHENSIVE GUIDE* 201 (Brian Garth & Phyllis Bernard, eds. 2002) (“If one adopts the view that the parties should be permitted to craft their own process, there should be no prohibition against a neutral acting as a mediator and arbitrator in the same case notwithstanding the potential risks, so long as there is a full understanding of those risks.”).

¹⁵³ See *supra* notes 92-99 and accompanying text.

¹⁵⁴ See, e.g., *Tech. Capital, LLC v. Richard*, No. 08-442-P-H, 2009 WL 1163498, at *6 n.5 (D. Me. April 15, 2009) (dismissing argument that a process using the mediator as arbitrator requires a special demonstration of consent because the neutral’s rulings on arbitrability will raise ethical issues and make the decision vulnerable on appeal).

¹⁵⁵ See *Allied Erecting & Dismantling Co., Inc. v. Qwest Commc’ns Int’l*, No. 08MA212, 2010 WL 4927617 (Ohio Ct. App. Dec. 2, 2010).

¹⁵⁶ UNIF. MEDIATION ACT § 7.

¹⁵⁷ *Qwest Commc’ns*, 2010 WL 4927617, at *5.

¹⁵⁸ See also *Wright v. Brockett*, 571 N.Y.S.2d 660, 666 (N.Y. Sup. Ct. 1991) (urging rules for med-arb that “insure that there is a legally sufficient written ‘plain language’ consent by the parties both to the arbitration of the dispute and the specific procedures to be employed”).

¹⁵⁹ *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175, at *6 (Ohio Ct. App. June 20, 2003).

record must contain “clear evidence” that the parties had agreed to med-arb with the same neutral. In addition, the court stated that the record must also contain:

(1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to a arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process by [the Ohio Uniform Mediation Act] in the event that their disputes are later arbitrated.¹⁶⁰

Without an agreement that met these standards, the court held that the arbitrator had exceeded his powers by using a failed settlement proposal as the basis for his award.¹⁶¹

The court in *Lindsay v. Lewandowski* also stressed the need for an explicit agreement in order to use a binding process following mediation. If they desire, the parties may agree that the same person may act as mediator and then arbitrator. But the court added that the agreement would also need to specify whether or not the arbitrator could consider facts presented to him during the mediation.¹⁶² A concurring opinion cited with approval the requirements for combining mediation with other processes in the California Rule of Court on quality of the mediation process in court-connected mediation for civil cases.¹⁶³ This rule requires informed consent, specifies that the mediator must inform the parties of the consequences of revealing information in one process that might be used for a decision in another process, and mandates an opportunity for the parties to select another neutral to conduct the subsequent process.¹⁶⁴ These courts’ requirements for consent should inform the development of a standard of review for combined processes.

C. Protecting Process Rights through Design and Consent

When a party agrees to arbitration, it “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”¹⁶⁵ This does not mean, however, that when a party agrees to a combined process it

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *7.

¹⁶² *Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846, 850 (Cal. Ct. App. 2006).

¹⁶³ *Id.* at 853 (Sills, P.J., concurring).

¹⁶⁴ CAL. RULE OF COURT 3.857(g) provides:

(g) Combining mediation with other ADR processes

A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

¹⁶⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

necessarily gives up the fundamental process rights of equal treatment and an opportunity to be heard that are associated with arbitration as well as litigation. Nor does an agreement to use a combined process necessarily surrender the confidentiality rights associated with mediation. The combined process can be designed to minimize, and to some extent avoid, these problems, although these solutions often come with the price of decreased efficiency. Alternatively, parties can waive their rights, but in this situation courts should ensure that this waiver was both knowing and voluntary.

The most straightforward way to design a combined process that avoids the problems is to employ separate neutrals. There are ways to do this that retain at least some of the practical advantages of a same-neutral design. For a mediation windows process that can take place in the midst of arbitration,¹⁶⁶ a separate neutral can serve as a “stand-by mediator” who observes the arbitration and reads the briefs. This neutral is then already educated about the dispute in case the parties want to attempt mediation. By integrating the two processes to this degree, the design improves efficiency over two separate processes involving different neutrals.¹⁶⁷ With a panel of three arbitrators, some separation between neutral functions can be achieved if the two party-appointed arbitrators take on the role of co-mediators, excluding the presiding arbitrator from the mediation process. Then if there is no settlement the arbitral decision is left to the presiding arbitrator who has not heard any confidential communications during mediation.¹⁶⁸

Another way to retain an opportunity for the parties to settle the case in mediation without information flowing into arbitration is to use the arb-med process. Although, as noted, this design eliminates the cost savings associated with a med-arb settlement because the parties must incur the expense of the arbitration in any event,¹⁶⁹ it does offer the advantage of finality if mediation fails, with the lesser expense of only one neutral.

It is also possible to conduct the mediation without using caucuses.¹⁷⁰ While the mediator may still learn things that are irrelevant or prejudicial to the arbitration, at least all the parties would be aware of these communications, and would have an opportunity to respond. This no-caucus approach is consistent with the recommendations of the CEDR Commission on Settlement in International Arbitration, which reviewed settlement practices and drafted rules and guidelines designed to promote improvements.¹⁷¹ The rules developed by the Commission provide that an arbitral tribunal shall not “meet with any Party without all other Parties being present; or obtain information from any Party which is not shared with other Parties.”¹⁷²

¹⁶⁶ See *supra* text accompanying notes 15-18.

¹⁶⁷ BÜHRING-UHLE ET AL., *supra* note 9, at 261.

¹⁶⁸ Collins, *supra* note 42, at 342; Sussman, *supra* note 1, at 71.

¹⁶⁹ See *supra* notes 11-14 and accompanying text.

¹⁷⁰ The “understanding” model of mediation employs only joint sessions involving all the parties and the mediator. See GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008).

¹⁷¹ CEDR Commission on Settlement in International Arbitration, Final Report ¶ 1.5, at 1 [hereinafter CEDR Report], available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf.

¹⁷² CEDR Rules for the Facilitation of Settlement in International Arbitration, Art. 5 (2), CEDR Report, *id.* at App. 1. These rules are not binding unless the parties adopt them. If the parties wish to employ a same-neutral process with private meetings, the Commission recommends steps to minimize the risk that the award will not be enforced. See Safeguards for Arbitrators who Use Private Meetings with

If the parties want separate meetings, however, their effect on adjudicatory norms can be minimized using the approach of the Hong Kong Arbitration Ordinance, which permits an arbitrator to serve as a mediator with the parties' written authorization. If the neutral obtains any confidential information during mediation and the case does not settle, before resuming arbitration he must disclose to all the parties "as much of that information as the arbitrator considers is material to the arbitral proceedings."¹⁷³

Absent a protective design for a combined process, the parties may alternatively waive their rights. But the nature of the combined process they have agreed to use, and the extent of their waiver, must be clear.¹⁷⁴ This is important not only to protect the rights of the parties, but to ensure enforcement of a resulting award.¹⁷⁵ Courts undertaking review of such waivers should not be bound by the deferential standards of the FAA because, as argued above, if valid, the waiver of a fundamental aspect of arbitration should remove it from the scope of the FAA's coverage of "arbitration."¹⁷⁶

The following proposal for standards for consent is drawn from the court decisions that have carefully considered the appropriate conditions for waiver and from the recommendations of the CEDR Commission on Settlement in International Arbitration.¹⁷⁷ First, consent should be contained in a written agreement signed by the parties. This is consistent with the FAA's writing requirement for an enforceable arbitration agreement¹⁷⁸ and with the Uniform Mediation Act's writing requirement for waivers of the mediation privilege.¹⁷⁹

Second, the consent should include a clear definition of the processes that the parties will use in mediation and in presenting their cases to the decision-maker. In order to dispense with a hearing or other submission of evidence in the arbitration phase, the agreement needs to specifically authorize the arbitrator to rely on information presented during the mediation.¹⁸⁰ In states where a confidentiality statute provides a mediation

each Party as a Means of Facilitating Settlement, CEDR Report, *id.* at App. 2 [hereinafter CEDR Safeguards].

¹⁷³ Hong Kong Arbitration Ordinance § 33(Cap 69 2011), *available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075?OpenDocument&bt=0; *see also* Singapore Arbitration Act § 63 (2002 as amended), *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=0fa3b67d-2786-4479-a1d6-5d38094162ee;page=0;query=CompId%3Ad806f86c-be56-471b-b418-bdfa342deb3c;rec=0#pr63-he->

¹⁷⁴ *See, e.g.,* Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 853 (Cal. Ct. App. 2006) (concurring opinion) ("The key to approval of such agreement is clarity of language and informed consent."). Both academic and practitioner commentators agree wholeheartedly. Blankley, *supra* note 4, at 365-66; Brewer & Mills, *supra* note 2, at 36; Phillips, *supra* note 3, at 31; Sussman, *supra* note 1, at 73.

¹⁷⁵ CEDR Report, *supra* note 171, at ¶ 2.4.3 (expressing the risk of a successful challenge to an award as a central concern in using a same-neutral process).

¹⁷⁶ *See supra* note 152-153 and accompanying text.

¹⁷⁷ *See also* Abramson, *supra* note 10, at 7-15 (proposing protocol for arbitrators settling cases); Blankley, *supra* note 4, at 361-66 (discussing confidentiality terms in stipulation and waiver); Brewer & Mills, *supra* note 2, at 36-36 (recommending steps to ensure consent and proposing elements of an agreement on a specific protocol); Phillips, *supra* note 3, at 31 (providing example of stipulation and waiver).

¹⁷⁸ 9 U.S.C. § 2 (2006).

¹⁷⁹ UNIF. MEDIATION ACT § 5.

¹⁸⁰ Bowden v. Weickert, No. S-02-017, 2003 WL 21419175, at *6 (Ohio Ct. App. June 20, 2003) (requiring a "written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator"); Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 850 (Cal. Ct. App. 2006) (requiring the

privilege or prohibits a decision-maker from relying on communications made in mediation, the parties need to satisfy the statutory standards for waiving the confidentiality requirements.¹⁸¹ With regard to the mediation process, the agreement should specify whether ex parte contacts are permitted and, if they are, how the neutral is to handle information gathered during caucuses. This may include a requirement that the neutral disclose information learned in confidence in the mediation.¹⁸²

Third, if the agreement was made before the dispute arose or before the mediation phase of the combined process, it should be affirmed by the parties before proceeding (or returning) to arbitration.¹⁸³ Consent given after the mediation phase is “particularly important because it is given in the knowledge of developments during the mediation.”¹⁸⁴ Without an option to select a new neutral at this stage, a party may argue that its consent was not given on a fully informed basis in that it was not aware the neutral would learn of matters that were discussed in the mediation.¹⁸⁵

It is important that the parties understand the full implications of their consent to use the same neutral and to the procedures they have selected.¹⁸⁶ They need to appreciate that the neutral’s functions during the mediation phase are inconsistent with expectations for an arbitrator’s behavior and that the mediator is likely to learn information that would otherwise be confidential and that might influence her later judgment as an arbitrator.¹⁸⁷

There may be situations in which a reviewing court can relax these requirements.¹⁸⁸ If, for example, both parties are repeat players using a combined process that is familiar and predictable, perhaps consent may be presumed from the circumstances. One example might be the resolution of disputes between a labor union and a public employer using a combination of mediation and interest arbitration. The parties are institutional players who engage in this process repeatedly under state law and can be expected to be familiar with the risks of the combination.¹⁸⁹ These circumstances can be consistent with a knowing and voluntary waiver.

agreement to specify whether the arbitrator may consider facts presented to him in mediation).

¹⁸¹ *Bowden*, 2003 WL 29419175, at *6.

¹⁸² CEDR Safeguards, *supra* note 172, at ¶ 7.1, 7.4.

¹⁸³ *Cf.* Mohamed Faizal Mohamed Abdul Kadir, *Reflections on the Council for Private Education Mediation-Arbitration Scheme*, 2012 ASIAN J. ON MEDIATION 54, 56 (2012) (describing med-arb process for students and private education institutes in which the student can elect arbitration if mediation is unsuccessful).

¹⁸⁴ CEDR Safeguards, *supra* note 172, at ¶ 7.3.

¹⁸⁵ *Id.* at ¶ 5; *see also* CAL. RULE OF COURT 3.857(g) (providing that when mediation is combined with another ADR process the parties must have “the opportunity to select another neutral for the subsequent process”), *cited in Lindsay*, 43 Cal. Repr. 3d, at 853 (Spills, P.J., concurring).

¹⁸⁶ *Brewer & Mills*, *supra* note 2, at 36 (stressing the need for understanding both the advantages and disadvantages of med-arb and the importance of counseling clients); *Collins*, *supra* note 42, at 341.

¹⁸⁷ CEDR Safeguards, *supra* note 172, at ¶¶ 4, 6 (recommending the tribunal explain these risks); CAL. RULE OF COURT 3.857(g) (requiring mediator to inform the parties of “the consequences of revealing information during any one process that might be used for decision making in another process”).

¹⁸⁸ *Cf.* Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (arguing for different regulatory treatment of traditional arbitration between repeat players versus arbitration that is imposed on one-shot players such as employees and consumers).

¹⁸⁹ The use of a same-neutral combination may also be supported by policy considerations. *See* Martin H. Malin, *Two Models of Interest Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 145, 168-69 (2013) (arguing that mediation and limited judicial review are important to the interest arbitration used for public labor disputes because they make the process more of an extension of the collective bargaining process than an adjudicative determination, and thus encourage settlement).

In other settings, even a knowing and voluntary waiver may not be enough. Some courts have categorically prohibited a guardian *ad litem* from serving as a mediator. The guardian's role includes factfinding, which is akin to making an arbitral decision, but the situation is distinguished from ordinary arbitration by the role of the guardian as an officer of the court who advises the judge on the interests of the children.¹⁹⁰ This moves the process from the realm of private agreement, where waiver can be acceptable, into the realm of public adjudication, with implications for the integrity of the judicial process.

In any circumstance, however, courts should proceed cautiously in assuming that the indicia of a knowing and voluntary agreement are not necessary for a sophisticated party or for a party represented by an attorney. While it is particularly important for a reviewing court to satisfy itself that the parties knowingly waived their rights when the process involves less sophisticated one-shot parties or when there is an imbalance of power,¹⁹¹ combined processes are new and there are many variations. Courts should not presume that parties and their counsel are familiar with these processes or with the risks they pose. It is telling that the CEDR Commission recommends informing the parties of the risks and suggests that they enter a detailed agreement even in the context of international commercial arbitration, which can be assumed frequently to involve sophisticated parties.

V. CONCLUSION

A process that combines mediation and arbitration can be an efficient and attractive means of settling a dispute, but it also carries certain risks. Party consent to bear those risks and waiver of procedural rights should be respected. That consent, however, should be knowing and voluntary, both for an agreement to use the FAA's expedited and deferential review for a settlement agreement and for an agreement to accept the effects on the process of engaging in mediation with the same neutral prior to arbitration. By simply agreeing to combine mediation and arbitration, parties should not be deemed to have given up the rights associated with these two processes as separate and distinct methods of dispute resolution.

¹⁹⁰ See *supra* notes 118-119 and accompanying text.

¹⁹¹ Cf. Kirgis, *supra* note 71, at 118-19 (proposing a modestly heightened standard of review for errors of law when an exculpatory agreement to waive legal rights would violate contract law, including situations with an imbalance of power in which the weaker party is not likely to understand the rights it is waiving).