

THE ARBITRATOR
AS A *SETTLEMENT FACILITATOR*

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I. – INTRODUCTION

Arbitration is a dispute resolution mechanism geared towards resolving disputes through binding decisions imposed upon parties. The arbitrator's primary mission is to conduct fair and efficient proceedings and to render a final award that resolves the dispute at issue. An arbitrator is not specifically appointed to assist the parties in settling their dispute – this is what distinguishes arbitration from other forms of ADR such as mediation or conciliation.

Should an arbitrator's role be seen broadly in the sense that his role to resolve the dispute encompasses not only the decision-making itself, but also a proactive promotion of settlement negotiations throughout the proceedings? Is this dual role best practice or *faux pas*?¹ What is the appropriate degree of direct involvement when assisting the parties in resolving their dispute by way of settlement? What are the ground rules for such a hands-on approach to settlement?

There are no straightforward answers to these questions. Views diverge, depending on the legal background of the participants in the arbitration. Finding the right answer becomes all the more complex in an international context where cultural differences between the arbitrators, parties and counsel exist. Nonetheless, recent developments indicate that a transnational standard may be emerging to bridge many of the existing differences.

II. – HISTORICAL CIVIL LAW – COMMON LAW DICHOTOMY

Based on varying practices and traditions in diverse legal cultures, the perceived role of the arbitrator ranges from absolute approval to unconditional rejection of the arbitrator's encouragement of settlement negotiations.² In general, while most civil law legal systems have traditionally considered it a primary duty of judges and arbitrators to

¹Renate DENDORFER, "Aktives Vergleichsmanagement – Best Practice oder Faux pas schiedsrichterlicher Tätigkeit?", *SchiedsVZ*, 2009, p. 276.

²Michael E. SCHNEIDER, "Combining Arbitration with Conciliation", *Transnational Dispute Management*, Vol. I, Issue 1, February 2004 (ICCA Seoul Arbitration Conference 1996), p. 2.

promote settlement, their common law counterparts have not been allowed to be actively involved in settlement facilitation, or at least have not dared to actively contribute to the amicable settlement of the dispute out of fear of being perceived as impartial if the settlement effort fails.

II.1. *Arbitral practice in civil law jurisdictions*

Under the “inquisitorial” legal traditions of Continental Europe, where judges or arbitrators actively lead the parties throughout the proceedings, there is a general consensus that settlement facilitation is not only compatible with an arbitrator’s role, but is a desirable part of it, a “noble obligation”.³ It is a widely used and successful approach: a majority of domestic arbitrations settle.⁴

In certain civil law countries, the parties and their lawyers clearly expect that the arbitrator will at some stage in the procedure – *ex officio* – express a preliminary but clear view on the merits of the case and explicitly encourage an amicable settlement.⁵

This is often referred to as the “German approach”. German law has a long tradition of judges and arbitrators proactively assisting the parties in negotiating and reaching a settlement during the proceedings. Under Sec. 278(1) of the German Civil Procedure Code the German judge is expected, throughout the proceedings, to look out for opportunities for an amicable settlement of the dispute or any of the contentious issues.⁶ Hearings are generally preceded by a conciliation hearing (*Güteverhandlung*), at which the judge discusses the case with the parties and at which representatives of the parties themselves shall be present.⁷

³ Daniele FAVALLI and Max K. HASENCLEVER, “The Role of Arbitrators in Settlement Proceedings”, 23, *Mealey’s International Arbitration Report* 7 (Lexis Nexis, 2008), p. 2.

⁴ Werner WENGER, “The Role of the Arbitrator in Bringing about a Settlement – A Swiss Perspective”, in Markus WIRTH (ed.), *Best Practices In International Arbitration*, ASA Special Series No. 26, July 2006, p. 143; Karl-Heinz BÖCKSTIEGEL, “Past, Present, and Future Perspectives of Arbitration”, (2009) 75 *Arbitration* 2, p. 185; Fritz NICKLISCH, *Schiedsgerichtsverfahren mit integrierter Schlichtung*, *Recht der Internationalen Wirtschaft (RIW)*, 1998, p. 169 *et seq.*; Hilmar RAESCHKE-KESSLER, “The Arbitrator as Settlement Facilitator”, 21 *Arbitration International* 4 (2005), p. 535; SCHÜTZE/TSCHERNING/WAIS, *Handbuch des Schiedsverfahrens*, 2nd ed. (de Gruyter, 1990), p. 109; *see also e.g.* Carlos NEHRING NETTO, “The Brazilian Approach to Arbitrator’s as Settlement Facilitators”, in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 585.

⁵ Karl-Heinz BÖCKSTIEGEL, *op. cit.*, p. 185; Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 525.

⁶ John H. LANGBEIN, “The German advantage in civil procedure”, (1985) 52(4) *University of Chicago Law Review*, p. 823, 824.

⁷ Sec. 278(2) German Civil Procedure Code (ZPO).

By the same token, German arbitrators traditionally encourage settlement. Section 32.1 of the 1998 Arbitration Rules of the German Institution of Arbitration (DIS) states: "At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute." Moreover, according to Section 5.3 of the 2008 DIS Supplementary Rules for Expedited Proceedings (SREP), the arbitral tribunal "should at the earliest possible stage of the proceedings identify to the parties and as a rule after each round of written submissions, the issues it may regard as relevant and material for the outcome of the case."

The same approach is followed in Austria. According to Sec. 204(1) of the Austrian Code of Civil Procedure, a judge – and, by analogy, an arbitrator – may upon request or *ex officio* attempt to reach a settlement at the first hearing.⁸

The situation in Switzerland is very similar,⁹ particularly in the Canton of Zurich where it is a natural part of the judge's and arbitrator's role to enquire whether the parties wish to hear a preliminary, without prejudice, assessment of the case (*Referentenaudienz*).¹⁰ Pursuant to the Swiss Civil Procedure Code, which will enter into force on 1 January 2011 and bring about the unification of the 26 different civil procedure laws of all the cantons, the judge may at all times attempt to encourage a settlement.¹¹

In Germany, Austria and Switzerland, the arbitrator's obligation to promote and facilitate settlement negotiations is in principle considered to be both in the public¹² and private interest of the parties concerned.¹³ This obligation, however, should be understood as an addi-

⁸ Alexander PETSCHÉ and Martin PLATTE, "Chapter II: The Arbitrator – The Arbitrator as Dispute Settlement Facilitator", in Christian KLAUSEGGER, Peter KLEIN et al. (eds.), *Austrian Arbitration Yearbook 2007*, p. 89.

⁹ Pierre LALIVE, "The Role of Arbitrators as Settlement Facilitators – A Swiss View", in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 556-564; Werner WENGER, *op. cit.*, p. 139-153.

¹⁰ See ZPO Zurich, Sec. 62 and 118(1).

¹¹ Sec. 124 and 226 Swiss Civil Procedure Code.

¹² See in particular Renate DENDORFER, *op. cit.*, p. 276 and Fritz NICKLISCH, *op. cit.*, p. 172.

¹³ Arthur L. MARRIOTT, "Arbitrators and Settlement", in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 (Beijing, 2005), p. 533, 537; BÜHRING-UHLE et al., "The Arbitrator as Mediator: Some Recent Empirical Insights", (2003) *Journal of International Arbitration*, p. 82.

tional task – it is not the tribunal’s main remit to ensure that the parties settle the dispute.¹⁴

The “German approach” to facilitating settlement is not mediation (nor Arb-Med or Med-Arb), but a *sui generis* method of proactive “managerial judging”.¹⁵ Caucusing or meeting the parties separately is almost never practiced.¹⁶ Moreover, the arbitrator’s expression of a preliminary view on the merits of the case and the suggestion of a possible settlement does not constitute bias or pre-judgment and thus does not disqualify an arbitrator from continuing to serve should the attempt at settlement be unsuccessful.¹⁷ To be on the safe side, arbitrators generally expressly reserve their right to reconsider their position in light of new evidence.¹⁸

In France, conciliation is expressly mentioned as one of the functions of the judge and arbitrator (Article 21 Code of Civil Procedure, which is applicable to arbitration pursuant to Article 1460). In practice, however, French arbitrators are hesitant to promote an amicable settlement without the parties’ express consent.¹⁹

Similar to the “German approach” is the practice of arbitrators in several East Asian countries, where a cultural preference for settling disputes predominates. Many commentators have written about the practice of Chinese arbitrators who – without being obliged to do so by law – systematically ask the parties whether they need assistance in attempting to reach a settlement.²⁰ Article 40 of the CIETAC Arbitra-

¹⁴ Siegfried ELSING, in *Arbitration in Germany – The Model Law in Practice*, BÖCKSTIEGEL/KRÖLL/NACIMIENTO (eds.), Kluwer Law 2007, p. 767; see also Michael COLLINS, “Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them”, *Arbitration International*, Vol. 19 Issue 3, p. 334, *op. cit.*, p. 343.

¹⁵ Jacob ROSOFF, “Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings”, *Journal of International Arbitration* 2009, Vol. 26, Issue 1, p. 89; Matthias M. PITKOWITZ and Marie-Therese RICHTER, “May a Neutral Third Person Serve as Arbitrator and Mediator in the same Dispute?”, *SchiedsVZ*, 2009, p. 225 *et seq.*

¹⁶ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 535.

¹⁷ Teresa GIOVANNINI, “Chapter 21 – The Continental European Perspective and Practice of Advocacy”, in Doak BISHOP and Edward G. KEHOE (eds.), *The Art of Advocacy in International Arbitration*, 2nd ed., JurisNet, 2010, p. 515-516.

¹⁸ Werner WENGER, *op. cit.*, p. 149.

¹⁹ See Gabrielle KAUFMANN-KOHLER, “When Arbitrators facilitate settlement: Towards a Transnational Standard”, 25 *Arbitration International* 2 (2009), p. 190.

²⁰ See in particular Johannes TRAPPE, “Conciliation in the Far East”, *Arbitration International* 1989, Vol. 5 Issue 2, p. 176 *et seq.*; Gabrielle KAUFMANN-KOHLER and Fan KUN, “Integrating Mediation into Arbitration: Why it works in China”, 25 *International Arbitration* 4 (Kluwer Law International, 2008), p. 479, 487; Michael HWANG, “The Role of Arbitrators as Settlement Facilitators – Commentary”, in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 571; Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 525.

tion Rules 2005 provides that “where both parties have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings.” Similarly, Article 38 of the 2004 Beijing Arbitration Commission Arbitration Rules provides that “the arbitral tribunal may, at the request of both parties or upon obtaining the consent of both parties, conciliate the case in a manner it considers appropriate.”

II.2. *Arbitral practice in common law jurisdictions*

Judges and arbitrators in the “adversarial” Anglo-American legal system have traditionally not promoted settlement negotiations during pending proceedings. The possibility of the arbitrators’ involvement in such negotiations was even excluded, or at least not carried out in practice.²¹ The separation of roles is also the reason why historically, in the common law, ADR methods such as mediation or conciliation have been developed and played a much stronger role.²²

The general aversion to the arbitrator’s role as a settlement facilitator among common law practitioners has to do mainly with the loss or perceived loss of impartiality. Based on the perception that the arbitrator’s involvement in settlement negotiations would – as in a mediation process – necessarily require conducting *ex parte* discussions with the parties,²³ it is believed that arbitrators should not participate in the settlement process at all.

It cannot be denied that if caucusing takes place, an arbitrator is likely to learn of matters from the parties which he would otherwise be unaware of and which might thereafter influence his decision.²⁴ As explained above, the civil law approach generally proceeds without caucusing; all of the arbitrator’s activities take place in the presence of both parties.

The common law approach differs from the civil law approach in that even the arbitrator’s preliminary views of the merits of the case create discomfort. If the settlement attempt fails, the parties may con-

²¹ Karl-Heinz BÖCKSTIEGEL, *op. cit.*, p. 185; Daniele FAVALLI and Max K. HASENCLEVER, *op. cit.*, p. 2.

²² Judith GILL, “The Arbitrator’s Role in Bringing about a Settlement – an English View”, in Markus WIRTH (ed.), *Best Practices In International Arbitration*, ASA Special Series No. 26, July 2006, p. 157-178.

²³ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 525.

²⁴ Judith GILL, *op. cit.*, p. 158.

sider that the arbitrator was unduly influenced by his prior assessment.²⁵

However, the positions today are closer than might appear at first sight. For example, the AAA Code of Ethics for Arbitrators in Commercial Disputes, a joint project of the American Arbitration Association and the American Bar Association, revised in 2004, stipulates that arbitrators are permitted, indeed encouraged, to take on the role as settlement facilitator, provided the parties consent to it.

The Comment to Canon I of the Code, which sets standards for the arbitrator to uphold the integrity and fairness of the arbitration process, provides :

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I²⁶ is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

Similarly, Canon IV, Section (F) of the Code provides :

Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as mediator unless requested to do so by all parties.

In England, following the 1999 Woolf reform of the civil justice system, named after Lord Woolf of Barnes then Master of the Rolls, the judicial practice has changed towards promoting settlements. Judges are now required to actively manage their cases, *inter alia* by giving indications about their assessment of the merits and by encouraging settlement discussions.²⁷

In a 2009 speech, Lord Woolf stated that “arbitrators should see it as part of their role to help facilitate a settlement” and be “more proactive in the delivery of justice, and in particular they should have in the forefront of their minds the need to assist the litigants before them to resolve their dispute if this is at all possible at the first and earliest

²⁵ Judith GILL, *op. cit.*, p. 159.

²⁶ Paragraph D of Canon I reads : “Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.”

²⁷ English Civil Procedure Rules (CPR) Part 1 at 1.4(2)(e) and (f). Judith GILL, *op. cit.*, p. 156, 161, 162.

stage.”²⁸ He added that “Nobody who is sensible enjoys litigation and therefore, if the court can assist them to resolve their dispute without the need for going through the process, that must be beneficial to them.”²⁹

Hong Kong³⁰ and Singapore³¹ – both common law jurisdictions – have enacted laws providing that if the parties consent in writing, and for as long as no party withdraws its consent in writing, an arbitrator may act as conciliator. Other common law jurisdictions expressly allow arbitrators to act as settlement facilitators such as Canada (Alberta³² and British Columbia³³), Australia (New South Wales and Queensland³⁴), and India.³⁵

III. – THE ARBITRATOR FACILITATING SETTLEMENT : PROS AND CONS

The main rationale for the arbitrator taking on a dual role is the increased efficiency of the dispute settlement process.³⁶ An arbitrator is familiar with the facts of a dispute because he conducted the proceedings from their inception and studied the parties’ submissions. Involving a separate neutral person for the purpose of conducting a mediation or conciliation before, during or in parallel with the arbitration, means duplicating the work, incurring additional costs and also possibly losing time.³⁷ In addition, as he is in charge of the timing of the proceedings, the arbitrator is best placed to know when a good opportunity has arisen to encourage settlement negotiations.

²⁸ Lord WOOLF, *Mediation in Arbitration in the Pursuit of Justice*, (2009) 75 *Arbitration* 2, p. 172.

²⁹ Lord WOOLF, *op. cit.*, p. 169.

³⁰ Hong Kong Arbitration Ordinance (2000), sec. 2 B(1).

³¹ International Arbitration Act of Singapore (2002), Art. 17(1); see also Michael HWANG, “The Role of Arbitrators as Settlement Facilitators – Commentary”, in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 574-578.

³² Alberta Arbitration Act, R.S.A. 2000, Art. 35.

³³ British Columbia International Commercial Arbitration Act, R.S.B.C 1996, Art. 30(1).

³⁴ New South Wales Commercial Arbitration Act 1984, Sec. 27 (Settlement of disputes otherwise than by arbitration); Queensland Commercial Arbitration Act 1990, Art. 27; see also Fali S. NARIMAN, *The Role of Arbitrators as Settlement Facilitators – Introduction*, p. 531, N. 1; Arthur L. MARRIOT, “Arbitrators and Settlement”, in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 (Beijing, 2005), p. 537.

³⁵ Indian Conciliation and Arbitration Act 1996, Sec. 30.

³⁶ Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 197.

³⁷ Judith GILL, *op. cit.*, p. 163; Fritz NICKLISCH, *op. cit.*, p. 173; Lord WOOLF, *op. cit.*, p. 172.

Further, having the arbitrator himself attempt to promote a settlement provides greater flexibility. The arbitration can be resumed at any time and new attempts to settle the dispute can be commenced at any time. A beneficial effect on the parties may be that they are more “relaxed” when negotiating, with the certainty that they have a “safety net” in the form of the arbitration.

Last but not least, whether there is a settlement or not, in both cases the proceedings end with a final, binding and enforceable decision. An amicable settlement reached during the arbitration can be recorded as a consent award and thus, in principle, become enforceable under the 1958 New York Convention.³⁸ In fact, if the negotiations fail, the outcome of an arbitral award may be of better quality and more acceptable to the parties as the issues at stake may have been narrowed down during the settlement negotiations.³⁹

The main drawback of the arbitrator’s dual role is the risk that he loses – or is perceived by the parties to have lost – his impartiality if the settlement fails. The result is an increased risk that the award will be subject to challenge⁴⁰ and that the enforceability of the award may be jeopardized. Indeed, there can be no guarantee that the arbitrator, when taking his decision, will not be influenced by any confidential information acquired during the settlement discussions.

The most efficient ways for avoiding these risks appear to be to advance with circumspection, to obtain the appropriate waivers from the parties, and to avoid holding separate meetings with the parties. The arbitrator must at all times be able to steer the parties back to the arbitration process.

IV. – A RECENT DEVELOPMENT : THE 2009 CEDR SETTLEMENT RULES

In 2007, the Centre for Effective Dispute Resolution (CEDR), an independent non-profit organization and dispute resolution services provider based in London, “with a mission to cut the cost of conflict and create choice and capability in dispute prevention and resolu-

³⁸Alexander PETSCHKE and Martin PLATTE, *op. cit.*, p. 87; Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 523. Jean-François POUURET and Sebastien BESSON, *Comparative Law of Internal Arbitration*, Schulthess, 2007, para. 731 (f).

³⁹Gabrielle KAUFMANN-KOHLER and Fan KUN, *op. cit.*, p. 491.

⁴⁰Michael COLLINS, *op. cit.*, p. 337; Judith GILL, *op. cit.*, p. 160.

tion,”⁴¹ set up a Commission, co-chaired by Lord Woolf of Barnes and Professor Gabrielle Kaufmann-Kohler, to review current practice and to draft best practice guidelines regarding the facilitation of settlement by international arbitral tribunals.⁴²

In November 2009, the Commission issued its Final Report and the CEDR Rules for the Facilitation of Settlement in International Arbitration (“CEDR Settlement Rules”) were published. While the benefit of so-called “para-regulatory texts” is not entirely uncontroversial,⁴³ the CEDR Settlement Rules constitute a useful body of rules and are a step towards establishing a transnational standard for encouraging the settlement of disputes in international arbitration.

Pursuant to the introductory comments, the CEDR Settlement Rules have as their aim “to increase the prospects of Parties in international arbitration proceedings being able to settle their disputes without the need to proceed through to the conclusion of those proceedings.”

The CEDR Settlement Rules compliment any other applicable legal provisions or rules governing the arbitration (Article 2(1) to (3) CEDR Settlement Rules). These rules may be adopted in an arbitration clause or by way of a procedural agreement, by an arbitral institution in its rules of arbitration, or by an arbitral tribunal in the terms of reference or specific procedural rules.

V. – EMERGING BEST PRACTICE

Admittedly, it is difficult to generalize best practice rules for the facilitation of settlement by arbitrators since each particular case deserves customized treatment, having regard to the specific circumstances.⁴⁴ Nonetheless, a number of standards and ground rules have emerged from the international arbitral practice to guide arbitrators in settlement facilitation as part of the arbitration process.⁴⁵

⁴¹ www.cedr.com.

⁴² Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 195.

⁴³ Michael E. SCHNEIDER, “President’s Message – The sense and non-sense of ‘para-regulatory texts’ in international arbitration”, *ASA Bull.* 2010, Vol. 28, No. 2, p. 201-202, announcing an ASA conference on the subject in September 2010.

⁴⁴ Pierre LALIVE, *op. cit.*, p. 562.

⁴⁵ David W. PLANT, “The Arbitrator as Settlement Facilitator”, *Journal of International Arbitration*, Vol. 17 Issue 1, p. 143 *et seq.*; see also Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 204-205, and Daniele FAVALLI and Max K. HASENCLEVER, *op. cit.*, p. 3-6.

*V.1. Can an arbitrator proactively encourage
settlement during an arbitration?*

In light of the above, there is a clear trend towards encouraging international arbitrators to consider their role in a broader sense, which includes providing assistance to parties in reaching a settlement, even when not bound to do so by law or under the applicable arbitration rules.⁴⁶

There is unanimity, however, that any action by the arbitrator in this respect should be taken with caution and also with sensitivity to the parties' and their counsel's possibly conflicting expectations and interests. In recognition of the different perspectives, Sec. 47 of the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings reads :

Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.⁴⁷

Therefore, a series of safeguards must be observed to make sure that the worst case scenario would be avoided, namely acting in such a way as would make the award susceptible to a successful challenge (Article 3.1 CEDR Settlement Rules).⁴⁸

V.2. Informed Consent

The first of these safeguards is respect for the principle of party autonomy and the necessity to obtain the parties' (not only their counsel's) express consent. This is best recorded in writing⁴⁹ prior to any promotion of settlement negotiations by the arbitrator.⁵⁰ An arbitrator should never force a settlement on the parties against their will.⁵¹ *Gabrielle Kaufmann-Kohler* has rightly stated that there is "a fine line between a judge coercing settlement and a judge facilitating settlement."⁵²

⁴⁶Michael COLLINS, "Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them", *Arbitration International*, Vol. 19 Issue 3, p. 343.

⁴⁷Emphasis added.

⁴⁸It should also be noted that certain kinds of disputes do not lend themselves to settlement, for instance doping violations in sports arbitration.

⁴⁹Werner WENGER, *op. cit.*, p. 148; Michael COLLINS, *op. cit.*, p. 341.

⁵⁰Renate DENDORFER, *op. cit.*, p. 281. See also Article 8 of the IBA Rules of Ethics for International Arbitrators, whereby the arbitral tribunal may make proposals for settlement "[w]here the parties have so requested, or consented to a suggestion by the arbitral tribunal."

⁵¹Michael COLLINS, *op. cit.*, p. 334.

⁵²Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 192.

The parties must not only consent to the process, they should also be able to make an informed decision. The arbitrator should explain and discuss the different options at their disposal. For instance, the parties need to know what they consented to and what the different steps and rules are, including the impact of any settlement on costs⁵³ and, should the negotiations fail, on the remainder of the arbitration.⁵⁴ The parties may be more willing to enter into settlement negotiations if the arbitrator makes them feel that they are being taken seriously and that their positions are well understood.⁵⁵

Article 4 of the CEDR Settlement Rules sets up the following guidelines for discussion at the first procedural conference :

1. The Arbitral Tribunal shall invite the Parties themselves (represented by a member of their management or in-house legal function) to participate in the First Procedural Conference (or such other early hearing or discussion as is used to establish the procedure for the arbitration). The Parties shall be encouraged to speak directly with the Arbitral Tribunal during the First Procedural Conference on matters relating to settlement.

2. At the First Procedural Conference, the Arbitral Tribunal shall :

2.1. ensure that the Parties understand that they can settle their dispute or part of their dispute at any time;

2.2. ensure that the Parties are aware of the different dispute resolution processes (such as mediation) which, in the opinion of the Arbitral Tribunal, might assist the Parties in settling their dispute;

2.3. where appropriate, discuss with the Parties how other dispute resolution processes used to facilitate settlement might be accommodated at an appropriate time within the procedure for the arbitration (for example by way of a Mediation Window);

2.4. discuss and agree with the Parties the steps that the Arbitral Tribunal will be taking in accordance with Article 5 of the CEDR Settlement Rules to facilitate settlement;

2.5. discuss and agree with the Parties whether the Arbitral Tribunal, when allocating the costs of the arbitration between the Parties, is to take into account offers to settle in the manner described in Article 6 below; and

2.6. discuss and agree with the Parties the points during the course of the arbitration when the topic of settlement will be discussed again between the Parties and the Arbitral Tribunal.

Consent is also the best guarantee against claims of an alleged loss of the arbitrator's impartiality and independence.⁵⁶

⁵³ The arbitral tribunal can take into account, for purposes of allocation of costs, any offer to settle that was not accepted (Art. 6 CEDR Settlement Rules).

⁵⁴ Michael COLLINS, *op. cit.*, p. 341.

⁵⁵ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 531.

⁵⁶ Fritz NICKLISCH, *op. cit.*, p. 172.

V.3. *Timing*

As foreseen in Article 4 of the CEDR Settlement Rules, the arbitrator should raise the idea of settlement discussions and obtain the parties' consent at the outset of the proceedings, ideally at the first procedural meeting.⁵⁷ The scope of the settlement mechanism can then, if necessary, be included in the terms of reference or the provisional timetable. The written consent should be as detailed as possible and allow for the possibility of the arbitrator resuming his role in the event that settlement negotiations fail.⁵⁸

The settlement facilitation activities themselves, however, usually make sense only once the parties have had a chance to develop their case fully in writing and the arbitrator has had a good overview of the case and its relevant issues, but prior to the evidentiary hearing.⁵⁹ Choosing the right point in time to encourage settlement is crucial and more experienced arbitrators generally have a feel for the opportune moment.⁶⁰

The CEDR Settlement Rules make no provision for the timing of the facilitation of settlement, allowing maximum flexibility. Article 2(5) states that insofar as the Rules are silent, the arbitral tribunal "may facilitate settlement, as it deems appropriate, in accordance with the general principles of the CEDR Settlement Rules."⁶¹

V.4. *Procedure*

There is of course no standard procedure. The arbitrator should develop a custom-made solution, using the different methods available to him and tailoring his degree of involvement so as to meet the parties' expectations.⁶² He must also bear in mind that, in many cases, the parties have resorted to arbitration because they were unable to resolve the dispute amicably prior to commencing arbitration.

There are a variety of proactive steps at the arbitrator's disposal that can be used separately or in combination.

Most importantly, the arbitrator may, at his discretion, identify critical issues and make a non-binding preliminary assessment of the case,

⁵⁷ Werner WENGER, *op. cit.*, p. 147.

⁵⁸ Daniele FAVALI and Max K. HASENCLEVER, *op. cit.*, p. 3-4; David W. PLANT, *op. cit.*, p. 146.

⁵⁹ Fritz NICKLISCH, *op. cit.*, p. 169; Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 528.

⁶⁰ Pierre LALIVE, *op. cit.*, p. 563.

⁶¹ Emphasis added.

⁶² Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 533.

based on the parties' argument and the evidence on record.⁶³ In order to identify the relevant issues, the arbitrator must be well-acquainted with the file. The arbitrator's preliminary views are useful to the parties and counsel in assessing the prospect of success of their case versus possible settlement negotiations.

The arbitrator must, however, at all times keep an "open but not empty mind,"⁶⁴ i.e. remain open to persuasion by the evidence and arguments that may still be presented if the arbitration were to resume.

Article 5(1) of the CEDR Settlement Rules provides that, unless otherwise agreed by the parties in writing, the arbitral tribunal may, if it is helpful, take one or more of the following proactive steps to facilitate a partial or full settlement of the dispute :

- provide all parties with the arbitral tribunal's preliminary views on the issues in dispute and what will be necessary in terms of evidence from each party in order to prevail on those issues;
- provide all parties with preliminary non-binding findings on key issues of law or fact in the arbitration;
- where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation;
- where requested by the parties in writing, chair one or more settlement meetings attended by representatives of the parties at which possible terms of settlement may be negotiated.

Additionally, under Article 5(3) of the CEDR Settlement Rules, the arbitrator may facilitate settlement by opening a so-called "Mediation Window", when requested to do so by all parties, in order to enable settlement discussions, through mediation or other ADR methods.

Finally, upon request of a party, the arbitrator may adjourn the proceedings for a specified period in order to enable mediation where the contract in dispute contains a mandatory mediation provision that requires the parties to mediate any relevant dispute, and the parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the party requesting the adjournment) (Article 3.2 CEDR Settlement Rules). This solution, however, bears the risk of delay and additional

⁶³ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 534.

⁶⁴ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 528.

costs, which can be avoided where mediation takes place in parallel, i.e. without a suspension of the arbitration activity.

V.5. Confidentiality

If the settlement negotiations fail and the arbitrator resumes regular proceedings, he must take special care not to refer to confidential information acquired off the record during settlement discussions.

Nothing that has been said or done by a party or its counsel during the course of the settlement negotiations or otherwise should be used against a party in the event that the arbitration resumes (Article 3(4) CEDR Settlement Rules). The only exception to this rule is with respect to cost allocation. Pursuant to Article 6, the arbitrator can take into account, for purposes of allocation of costs, any offer to settle that was rejected.⁶⁵

Similarly, when deliberating and drafting the award, the arbitrator must not take into account any substantive matters that were discussed in settlement meetings or communications, unless the matter was introduced into the arbitration. Moreover, the arbitrator shall not question the credibility of any witness who represented a party during settlement discussions, or disclosed certain facts during these discussions (Article 3(5) CEDR Settlement Rules).

V.6. No Caucusing

As stated above, the “German approach” is quite successful without caucusing. Unlike the Med-Arb or Arb-Med⁶⁶ process, separate meetings with the parties are unnecessary to achieve the desired goal.⁶⁷ Indeed, avoiding caucuses does away with many of the risks inherent to arbitrators promoting settlement negotiations.⁶⁸ Every party must have the opportunity to challenge its opponent’s allegations. *Judith Gill*, when describing the English view on the arbitrator’s role in bring-

⁶⁵ Article 6 of the CEDR Settlement Rules provides as follows: “1. When considering the allocation between the Parties of the costs of the arbitration, (including the Parties’ own legal and other costs) the Arbitral Tribunal may take into account: 1.1. any offer to settle that has been made by a Party where the Party to whom such an offer has been made has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle; 1.2. any unreasonable refusal by a Party to make use of a Mediation Window; or 1.3. any failure by a Party to comply with a requirement to mediate or negotiate in the contract between the Parties which is the subject of the arbitration.”

⁶⁶ See e.g. Mercedes TARRAZÓN, “Arb-Med: A Reflection à Propos of a Bolivian Experience”, *New York Dispute Resolution Lawyer (NYSBA)* 2009, Vol. 2, No. 1, p. 87-88.

⁶⁷ Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 534-535.

⁶⁸ Daniele FAVALLI and Max K. HASENCLEVER, *op. cit.*, p. 2.

ing about a settlement, admits that “many of the objections raised can be resolved if the practice of caucusing is omitted from any settlement process.”⁶⁹

While the IBA Rules of Ethics for International Arbitrators state that the arbitral tribunal, “may make proposals for settlement to both parties simultaneously and preferably in the presence of each other,”⁷⁰ Article 5(2) of the CEDR Settlement Rules formulates a negative obligation: the arbitral tribunal “*shall not*” meet with any party without the presence of all other parties or obtain information from any party that is not shared with the other parties.

V.7. *Waiver*

In the event that the settlement negotiations fail, an arbitral tribunal may eliminate or reduce the risk of a challenge to its award by obtaining from the parties, as early as possible in the proceedings, an express waiver that they will not use the fact that it attempted to facilitate settlement as a ground for challenge of the tribunal or award (Article 3(3) CEDR Settlement Rules).⁷¹

This safeguard is already to be found in the 2004 IBA Guidelines on Conflicts of Interest, which were drafted with a view to restating the best practice in international arbitration, in a manner acceptable to both civil law and common law practitioners.⁷² General Standard 4(d) states:

An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.

In the Explanation to General Standard 4(d), the IBA Guidelines on Conflicts of Interest provide that, in giving their express consent, the

⁶⁹ Judith GILL, *op. cit.*, p. 164.

⁷⁰ IBA Rules of Ethics for International Arbitrators, Article 8 (Emphasis added); see also Carlos Nehring NETTO, “The Brazilian Approach to Arbitrator’s as Settlement Facilitators”, in Albert Jan VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 585.

⁷¹ Jacob ROSOFF, *op. cit.*, p. 89.

⁷² Klaus Peter BERGER, “The Need for Speed in International Arbitration”, 25 *International Arbitration* 5 (Kluwer Law International, 2008), p. 605; see also Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 194-195.

parties assume the risk of what the arbitrator may learn in the settlement process and “should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.”

VI. – RESIGNATION IF IMPARTIALITY IMPAIRED

In the final provision, the CEDR Settlement Rules advocate that an arbitrator shall resign if, as a consequence of his involvement in the settlement, he learns of matters that would impair his capacity to conduct the remainder of the arbitration or render an award impartially and independently (Article 7 CEDR Settlement Rules).⁷³

This rule is fully consistent with General Standard 4(d) of the 2004 IBA Guidelines on Conflicts of Interest, where the arbitrator shall resign “if, as a consequence of his or her involvement in the settlement process, [he] develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.”

VII. – CONCLUSION

An arbitrator is a service provider. The users of arbitration are concerned that arbitration is becoming an increasingly inefficient and expensive process and therefore expect that the modern arbitrator will find a solution in the parties’ best interest.⁷⁴ There may not yet be an established transnational consensus on how the international arbitrator may meet these expectations.⁷⁵ However, the trend clearly favors the arbitrator as a more actively involved settlement facilitator. This is the added value of an arbitrator’s dispute resolution mandate, which meets the demands of the business community.⁷⁶

The recent CEDR Settlement Rules, which to some extent restate the transnational best practice, represent an important step forward as they seek to transform arbitrators into proactive settlement facilitators, while clearly setting out certain safeguards. These rules have the potential to enhance the efficiency of international arbitral proceedings.

⁷³ See also Hilmar RAESCHKE-KESSLER, *op. cit.*, p. 527.

⁷⁴ Karl-Heinz BÖCKSTIEGEL, *op. cit.*, p. 185.

⁷⁵ Gabrielle KAUFMANN-KOHLER, *op. cit.*, p. 189.

⁷⁶ Werner WENGER, *op. cit.*, p. 147.

The CEDR Settlement Rules propose sample wording for a contract clause: “In the conduct of any arbitration under this [Agreement], the Arbitral Tribunal shall apply the CEDR Rules for the Facilitation of Settlement in International Arbitration.” It remains to be seen whether such language will soon appear in contracts, arbitration rules, terms of reference or specific procedural rules governing arbitrations.

“An arbitrator, is an arbitrator, is an arbitrator, whose function it is, not merely to adjudicate the dispute but also to help resolve it amicably with the co-operation of the parties ... ‘Arbitration’ must never be considered as excluding from its purview the settlement of a dispute before the arbitrator: because this is of the essence of *the spirit* of arbitration.”⁷⁷

⁷⁷ Fali Nariman, *The Spirit of Arbitration*, The Tenth Annual Goff Lecture, 2000, 16 *Arbitration International*, p. 267.

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WALKING A THIN LINE
WHAT AN ARBITRATOR CAN DO,
MUST DO OR MUST NOT DO



RECENT DEVELOPMENTS AND TRENDS

Colloquium CEPANI 40
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