MEALEY'S™
International Arbitration Report

The Role Of Arbitrators In Settlement Proceedings

by
Daniele Favalli

VISCHER
Zurich

Max K. Hasenclever

KLUTH Rechtsanwälte
Düsseldorf, Germany

A commentary article reprinted from the July 2008 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

The Role Of Arbitrators In Settlement Proceedings

By
Daniele Favalli
and
Max K. Hasenclever

[Editor's Note: Mr. Daniele Favalli is currently working with the Zurich based VISCHER law firm. Upon completion of his post graduate law studies at the University of Austin at Texas in the year 2000, he practiced in the field of international arbitration in the U.S. and Latin America with Steel Hector & Davis LLP (now Squire Sander & Dempsey) in Miami until 2005. In addition, Daniele Favalli teaches international arbitration at the University of Lucerne, Switzerland, and is a founding member of the Swiss Arbitration Academy.

Mr. Max K. Hasenclever is a German attorney at law, presently practicing with the Düsseldorf based law firm of KLUTH Rechtsanwälte. His practice emphasizes on all areas of commercial law, including German and international corporate law. Furthermore, Max Hasenclever focuses on both court litigation and alternative dispute resolution in his areas of his expertise.

Replies to this commentary are welcome. Copyright 2008 by Daniele Favalli and Max K. Hasenclever.]

A. Introduction

It is common to every dispute that the parties have to evaluate strong and weak elements of their case. The parties have to compare the risk of losing with the likelihood of winning, the uncertainty of not having the problem resolved for the time of the proceedings, as well as the risk of losing future business. Finally, the costs of arbitration can be significant and have to be considered.

It may be in the interest of the parties to terminate a dispute before an arbitrator has decided the matter. According to the principle of party autonomy, the parties are free to end a dispute through an amicable settlement. In fact, the arbitral tribunal often does not know about settlement negotiations. The parties negotiate the terms of a possible settlement and inform the arbitral tribunal once a settlement is reached.[1] One could, however, envision a situation where the dispute is *"ripe"* for settlement, but the parties may not be aware of it. The tribunal may be in a better position to realize that the parties' positions are not inconceivably distant.

In this article, a possible involvement of the arbitral tribunal in settlement proceedings will be examined. Can the arbitral tribunal induce settlement negotiations and to what extent should the arbitrator influence the conclusion of a settlement?[2] There is a range of possible actions the arbitrator may consider to play an active role therein. Surprisingly, the conclusion may be that this topic is not necessarily taboo in common law regimes.

Some arbitration rules do not make reference to (vested) powers that the arbitral tribunal may have to induce a settlement. Other rules simply refer to the possibility of the arbitral tribunal to decide a dispute on an equitable basis to achieve a just result. Ordinarily, arbitration rules refer to the terms *ex aequo et bono* or *amiable compositeur*.[3] These terms, however, do not refer to the role of an arbitrator in settlement proceedings.

Because a large number of international arbitrations are terminated by settlement, the arbitrators' possible

involvement is of importance.[4] The arbitration practices in England and the U.S. have never given much consideration to the role of the arbitral tribunal in regard to settlements. On the contrary, the possibility of the arbitral tribunal's involvement was excluded. The arbitrator was appointed to decide the parties' dispute as it is presented to him. It would appear as if the arbitrator was not willing or able to make a decision. In other jurisdictions, such as Germany or Switzerland,[5] the arbitrator's involvement in settlement proceedings is a common practice. The Anglo-American and the continental European point of view may not be considerably different. The arbitral tribunal's participation should not be excluded *a priori*. In fact, the arbitrator's involvement in settlement proceedings could be viewed as noble obligation (*"nobile officium"*) of his mandate.

B. Different Ways The Arbitrator Can Be Involved

In the context of this article, the arbitrator's role in arbitral proceedings will be discussed. The means of mediation and the role and function of a mediator are not the subject of this analysis. It is understood, however, that an arbitrator cannot at the same time be a mediator.

1. The Arbitrator Involved In Settlement Negotiations Is Not A Mediator

One of the predominant factors that distinguish a mediator from an arbitrator is that the mediator has no power to render an enforceable award, *i.e.*, the mediator cannot decide the dispute. He can "only" advise the parties that there may be room for settlement. Assuming that role, the mediator becomes a "quasi-ally" of the parties. The parties view the mediator as a sparring partner for their arguments and a facilitator between the parties' positions. Whatever the parties reveal to the mediator cannot affect any subsequent or parallel arbitration. The parties know that their case is safe when disclosing information to the mediator.

The mediator is in a position to hold discussions with the parties separately. This is a benefit of mediation, because the parties can reveal information they would not otherwise disclose. The mediator, contrary to the arbitrator's obligation, must not disclose such information to the other party. This is the main reason why a mediator cannot be or become an arbitrator in the same proceeding between the same parties or *vice versa*.

The above rationale is the predominant argument within common law jurisdictions why an arbitrator should not engage in settlement negotiations. The arbitrator should not hear one party without the other party being present. Thus, the arbitrator should not be involved in settlement proceedings. The arbitrator's knowledge of such information would be incompatible with his impartiality if the parties could not reach a settlement and the arbitrator would have to render an award afterwards.

A detailed analysis may show, however, that the arbitrator could participate in settlement proceedings, even under the auspices of common law rules, if certain limitations are respected. In particular, the arbitral tribunal should not hear one party without the other party being present and it should not receive any information that may poison its impartiality. The tribunal would be in the role of communicating with the parties and not *vice versa*. Furthermore, the arbitrator would not receive new information from the parties or be involved in the actual negotiations, but would shed light on the arbitral tribunal's considerations about the dispute at that time. The decision making process of the arbitral tribunal would become transparent which would be to the advantage of the parties.

2. The Arbitrator's Possibilities To Induce A Settlement

An arbitrator may be involved in settlement proceedings in different ways. As shown, it is presumed that the arbitrator is not discussing the case with one party only. It is further presumed that the parties do not reveal any relevant information that they would not disclose to the arbitral tribunal otherwise.

Based on the above assumptions, the arbitrator may facilitate settlement negotiations as follows:

a. The arbitrator asks whether the parties have tried to settle the matter.[6]

b. The arbitrator asks whether the parties wish the arbitrator's assistance with settlement negotiations.[7]

As it will be shown below, the arbitral tribunal should not insist, unless the parties agree. The question arises whether the arbitral tribunal is entitled to discuss

with the parties how it intends to facilitate settlement proceedings or if it is only entitled to ask whether the parties wish assistance at all.

For the parties to understand the potential involvement of the arbitral tribunal, the arbitrator should describe the capacity and extent of its role in the settlement discussions. The parties' position would not be harmed thereby.

If the parties indeed request the arbitrator's assistance, then a variety of further possibilities exist to induce settlement negotiations:[8]

c. The arbitrator discloses his understanding of the facts and the relevant legal questions as the case presents itself at that time.

d. The arbitrator discloses how he views the burden of proof on key issues.[9]

e. The arbitrator discloses his preliminary analysis of the case, including how he would decide key issues at stake.[10]

What are the advantages of the arbitral tribunal's assessment? First, the parties learn about their likelihood of success at a point in time when there is still an opportunity to present further arguments and additional evidence to support their position.[11] Otherwise, the parties would never know the arbitral tribunal's thought process before the award is rendered. Second, the arbitrator's assessment helps the parties to put emphasis on issues not yet fully clarified. Submission of further evidence should, if warranted, change the arbitral tribunal's decision. In other words, the arbitral tribunal is rendering its preliminary opinion based on the facts and the evidence at that time.[12] Finally, the parties could settle their dispute at an early stage.

The involvement of an arbitrator with the most impact would be the following:

f. The arbitrator submits a draft settlement proposal.[13]

A draft settlement proposal would provide a basis of how to settle the dispute. The arbitral tribunal would express its opinion on who would prevail and to what extent. The proposal, however, should be presented to all parties simultaneously, preferably in a meeting with the parties.[14] Importantly, the arbitral tribunal should stress that the presentation of further evidence or the hearing of witnesses may result in a different conclusion or even reverse the arbitral tribunal's preliminary assessment.

The arbitral tribunal should not participate in actual discussions between the parties. The arbitral tribunal's role should be limited to disclosing its decision-making process. The arbitral tribunal would therefore not receive any information nor hear the parties other than to have them clarify questions it may have.

3. Party Consent To The Arbitral Tribunal's Involvement

Ordinarily, parties resort to arbitration as *ultima ratio*. Once they have initiated the arbitration process, parties expect the arbitral tribunal to render a decision. In other words, the parties have a right to receive an award. Consequently, the arbitral tribunal should not (and cannot) insist on settlement proceedings if the parties are not agreeing to settlement discussions.[15]

As discussed above, the arbitral tribunal should at least be allowed to bring up the issue of settlement negotiations. Otherwise, the arbitral tribunal would have to "sit and wait" even if it believed that the parties may have room for settlement. This is particularly relevant because parties may be reluctant to initiate settlement negotiations themselves if they think the suggestion could be seen as a sign of weakness.[16] Nevertheless, a settlement may still be the appropriate way to terminate the dispute. In such a situation the arbitrator's independent interference could add value towards a satisfactory resolution of the dispute. The parties' consent, however, is necessary.[17]

The notion here presented is supported by some arbitration rules. For example, the Code of Ethics of the American Arbitration Association and the American Bar Association (hereinafter "Code of Ethics") provides explicitly in its Canon IV that arbitrators are entitled to suggest the possibility of a settlement.[18] The arbitration rules of the German Institution of Arbitration (hereinafter *"DIS"*) provide for the same.[19]

It is without a doubt recommended that the parties be required to consent in writing.[20] Furthermore, the

arbitral tribunal should have the parties confirm that the arbitrators' participation will not be viewed as a ground for disqualification later in the proceeding and, by the same token, the arbitrator's participation should not be a reason for challenging any subsequent award.[21]

C. Discussion Of The Arbitrator's Involvement

As seen, the arbitral tribunal's involvement may facilitate the process to resolve the outstanding dispute in due course. Concerns, nevertheless, exist, in particular, in the U.S. and other common law jurisdictions. For the following reasons, it is to the parties' advantage for an arbitrator to be involved in settlement negotiations. The arbitrator may perfectly assume an active role in promoting an amicable settlement, provided that certain rules relating to independence, impartiality, and neutrality are respected.

1. Independence

It is commonly understood that an arbitrator must be independent. *Independence* means the absence of any objective link (personal or business relationship) between the arbitrator and one of the parties.[22] *Impartiality*, on the other hand, refers to a subjective attitude or state of mind of the arbitrator, who is not allowed to favor any party over another.[23] The arbitrator consciously respects the dignity of the law and abides to principles of equality. In contrast, *neutrality* refers to the position of the arbitral tribunal, which cannot have any direct or indirect interest in the outcome of the arbitration.

Independence, impartiality and neutrality are important principles of any tribunal in which the rule of law prevails. Lack of independence would make the tribunal's findings void and an award could be challenged. As a result, an arbitrator should not be or even appear to be dependent on either party.

Arbitration itself is neutral to the law, language, and culture of the parties, thereby avoiding any home court advantage of either party. Companies engaged in international business are often reluctant to submit disputes to litigation in the foreign courts fearing that courts could favor their own nationals. Partiality of a foreign court is obviously of less concern in international arbitration because the parties choose the site of the arbitration as well as their arbitrators. It is necessary to examine whether the arbitrator's independence could be questioned if the arbitrator would be involved in settlement proceedings. Would a party, presented with the arbitral tribunal's views it does not like, have grounds to claim that the arbitral tribunal was prejudiced? Furthermore, one could question whether the tribunal would maintain the ability to render an award different from its preliminary assessment. Bernini, for example, argued that arbitrators hardly remain independent if they prejudged the case during their attempt to settle it amicably.[24]

Furthermore, a settlement proposal by the arbitrator could lead to a rejection by one party and the approval by the other party. The rejecting party would then be in the inconvenient position of having declined a proposed settlement that the approving party would have accepted. Or, to avoid any repercussion by the arbitral tribunal, the rejecting party may even feel *de facto* forced to accept the proposal because, otherwise, the arbitral tribunal may render an even more unfavorable award.

The argument against the arbitrator's involvement would be that the arbitrator had suggested an amicable settlement, because he believed this to be the best solution to the dispute. If one party rejects the proposal, the arbitrator is then "forced" to decide, even though the arbitrator's first choice was to settle the dispute. It is likely, however, that the tribunal's mind is set regardless of whether it expressed the arbitral tribunal's view before rendering the award. The important question remaining is whether the arbitrator will have the ability to change his predisposition, subject to one party proving an issue to be different in the course of the proceeding.

Another question is whether the arbitrator will affirm his first assessment or whether he will be likely to change his mind once the parties have a chance to hear the arbitrator's assessment. One could argue that the arbitrator will not be able to change his views, because it could be considered "not sure about his own decision" if the arbitrator deviates from his standpoint. Moreover, one could argue that the arbitrator was biased towards one party if he changed his opinion in favor of this party. One could, however, also argue that by not changing his opinion, if a party presents relevant new evidence, the arbitrator would deny the parties right to be heard.

It is questionable whether the arbitrator's disclosure impacts the final outcome. Generally, the arbitrator must respect the right to be heard, and make fair decisions regardless of any disclosures. An arbitrator should proactively avoid the appearance of dependence or partiality and avoid surprises.[25]

Under these conditions, the arbitral tribunal may be involved in settlement proceedings. A number of aspects are salient. First, an arbitrator should carefully decide when and how a preliminary opinion is disclosed. It should be ensured that any opinion would not be binding if an award would have to be rendered at a later time.

Second, the tribunal should stress in its opinion under what conditions it would reach a different conclusion.

Finally, it is possible that the parties, despite all warnings, presented facts and/or made concessions because they expected to reach a settlement.[26] Should the arbitrator ultimately be asked to issue an award, he must not consider those facts when deciding the case.[27] Otherwise, the settlement negotiations would neither make sense nor ever be successful.

A judge in the U.S. or Europe is regularly confronted with the same problem. Sometimes evidence must not be considered although the judge knows that the use thereof would probably lead to a different result. He must "forget" things he has previously heard.

2. Parties' Opportunity To Adjust Their Strategy Before A Final Award Is Rendered

In the event that the settlement discussions do not lead to a settlement, the parties may still benefit from the negotiations. It is important for the parties to learn what issues are considered to be of importance. The arbitrator's opinion may enable the parties to be more efficient in their future presentations. The parties will know, based on the evidence they have available but have not presented yet, if they may be in a position to change the arbitral tribunal's perception. Moreover, the ability to influence the case before a final award is issued is, generally speaking, in the interest of a prompt, efficient, and speedy process. Finally, it is cost effective.

Counsel to a party may be reluctant to suggest settlement negotiations too early in the proceedings, because it could be viewed as lack of confidence regarding the client's likelihood of success. In fact, parties may pay more attention to the preliminary assessment of the arbitrator as opposed to counsel's opinion. It is further possible that counsel has already suggested to the client an amicable settlement. The client, however, may question counsel's loyal representation and counsel's interest in the case. In other words, clients may argue that if counsel is suggesting a settlement, he may not believe the case to be strong and will, therefore, not represent the client's best interest.

In short, the disclosure of the arbitrator's view of the case gives the parties an opportunity to put emphasis on relevant issues or change the strategy of the case. This is important as arbitral proceedings, ordinarily, do not allow for *de novo* review of the award, unless provided for by the agreement between the parties.

3. Acceleration Of The Proceedings: Saving Time And Money

The costs of a dispute become more significant the longer a dispute lasts and, therefore, the incentive to continue arbitration proceedings will decrease also. It is a fact that "*at the end of the day, the issues in commercial arbitration relate exclusively to money.*"[28] Each party, bearing in mind the risk of losing, will reach a point within the proceedings where it makes sense to settle rather than to proceed. Consequently, the parties' knowledge of the arbitrator's preliminary opinion is cost efficient. Parties will be in a better position to assess the general direction of where the case is going. If the dispute can be settled earlier in the arbitration proceedings, the parties will avoid attorney's fees for time consuming evidentiary hearings.

Settlements are encouraged by the legal systems of most countries, in particular because a settlement saves costs and shortens the duration of the dispute. Thus, legal systems often provide that the losing party bear costs and legal fees. The idea of not having to pay the other party's attorney's fees may in itself be another reason to seek a settlement.[29]

A settlement will put an end to the dispute and allow the parties to "move on." There is a great value to the

comfort of finality. It will allow the parties to concentrate on their business and close a chapter related to the past.

4. Reconciliation Between The Parties

The possibility of reconciliation is another advantage of settlement negotiations. Any conflict between parties undoubtedly has an impact on their future business with each other. In contrast, a possible reconciliation through a settlement may be a chance for the parties to conduct further business. There is little doubt that such an outcome would be beneficial to all parties involved. Neither party wants to lose face or admit to having lost a dispute. Losing in arbitration does not only have a financial impact, but the losing party may be stigmatized as having done something wrong. The losing party's integrity and way of doing business may be questioned by other business partners. This would not occur if the case is settled.

As seen above, it could be viewed as weak if one of the parties seeks to settle the dispute. Thus, a settlement may be of even greater value if the terms of the settlement are suggested by the arbitral tribunal and not by the parties.

One could finally argue that parties willing to settle would prefer to seek a settlement through mediation. There are a number of reasons why a settlement during an arbitration proceeding is as likely as by means of mediation. First, parties may not have included a mediation clause in their contract. If so, they may not even agree to mediate a dispute even though mediation would prove to be beneficial to the parties. Second, the parties may fear the additional costs of a mediation proceeding without having the guarantee to reach a final solution of the dispute. In other words, one would still have to resort to arbitration if the attempt to mediate fails.

D. U.S. Resistance To The Arbitrator's Involvement In Settlement Negotiations

In the U.S., the erudite commentaries stress that an arbitrator cannot become a mediator and *vice versa*. What the role of the arbitrator in settlement proceedings could be, however, has not been extensively discussed. It seems that the general rule would read as follows: "Arbitrator, do not participate in settlement negotiations."[30]

1. Is There Room For An Alternative Interpretation?

Not surprisingly, the International Rules of the American Arbitration Association[31] do not provide any specific rule on the role of arbitral tribunals in settlement discussions. In the following, it will be scrutinized whether there is room for an alternative interpretation of the arbitrator's role in settlement proceedings.

The International Arbitration Rules of the ICDR provide in Article 29, paragraph 1 that "*if the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of an award on agreed terms.*" No rule exists providing any guidelines as to the role of the arbitral tribunal in such an endeavor.

Without a specific provision addressing the tribunal's right to give preliminary opinions, one must look to other (broader) provisions that speak to the intent the drafters had in devising the arbitrator's role. A reference can be found in Article 16 of the ICDR Rules. Arbitral tribunals have wide discretion so long as they do not violate certain rights entitled to all parties. Article 16 reads as follows:

> [S]ubject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

Thus, Article 16 empowers the arbitral tribunal to take an active role in inducing a settlement, as generally provided for in Article 29. Assuming that the arbitral tribunal should be allowed to play an active role in settlement proceedings, their role can be divided in two manners.

First, one can argue that Article 16 requires the arbitral tribunal to conduct the proceedings as it deems appropriate so long as the parties are treated with "*equality*," are granted the "*right to be heard*," and give each party a "*fair opportunity to present its case*." The question arises, however, if allowing the arbitral tribunal to render a preliminary opinion, perhaps with regard to the possible outcome of the dispute, might

be considered to be compromising these standards. The critical issue at stake is whether the parties are given a fair opportunity to present their case if both sides are aware of the arbitrator's thought process and predisposition. Can the party for whom the less favorable opinion was given be treated equally thereafter? Is the party's right to be heard after such a preliminary opinion a legitimate one?

One could argue that the party for whom the preliminary opinion was positive might have an advantage because it knows of the arbitral tribunal's predisposed opinions. While parties would be allowed to proceed with the arbitration regardless of the preliminary opinion, some might argue that this right to be heard is not legitimate if they know their arguments are already attempting to overcome the tribunal's now known preliminary assessment.

The first step for addressing these concerns is to require party consent. In other words, the way to allow the arbitral tribunal to use its discretion to expedite the case without compromising the equality and fairness of the proceedings is to have all parties approve of such a preliminary opinion. If the parties feel it might upset the integrity of the proceedings then they should voice that view ahead of time.

The second manner on which one can view Article 16 is in conjunction with paragraph 2 of Article 16 that states "*the tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute.*" It is widely recognized that "*[a]rbitration rules, such as those of the AAA, are intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation.*"[32] Accordingly, if an arbitrator considers the suggestion of settlement proceedings to be appropriate in accordance with Article 16 paragraph 1 and expeditious of the dispute's resolution as defined in Article 16 paragraph 2, then the inducement of settlement discussions between the parties should be viewed as in tune with the ICDR Rules.

Consequently, each party's consent to the arbitral tribunal's involvement in the settlement negotiation process would be assumed. Following this second thought, party consent would not even be required, but still recommended. With the most important overall intent being efficiency, there should not be any reason why inducing settlement via the arbitral tribunal would not be permitted. This is, in particular, true if the arbitral tribunal seeks the parties' consent to its proactive involvement.

2. U.S. Federal Rules Of Civil Procedure And Federal Arbitration Act

Since the international rules of the American Arbitration Association are silent on the subject, federal civil procedure rules may be another source to answer the question.

The Federal Arbitration Act (hereinafter *"FAA"*) is as well silent on the issue altogether. The FAA is brief and rather "open-minded," providing arbitral tribunals with a great deal of discretion to maintain arbitration as a flexible, alternative form of dispute resolution.

The result is different with regard to the Federal Rules of Civil Procedure which may apply as *lex fori* to the dispute or when U.S. statutes govern the contract.[33] The conclusion in favor of the arbitrator's involvement in settlement proceedings is likely supported when applied by analogy. The Rules authorize the courts to use their discretion in inducing a settlement. Rule 16(a)(5) of the Federal Rules of Civil Procedure states that "*[i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as [. . .] (5) facilitating the settlement of case.*"[34]

This rule relating to pretrial procedure authorizes the court to conduct conferences with counsel to help in the disposition of the case. The purpose is to assist the litigants, not to exhaust them.[35] The pretrial conference intends to expedite litigation and eliminate surprise at trial.[36] It gives the court broad discretion in conducting pretrial procedures to narrow the issues, reduce controversies about the facts, and simplify mechanics of offer and receipt of evidence.[37]

These same objectives are promoted by allowing arbitrators the discretion to provide parties with preliminary opinions before hearings begin for a possible settlement. Such rationale should be applied to arbitral tribunals so that they also may expedite proceedings through the clarification and narrowing of issues. Furthermore, if something is permissive in litigation

it should generally not be excluded in arbitration. After all, arbitration is a process meant to be less restrictive than litigation. Thus, the arbitral tribunals should tend to go further than judges in their efforts to reach a settlement.

E. Conclusion

The idea that an arbitrator could induce settlement negotiations between the parties is not new in international arbitration. There are, in particular, German and Swiss traditions allowing settlement negotiations based on their civil procedure rules. On the contrary, the topic is barely discussed in common law jurisdictions. The view predominates that an arbitrator would easily become a mediator if engaged in settlement discussions. Thus, one should *per se* avoid such a situation. The arbitrator's only task is to decide the dispute at stake.

With the consent of the parties, there are various viable means of how the arbitral tribunal may foster the settlement of the case to the benefit of the parties. If done correctly and if the parties are willing to consider an amicable settlement, the benefits outweigh possible concerns.

Interestingly, one can argue that settlement discussions are beneficial to the parties even if no actual settlement is reached. The parties learn where they stand and what it may take in the further course of the arbitral proceeding to obtain a favorable award.

Finally, one could propose the idea of arbitrator induced settlement negotiations under common law rules. A review of the ICDR rules, the FAA, and U.S. Federal Rules of Civil Procedure does not seem to *a priori* exclude that the arbitral tribunal induce and (even) accompany settlement negotiations between the parties. Considering an amicable settlement in the terms described above would be in line with the trend to converge common and civil law systems in international arbitration.[38]

As a result, it can be concluded that modern international arbitration should foster a speedy and cost efficient resolution of disputes. The arbitral tribunal can, within limits, assist the parties therein. It might even be the time for a discussion whether rules regarding settlement negotiations should be adapted by leading arbitral institutions, UNCITRAL, or the IBA.

Endnotes

1. Cynical commentators allege that a settlement is even more likely to happen without the lawyers being involved.

2. David W. Plant, *The Arbitrator as Settlement Facilitator*, 17 J. Int'l. Arb., at 143 et seqq. (2000): "An immediately apparent and practical question concerns the role the arbitrator may play in assisting the parties to resolve their dispute by way of settlement discussion. Normally, the parties have not considered, much less agreed, what the arbitrator's role should be in this regard."

3. The similar, but not synonym terms heard are: *amiable composition*, *amiable compositor*, and *amiable compositeur*. "The French term *amiable compositeur* [. . .] in French (and Louisiana law and practice) is an arbitrator authorized to abide something of the strictness of law in favor of natural equity. The Latin phrase *ex aequo et bono* derives from the civil law, literally meaning 'in fairness and justice' or 'according to what is just and good' or 'according to equity and conscience.' Thus in its most significant terms, these terms denote 'equity' [. . .]." (Thomas Oehmke, International Arbitration, at 26:110 (1990).

4. The numbers, often estimates, differ from institution to institution and from author to author; they range between 40% and 65%.

5. Marc Veit in Zuberbühler/Müller/Habegger, Swiss Rules of International Arbitraiton, Commentary, Kluwer/Schulthess 2005, 34:19.

6. Plant, *supra* note 2; 1 John Tackaberry et al., Bernstein's Handbook of Arbitration and Dispute Resolution Practice, at 155 (4th ed. 2003).

7. John Tackaberry et al., *supra* note 6, at 155

8. Plant, *supra* note 2; John Tackaberry et al., *supra* note 6, at 155.

9. Klaus Peter Berger, International Economic Arbitration, at 250 (1993); Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 Arbitration International, at 523, 534 (2005).

10. Raeschke-Kessler, *supra* note 9.

11. Raeschke-Kessler, *supra* note 9, at 531.

12. John Tackaberry et al., *supra* note 6, at 155.

13. Raeschke-Kessler, *supra* note 9, at 534.

14. *IBA Rules of Ethics for International Arbitrators*, Rule 8. A proposal may also be made by telephone, fax or e-mail as long as it is made to all parties simultaneously.

15. Giorgio Bernini, *Report on Neutrality, Impartiality, and Independence*, *in* International Commercial Arbitration — a transnational perspective, at 276 (Tibor Várady et al. eds., 1999).

16. Berger, see *supra* note 9, at 248; Eugen Bucher, Die Rolle des Schiedsrichters bei der vergleichsweisen Regelung des Streites, Introductory Adress Before the Panel Discussion following the XX. General Meeting of the Swiss Arbitration Association (September 8th, 1995), *in* ASA Bulletin 3/95, at 568 (574).

17. Raeschke-Kessler, *supra* note 9, at 534.

18. *AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, at Canon IV., F: "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."

19. DIS-Schiedsgerichtsordnung 1998, at § 32.1.

20. Plant, *supra* note 2; Hilmar Raeschke-Kessler, *Making Arbitration more efficient: Settlement Initiatives by the Arbitral Tribunal*, 6 The Vindobona Journal of International Commercial Law and Arbitration [VJ], at 245, 251 (2002); Bucher, *supra* note 16, at 578.

21. Plant, *supra* note 2; Raeschke-Kessler, *supra* note 20 at 251; Bucher, *supra* note 16 at 578.

22. Bernini, *supra* note 15, at 272 et seq.: Independence can be defined as the combination of two elements: neutrality and impartiality. Whereas neutrality is the objective status of "having, and always maintaining, a mental attitude which is, in concrete terms, wholly and actually equidistant vis-à-vis the parties."

23. Bernini, *supra* note 15, at 272: "Impartiality [. . .] partakes more of a subjective status to be actually tested in the context of the concrete relations existing between the arbitrator(s) and each individual party."

24. Bernini, *supra* note 15 at 276.

25. Karl-Heinz Böckstiegel, *ICC-Schiedsgerichtsbarkeit aus der Sicht eines Schiedsrichters*, *in* Recht und Praxis der Schiedsgerichtsbarkeit der Internationalen Handelskammer, at 86 (Karl-Heinz Böckstiegel ed., 1986).

26. Berger, *supra* note 9 at 450; *see* Raeschke-Kessler, *supra* note 20 at 255.

27. Berger, *supra* note 9 at 451; *see* Raeschke-Kessler, *supra* note 20 at 255.

28. Gillis Wetter, *Arbitration in the New Europe,* 5 Mealey's International Arbitration Report 13, 18 (1990).

29. John Tackaberry et al., *supra* note 6, at 275.

30. James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l Arb. 83 (1997); Harold I. Abramson, *Protocol for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l Arb. 1 (1999); Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 Akron L. Rev. 287, 307-309 (2004); Kathy L. Cerminara, *Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict*, 33 Loy. U. Chi L.J. 43, 557 (2002); Thomas J. Brewer & Lawrence R. Mills, *Combining Mediaton & Arbitration*, Disp. Resol. J, Nov. 1999 at 32-33; Elizabeth A. Hunt, *Arb-Med: ADR in the new Millenium*, 42 Orange County Law 29 (2000).

31. Hereinafter referred to as "ICDR," the international division of the American Arbitration Association.

32. *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

33. One possible rebuttal of such argument would be the doctrine of *expression unius est exclusion alterius*. Had the applicable arbitral rules intended to apply Rule 16 of the Federal Rules of Civil Procedure or the rationale therein, they would have included such intention or language. Their silence does not indicate acquiescence but rather an intention to leave the decision to the arbitrators.

34. Fed. R. Civ. P. § 16(a)(5).

35. *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. (W.Va.) 1976).

36. *Wallin v. Fuller*, 476 F.2d 1204 (5th Cir. (Ala.) 1973).

37. *Pacific Indem. Co. v. Broward County*, 465 F.2d 99 (5th Cir. (Fla.) 1972).

38. With respect to the presentation of evidence see Section 1 of the Preamble of the *IBA Rules on the Taking of Evidence* of 1999: *"are intended to govern [. . .] arbitrations [. . .] between Parties from different legal traditions."* ■

MEALEY'S INTERNATIONAL ARBITRATION REPORT
edited by Edie Scott
The Report is produced monthly by

LexisNexis®

1018 West Ninth Avenue, 3rd Floor, King of Prussia Pa 19406, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
Email: mealeyinfo@lexisnexis.com Web site: http://www.lexisnexis/mealeys
ISSN 1089-2397