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PROMOTION OF SETTLEMENT IN ARBITRATION

Presented by

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1. Introduction

The subject of this master thesis came out of a discussion the author had with members of the WIPO Arbitration Center about article 65 of the WIPO Arbitration Rules. Enacted already in 1994, this provision expressly enables the arbitrator to suggest the parties to explore settlement[1].

During this conversation, the rationale of the existence of such disposition was tentatively attributed to the fact that intellectual property disputes often arise out of complex and long term contracts, and therefore the parties would rather have the ability to preserve their business relationships, settle their disputes and continue with their contracts instead of going through arbitration.

The same motivation being certainly valid in other international business fields, the question was then raised if similar rules exist in other dispute resolution institutions or arbitration laws; in other words, if the promotion of settlement is established in modern international commercial arbitration or if the above mentioned disposition is an exception.

Research has shown that settlement rates in arbitration are significantly lower than they are in many national courts, particularly those courts where judges are systematically able to promote early settlement and the use of dispute resolution techniques such as mediation[2]. Why is it so, when it seems that parties generally want to avoid disruption of their business, go on with their relationships and therefore want their problems solved cost effectively and efficiently[3]?

Can or should the arbitrator in the course of the arbitration process promote and take part into settlement talks or, on the contrary, should he abstain from intervening in this field[4]? Is it part of the arbitrator's mission? What is the opinion of the arbitration community? What do the existing arbitration laws and rules provide for? Do the national judicial systems have

[1] Article 65 WIPO Arbitration Rules: *(a) The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate. (b) If, before the award is made, the parties agree on a settlement of the dispute, the Tribunal shall terminate the arbitration and, if requested jointly by the parties, record the settlement in the form of a consent award. The Tribunal shall not be obliged to give reasons for such an award.*
[2] CEDR, §1.4
[3] The PricewaterhouseCoopers survey shows that the main motivations to settle a dispute before an arbitration award is rendered are the preservation of business relationships and the avoidance of high costs
[4] Kaufmann-Kohler/Bonnin, 81

any influence on the perception arbitrators have of their mission? If an arbitrator may encourage settlement of disputes, when would it be appropriate to do so and how would he go about it? What can the parties do in order to ensure a successful settlement?

These questions are pertinent as experience - although rare - has shown that complex disputes can be resolved by integrating mediation in arbitration. The IBM v. Fujitsu case is a very good example of promotion of settlement in arbitration. It illustrates how arbitrators and parties can design a process of dispute resolution which integrates adjudicatory and conciliatory elements leading to a result satisfactory to all parties[5].

Given that settlement is a voluntary process, the position of the parties and their counsel toward settlement is of key importance. Rules of arbitration regarding settlement and encouragement from tribunals and institutions will for sure help, but will be of significantly reduced effect if the parties, their counsels and the arbitrators are not willing to engage into settlement[6].

Arbitration is a perfect place where participants could explore settlement because of the flexibility offered by arbitration and the ability for the parties to develop procedures that are especially convenient for them and their case[7]. It is therefore submitted that promotion of settlement and integration of mediation in arbitration should be encouraged so as to become a common way of dispute resolution instead of an exception.

This master thesis intends to discuss the ability for arbitrators to promote settlement of dispute during the arbitration process and to take part in the settlement talks by the means of mediation or by using mediation tools. It focuses on the mediation process because first mediation can be seen as the prototype for alternative dispute resolution (ADR) methods[8] and second because it encompasses the process of conciliation which is not different from mediation, as these terms tend to be used interchangeably[9].

[5] Koch/Schäfer, 175
[6] CEDR Report, § 4.8
[7] Berger, 386
[8] Girsberger/Voser, §35
[9] Girsberger/Voser, §50, Bühring-Uhle/Kirchhoff/Scherer I, 31, Kaufmann-Kohler/Rigozzi, § 28; Redfern/Hunter §1-75; see also article 1(3) UNCITRAL Conciliation

After a quick overview of the main combinations of arbitration and mediation available to the parties (chapter 2), chapter 3 shall examine if, according to the arbitration community and the existing arbitration laws and rules, the mission of the arbitrator encompasses the promotion of settlement and the ability to take part in the settlement talks. It will also be investigated if the national judicial systems have an influence on the perception the arbitrator has of his mission. Thereafter, the benefits and obstacles of enabling the arbitrator to settle the dispute in the course of the arbitration as well as the ways to circumvent the obstacles will be explored (chapter 4). Then, chapter 5 will discuss who should initiate the settlement talks, when in the arbitration process and how; and what issues the parties need to think about in order for the settlement process to be successful. Before concluding in chapter 6, a few words will be written to address the question of what happens if the settlement's attempts fail or succeed.

Please note that the use of the masculine gender throughout this document and in relation to any physical person shall be understood as including the feminine gender.

2. What are the main combinations of mediation and arbitration available to the parties?

Before analysing how mediation and arbitration can be combined, the main features of these processes shall be briefly recalled.

Arbitration is a private adjudication process[10] whereby the settlement of a dispute between two or more parties is entrusted to one or more persons (the arbitrator[s]).The arbitrators derive their powers from a private agreement (the arbitration agreement) and not from the authority of a state. They proceed and decide the case on the basis of the arbitration agreement by rendering a final and binding arbitral award[11], which generally cannot be appealed on the merits[12]. Arbitration requires the existence of a dispute between the

[10] Bühring-Uhle/Kirchhoff/Scherer I, 32
[11] Girsberger/Voser, §1
[12] Bühring-Uhle/Kirchhoff/Scherer I, 110

parties; it is not just about resolving a mere conflict or difference of opinion[13]. The parties agree on the intervention of arbitrators in advance, who are expected to be independent and impartial professionals, unrelated to the parties and to the dispute. The arbitrators leave the parties to present their cases and bring evidence and arguments following which they decide the dispute in strict confidence[14]. The parties do not expose their underlying interests and do not meet the arbitrators separately. The interests of the parties are submerged by rights, with each side tending to cast their own case in the best light and their opponents' in the worst[15]. In the course of the arbitration process the arbitrators and the parties interact; however the level of interaction is dependent on the applicable procedural rules, institutional or chosen by the parties and also on the personal style of the arbitrators. In any event, the arbitration procedure is determined and controlled by the parties; the party autonomy is the guiding principle of arbitration[16]. Arbitration ends, within a reasonable acceptable timeframe[17], with a final, binding and enforceable decision on the dispute[18].

On the other hand, mediation is a non-binding intervention by a neutral third party – the mediator - who helps the parties negotiating an agreement[19]. The mediator has no decision power[20]; the settlement is a voluntary and responsible agreement between the parties. The mediation process is interests oriented, the mediator looks for elements beyond the dispute so as to enlarge the scope of a possible settlement and create grounds for an arrangement in which all the parties find their advantages[21]. The mediator can find ways of positively helping the parties resolve their dispute which results in a solution that is not connected with the dispute. Mediation is not subject to any laws and the parties cannot claim rights of due process or equal treatment[22]. It is a confidential process subject to privilege so as ensure a candid free, uninhibited and frank flow of information between the parties during their settlement talks[23]; indeed the parties must be able to abandon their adversarial tendencies.

[13] For instance, see article 7 UNCITRAL Model Law
[14] Schneider, 60; Kaufmann-Kohler/Rigozzi, 9
[15] Elliott, 176
[16] Girsberger/Voser, §23; Bühring-Uhle/Kirchhoff/Scherer I, 70
[17] Elliott, 175
[18] Berger, 389
[19] Girsberger/Voser, §36
[20] Schneider, 65
[21] Schneider, 66
[22] Berger, 390
[23] Berger, 268

The mediator usually meets the parties individually and separately - the caucus - during which the bottom line of each party is clarified and discussed. The parties will attempt to make settlement seeking to meet their own and the other parties' interests; mediation will involve fashioning an agreement looking to their future relationship[24]. Mediation offers a chance of working out the dispute while retaining control of the decision and "getting on with business"[25].

The essential differences between mediation and arbitration are the role of the third party (the arbitrator issuing a final and binding decision versus the mediator assisting the parties to settle[26]) and the type of process (one is legal and adversarial whereas the other is interest-oriented and non adjudicatory[27]). It is therefore not surprising that the thought of combining them is an anathema to many[28]. However, there exists an increasing number of variations of combination of arbitration and mediation: *mediate first and if mediation fails, arbitrate; start arbitration proceedings and allow for mediation at some point during the arbitration, mediate some issues and arbitrate others; mediate, then arbitrate some unresolved issues, then return to mediation*[29].

The reason for the existence of different combinations is that the same basic and fundamental principle exists in both forms of dispute resolution: arbitration and mediation are consensual; they are based upon an agreement between the parties and the form they take is dependent on the will of the parties[30]. Such consent therefore enables the parties to choose to bring the mediation process into the arbitration procedures in whatever combination they wish.

a. Combination by succession

In this type of combination, the processes of arbitration and mediation are combined, but are used separately and successively.

[24] Elliott, 176
[25] Elliott, 175; Woolf, 171
[26] Girsberger/Voser, § 38
[27] Article 10 § 6 UNCITRAL Conciliation
[28] Elliott, 176
[29] Elliott, 175
[30] Berger, 391

i. Pre-arbitral Mediation

This combination is the most common[31]: both mediation and arbitration are conducted separately; the parties first begin with the mediation process and then if mediation fails, an arbitration process will take place if the parties agree to. The advantage is that such process might enable the parties to avoid arbitration at all, as the mediation process performs a filter function[32]. What has been said and done during mediation cannot be taken into account later in the arbitration. Usually, the mediator will not take part in the arbitration[33]; different persons conduct the mediation and the arbitration; although in some instances the parties may choose to have the same person acting as an arbitrator[34].

ii. Med-Arb

Med-Arb is a process by which both mediation and arbitration are agreed upon as a means by which parties intend to resolve their dispute in a successive way. If the mediation fails, arbitration steps in and the parties must usually proceed to binding arbitration[35]. However contrary to pre-arbitral mediation, only one person is appointed both to mediate and - if mediation fails - to arbitrate the dispute[36]. Although traditionally rejected, some rules[37] expressly provide for the possibility of the mediator succeeding himself as an arbitrator, however subject to the parties' agreement.

iii. Med-Arb opt out

Med-Arb opt out is the process of Med-Arb with the ability for the parties to choose, when the mediation fails, to either keep the mediator as the arbitrator in the subsequent arbitration or, to refrain the mediator from further participating into the arbitration[38] and therefore to change the third party neutral.

[31] Bühring-Uhle/Kirchhoff/Scherer I, 251
[32] Bühring-Uhle/Kirchhoff/Scherer I, 251
[33] Berger, 392
[34] Bühring-Uhle/Kirchhoff/Scherer I, 252
[35] Dendorfer/Lack, 84
[36] Elliott, 175; Schneider, 71; Redfern/Hunter, § 1-82; Horvath, 299
[37] See for instance, article 12 UNCITRAL Conciliation; article 13 (b.4) WIPO Mediation; art. 2A HK Arbitration Ord.; Article 7 (3) ICC ADR Rules
[38] Berger, 393

b. Combination by integration

The arbitrator can facilitate settlement in different ways[39]: first, upon the request of the parties, the arbitrator can just record the parties' agreement which has been made outside the arbitration room in parallel to the arbitration process without the involvement of the arbitrator. Second, the arbitrator can rectify such agreement. Third, the arbitrator can attempt to conciliate the parties and even wear the mediator's hat.

The combination of arbitration and mediation by integration is most concerned with the third way, the arbitrator facilitating settlement. In such case, the processes of arbitration and mediation are mixed or integrated, as the mediation or the attempts to settle are taking place during the process of arbitration, after the arbitration has begun.

i. Arb-Med

In the Arb-Med process, arbitration is conducted from the beginning to end (in case of failure to settle). However the arbitration is enriched with mediation or elements of mediation[40]. Contrary to the combination by succession, in this process, the divisions between arbitration and mediation tend to blur, mediation is imbedded in arbitration. At a certain time in the arbitration process, the arbitrator stops the arbitration and takes the hat of a mediator to attempt settlement talks with the parties. In such process the arbitrator becomes the mediator and if the settlement talks fail then returns to his arbitrator's functions.

ii. The envelope method

Another way of integrating mediation into arbitration is to first conduct the process of arbitration in its entirety (exchange of briefs, hearing and formal presentations). Once the arbitral award is prepared, signed and put in sealed envelopes, the arbitrator invites the parties at a meeting to provide them with the envelopes. At this moment, the arbitrator

[39] Kaufmann-Kohler/Bonnin, 83
[40] Berger, 397; Cheng, 5

suggests to the parties to mediate their dispute[41]. If the parties are not able to reach an agreement, the envelopes are opened and the arbitral award communicated.

This master thesis will focus on the process of Arb-Med or the facilitation by the arbitrator of settlement during the arbitration (see section b.i. above) because the integration of the process of mediation or elements of it during the arbitration raises most of the legal and practical questions.

3. Is the promotion of settlement part of the arbitrator's mission; if not, should it be?

According to the current views of the arbitration community and the existing arbitration laws and rules, can the arbitrator - while the arbitration takes place and feeling that there is room for settlement - promote settlement discussions and even suggest mediating the dispute? If not, should it be part of his mission?

From the brief explanation of the Arb-Med process above, one can question how the arbitration and mediation - two opposite systems[42] - could be successfully and lawfully combined. In any event, it makes no doubt that the professional wearing successively the hats of arbitrator-mediator-arbitrator has to be flexible and cognizant of both processes and their limits in order for the process to be successful.

Most of the controversy about the combination of arbitration and mediation in the Arb-Med process is created by the fact that the arbitrator and the mediator are one and the same person[43]. The traditional view is that the mediator should abstain from any activity and act neither as arbitrator nor as counsel nor as witness[44] unless otherwise agreed to by the parties.

[41] Oghigian, 78; Horvath, 299
[42] Case-study, 23
[43] Schneider, 67
[44] Schneider, 69; for instance article 44 (2) Swiss Arbitration Rules

It is worth asking the question as many cases are settled outside the arbitration room before the arbitrator has decided all or even part of the dispute[45]. Therefore if the parties are able to settle outside the arbitration room, in parallel of the arbitration process, why should the arbitrator abstain - if there is an opportunity to settle - from suggesting settlement talks?

Before attempting to answer these questions, it is necessary to first try to identify how the mission of the arbitrator is traditionally viewed by the arbitration community.

According to learned authorities, arbitrators exercise a jurisdictional mission, which implies that the arbitrator's status is subject to the applicable statutory rules, supplemented by the contract between the parties and the arbitrator[46]. The arbitrator is there to serve the parties[47] and to decide the dispute in confidentiality[48]. Is it universally accepted that the arbitrator has to be independent and impartial[49] and shall treat the parties equally while organizing efficient and effective proceedings[50]. The arbitrator plays a proactive role[51]; speaking impartially to all parties[52]. He renders a binding and final award after conducting the arbitration in a fair manner, applying the law to the facts independently[53]. The arbitrator's fundamental duty is to preserve the integrity and fairness of the arbitral process[54] and to render a valid award, immune from challenges[55].

Promotion of settlement depends on the possible restrictions and obligations that the applicable arbitration laws and rules impose on the arbitral tribunal. But, it also depends on the concept which the arbitrator has of his role and mission, which can very well be influenced by the civil procedural laws applicable in the jurisdiction of origin of the

[45] Schneider, 71
[46] Poudret/Besson, §450; Born, 1604
[47] Woolf, 174; Hunter, 194; Horvath, 294
[48] Fouchard/Gaillard/Goldman, §1018 and §1167
[49] Kaufmann-Kohler/Rigozzi, §363-364; Fouchard/Gaillard/Goldman, §1021; Lew/Mistelis/Kröll, § 12-17; Article 12 UNCITRAL Model Law; Article 33 UK Arbitration Act; article 180 (1.c) PILS; Section 10 US Arbitration Act
[50] Fouchard/Gaillard/Goldman, §1129; Article 18 UNCITRAL Model Law; Article 182(3) PILS; Article 33 UK Arbitration Act
[51] Raeschke-Kessler, 524
[52] Preamble nr 3 IBA Rules on the Taking of Evidence; Canon I AAA/ABA Code of Ethics
[53] Franck, 502-504
[54] Preamble ABA/AAA Code of Ethics
[55] Lew/Mistelis/Kröll, § 12-12; Born, 1621

arbitrator. The acceptance or not of settlement in arbitration is therefore definitively related to the personal attitude of the arbitrator or the perception he has of his mission[56].

There is a variety of positions throughout the world both in practice and in law regarding the role arbitrators may play in the promotion of amicable settlements between the parties[57]. However, as it will be observed below, even if the arbitration laws and rules are often silent on the subject, the trend is definitively towards the acceptance of the arbitrator as settlement promoter[58], although still with some hesitations as to the ability for the arbitrator to take part personally in the settlement talks and act as a mediator.

a. The arbitration community point of view

The mission of the arbitrator depends not only on the mandatory arbitration laws that apply to the arbitration process, but also on the chosen institutional rules and the specific procedural rules agreed by the parties. If the parties have not chosen any procedural rules to conduct their arbitration, does or should the mission of the arbitrator, according to the arbitration community, include the facilitation of settlement while arbitrating; could the arbitrator take part personally into the settlement talks?

It is the subject of divided opinions; reality and experience show that indeed the cultural and legal background of the arbitrator has an influence on the conception of arbitration and settlement. For some the arbitrator shall only be an adjudicator, for others it can also be a facilitator of settlement[59], even a mediator.

It seems that, on one hand, authorities from the civil law community as well as China are more inclined to accept that the arbitrator suggests, initiates or otherwise becomes involved in settlement negotiations; and that, on the other hand, the common law community regards it with hesitation[60] or rejects it unless such is requested by the parties[61].

[56] Shilston, 161; Koch/Schäfer, 154
[57] Böckstiegel, 185
[58] Goldstein, 12- 13
[59] Kaufmann-Kohler/Bonnin, 87
[60] Born, 1633
[61] Schwartz, 90; Bühring-Uhle/Kirchhoff/Scherer II, 87

i. The common law community

If there are authorities that still reject the dual role of the neutral or see it with reluctance, most of them seem to accept that the arbitrator promotes settlement.

Lew/Mistelis/Kröll as well as Redfern/Hunter believe that the same individual acting as both mediator and arbitrator gives rise to serious misgivings and problems[62]; and there is no such positive duty for the arbitrator to promote an amicable settlement as the arbitrator's mission is to decide the dispute between the parties, unless agreed by the parties. In other words everything is possible with the agreement of the parties[63].

Born states that although less frequently encountered in common law jurisdictions, there is generally no blanket prohibition against arbitrators proposing settlement of the parties' dispute[64]. Plant is of the opinion that arbitrators should be encouraged to suggest and to participate in settlement discussions between the parties under appropriate circumstances; however it creates ethical issues[65]. Marriott recommends it should become standard practice for the arbitral tribunal to assist parties towards settlement[66]. Nariman thinks that the settlement of a dispute through agreement of the parties is of the essences of the spirit of arbitration; the arbitrator's function is not to merely adjudicate the dispute but also to help resolve it amicably with the cooperation of the parties[67]. Very recently Lord Woolf openly suggested finding out ways in which arbitrators can play a part in at least facilitation of mediation and by encouraging mediation[68]; he urged that arbitrators should see it as a part of their role so as to encourage the parties to go to mediation if their feeling is that it will assist[69]. As for Shilston, already in 1996, he asked the question: why not through Arb-Med mobilise to the full the potential skills and techniques of modern arbitrators[70]? Collins agrees that an international arbitrator ought as a matter of good practice to encourage settlement whenever the opportunity to do so presents itself[71]. At last, Abramson believes

[62] Lew/Mistelis/Kröll, § 1-48; Redfern/Hunter, § 1-95
[63] Hunter, 195
[64] Born, 1634
[65] Plant, 143 and 145
[66] Schneider, 72, citing Arthur Marriott QC, the 1995 Freshfields Lecture, in 62 Arbitration (August 1996 Supplement), p.40
[67] Nariman, 267
[68] Woolf, 170
[69] Woolf, 172
[70] Shilston, 162
[71] Collins, 343

that although international arbitrators should stay out of the direct settlement business, pragmatically there should exist arrangements to enable neutrals to serve both processes while preserving impartiality; he suggests putting together protocols so as to minimize the risks posed by arbitrators trying to settle cases[72].

ii. The civil law community

On the side of the civil law authorities, the views are unanimous. German and other European are in favour of the dual role of the arbitrator[73]. According to Kaufmann-Kohler, provided some safeguards are put into place, the arbitrator may facilitate settlement at any time during the process on his initiative or at the parties' request[74]. Fouchard/Gaillard/Goldmann believe that it is the mission of any arbitrator to try to conciliate the parties[75]. For Koch/Schäfer, the nature of arbitration is perfectly suited to afford arbitrators the opportunity to be actively and constructively involved in helping parties find negotiated solutions to their disputes. The differences of cultures, language and commercial traditions are the prime targets for successful proactive settlement efforts of arbitrators[76]. Lazareff thinks that the arbitrator, whose evident permanent mission is the conciliation of the parties, should suggest settlement to the parties[77]. Hausmaninger, on his side, believes that the nature of arbitration aims at preserving the possibility of continuing a business relationship; the promotion of settlement by the arbitrator is therefore useful to enable the parties to better evaluate the risks and chances of the procedure and encourage constructive relations among them in their future dealings[78]. Schneider is of the opinion that it is a necessary condition for any arbitral tribunal assisting during settlement negotiations that the parties have specifically requested and agreed to such assistance; the degree of involvement depends exclusively on the joint wishes of the parties and may be tailored to

[72] Abramson, 2 and 17
[73] Schneider, 78
[74] Kaufmann-Kohler, 28
[75] Fouchard/Gaillard/Goldman, §19
[76] Koch/Schäfer, 169
[77] Lazareff, 4
[78] Hausmaninger, 44

meet their expectations[79]. At last, Horvath believes that in certain cases, it is legitimate and meaningful for the arbitrator to actively stimulate a settlement[80].

iii. The Chinese View

According to Lu, it is part of the culture in China that settlements take place during arbitration. Settlements are even desired by arbitrators in some troublesome cases since they are reluctant to ruin the business relations between the parties by an award. If requested by the parties, the arbitrators will be keen to comply with such requests and should not refuse it unless the settlement would constitute a serious violation of law[81].

From the above analysis, one may state that the common and civil law communities are converging to the acceptance that part of the mission of the arbitrator is to facilitate settlement. This was already confirmed by a first survey conducted by Bühring-Uhle in 1995 which found that for the overwhelming majority (83%) of the questioned arbitrators, the facilitation of voluntary settlement was regarded as one of the functions of the arbitral process[82]. The second survey conducted between 2001 and 2004 increased this majority to 86%. German and common law representatives (without the United States of America) universally accepted that facilitating a consensual solution is one of the function of the arbitral process; the United States of America and the other civil law representatives accepted it for respectively 74% and 85 %[83].

As to the form under which facilitation has to take place, as for instance the arbitrator becoming the mediator, the last survey - the only recent source available – corroborates the above analysis, according to which there is diversity of experience and attitudes between the common and civil law communities representatives. German respondents were more familiar with the dual role of the neutral whereas the common law respondents hardly ever encountered such practice and even found it inappropriate[84] and preferred to use a separate

[79] Raeschke-Kessler, 534
[80] Horvath, 294
[81] Lu, 41
[82] Bühring Uhle, 157
[83] Bühring-Uhle/Kirchhoff/Scherer I, 111
[84] Bühring-Uhle/Kirchhoff/Scherer I, 122

mediator[85]. If combination of both processes occurred, the relatively most frequent combination was a mediation attempt by a sole arbitrator or the chairman of a three arbitrators tribunal, which on the average the participants to the survey had experienced about 8% of their arbitration cases in the last three years[86].

In conclusion to this chapter, one can say that if the general mission of the arbitrator to facilitate settlement is not recognized by arbitration laws and rules today, which shall be analyzed below, the arbitrators, originating from a common or civil law background will tend to view their role not only as private adjudicator but also as settlement facilitator. This submission is validated by the very recent (2009) CEDR Report[87] which declares that not only has the arbitral tribunal the primary responsibility to produce an award which is binding and enforceable, but also it should take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute, while preserving the award from successful challenges[88].

As to if the arbitrator shall function as mediator, it is submitted that if the general mission of the arbitrator encompasses the facilitation of settlement, there is no reason why the combination of both roles should not be encouraged, provided however that the parties agree and that certain safeguards are put in place as will be discussed below in chapter 4.

b. The influence of the national judicial systems

If, in the arbitration process, the question of permissibility and degree of involvement of arbitral tribunals in parties' settlement negotiations is heavily debated, it is because arbitrators and parties come from the different cultural and legal jurisdictions where in some an adjudicator can bring about a settlement as a solution to the dispute and in some other the adjudicator cannot.

Subject to the applicable arbitration laws, the procedural rules of the arbitration will usually be chosen by the parties and if the parties have not made use of their autonomy, then the arbitral tribunal will have complete discretion to decide the procedures of the arbitration. In

[85] Bühring-Uhle/Kirchhoff/Scherer I, 125
[86] Bühring-Uhle/Kirchhoff/Scherer I, 122
[87] See explanation below, chapter 3.c. v
[88] § 2.4 and § 2.7 CEDR Report

such case, the arbitrator will simply act as he views the role of the arbitrator. In this context, it is then not a surprise that the arbitrator might instinctively rely on its legal and cultural background[89] to handle the question of settlement within the arbitration. It is therefore wrong to believe that arbitration exists in a vacuum. Arbitrators are subject to and influenced by their national political, economic and legal environment as well as practice of state courts and the usages of the national business community[90]. Experience and empirical research show that arbitration practitioners often approach the role of the arbitrator by referring to the rules applicable in their home courts[91]. Such practice is confirmed by a survey which showed that the settlement rate during arbitration is highly dependent on the practices and traditions of the respective judicial systems[92].

As both the litigation and arbitration processes aim at obtaining a decision which resolves a dispute and brings it to the end, there is no reason why assistance to settlement by the arbitrator could not just happen in arbitration[93], such as it exists in state courts.

As it will be illustrated below, there is definitively a movement towards the integration of mediation or facilitation of settlement in the state court processes[94] - even in the common law world - as most of the civil procedural rules in both common and civil law worlds enable the judge to assist the parties to settle their case.

i. China and Hong Kong

In China, it is usual for the parties to take the necessary steps early to amicably resolve their dispute so as to preserve the harmony within the community in opposition to coercive and oppressive methods[95]. Such culture is expressed in chapter 8 of the Civil Procedure Law of PRC, which is entirely devoted to conciliation in litigation proceedings and where the principle of voluntariness of the parties is stressed[96].

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[89] Kaufmann-Kohler, 13
[90] Böckstiegel, 186
[91] Kaufmann-Kohler, 4; Koch/Schäfer, 154
[92] Bühring-Uhle/Kirchhoff/Scherer II, 83
[93] Woolf, 170
[94] Koch/Schäfer, 160
[95] Kaufmann-Kohler/Kun, 481-482
[96] Article 85 Civil Procedure Law of PRC: *In the trial of civil cases, the people's court shall distinguish between right and wrong on the basis of the facts being clear and conduct conciliation between the parties on a voluntary basis.*

As for Hong Kong, the Civil Justice Reform has recently (April 2009) introduced mediation in its litigation system[97]. Such requirement to mediate before entering into trial will be effective on 1 January 2010. It will require parties to legal proceedings to consider mediation as a means of alternative dispute resolution[98].

ii. United States of America, United Kingdom and Canada

In the United States of America, the US Federal Rules provide the judge with discretionary powers to determine the appropriate measures for facilitating the resolution of the dispute before the court[99], in enabling the court to order pre-trial conferences for facilitation of settlement. Given the discretionary power of the judge, practice seems to be divided as to the application of such rule: some believe that the better course is not to undertake mediation at all even when asked to do so by the parties[100] as the image of the judge is one of a detached impartial decision maker[101] and others believe that the role of the Federal courts should be to assist the parties in resolving their disputes[102]. The trend seems however to evolve towards acceptance of settlement in the courts. Indeed, the advisory commentary committee to the California Code specifically states that the courts should facilitate settlement but that parties should not feel coerced into surrendering their right to have the controversy resolved by the courts[103].

In the United Kingdom, the Woolf reform of the UK Civil Procedure Rules in 1999 has made the proactive judge acceptable to the Anglo-American legal world[104]. Article 1.4(2) e and f

[97] Woolf, 169, referring to Pt 1a of the Civil Procedure Rules of the Civil Justice Reform in Hong Kong
[98] Wang, Mediation
[99] Rule 16 US Federal Rules, Pretrial Conferences, Scheduling, Management: *In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:…(5) facilitating settlement.*
[100] Collins, 340, citing Judge Harold Baer District court of Southern District of NY; Marriott, 10-8, referring to Prof. Fiss
[101] Bühring-Uhle/Kirchhoff/Scherer II, 83
[102] Marriott, 10-36
[103] Canon 3(B)(8) California Code: *A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.* California Advisory committee commentary: *…A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.*
[104] Raeschke-Kessler, 524

provides for the judge to encourage the parties if such is adequate[105]. Since then, there is clearly a movement in favour of settlement and away from adjudication for reasons of efficiency[106].

At last in Canada, at the federal level[107], the court has the ability to order that mediation is conducted to find a settlement. At the provincial level of Ontario for instance, the court has also the ability to recommend mediation[108].

iii. Switzerland, Germany, France and the Netherlands

In Switzerland, at the federal level, the Swiss Federal Procedural Rules are silent on the ability for the judge to suggest settlement. At the cantonal level, some cantonal rules[109] enable the judge to suggest settlement. The trend in Switzerland is going toward admission for the court to suggest mediation as the latest Swiss CPC Draft – which will unify the cantonal civil procedural rules - provides that the tribunal can suggest mediation at any time during the trial[110].

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[105] Rule 1.4 (2) e and f UK Civil Procedure Rules: *….encouraging the parties to use an alternative dispute resolution if the court considers that appropriate and facilitating the use of such procedure; f) helping the parties to settle the whole or part of the case.*

[106] Kaufmann-Kohler, 9

[107] Rule 386 Canada Rules, Order for dispute resolution conference: (1) *The Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.*
Rule 387 Canada Rules: *A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(c), who may (a) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute.*

[108] Rule 151.6 Ontario Civil Rules: *At the time of presentation of the action or application, the court may, after examining the questions of law or fact at issue,… 5) determine how the conduct of the proceeding may be simplified or accelerated and the hearing shortened, by ruling among other things on the advisability of splitting the proceeding, better defining the questions at issue, amending the pleadings or admitting any fact or document, or invite the parties to a settlement conference or to recommend mediation.*

[109] For instance, article 62 ZH ZPO*: Das Gericht kann die Parteien jederzeit zu einer Vergleichsverhandlung vorladen. Diese soll in der Regel vor Anordnung des schriftlichen Verfahrens für Replik und Duplik durchgeführt werden.* Or Art. 54 LPC Ge*: Conciliation en cours de procédure : Dans toutes les causes qui, d'une manière générale, leur paraissent de nature à être conciliées après leur introduction, les tribunaux du canton en matière civile doivent, en tout état de cause, avant comme après les plaidoiries, convoquer les parties en chambre du conseil, pour les concilier si faire se peut. Les tribunaux peuvent déléguer un de leurs membres à cet effet.*

[110] Article 214 al. 1 Swiss CPC Draft: *Le tribunal peut conseiller en tout temps aux parties de procéder à une médiation.*

In Germany, the German ZPO[111] expressly encourages judges to the settlement of the disputes.

As for France, article 21 of the CPC provides that the judge has for mission to conciliate the parties[112] and the judge can designate a third party to mediate the dispute[113].

At last, in the Netherlands, the current Code of Civil Procedure does not contain any rule providing the judge with a mission to conciliate the parties[114]. However, the tradition of the judge settling a dispute still plays an important role in the Dutch legal system[115], probably because the former Code of Civil Procedure of 1838 did provide for the ability for the judge to encourage settlement[116].

iv. Other Rules

Mediation is also promoted at the European level with the Directive on Mediation promulgated in 2008 which encourages mediation to be incorporated in judicial systems in cross border disputes[117].

From this succinct overview of some current national civil procedural laws, one can observe that most of them, being in the common or the civil legal systems, allow for the judge to encourage settlement, however - except for China, Switzerland (Geneva), France - without explicitly conferring him the right to settle the matter himself.
It is therefore not a surprise that the arbitration community tends to clearly accept that promotion of settlement by the arbitrator is part of the arbitrator's mission and to consider the dual role with more hesitation.

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[111] Article 278 German ZPO: *Das Gericht soll in jeder Lage des Verfahrens auf eine gütliche Beilegung des Rechtsstreits oder einzelner Streitpunkte bedacht sein.*
[112] Article 21 CPC: *Il entre dans la mission du juge de concilier les parties.*
[113] Article 131-1 CPC : *Le juge saisi d'un litige peut, après avoir recueilli l'accord des parties, désigner une tierce personne afin d'entendre les parties et de confronter leurs points de vue pour leur permettre de trouver une solution au conflit qui les oppose.*
[114] Jagtenberg/de Roo, § 7
[115] Niemeijer/Machteld, 347
[116] Article 19 Dutch Code of Civil Procedure 1838: *The judge may in all cases, in every phase of the proceedings, instruct the parties to appear before him in order to attempt to reach a settlement.*
[117] Article 5 (1) 1 Directive on Mediation; Recourse to mediation: *A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.*

c. The existing arbitration laws and rules

Having concluded that both the arbitration community and the national judicial systems accept the principle that respectively the arbitrator and the judge may encourage the parties to settle, what is the situation in the existing arbitration laws and rules? Do they enable the arbitrator to suggest and take part into settlement during the arbitration process? Such question will be analysed in a geographical order, first looking at the arbitration laws and then at the available arbitration rules in the same jurisdiction.

As will be presented below, but with the exception of Asia, the Netherlands, the Canadian province of Alberta and some international rules, many national arbitration laws and rules are silent on the acceptability of an arbitrator becoming involved in settlement[118], even though most of them enable the arbitrator to issue awards on agreed terms.

i. China and Hong Kong

The way mediation is treated in the Chinese national judicial system has definitively had some influence on the arbitration laws and rules available in China. Chinese arbitrators systematically take the initiative to ask the parties if they wish the tribunal to assist them in reaching an amicable solution[119]. Indeed the PRC Arbitration Law provides for the ability for the arbitral tribunal to undertake mediation, before an award is made, or if the parties wish to[120]. The combination of mediation and arbitration is a characteristic of the arbitration practice in China and demonstrates the cultural preference for amicable settlement[121].

With regard to the arbitration rules, the CIETAC Rules stipulate the combination of conciliation with arbitration, which is one of CIETAC's distinctive features. The arbitral

[118] Kaufmann-Kohler, 10
[119] Kaufmann-Kohler/Kun, 487
[120] Song, 59; Article 51 PRC Arbitration Law: *Before an award is made by the arbitration tribunal, the tribunal may first undertake mediation. Where the parties concerned wish to undertake mediation, the arbitration tribunal shall allow mediation. Where mediation is unsuccessful an immediate award shall be made.*
[121] Song, 6

tribunal may conciliate the parties if they desire during the arbitration proceedings[122] and if such conciliation fails, the arbitral tribunal shall continue the arbitration proceedings[123].

Under the arbitration laws of Hong Kong, upon written agreement by all parties, the arbitrator or umpire may act as a conciliator[124]. However, the HKIAC rules[125], which are based on the UNCITRAL Arbitration Rules, do not provide for the ability for the arbitrator to mediate a dispute; the world settlement only appears in the appendix concerning the costs.

These provisions reflect Asia, particularly the Chinese culture where there is a strong preference for a negotiated solution over a confrontational adversarial approach[126]. With no doubt, the process of Arb-Med has its place to play in dispute resolution in Asia[127].

ii. United States of America, United Kingdom and Canada

From experience, one would assert that a US or English arbitrator would be less inclined to facilitate a settlement[128], as conciliation in arbitration is considered as overstepping the power of adjudication conferred to the arbitrator[129]. It is therefore not a surprise to observe that the US Federal Arbitration Act is silent on this subject. On the other hand, the AAA Arbitration Rules provide for the possibility of mediation during the arbitration; however

[122] Article 40 (2) CIETAC Rules: *Where both parties have the desire for conciliation or one of the 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.*

[123] Article 40 (4) CIETAC Rules: *The arbitral tribunal shall terminate the conciliation and continue the arbitration proceedings if one of the parties requests a termination of the conciliation or if the arbitral tribunal believes that further efforts to conciliate will be futile*.

[124] Art 2B HK Arbitration Ord., Power of arbitrator to act as conciliator: *(1) If all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.(2) An arbitrator or umpire acting as conciliator- (a) may communicate with the parties to the reference collectively or separately, (b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies. (3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.(4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.*

[125] Article 2 HKIAC Rules: *The UNCITRAL Arbitration Rules, with such modifications as noted herein, shall be the rules for any arbitration conducted under the Procedures.*

[126] Collins, 336

[127] Cheng, 8

[128] Kaufmann-Kohler/Bonnin, 82; Schneider, 78

[129] Kaufmann-Kohler/Bonnin, 86

such shall be run by a mediator that is not an arbitrator to the dispute[130]. It therefore does not happen that the arbitrator asks the parties if they want him to help facilitate mediation[131].

However, one can say when looking at the AAA/ABA Code of Ethics that the traditionally hostile attitude to conciliation efforts by the judge and arbitrator in the USA is evolving. Although designed for use in domestic arbitrations[132], Canon IV and V provide that the arbitrator may be present or participate in settlement discussions if the parties agree to it and, in case of settlement, such can be embodied in an award[133].

As for the United Kingdom, the UK Arbitration Act does not address if the arbitrator can promote settlement. Quite the contrary, it ensures a process that is essentially judicial in nature and which results in the tribunal handing down a binding decision[134]. However, it does not mean that settlements are excluded: it is part of the duty of the arbitral tribunal to adopt procedures suitable to the circumstances of the particular case so as to provide a fair means for the resolution of the matters to be determined[135]; indeed if the parties settle, the arbitrator can issue a consent award[136]. The LCIA Arbitration Rules are also silent on the role of the arbitrator as a mediator. The prohibition of the arbitrator to advise any party on the

[130] Rule 8 AAA Arbitration Rules: *At any stage of the proceeding, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case.*
[131] Woolf, 170
[132] Hunter, 190
[133] Canon IV F AAA/ABA Code of Ethics, An arbitrator should conduct the proceedings fairly and diligently: *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 a mediator unless requested to do so by all parties.* Canon V D AAA/ABA Code of Ethics, An arbitrator should make decisions in a just, independent and deliberate manner: *In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.*
[134] Collins, 334
[135] Article 33 UK Arbitration Act (General duty of the tribunal)
[136] Article 51 UK Arbitration Act, Settlement: *(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties. (2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award. (3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.*

merits or outcome of the dispute would rather speak against[137]. However, as in the UK Arbitration Act, if the parties have settled their case, the Arbitral Tribunal has the ability to render a consent award[138].

In Canada, the Commercial Arbitration Act, which applies only when it involves the Canadian Government, does not enable the arbitrator to act as a mediator, as it follows the UNCITRAL Model Law[139]; the arbitrator can however record a settlement in the form of an arbitral award on agreed terms (article 30). On the contrary, the arbitration act of the common law province of Alberta, although based on UNCITRAL Model Law[140], authorizes the arbitrator to act as a mediator if the parties have agreed to it[141].

As for the ADR Canada Arbitration Rules[142], they provide that the tribunal may encourage settlement. However it seems from the wording that such would not be done by the tribunal itself.

iii. Switzerland, Germany, France and the Netherlands

From experience, one would say that a Swiss or a German arbitrator would be more inclined to facilitate a settlement[143] or to act as a mediator. However, except for the Netherlands, the arbitration laws and rules do not reflect such practice.

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[137] Article 5.2 LCIA Arbitration Rules: *No arbitrator whether before or after appointment shall advise any party on the merits or outcome of the dispute.*

[138] Article 26.8 LCIA Arbitration Rules: *In the event of a settlement of the parties' dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing (a "Consent Award"), provided always that such award contains an express statement that it is an award made by the parties' consent. A Consent Award need not contain reasons. If the parties do not require a consent award, then on written confirmation by the parties to the LCIA Court that a settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded, subject to payment by the parties of any outstanding costs of the arbitration under Article 28.*

[139] Barin, 31

[140] Barin, 31

[141] Article 35 Alberta Arbitration Act: *(1) The members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute.* (2) *After the member of an arbitral tribunal use a technique referred to in subsection (1), they may resume then roles as arbitrators without disqualification.*

[142] Article 43 ADR Canada Arbitration Rules, Settlement: *The Tribunal may encourage settlement of the dispute and, with the written agreement of the parties, may order that mediation, conciliation or other procedures be used by the parties at any time during the arbitration proceedings to encourage settlement. If, during the arbitration proceedings, the parties settle the dispute, the Tribunal shall, upon receiving confirmation of the settlement or determining that there is a settlement, terminate the proceedings and, if requested by the parties, record the settlement in the form of an arbitration award on agreed terms.*

[143] Kaufmann-Kohler/Bonnin, 81

The provisions of the German Arbitration Act are based on the UNCITRAL Model Law and closely follow its structure and content, they are therefore silent as to if the arbitrator is authorized to propose settlement talks[144]. They only provide that if the parties settle the case in the course of arbitration, they may request the arbitral tribunal to record their settlement on a form of an award[145]. On the other hand, the DIS Arbitration Rules[146] authorize the arbitral tribunal to encourage the parties to seek settlement, although it does not say if the arbitrator can change hats.

In Switzerland, the PILS - applying to international arbitration - is silent as to whether or not the arbitrators can encourage settlement. The Concordat, which applies to domestic arbitration, does not expressly state that the arbitrator can act as mediator, however it indicates that if a settlement is found between the parties, the tribunal records it in the form of an award[147]. As for the Swiss Arbitration Rules, they only provide that in case of settlement, the tribunal, upon request of the parties and if accepted by the tribunal, can record the settlement in form of an award[148].

In France, the CPC is silent on the ability for the arbitrator to promote settlement; however article 1460 which applies to domestic arbitration expressly provides that the fundamental principle embodied in article 21 CPC (*the judge mission is to conciliate the parties*[149]) is applicable to arbitral proceedings. As for the ICC arbitration rules, they do not provide for the ability of the arbitrator to change hats, however if the parties settle, the tribunal can

[144] Article 1042(4) German Arbitration Act, General Rules of Procedure: *Failing an agreement by the parties, and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.*

[145] Section 1053 (1*)* German Arbitration Act, Settlement *If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, it shall record the settlement in the form of an arbitral award on agreed terms, unless the contents are in violation of public policy (ordre public)*.

[146]Section 32 (1) DIS Arbitration Rules, Settlement: *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.*

[147] Article 34 Concordat, Accord des parties: *Si le tribunal arbitral constate l'accord des parties mettant fin au litige, il le fait sous la forme d'une sentence*

[148] Article 34 (1) Swiss Arbitration Rules, Settlement or other grounds for termination: *If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.*

[149] See above footnote 112

issue a consent award[150]. As for French case law, the Appeal Court of Paris, already in 1984, has confirmed that the conciliation followed by a transaction is a natural outcome of the arbitration[151].

In the Netherland, the Dutch Arbitration Act specifically provides for the arbitral tribunal to be able to order the appearance of the parties in order to attempt to arrive at a settlement[152].

iv. Other Rules

As already pointed out, the UNCITRAL Model Law is silent on the ability for the arbitrator to suggest settlement. However it provides that the parties may request the tribunal to issue a consent award in case of settlement[153] and the UNCITRAL Model Law Notes[154] recognize that it may be opportune for the arbitral tribunal to schedule proceedings so to facilitate settlement negotiations, although such should be done with caution. The UNCITRAL Arbitration Rules are also silent on the subject matter; however they enable the tribunal to issues consent awards in the event of a settlement[155]. It is therefore not surprising that some arbitration laws and rules do not expressly provide for the arbitrator to facilitate settlement.

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[150] Article 26 ICC Arbitration Rules, Award by Consent: *If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.*

[151] *CIGA c/ Société La Margeride*, Cour d'Appel de Paris (1 Ch. Suppl.), 13 janvier 1984, in Revue de l'Arbitrage 1984, p. 531

[152] Article 1043 Dutch Arbitration Act: *At any stage of the proceedings, the arbitral tribunal may order the parties to appear in person for the purpose of providing information or attempting to arrive at a settlement.*

[153] Articel 30 (1) UNCITRAL Model Law: *If during arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties,and not objected to by the Arbitral Tribunal, record the settlement in the form of an Arbitral Award on agreed terms.*

[154] Article 47 UNCITRAL Model Law Notes: *Attitudes differ as to whether it I appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practice in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However there may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.*

[155] Article 34 (1) UNCITRAL Arbitration Rules: *If before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.*

On an international basis, it seems that dispute resolution centers and their related rules tend to address the subject matter positively. For instance the CAS Rules[156] enable the panel to suggest settlement at any time whereas the ICSID arbitration rules[157] enable the parties to request pre-hearing conference in order to seek settlement of their dispute. As for the WIPO Arbitration Rules[158], they authorise the arbitral tribunal to suggest settlement to the parties at a time it deems appropriate.

These "international" examples can be considered as embodying a modern standard for arbitral procedure[159], they definitively legitimate the opinion that the initiation of settlements by arbitral tribunals[160] should be part of their mission. Even the IBA Ethics rules - although not binding (unless agreed by the parties) - expressly permit the combination of the two[161]. As for the IBA Guidelines, they provide that the arbitrator may assist the parties to settle their dispute, however only if they have expressly agreed to it[162].

[156] R42 CAS Rules, Conciliation: *The President of the Division, before the transfer of the file to the Panel, and thereafter the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.*

[157] Article 21(2) ICSID Arbitration Rules: *At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives may be held to consider the issues in dispute with a view to reaching an amicable settlement.*

[158] See above foot note 1

[159] Koch/Schäfer, 163

[160] Berger, 399

[161] Article 8 IBA Ethics Rules, Involvement in Settlement Proposals*: Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously and preferably in the presence of each other. Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that an arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that an arbitrator involved in such discussion will become disqualified from any future participation in the arbitration.*

[162] Article 4 (d) IBA Guidelines: *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 a 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. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.*

v. The Draft CEDR Rules for the facilitation of settlement in International Arbitration

One cannot discuss the issue of promotion settlement in arbitration without referring to the CEDR Draft Rules. The Centre for Effective Dispute Resolution (CEDR), based in the United Kingdom, has gathered over the last 19 years experience in dispute resolution. It is supported by members from multinational organizations, international law firms, and professional and governmental bodies. It plays an important role in the UK and internationally to bring mediation into business practice. The CEDR has recently formed a commission[163] on settlement in international arbitration to review the current practice in this field and to come up with recommendations to improve settlement in arbitration. A CEDR Report of the commission was issued in 2009[164] in which the CEDR Draft Rules are suggested.

According this draft, it is accepted that the tribunal will be proactive to assist the parties to achieve a negotiated settlement of part or their entire dispute[165] with a waiver from the parties to use such promotion of settlement as a ground for challenging the arbitrator or the award[166]. The tribunal can chair settlement meetings and provide the parties with preliminary views. If requested by the parties, the tribunal can offer suggested terms of settlement as basis for further negotiation[167]. These rules also enable the organization by the arbitral tribunal of a mediation window in the arbitral proceedings when requested by the parties to enable settlement discussions[168]. However, these rules do not provide for the arbitral tribunal to issue consent awards, although it is believed that such would be a logical consequence.

In conclusion to this chapter, and in the light of the international evolution and the views of the arbitration community, and despite the lack of regulation in the arbitration laws and

[163] The Commission is comprised of many of the world's foremost international arbitrators and all significant arbitration bodies were invited to participate. The Co-Chairs are Lord Woolf of Barnes and Gabrielle Kaufmann-Kohler, and the Director is Dr Karl Mackie.
[164] Commission on Settlement in International Arbitration; Report of the Commission, Draft paper for consultation (December 2008), Consultation document 2009, www.cedr.com
[165] Article 3.2 CEDR Draft Rules
[166] Article 3.3 CEDR Draft Rules
[167] Article 5.1 CEDR Draft Rules
[168] Article 5.3 CEDR Draft Rules

rules on the subject, it becomes difficult to argue that it is incompatible with the role of the arbitrator to act as settlement facilitator or even as mediator, especially if the parties have consented to it.

The lack of guidance on a national level may be explained by the fact that most of the arbitration laws are based or have been influenced by the UNCITRAL Model Law, which, as already mentioned, does not address the subject matter. Another reason may be that arbitration being a consensual process, silence and therefore absence of prohibition mean that it is for the parties to decide, if they desire, to combine arbitration and mediation. If they have not, the personal belief of the arbitrator will step in.

It is therefore submitted that if the arbitration community increasingly accepts the facilitation of settlement by the arbitrator and even his involvement in settlement talks; in the future, arbitrators may more and more often attempt to discuss settlement during the arbitration process, and even participate in the settlement talks or act as mediator, if the parties agree. Indeed the arbitrators who regard arbitration as a prime means to generate consensual solutions experience a high settlement rate and vice versa[169]. The survey conducted in 2001-2004 by Bühring-Uhle/Kirchhoff/Scherer supports this submission as it found out that the proportion of international commercial arbitration cases that were settled by the parties before the issuance of an arbitral award was significant (43%)[170] and higher than in the survey conducted 10 years earlier (40.6%)[171]. Such increase in settlements has also been experienced by the WIPO Arbitration Center[172].

4. Why or why not promote settlement during arbitration?

While the mere promotion of settlement by the arbitrator does not seem to raise too many questions, the participation of the arbitrator himself in such settlements talks – as mediator in the Arb-Med process for instance – is subject to more debate. In this chapter, the benefits

[169] Bühring-Uhle/Kirchhoff/Scherer I, 112
[170] Bühring-Uhle/Kirchhoff/Scherer I, 112
[171] Bühring-Uhle, 163
[172] WIPO Arbitration Center Update, 52

as well as the obstacles in the involvement of the arbitrator in the settlement talks will be examined and solutions suggested.

a. Benefits

The same person acting both as arbitrator and mediator or settlement facilitator is definitively one of the major advantage of the combination of arbitration and mediation.

First the arbitrator being familiar with the case and the issues at hand[173] is well placed to act as mediator. In the course of the arbitration proceedings, the arbitrator becomes immersed in the dispute so as to be better equipped to resolve it. Therefore, when entering into the settlement phase, the arbitrator has a sound knowledge of the case and there is no need to educate another neutral. If the arbitration resumes and the parties have agreed that the information gathered during the settlement phase can be used in subsequent arbitration proceedings, the time spent during mediation will have supplied the arbitrator with enough information for a decision to be made so that time is not wasted in subsequent arbitration hearings[174].

The fact that the arbitrator and the mediator are the one and same person offers the arbitrator the unique flexibility to switch from one method to the other at any time of the arbitration process and several times if needed. The arbitrator is in control of the timing of the proceedings and is in the best position to choose the appropriate momentum to offer the tribunal's services for settlement purposes. It will necessarily speed up the dispute resolution process.

It also avoids duplication of work, and enables substantial cost savings[175]. No delays are incurred as there is no change of process and person. It makes Arb-Med superior to each of arbitration and mediation taken alone[176].

The other benefit of starting off with the arbitration process is that the issues are crystallised in the request for arbitration or subsequent written submissions and the proper legal

[173] Woolf, 171
[174] Elliott, 175
[175] Bühring-Uhle/Kirchhoff/Scherer I, 110; Abramson, 3
[176] Schneider, 77; Woolf, 171

position analysed. It enables the parties and the arbitrator to concentrate on the core disputes[177] and to exactly know the issues that may be the subject of the settlement talks.

At last, the advantage of trying to resolve the dispute while arbitrating is that in case of settlement, it enables the parties to maintain a good relationship and to go on with their business.

All benefits added, the main advantage of Arb-Med is definitively the increase of the efficiency of dispute resolution[178], as at the end of the day, an outcome is guaranteed either through a settlement or through a final arbitral award[179].

b. Obstacles

As for the benefits, most of the obstacles against Arb-Med find their origin in the dual role of the neutral person: the opponents believe that because the processes of arbitration and mediation are so different, the two roles are incompatible**.**

The first objection is that when wearing the arbitrator's hat back in the event of failure of settlement, the arbitrator may lose his objectivity and therefore become impartial[180], as the mediator/settlement facilitator will have received information during the mediation proceedings, which should not be part of the arbitration record or which would have not necessarily been disclosed if no mediation/settlement talks had taken place. This objection is particularly relevant when caucus meetings have been conducted during the settlement talks. If the arbitrator relies on information received during such meetings, where one party will not have been able to respond to the allegations made by the other and facts that the other side is unaware of will have been admitted or disclosed to the mediator[181], the disclosure of such information or facts by the arbitrator in subsequent arbitration

[177] Cheng
[178] Kaufmann-Kohler, 5; § 1.5 CEDR Report
[179] Dendorfer/Lack, 88
[180] Woolf, 171; Abramson, 4
[181] Kaufmann-Kohler, 18; Plant, 143

proceedings may amount to a breach of due process or natural justice[182], and expose the award to challenges[183].

It is therefore not a surprise that this aspect of mediation raises the most serious objections to settlement efforts by an arbitrator[184]. Common law countries seem more opposed[185] to caucusing than civil law countries, although in Austrian, German or Swiss arbitration caucusing is almost never practiced[186]. The survey conducted by Bühring-Uhle showed that most of the participants (from both backgrounds) were against the caucus[187]. It is also relevant to read that the IBA Ethics Rules do not encourage caucus sessions[188].

The second objection finds its root in the unanimously accepted ADR general mediation privilege. Derived from the notion of confidentiality which is the central pillar in ADR processes[189], the mediation privilege renders all oral or written evidence inadmissible in subsequent arbitration proceedings. This means that in the absence of any agreement of the parties to the contrary, the participants shall not in any manner rely on documents, statements, expressed views or admissions made during the ADR process in any judicial, arbitration or similar proceedings[190]. The requirement of fair treatment of the parties in an arbitration as an essential element of arbitral due process would be violated if a party had to refer to a document even though at the moment the document was produced, it relied in good faith and with just reason on the generally accepted settlement privilege. Any tribunal failing to respect the settlement privilege would risk the setting aside of the award or refusal of enforcement of the award for violation of arbitral due process[191].

[182] Elliott, 177; Schneider, 94; Berger, 392
[183] Talbot, 221 referring to *Glencot Development and Design Co Ltd v. Ben Barrett § Son (Contractors) Ltd* (adjudication process during which a mediation took place, the mediation failed and adjudication resumed; challenge for bias as the adjudicator was also the mediator)
[184] Schneider, 90; Collins, 341
[185] Hunter, 195; Woolf, 172
[186] Raeschke-Kessler, 535
[187] Bühring-Uhle/Kirchhoff/Scherer II, 87, Bühring-Uhle/Kirchhoff/Scherer I, 122
[188] Article 8 IBA Ethics Rules: *Although any procedure is possible with the agreement of the parties, the tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that any arbitration involved in such discussions will become disqualified from any future participation in the arbitration.*
[189] Berger II, 266
[190] Berger II, 266
[191] Berger II, 276

Ineffectiveness is another objection against the Arb-Med process. If the parties know that in case of failure of mediation the matter will be subject to arbitration they may be less candid[192] in the caucus sessions and hide some of the information in the fear that such will be revealed later during the arbitration. In this event, the mediation process becomes ineffective as it might be difficult under these circumstances for the mediator to ascertain the parties' bottom line positions and their private concerns. It follows that avoidance of caucus or the retention of information by the parties during such caucus sessions may severely impair the mediator to act effectively in that role.

Another disadvantage is that the parties might feel coerced into settlement[193]. In those instances in which a right or even a duty of the arbitrator to promote a settlement is recognized, the arbitrator may not force settlement discussions upon the parties[194], as it is still a matter of consent of the parties.

An additional obstacle is related to the scope of the dispute before the arbitrator, which places some constrains on the mediator's efforts. Contrary to the mediation process where the mediator looks for the underlying interests of the parties that might have no relation with the dispute, an arbitrator acting as mediator may be reluctant to explore settlements away from the subject matter before him and the parties may hesitate to discuss with him matters wholly unrelated to the dispute[195]. As a result, the settlement efforts by an arbitral tribunal may differ in scope from these of mediators acting outside pending court or arbitration proceedings.

Another controversial argument is the use of indication of preliminary views by the arbitrator to indirectly bring the parties to think about settlement. The main objection is the fear of prejudice or the appearance of it. The opinions are different depending on the background[196]. In practice, Germans and Swiss are more familiar with this form of preparing the parties for settlement[197]. In Schneider's opinion, the expression of preliminary views of the arbitral tribunal's assessment of the dispute is not only admissible but desirable and very

[192] Kaufmann-Kohler, 20
[193] Kaufmann-Kohler, 20
[194] Hausmaninger, 45; § 4.2.6 CEDR Report
[195] Schneider, 66
[196] Bühring-Uhle/Kirchhoff/Scherer I, 121
[197] Bühring-Uhle/Kirchhoff/Scherer II, 86; Raeschke-Kessler, 534; §2.2 CEDR Report

useful, although such should only happen if the arbitrator acts with prudence, open to further explanations, and after carefully having studied the file [198], and only with the consent of the parties[199]. This view is followed by the CEDR Draft Rules which also give the tribunal the ability to provide the parties with its preliminary views[200]. Others on the contrary believe that the arbitrator should refrain from expressing any views as to the merits or demerits of a particular claim in order to minimize the risk of challenges for lack of impartiality[201]. This view is particularly valid in the common law world where arbitrators refrain from engaging with the parties on substantive issues for fear that this may suggest that they have prejudiced the case before hearing all of the evidence and arguments[202]. In China, also, arbitrators try not to express their opinions about the case; however they can speak about the weaknesses and strengths of the case without pronouncing anything about the outcome of the arbitration[203].

At last, another opposition is related to the psychological impact of integrating mediation or settlement talks into arbitration. If the arbitrator does not take the initiative to suggest settlement, and if such process has not been agreed by the participants beforehand, the parties may hesitate to take the initiative as it might be regarded as a sign of weakness. They may also refuse the suggestion of the arbitral tribunal to try settlement, under internal pressure not to make any concessions. In such event, if the counsels are more oriented to an adversarial procedure, they will not encourage the parties to make any steps towards settlement[204]. Also the need to follow a dual strategy (settlement talks together with the underlying arbitration), the lack of negotiations skills or authority on the part of the parties' representatives, the unwillingness to give up a position, the lack of analysis, very high egos[205] or tactical considerations (formalization of the dispute, preservation of evidence)[206]may all be good reasons to avoid settlement talks during arbitration.

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[198] Schneider, 76
[199] Berger I, 400
[200] Article 5.1.1.2 CEDR Draft Rules
[201] Collins, 337-338; Elliott, 177; see also Article 5.2 LCIA Arbitration Rules: *No arbitrator whether before or after appointment shall advise any party on the merits or outcome of the dispute.*
[202] CEDR Report, § 2.3
[203] Kaufmann-Kohler/Kun, 489
[204] Bühring-Uhle, 170
[205] Bühring-Uhle, 175; Bühring-Uhle/Kirchhoff/Scherer I, 116
[206] Bühring-Uhle, 179, Bühring-Uhle/Kirchhoff/Scherer I, 118

c. Suggested solutions to circumvent the obstacles

In order to ensure that the Arb-Med process respects the principle of due process, fairness, equal treatment and impartiality, the first step for the parties is to make a maximum use of their autonomy.

In order to avoid challenges based on impartiality, the parties should first accept in writing that the arbitrator acts as a mediator/settlement facilitator and, if mediation fails, that the mediator is allowed to wear his arbitrator's hat back[207]. The parties should be well informed on what such process implies and what could be the disadvantages. They should also agree that once the parties have accepted such dual role, they may later neither challenge the arbitrator nor the award, should the settlement fail[208]. This means that the parties must waive their right to challenge the award based on the ground of violation of equal treatment or impartiality. Such solution has been adopted or is possible under some arbitration laws[209], or rules[210] and is suggested by the IBA Guidelines[211].

With regard to the caucus and related disclosed information, remedies exist[212] that need to be discussed between the parties and form part of an agreement in order to be enforceable[213], in case of settlement failure.

First, the parties may decide to use the Arb-Med process, but without the caucus sessions in the mediation phase, understanding that this will take away one of the essential tool of the

[207] Newmark/Hill, 86, Koch/Schäfer, 173

[208] Raeschke-Kessler, 527

[209] Article 35(2) Alberta Arbitration Act: *After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification;* see also Article 27 (3) New South Wales Act: *Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1)*; and article 192 PILS.

[210] Article 3.3 CEDR Draft Rules; Article 7.5 CEDR Safeguards

[211] IBA Guidelines to 4(d): *The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well established in some jurisdictions but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful. Thus, parties assume the risk of what the arbitrator may learn in the settlement process. In giving their express consent, the parties should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.*

[212] Kaufmann-Kohler, 18

[213] Article 7.2 CEDR Safeguards

mediation process. This is the solution suggested by the CEDR Draft Rules as a principle[214]. However, if the arbitrator knows the file very well, it is likely that the information that would have been disclosed during the private meetings may be found by the arbitrator anyway. It will largely depend on the manner in which the arbitrator has conducted the arbitration prior to the settlement meetings[215].

The second solution is to agree that the mediator transformed into arbitrator will not add to the arbitration record the information acquired informally and off the record during caucus sessions[216], applying therefore the privilege principle of mediation. This is the solution provided by several rules[217]. This solution seems really unrealistic, as the arbitrator may be subconsciously influenced by such information[218]. He may remember certain facts that the other party does not know about, which places such party in an unequal position. This also put the arbitrator in a delicate situation as he might be challenged for treating the parties unequally.

Finally another solution is that the parties agree that any information disclosed during the private meetings will be fully communicated to the other party and may be used in the event of further arbitration proceedings[219]. This should be agreed in writing so as to ensure that none of the parties alleges a violation of the mediation privilege. This is the solution suggested by some arbitration laws and rules[220]. From the arbitrator's point of view, this is certainly the best way out; however the parties might then refrain from exposing to the

[214] Article 5.2.1 CEDR Draft Rules
[215] Schneider, 93
[216] Schneider, 94; Plant, 146
[217] Article 17 WIPO mediation rules; article 7(2) ICC ADR Rules; Article 131-14 CPC
[218] Collins, 339
[219] Wenger, 149-150; Schneider, 96
[220] For instance, Section 2B(3) HK Arbitration Ord.: *Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.* Article 63(3) Singapore Arbitration Act: *Where confidential information is obtained by an arbitrator from a party to the arbitration proceedings during mediation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator shall before resuming the arbitration proceedings disclose to all other parties to the arbitration proceedings as much of that information as he considers material to the arbitration proceedings.* Article 40 (8) CIETAC Rules: *Where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by ether party of by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings , judicial proceedings or any other proceedings.*

arbitrator all information they have, knowing that it will be disclosed later; they unconsciously may refrain from telling the full story.

Several authors suggest in relation to the caucus objection that the wise mediator/arbitrator should resign if he develops doubts about his ability to remain impartial or independent or, if discussed beforehand with the parties, the arbitrator should at the beginning of the process reserve his right to resign[221], establishing a kind of Arb-Med opt out on the side of the arbitrator/mediator[222].

At last, a solution that might seem obvious and that should also be valid for the whole process is that the parties should trust the person who acts as arbitrator-mediator-arbitrator. They should trust that this person understands and knows the arbitration and mediation processes; will remain impartial and will treat the parties equally. If not, they should change their neutral or not agree to such a process[223].

The integration of mediation into arbitration has definitively arguments that speak in its favor, such as the preservation of the business relationships, the costs savings, the time effectiveness and a better knowledge of the dispute by the mediator/settlement facilitator. It is believed that the disadvantages put forward, even though acknowledged and real, can be avoided by the parties by ensuring that they agree on the scope of the settlement phase and the process in detail.

5. How does it work?

How do the participants come to the idea to settle, how should it be brought forward, by whom and at which stage of the proceedings? What are the issues that should be thought of so that the process runs smoothly?

[221] Woolf, 172
[222] Nariman, 267; Wenger, 149-150; article 7.6 CEDR Safeguards
[223] Cheng, 6

In a perfect world, the arbitration agreement should include the ability for the arbitrator to act as mediator/settlement facilitator and if possible the details of his intervention should be outlined. Unfortunately, according to the latest Bühring-Uhle/Kirchhoff/Scherer survey, it seems that the least intrusive the arbitration agreements are the most accepted[224], which would obviously not be the case for such an arbitration agreement.

In the same perfect world, all these questions should be discussed at the beginning of the process of arbitration - for instance at the first procedural conference[225] -, not only by the parties, but together with the arbitrator. Indeed without the consent of the parties, the promotion of settlement and the settlement itself cannot take place, the consent being the cornerstone principle of both arbitration and mediation. Expectations of all participants need to be managed right from the beginning of the process so that if settlement is talked about, it does not come as a surprise. If the principle of facilitation of settlement is raised at an early stage, it enables the parties to express their reservations[226], as the success of the process is dependent on the arbitrators discussing with the parties and understanding their expectations.

The most obvious ingredient to a successful process is to record the parties' consent to possible mediation[227], by the same neutral, in writing in a procedural code or guidelines and to agree on what would be proper or improper in the conduct of arbitrators[228]. There must be a common understanding that is reflected in the rules that apply to the arbitration and settlement process.

a. Who takes the initiative?

In such code or guidelines, the participants should decide if the arbitrator is able to take the initiative when an opportunity arises or if settlement attempts can only occur upon the parties' request. In other words who can take the initiative of the settlement/mediation? In the event where the parties have not agreed on the possibility for the arbitrator or the

[224] Bühring-Uhle/Kirchhoff/Scherer I, 126
[225] Article 4 CEDR Draft Rules
[226] Schneider, 86; Plant, 146
[227] Collins, 341
[228] Hunter, 182; Abramson, 7

parties to attempt settlement negotiations, could the arbitrator in the fulfilment of his mission suggest the parties to settle?

Best modern practice and the arbitration community (as seen under chapter 2 above) recognize that arbitrators should have the ability to suggest settlement as it is part of their mission. However it does not mean that the arbitrators have an obligation to enquire whether there is anything that arbitrators can do by consent to assist the parties to achieve settlement[229]. Collins is of the opinion that arbitrators should promote settlement only if they see an opportunity to encourage settlement. Woolf believes that the arbitral tribunal cannot order mediation for the reasons that this is taking place in a consensual process; the tribunal should rather encourage the mediation as nobody can order parties to mediate if they are not willing to[230].

It is submitted that the arbitrator – having discussed or not the matter with the parties, should - if such opportunity arises or if he feels that there is a momentum for settlement - offer to assist the parties to mediate their dispute. After all, the arbitrator is paid to serve the parties. It is in the arbitrator's mission to help the parties to find an outcome to their dispute either through a settlement or a binding award. Provided it is made at the right moment, it cannot harm the process of arbitration to ask if settlement is possible as, at the end of the day, the parties are the only one to master the outcome; either they consent to try mediation/settlement or not.

b. At which stage of the proceedings?

Another practical question is at which stage should the suggestion of settlement intervene: after the terms of references, after an interim award, before or after the hearings or the written submissions? The question is important because if the suggestion is made at the wrong moment, this might eliminate all potential settlement opportunities.

It may be appropriate and in the interests of the transparency of the proceedings that the timing of the settlement explorations, if any, is discussed at the very beginning of the

[229] Collins, 335
[230] Woolf, 176; Collins, 343

proceedings and that the stage envisaged for a settlement initiative be included in the provisional timetable[231] in the code or guidelines referred to above.

However such ideal solution only exists if the participants have discussed the principle of settlement attempts and often such topic will not have been considered beforehand.

If the arbitrator sees an opportunity to settle, then when should the tribunal take the initiative to suggest settlement? The reasonable answer is of course when the arbitrator believes to have good reasons to do so, at least when the arbitrator feels that one party is ready to seek settlement. The best strategy may be not to talk about settlement but to conduct the proceedings actively and efficiently with the aim of reaching a decision[232] and to treat each party and their positions with respect and empathy[233].
The suggestion should not be made too early in the proceedings when the arbitrators do not have sufficient understanding of the issues and also to avoid to leave doubts to the parties about the arbitral tribunal's willingness to decide the dispute. It should not be too late either so as to avoid that the parties have spent too much time in arbitration and are not willing to settle anymore. The parties should have gained trust towards the arbitrator and the arbitrator should have acquired enough knowledge of the interests of the parties and of the dispute on a factual and legal point of view[234].

The parties should also have had the opportunity to present their case; the first possibility could be the stage of the terms of reference – if such stage exists in the proceedings - , or after the written statements have been exchanged[235] or before the hearings have commenced[236]. However, this does not mean that a settlement could not be suggested at the end of the proceedings, as mediation can be proposed at any stage of the proceedings before an arbitral award is rendered.

Even if the parties have refused to attempt to settle their dispute a first time, it does not mean that the tribunal could not try again at a later stage, as the arbitral tribunal should constantly assure itself of the intentions of the parties.

[231] Wenger, 147
[232] Schneider, 86
[233] Raeschke-Kessler, 531
[234] Horvath, 295
[235] Wenger, 147
[236] Raeschke-Kessler, 528

The 2001-2004 survey conducted by Bühring-Uhle/Kirchhoff/Scherer[237] confirmed that the settlement rate increases as the proceedings evolve with a peak during evidence hearings or in the post hearing phase. But it also showed that the participants were not unanimous: some believed that trying settlement at an early stage would enable largest savings, as the parties are still more open as they have invested less (time, effort and money); some other thought that suggesting settlement at a more advanced stage would enable the parties to know more about their strengths and their weaknesses and the case may be more ripe to be settled as more information has been exchanged.

At the end of the day, identifying the best moment is a question of judgement and experienced arbitrators will generally know when the time is ripe[238]. Anyhow, they should be mindful of the signals they give to the parties and should not urge a settlement against the parties' will[239].

c. How to suggest settlement?

Of course, the easiest and obvious way for the arbitrators to suggest a settlement is to simply ask the question either orally during the process of arbitration or better during a break at a hearing (off the records) or by a letter to the parties[240].

However, depending on the parties, the level of animosity or the type of dispute, it might be opportune – if such has not been discussed beforehand - to bring the parties to think about settlement using indirect means.

A very important tool for the arbitrator in bringing about a settlement is the indication to the parties of his preliminary views, indicating the strengths and weaknesses of the case, subject, of course, of revision as the arbitration proceeds. Such discussions have the effect of reducing excessive expectations of the parties, preparing the ground for settlement discussions.

[237] Bühring-Uhle/Kirchhoff/Scherer I, 113
[238] Kaufmann-Kohler, 16; Bühring-Uhle/Kirchhoff/Scherer I, 114 4
[239] Collins, 334
[240] Schneider, 86

Another way to bring the parties to think about settlement is to put questions to the parties, or witnesses inviting them to clarify points. The content of such questions by the arbitrator or the recipients of such questions may indicate weaknesses of a party's position. Lastly the active arbitrator will discuss the legal issues with the parties; which choice will indicate to the parties the respective points to be clarified or elaborated in order to convince the arbitrator[241]. This is indeed the classical method for arbitral tribunals to deal with the matter. Also the issuance of partial awards on certain issues may prepare the ground for a settlement on the remainder of the dispute[242].

d. What other practical issues should be thought of?

As discussed above in order to avoid any surprise and subject to the applicable arbitration laws and rules, the parties should record their consent to attempt settlement during the arbitration process and the scope of the settlement process, in the form of a procedural order[243], code or guidelines.

Such procedural order or code should address if the settlement attempts shall concern the whole dispute or only parts of it; if the arbitrator has the ability to indicate preliminary views with regard to the disputed issues; and if the arbitrator may during the settlement talks suggest a concrete settlement proposal, reasoned[244] or not.

It should also state if caucusing is permitted and what the mediator turned into arbitrator should do with the information gathered during caucus meetings.

In order to avoid change of views concerning the arbitrator impartiality and independence[245], the procedural order should imperatively include a waiver from the parties according to which they agree that the arbitral tribunal's involvement in the settlement negotiations does not disqualify the arbitrators to continuing to serve as arbitrators in the event that the settlement fails[246].

[241] Wenger, 146
[242] Schneider, 75
[243] Wenger, 149
[244] Schneider, 90
[245] Collins, 341
[246] Wenger, 149, Abramson, 15

The parties should also decide together with the arbitral tribunal if the settlement talks can be conducted by the chairman alone or the arbitral tribunal in its full composition, keeping in mind however that whoever conducts the mediation, it is important that the full arbitral tribunal support the mediation process. On the side of the parties, it would also be advisable that high representatives of the parties with real decision power-making take part to the mediation/settlement process[247].

If the issuance of preliminary views is accepted, the procedural order should then state that such views would be of a provisional unbinding nature and revisable in the event no settlement is reached. The parties should also decide if the settlement discussions are confidential or not[248].

At last, the procedural order or code should deal with the issue of timing – how long should the settlement process take – and if the costs of the mediation should be treated as costs in the arbitration.

e. What if the settlement's attempts fail?

In the event where the attempts for settlement are unsuccessful, the arbitration will resume if the parties have agreed to it or if the parties have committed to the continuance of the arbitration process in case of failure of settlement's attempts, that is if they have chose the Arb-Med process. The arbitrator will continue with the arbitration process and issue a final arbitral award.

The parties will have to decide - if not already agreed to – if the mediation shall have an impact on the arbitration or not, particularly in relation with the clarifications and confidential information gathered during the mediation phase.

f. What if the settlement's attempts succeed?

In the event where a settlement is reached, the parties may terminate the arbitral proceedings by formalizing their agreement in a contract. In such case, the arbitral tribunal

[247] Schneider, 88; Raeschke-Kessler, 531
[248] Plant, 146

shall render a termination order. Alternatively, if requested by the parties, the arbitral tribunal may record their settlement agreement in an award on agreed terms, also called a consent award. Such will depend on the applicable arbitration laws and rules[249] or the procedural rules agreed by the parties.

i. Termination orders

This is the order by which the arbitrator declares the arbitration terminated without any decision taken. This is the solution purported by most arbitration rules which require the arbitrator to terminate the arbitration unless a consent award is requested by the parties[250].

ii. Consent awards (or awards on agreed terms) and their enforcement

A settlement agreement concluded in the context of an arbitration can be established as an arbitral award on agreed terms or a consent award[251], if requested by the parties (although under the CIETAC Rules, a consent award is always issued unless the parties have agreed to the contrary[252]). It is a classical element of arbitration.

The obvious advantage is that if the settlement forms part of a consent award, the prevailing opinion is that it becomes fully enforceable under the NY Convention[253] in the same manner than any other award[254]. Indeed, unless otherwise stated by applicable arbitration laws and rules, such consent award is generally considered as an arbitral award in its full sense[255] although it differs from a final award by its object[256]. The enforcement of such an award should not be a problem as all members of the NY Convention in general recognize the consent award as being a final award; even if the NY Convention does not expressly address consent awards[257]. This means that a consent award can be challenged under the usual grounds of article V, especially under al. 1(d) if the award is the product of a procedure

[249] See for instance articles 30 and 32 UNCITRAL Model Law; article 51 UK Arbitration Act; Article 34 UNCITRAL Arbitration, article 34 Swiss Arbitration Rules, Article 32 (2) DIS Arbitration Rules
[250] See footnote n° 249
[251] Poudret/Besson, § 14; Nater-Bass, 431
[252] Article 40 (6) CIETAC Rules
[253] Kaufmann-Kohler, 16; Lazareff 4-5; Lörcher 277; Gisberger/Voser, §1152
[254] Poudret/Besson, §14; Poudret/Besson, § 731(f); Nater-Bass, 433, Woolf, 174
[255] Bertrand, 13; Born, 2439; see for instance Article 30 (2) UNCITRAL Model Law; article 51 (3) of the UK Arbitration Act, article 32(3) DIS Arbitration Rules
[256] Poudret/Besson, § 731 (f)
[257] Bertrand, 17; Lörcher, 277

which has not been agreed by the parties (in case of lack of consent by the parties of the arbitrator engaging in settlement procedures).

As to the form of the award, except for the presupposed requirement of a written award[258], there is no requirement of form[259] in the NY Convention and failure to satisfy formal requirements should not be a ground for refusal of enforcement under article V of the NY Convention[260]. However, national arbitration laws may impose formal requirements; in such event the form of the consent award should respect the applicable arbitration rules of the place where the award is rendered in order to avoid the award to be set aside[261]. Note that in China, an award incorporating a settlement of the parties would not be set aside since the settlement is deemed capable of curing all the procedural defects and the courts are reluctant not to honour the parties' agreement unless there is an intolerable violation of law[262].

The debated question is if consent awards must be reasoned or not. In general, although the NY convention does not require it, arbitration laws and rules mostly provide that awards should be reasoned[263] with an exception for the consent awards[264].

Despite these laws and rules, there seems to be divided opinions as to if a consent award needs to be reasoned or not in order to be enforceable; particularly if the laws where the award was made, admit unreasoned award, and the laws where the award needs to be enforced require reasoning. Some believe that the consent award should not only be reasoned[265] but it should be written with great care and not be a simple registration of the settlement. The arbitrator should ensure that the consent award has the same

[258] Article IV(1)a NY Convention
[259] Born, 2443
[260] Born, 2444
[261] Lörcher, 278
[262] Song, 42
[263] Born, 2450; Article 31(2) UNCITRAL Model Law; Article 189(2) PILS; Article 52(4) UK Arbitration Act
[264] Article 31 (2) UNCITRAL Model Law ; article 52 (4) UK Arbitration Act; Article 34 (1) UNCITRAL Arbitration; article 26 (8) LCIA Arbitration Rules ; Article 34 Swiss Arbitration Rules ; Article 42(2) CIETAC Rules; Article 34 (3) DIS Arbitration Rules
[265] Lazareff, 5; Bertrand, 24

irreproachable quality then a final award would have had; ensuring that the settlement reflected in the award is complete and not challengeable[266].

Other authorities do not believe that consent awards need to be reasoned[267] in order to be enforceable in a place where the arbitration laws require reasons although some national courts, such as France, may refuse enforcement for reasons of international public policy[268].

It is therefore submitted that, in order to ensure that it is enforceable and to avoid any related discussions, the consent award should at a minimum entail a text fully agreed by the parties, be designated as a "consent award", refer to the settlement agreement as reason of the award[269] and define clearly and in detail the parties obligations regulated by the settlement and the relief sought by the parties[270]. In summary it should enable the parties and any enforcement court to determine the scope of settlement, so that the res judicata effect is precisely determined.

At last, it is to be reminded that not all settlements may be issued as consent awards as arbitrators can impose certain limitations on their content. If the arbitrator believes that the settlement is contestable and goes against his ethics or is contrary to relevant mandatory law or is otherwise fraudulent or illegal[271], the arbitrator can refuse to issue a consent award[272]. This is where the consensual aspect of arbitration finds its limits; the arbitrator shall keep his freedom of mind and direct the process[273].

6. Conclusion

While the trend goes definitively towards the acknowledgement that the arbitrator can promote settlement in the course of the arbitration, at any time or upon request of the parties, signs show that the acceptance of the arbitrator being personally involved in the

[266] Bertrand, 24
[267] Poudret/Besson § 731(f); Song, 41
[268] Born, 2458-2459, Poudret/Besson § 1001
[269] Wenger, 151
[270] Nater-Bass, 434
[271] Gisberger/Voser, § 966; Redfern/Hunter, § 8-51
[272] See for instance article 26 in fine ICC Arbitration Rules; article 30(1) UNCITRAL Model Law; Article 51(2) UK Arbitration Act
[273] Lazareff, 4-5

settlement talks through mediation or by using mediation tools tends to increase; however only if certain safeguards are put in place.

It is therefore submitted that it is in the arbitrator's mission to always address the subject of settlement during arbitration, whether or not agreed by the parties. However, as promotion of settlement is directly related to the consensual aspect of arbitration, the personal participation in settlement talks or the transformation of the arbitrator into mediator should only happen if the parties have expressly agreed to it and have waived their right to challenge the arbitrator or his award because of the arbitrator's dual role. In order for the integration of mediation into arbitration to be successful, the parties must have confidence not only in the process but also in the capacity of the third party[274]; and the participants should regulate the process in detail.

In spite of the rising acceptance by the arbitration community of the integration of mediation or elements of mediation in arbitration proceedings, such process is used less frequently than this might suggest[275]. It may be because examples of successful outcomes, although existing, are rare or not published; or because the neutrals are not confident to manage the two processes. Another reason might also be that the parties are not aware of the existence of this hybrid process.

Rising awareness of this form of dispute resolution will for sure increase the number of arbitrations that include mediation[276]. But one thing is certain; change will not be induced without the active direct support, encouragement and participation of the business community itself[277] and the promotion of it by the arbitrators.

If well organized and safeguards put in place, the reality of mediation is that it is not competitive with, but complementary to arbitration. As discussed, there are no obstacles to an interaction between arbitration and mediation that cannot be overcome. On the contrary the combination of both procedures, and their interaction could lead to their enrichment and to better outcomes[278], as while the parties are going through the mediation process,

[274] Talbot, 229
[275] Bühring-Uhle/Kirchhoff/Scherer I, 128
[276] Bühring-Uhle/Kirchhoff/Scherer I, 127; Bühring-Uhle/Kirchhoff/Scherer II, 88
[277] Shilston, 163
[278] Dendorfer/Lack, 76

they may feel more open to settle knowing that if such is not successful, arbitration is always available[279] .

To choose to integrate mediation or elements of it in the arbitration process provides the parties with more chances to arrive at a settlement and preserve their relationship.

[279] Horvath, 299

I hereby confirm that this thesis is my personal work product and that I have not used any input from others without reference to the relevant source.

Prangins, July 31, 2009

Isabelle Hering

Annex: Bibliography

a. <u>Books</u>

- ***Barin Babak, Little Andrew D., Pepper Randy A***; The Osler Guide to Commercial Arbitration in Canada; The Hague, Kluwer Law International, 2006 (referred to as Barin)
- ***Born B. Gary***; International Commercial Arbitration; Volumes 1 and 2, Kluwer Law International, 2009 (referred to as Born)
- ***Bühring-Uhle Christian***; Arbitration and Mediation in International Business; International Arbitration Law Library, Kluwer Law International, 1995 (referred to as Bühring-Uhle)
- ***Bühring-Uhle Christian, Kirchhoff Lars, Scherer Gabriele***; Arbitration and Mediation in International Business; International Arbitration Law Library, Kluwer Law International, 2nd Ed. 2006 (referred to as Bühring-Uhle/Kirchhoff/Scherer I)
- ***Fouchard Philippe, Gaillard Emmanuel, Goldman B***.; Traité de l'arbitrage commercial international; ed. Litec, 1996 (referred to as Fouchard/Gaillard/Goldman)
- ***Girsberger Daniel, Voser Nathalie***; International Arbitration in Switzerland; Litera B, Ed. Schulthess §; 2008 (referred to as Gisberger/Voser)
- ***Kaufmann-Kohler Gabrielle, Rigozzi Antonio***; Arbitrage International : droit et pratique à la lumière de la LDIP; Ed. Schulthess § and Weblaw, 2006 (referred to as Kaufmann-Kohler/Rigozzi)
- ***Lew Julian D.M., Mistelis Loukas A., Kröll Stefan M.***; Comparative International Commercial Arbitration; Kluwer Law International, 2003 (referred to as Lew/Mistelis/Kröll)
- ***Poudret Jean-Francois, Besson Sebastien***; in Comparative Law of International Arbitration; 2nd ed., Schulthess § and Sweet&Maxwell, 2007 (referred to as Poudret/Besson)
- ***Redfern Alan, Hunter Martin***, ***with Blackaby Nigel and Partasides Constantine***; Law and Practice of International Commercial Arbitration; 4th Ed. Thomson, Sweet&Maxwell, 2004 (referred to as Redfern/Hunter)

b. Articles

- ***Abramson Harold I.*;** Protocols for International Arbitrators who Dare to Settle Cases; in The American Review of International Arbitration, 10 Am. Rev. Int'l Arb.1, 1999, pp. 1-17 (referred to as Abramson)
- ***Berger Klaus Peter***; Integration of Mediation Elements in Arbitration: Hybrid Procedures and Intuitive Mediation by International Arbitrators; in Arbitration International, 19 (3) 2003, pp. 387-403 (referred to as Berger I)
- ***Berger Klaus Peter***; The Settlement Privilege - A general Principle of International ADR Law; Arbitration International, 24 (2) 2008, pp. 265-276 (referred to as Berger II)
- ***Bertrand Edouard***; Sur le Bon Usage des Sentences d'Accord Parties; in ASA Bulletin 24 (1) 2006, pp 13-25 (referred to as Bertrand)
- ***Böckstiegel Karl Heinz***; Past, Present, and Future Perspective of Arbitration; in Arbitration, the International Journal of Arbitration, Mediation and Dispute Management, (2009) 75 Arbitration (2), pp. 181 –187 (referred to as Böckstiegel)
- ***Bühring Uhle Christian, Kirchhoff Lars, Scherer Gabriele***; The Arbitrator as Mediator; in The Journal of International Arbitration, 20 (1) 2003, pp. 81 – 88 (referred to as Bühring-Uhle/Kirchhoff/Scherer II)
- ***Collins Michael***; Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them?; in Arbitration International, 19 (3), 2003, pp 333-343 (referred to as Collins)
- ***Dendorfer Renate, Lack Jeremy***; The Interaction between Arbitration and Mediation: Vision v Reality; in Dispute Resolution International, Vol. 1 (1), June 2007, pp. 73-98 (referred to as Dendorfer/Lack)
- ***Elliott David C.***; Med/Arb: Fraught with Danger or Ripe with Opportunity?; in Arbitration, the International Journal of Arbitration, Mediation and Dispute Management, (1996) 62 Arbitration (1), pp. 175-183 (referred to as Elliott)
- ***Franck Susan D.***; International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of affairs? the Role of International Arbitrators; in ILSA Journal of International & Comparative Law, 12 ILSA, Spring 2006, pp 499-522 (referred to as Franck)

- ***Goldstein Marc J***.; Crossing The Common Law-Civil Law Divide in International Arbitration: A Primer for the Perplexed Practitioner; ©Hodgson Russ LLP, 2006 (referred to as Goldstein)
- ***Hausmaninger Christian***; Rights and Obligations of the Arbitrator with regard to the Parties and the Arbitral Institution – a Civil Law Point; in The Status of the Arbitrator, Special Supplément, The ICC International Court of Arbitration Bulletin, December 1995, pp. 36-65 (referred to as Hausmaninger)
- ***Horvath Günther J***.; Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?; in SchiedVZ, 3 Jahrgang, Heft 6, 2005, pp.292-302 (referred to as Horvath)
- ***Hunter Martin***; Ethics of the International Arbitrator; in ASA Bulletin 4 (4) 1986, pp 173-196 (referred to as Hunter)
- ***Kaufmann-Kohler Gabrielle, Bonnin Victor***; L'Arbitre-Conciliateur: Approche Statistique de la Corrélation entre le Rôle de l'Arbitre et sa Culture Juridique; in ICC Bulletin, 18 (2) 2007, pp. 79-88 (referred to as Kaufmann-Kohler/Bonnin)
- ***Kaufmann-Kohler Gabrielle, Kun Fan***; Integrating Mediation into Arbitration: Why it works in China; in The Journal of International Arbitration, 25 (4) 2008, pp. 479-492 (referred to as Kaufmann-Kohler/Kun)
- ***Kaufmann-Kohler Gabrielle***; When Arbitrators Facilitate Settlement: Towards a transnational standard; in Arbitration International, 25 (2) 2009, pp 187-206 (referred to as Kaufmann-Kohler)
- ***Koch Christopher, Schäfer Erik***; Can it be Sinful for an Arbitrator Actively to Promote Settlement? in The Arbitration and Dispute Resolution Law Journal, Vol. 8, 1999, pp 153-184 (referred to as Koch/Schäfer)
- ***Lazareff Serge***; Aux Frontières de l'Arbitrage et de l'ADR: la Sentence d'Accord Parties; in Gazette du Palais, Mercredi 14, Jeudi 15 Novembre 2001, pp 3-5 (referred to as Lazareff)
- ***Lörcher Gino***; Enforceability of agreed awards in foreign jurisdictions; in Arbitration International, 17 (3) 2001, pp 275-285 (referred to as Lörcher)
- ***Lu Song***; The Peoples' Republic of China; in Draft National Report – ICCA Yearbook 2008, pp. 1-60 (referred to as Lu)

- ***Marriott Arthur L. QC***; Tell it to the Judge – But Only if you Must; in Arbitration Insights, edited by Julian D.M. Lew and Loukas A. Mistelis, International Arbitration Law Library, Kluwer Law International, 2007, pp 169-200 (referred to as Marriott)
- ***Nariman Fali S.***; The Spirit of Arbitration; at the Tenth Annual Goff Lecture, in Arbitration International, 16 (3) 2000, pp. 261-278 (referred to as Nariman)
- ***Nater-Bass Gabrielle***; Praktische Aspeckte des Vergleichs in Schiedsgerichtsverfahren; in ASA Bulletin 20 (3) 2002, pp 427-441 (referred to as Nater-Bass)
- ***Newmark Christopher, Hill Richard***; Can a Mediated Settlement Become an Enforceable Arbitration Award; Arbitration International, 16 (1) 2000, pp 81-87 (referred to as Newmark/Hill)
- ***Niemeijer Bert, Pel Machteld***; Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations; in Penne State Law Review, Vol. 110:2, 2005, pp. 346-379 (referred to as Niemeijer/Machteld)
- ***Oghigian Haig***; The Mediation/Arbitration Hybrid; in Journal of International Arbitration, 20 (1) 2003, pp 75-79; (referred to as Oghigian)
- ***Plant David W.***; The Arbitrator as Settlement Facilitator; in The Journal of International Arbitration, 17 (1) 2000, pp 143-146; (referred to as Plant)
- ***Raeschke-Kessler Hilmar***; The Arbitrator as Settlement Facilitator; in Arbitration International, 21 (4) 2005, pp 523-536 (referred to as Raeschke-Kessler)
- ***Schneider Michael E***; Combining Arbitration with Conciliation; ICCA, Seoul Arbitration Conference 1996, in ICCA Congress Series n° 8, pp 57-99 (referred to as Schneider)
- ***Schwartz Eric A.***; The Rights and Duties of ICC Arbitrators; in The Status of the Arbitrator, Special Supplément, The ICC International Court of Arbitration Bulletin, December 1995, pp 67-92 (referred to as Schwartz)
- ***Shilston Alan;*** Med-Arb? Why Not Try Arb-Med?; in Arbitration: the International Journal of Arbitration, Mediation and Dispute Management, (1996) 62 Arbitration (1), pp 161-163 (referred to as Shilston)

- ***Talbot Peter***; Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?; in Arbitration: the International Journal of Arbitration, Mediation and Dispute Management, (2001) 67 Arbitration (1), pp 221-229 (referred to as Talbot)
- ***Wenger Werner***; The Role of the Arbitrator in Bringing about a Settlement- a Swiss Perspective; Best Practices in International Arbitration, Conference of January 27, 2006 in Zürich, in ASA Special Series 26, July 2006, pp. 139-151 (referred to as Wenger)
- ***The WIPO Arbitration and Mediation Center***; Update on the WIPO Arbitration and Mediation Center's Experience in the Resolution of Intellectual Property Disputes; in Les Nouvelles, Journal of the Licensing Executives Society International, Vol. XLIV (1) March 2009, pp. 49-54 (referred to as WIPO Center Update)
- ***Woolf Lord***; Mediation in Arbitration in the Pursuit of Justice; in Arbitration, the International Journal of Arbitration, Mediation and Dispute Management, (2009) 75 Arbitration (2), pp.169-176 (referred to as Woolf)

c. <u>Official documents (treaties, laws and rules)</u>

<u>Australia</u>

- ***New South Wales Commercial Arbitration Act*** (1984) (referred to as the New South Wales Act)

<u>Canada</u>

- ***Federal Courts Rules*** (1998) (referred to as Canada Rules)
- ***Ontario Code of Civil Procedure*** (Updated January 2009) (referred to as Ontario Civil Rules)
- ***The Alberta International Arbitration Act*** (amended 2000) (referred to as the Alberta Arbitration Act)
- ***Commercial Arbitration Act*** (1985) (referred to as the Commercial Arbitration Act)
- ***The ADR Institute of Canada Arbitration Rules*** (amended October 2008) (referred to as ADR Canada Arbitration Rules)

China

- ***Civil Procedure Law of the People's Republic of China*** (revised in 2007); in iSinoLaw Reference ID: 76611; 77252 – 10029249; provided by Professor LU Song for the MIDS Intensive Course "Arbitration in China" (referred to as Civil Procedure Law of PRC)
- ***Arbitration Law of the People's Republic of China*** (adopted in 1994); in CCH Asia Pacific (HRSG): China Laws for Foreign Business – Business Regulation, Volume 1-5, Hong Kong 1985 ff §10-470; provided by Professor LU Song for the MIDS Intensive Course "Arbitration in China" (referred to as PRC Arbitration Law)
- ***CIETAC Arbitration Rules*** (Effective May, 1 2005) (referred to as CIETAC Rules)

European Union

- ***Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters*** (May 2008), (referred to as Directive on Mediation)

France

- ***Code of Civil Procedure*** (consolidated version May 2009) (Referred to as CPC)
- ***The International Chamber of Commerce ADR Rules*** (2001) (referred to as ICC ADR Rules)
- ***The International Chamber of Commerce Arbitration Rules*** (1998) (referred to as ICC Arbitration Rules)

Germany

- ***Zivilprozeßordnung; other books of the Code of Civil Procedure – (ZPO),*** (as effective on July 1, 2009) (referred German ZPO)
- ***Zivilprozeßordnung; Tenth Book of the Code of Civil Procedure - ZPO)*** (as effective on July 1, 2009) (referred to as the German Arbitration Act (ZPO)
- ***German Institution of Arbitration (DIS) Arbitration Rules*** (amended 2005) (referred to as DIS Arbitration Rules)

Hong Kong

- ***Hong Kong Arbitration Ordinances*** (updated June 2009) (referred to as the HK Arbitration Ord.)
- ***Hong Kong International Arbitration Centre: Procedures for the Administration of International Arbitration*** (Effective March, 31 2005) (referred to as HKIAC Rules)

Netherlands

- ***The Dutch Code of Civil Proceedings***, ***Book IV: Arbitration*** (1986), (referred to as the Dutch Arbitration Act)

Singapore

- ***Singapore Arbitration Act*** (2001) (referred to as the Singapore Arbitration Act)

Switzerland

- ***Code de Procédure Civile*** (draft 2008) (referred to as Swiss CPC draft)
- ***Loi de Procédure Civile Genevoise (-Geneva)*** (as of May 2009) (referred to as LPC GE)
- ***Zivilprozessordnung (ZPO) (Zürich)***(as published in 2001) (referred to as ZH ZPO)
- ***Concordat sur l'Arbitrage*** (July 1, 1995) (referred to as Concordat)
- ***Federal Act on Private International Law (PILS), Chapter 12,*** (as amended until January 1, 2007) (referred to as PILS)
- ***Swiss Rules of International Arbitration*** (2006) (referred to as Swiss Arbitration Rules)

United Kingdom

- ***Civil Procedure Rules*** (Updated April 2009) (referred to as the UK Civil Procedure Rules)
- ***Arbitration Act 1996 Chapter 23*** (referred to as UK Arbitration Act)
- ***The London Court of International Arbitration Rules*** (Effective January 1, 2008) (referred to as the LCIA Arbitration Rules)

United States of America

- ***Federal Rules of Civil Procedure*** (amended 2007) (referred to as US Federal Rules)
- ***The California Code of Judicial Ethics*** (amended by the Supreme Court of California effective April 29, 2009) (referred to as the California Code)
- ***The Code of Ethics for Arbitrators in Commercial Disputes*** (2004) (referred to as AAA/ABA Code of Ethics)
- ***Federal Arbitration Act, 9 USC Sections 1 et seq.*** (1925) (referred to as the US Arbitration Act)
- ***Commercial Arbitration Rules and Mediation Procedures*** (Effective September 1, 2007) (referred to as AAA Arbitration Rules)

Others

- ***The Centre for Effective Dispute Resolution (CEDR) Rules for the Facilitation of Settlement in International Arbitration*** (draft 2009) (referred to as the CEDR Draft Rules)
- ***The Centre for Effective Dispute Resolution (CEDR) Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement*** (draft 2009) (referred to as the CEDR Safeguards)
- ***The International Bar Association Guidelines on Conflict of Interest in International Arbitration*** (approved on May 2004) (referred to as the IBA Guidelines)
- ***The International Bar Association Rules of Ethics for International Arbitrators*** (as at May 2009) (referred to as the IBA Ethics Rules)
- ***The International Bar Association Rules on the taking of Evidence In International Commercial Arbitration*** (June 1999) (referred to as the IBA Rules on the taking of Evidence)
- ***International Center for Settlement of Investment Disputes (ICSID) Arbitration Rules*** (as amended effective April 10, 2006) (referred to as ICSID Arbitration Rules)
- ***The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*** (1958) (referred to as the NY Convention)
- ***Statutes of the Bodies Working for the Settlement of Sports-related Disputes*** (1994) referred to as CAS Rules)
- ***UNCITRAL Arbitration Rules*** (1976) (referred to as UNCITRAL Arbitration)
- ***UNCITRAL Model Law on International Commercial Arbitration*** (Amended 2006) (referred to as UNCITRAL Model Law)
- ***UNCITRAL Model Law on International Commercial Conciliation*** (2004) with guide to Enactment and Use 2002; United Nations, New York (referred to as UNCITRAL Conciliation)
- ***World Intellectual Property Organization Arbitration Rules*** (effective October 1, 2002) (referred to as WIPO Arbitration)
- ***World Intellectual Property Organization Mediation Rules*** (effective October 1, 2002) (referred to as WIPO Mediation)

d. Case law

- ***Société Centre d'Information pour Groupement d'achats (CIGA) c/ Société La Margeride***, Cour d'Appel de Paris (1 Ch. Suppl.), 13 janvier 1984, in Revue de l'Arbitrage 1984, p. 531
- ***Glencot Development and Design Co Ltd v. Ben Barrett § Son (Contractors) Ltd***; [2001] BRL 207

e. Internet articles and documents

- ***Einstein's Lessons in Mediation***; case study: arbitration-mediation; in www.managingip.com, July/August 2006, pp 23-26 (referred to as case study)
- ***He Wei, Xing Keke***; Introduction of Main Amendments to the CIETAC 2005 Rules; in King § Wood China Bulletin, May 2005; http://www.kingandwood.com/Bulletin/Bulletin%20PDF/en_2005-05 (referred to as He/Xing)
- ***Jagtenberg Rob, de Roo Annie***; Mediation in the Netherlands: Past - Present – Future; in Electronic Journal of Comparative Law, vol 6.4, December 2002, http://www.ejcl.org/64/art64-8.html (referred to as Jagtenberg/de Roo)
- ***Wang Angela & Co***: Overview of Civil Justice Reform in Hong Kong; http://www.hg.org/article.asp (referred to as Wang)

f. Others

- ***Cheng Teresa SC***; The Search for Truth in Arbitration: Is Finding the Truth what Dispute Resolution is About? ASA Conference on February 6, 2009 in Zurich (referred to as Cheng)
- ***Centre for Effective Dispute Resolution (CEDR) Commission on Settlement in International Arbitration***; Report of the Commission, Draft paper for consultation (December 2008), Consultation document 2009, www.cedr.com, (referred to as CEDR Report)
- ***PricewaterhouseCoopers***; International Arbitration: Corporate attitudes and practices, 2008 (referred to as PricewaterhouseCoopers survey)