

# MEDIATION IN INTERNATIONAL COMMERCIAL ARBITRATION: SOME PRACTICAL ASPECTS

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## I. INTRODUCTION

In international commercial arbitration, some disputes cry out for informal resolution by the parties themselves. In assessing their response, parties, arbitrators and arbitral institutions must have in mind fundamental, practical and ethical considerations. This paper addresses some of the practical and provocative issues raised in these circumstances.

## II. SOME QUESTIONS

An immediately apparent, practical question in international commercial arbitration concerns the role the arbitrator may play in assisting the parties to resolve their dispute by way of settlement discussions. Often, the parties have not considered, much less agreed,

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what the arbitrator's role should be in this regard. This question gives rise to further questions, viz.

- 1) Is the arbitrator's sole responsibility to assure that the arbitral process results in an enforceable award arrived at in a fair, efficient and expeditious way?
- 2) Does the arbitrator's responsibility extend to assisting parties to arrive at the most equitable resolution of their differences at the earliest, practicable time in the most efficient and effective way?
- 3) Does the arbitrator have a responsibility to assure that arbitration in general, as an institution, provides the parties a menu of processes that may assist the parties in resolving their disputes in the most efficient and effective way?
- 4) If it is appropriate for an arbitrator to suggest, or to participate in, settlement discussions, what is the appropriate degree of participation, in what kinds of cases, when, and subject to what ground rules?
- 5) Will the availability of mediation on some basis assist in de-escalating contentiousness and over-lawyering in international commercial arbitration?

It will come as no surprise to some that this paper favors permitting, indeed encouraging, arbitrators to suggest and to participate in settlement discussions between the parties under appropriate circumstances. It is to some of those circumstances that the balance of this paper is devoted.<sup>1</sup>

### III. SOME OBSERVATIONS

Regardless of the provisions of (or practices under) specific arbitral rules,<sup>2</sup> some practitioners have asserted that arbitrators should never

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1. A comprehensive and thoroughly instructive discussion of this subject appears in Christian Buhning-Uhle, *Arbitration and Mediation in International Arbitration*, KLU. L. INT'L (1996). This paper draws primarily on my own experience, but it clearly benefits from some of the thoughts in Buhning-Uhle's excellent treatise.

2. One way or another, rules of international arbitration are often viewed as discouraging participation by arbitrators as mediators, conciliators or amiable compositeurs (e.g., UNICITRAL Conciliation Rules art. 19, *but cf.* art. 1(2) (1980)); ICC Rules of Arbitration art. 17(3) (1998); ICC Rules of Conciliation art. 10 (1998); WIPO Mediation Rules art. 13 (1994); WIPO Arbitration Rules arts. 59(a) and 65(a) (1994); AAA Rules of International Arbitration art. 28(3) (1997). Other rules that plainly contemplate a more pro-active role of arbitrators and mediators or conciliators are the CIETAC and the Hong Kong rules of arbitration. Also, German arbitrators may feel entirely comfortable in participating relatively thoroughly in settlement discussions in light of the practice of judges in German courts (*cf.* GERMAN CODE OF CIV. P. § 279). Swiss and French arbitrators may feel a similar level of comfort.

participate in settlement discussions between the parties. But all rules have exceptions, and all absolute rules absolutely have exceptions, as we shall see below.

Before turning to that discussion, I believe that it will be useful to settle an issue of vocabulary. Because mediation, conciliation and facilitation are likely to mean different things to different people, thus engendering confusion, I shall attempt to discuss the issues posed here in terms of the kind and degree of participation by the arbitrator in settlement discussions. This may assist in reducing miscommunication and in enhancing understanding among practitioners, whether from the same or different cultural and experiential backgrounds.

### III. SOME PRACTICAL CONSIDERATIONS

#### A. *The Dilemma*

One fundamental issue is whether, and if so how, an arbitrator can effectively participate in settlement discussions and at the same time preserve the integrity of the arbitral process.

Stated differently, the question is how can an arbitrator be transformed into a participant in off the record settlement discussions and then back into an arbitrator.

#### B. *The Kind of Dispute*

If the arbitration looks backward (e.g., who breached a contract in the past?) and the settlement discussions look forward (e.g., can a relationship be preserved or reformulated in the future?), an arbitrator may find it entirely appropriate to participate in settlement discussions.

On the other hand, if both the arbitration and the settlement discussions look in the same direction (e.g., quantum of past damages, quantum of future lost profits, schedule of future payments), it may be less appropriate, or more difficult, for an arbitrator to participate in settlement discussions.

The reasons for the foregoing distinction are relatively straightforward. If the settlement discussions can be separated in time or subject matter from the issues in the arbitration, the arbitrator is much less likely to be infected from the settlement discussions with off the record information or impressions that may affect the arbitrator's view of the merits of the issues being arbitrated on the record. Concomitantly, the larger the overlap between the subject of the settlement discussions and the issues being arbitrated, the greater the likelihood of the arbitrator's being affected by what the arbitrator sees or hears in the settlement discussions.

However, even where both the settlement discussions and the arbitration look in the same direction, if the parties expressly agree with each other and with the arbitrator on specific ground rules, it may be perfectly acceptable for the arbitrator to participate in the settlement discussions, e.g., *infra* Section V.

### *C. Cultural and Experiential Factors*

The cultural, business, legal, and other experiences of parties, counsel and arbitrators (and of the arbitral institution, if there is one) are important.

The synopsis of the selected rules and practices appearing in footnote two above demonstrates the wide difference in approaches among arbitral institutions and practitioners. These differences will materially affect the willingness and ability of parties, counsel and arbitrators to consider, to say nothing of arranging for, an arbitrator's participation in settlement discussions.

Such differences in personal backgrounds will also affect the kind and degree of participation that may be agreed upon among counsel and arbitrators. And those differences will affect the conduct of the arbitrators in connection with settlement discussions.

In fact, those differences may clearly, and not unexpectedly, emerge in different arbitrations under the same arbitral rules — simply because different cultures and experiences are represented on different arbitral tribunals operating under identical institutional rules, most notably with respect to the chairs of three person tribunals.

### *D. Timing*

A substantial number of international commercial arbitrations settle before an award is rendered. As in litigation, the likelihood of settlement increases as the arbitral proceedings evolve.

It is reasonable to assume that if settlement talks were facilitated earlier rather than later in arbitration, in some cases settlement might occur earlier. This seems to be a sufficiently real possibility to encourage arbitrators (and arbitral institutions) to make available facilities for enabling settlement discussions to commence and to continue at all stages of an arbitration.

Some will argue on the basis of experience that an arbitration, like a lawsuit, may have to proceed through an irreducible number of discrete stages before the environment becomes conducive to settlement. Nevertheless, that environment may be rendered more hospitable if a facility is available from the beginning to enable settlement discussions to

commence with ease.

### *E. What Is an Appropriate Role for an Arbitrator in Settlement Discussions?*

It is probably fair to assume that under any regime, an arbitrator may inquire as to whether or not the parties have engaged in settlement discussions. This calls only for a yes or no answer, does not compel the parties to disclose what in fact has occurred, and does not compel the parties to pursue settlement discussions.

Further inquiry or participation by an arbitrator raises the kinds of issues already alluded to. For example, can an arbitrator explore the status of past or current settlement discussions? Inquire as to what next is expected to occur in settlement discussions? Participate in such discussions? Communicate with parties and counsel in joint sessions? Conduct *ex parte* discussions with one party and its counsel? Hint at a probable outcome in the arbitration? Render an evaluation of the issues on the basis of information available to the arbitrator from the arbitral record? Propose a settlement formula?

And with a three-person arbitral tribunal comprising party-appointed arbitrators and a chair, should all three arbitrators meet with the parties jointly? May the chair meet with a party and its counsel on an *ex parte* basis? May a party-appointed arbitrator meet *ex parte* with the party who appointed that arbitrator? May that arbitrator meet *ex parte* with a party that did not appoint that arbitrator?

These are illustrative of questions the parties and their arbitrator should ponder before the arbitrator engages in settlement discussions.

### *F. What Is Going on in an Arbitration, Anyway?*

In those arbitrations where the parties are quarreling over who breached a joint development, partnership, construction, licensing, or other arrangement in which the parties were not acting entirely at arms length, it is frequently apparent to the arbitrator that the arbitrator is not hearing the full story, and it is destructive and wasteful for the parties to be challenging each other's conduct and *bona fides* rather than working on repairing or restructuring their relationship. If either or both of these impressions of the arbitrator is consistent with the facts, the arbitrator may well ask whether or not he or she ought to be performing another role, *viz.* facilitating the repair or restructuring of the relationship.

The arbitrator often does not know the full story because what the arbitrator hears is defined by the pleadings, terms of reference, evidence the parties elect to adduce and the relevant legal principles. This

constricted formal framework within which the issue of who breached what and how many times seldom permits the real interests and needs of the parties in connection with the dispute to be revealed. This may concern an arbitrator who senses that regardless of the arbitrator's ultimate resolution of the issues in the arbitration, there may be no winner in the sense that the relationship between the parties may be destroyed, and with it, the possibility of creating value if the relationship is preserved or reformulated. Thus, for the arbitrator who is sensitive to this situation, there may well be a compelling (and justifiable) motive to inquire about, if not participate in, forward looking settlement discussions between the parties.

### *G. Two Illustrative Situations*

Two recent international commercial arbitrations may serve to illustrate some of these concerns.

In an ICC arbitration, the three arbitrators participated in settlement discussions between the parties. The arbitration arose out of the breach of a development contract. Claimant claimed substantial damages, injunctive relief, and specific performance. During the evidentiary hearings on liability, it became apparent that the arbitration was backward looking, and if any settlement discussions were to occur at that stage they would be forward looking, for example, directed to preserving the parties' relationship in order to create value. The arbitrators were unaware of any settlement discussions, and the arbitrators did not participate in any at that stage.

After three weeks of evidence and two interim awards on liability, and during a fourth week of evidence on relief (including quantum), the parties agreed that the three arbitrators would participate in settlement discussions. After preliminary *ex parte* meetings with parties and their counsel (party appointed arbitrators conferred with their respective parties), senior management, counsel, and three arbitrators met for one day of settlement discussion. The goal was to settle the issue of quantum and to structure a schedule for payments. All three arbitrators participated. However, the driving force was the chair of the arbitral tribunal. At the end of the day, the parties had reached agreement in principle and initialed a heads of agreement. A detailed settlement agreement to be embodied in award on consent was tendered to the tribunal with one financial issue left for resolution by the arbitrators.

The potential risk here was that, if the parties had failed to settle, the information shared with the tribunal during the settlement discussions would have related directly to the issues of relief that the arbitrators, upon

resuming their original roles, would have had to decide. For their own good reasons, the parties agreed to accept this risk and to attempt to settle the money issues with the arbitrators as facilitators. Fortunately, it worked.

In another ICC arbitration, after two weeks of evidentiary hearings on liability and damages, the parties agreed that the three arbitrators should participate in settlement discussions. This arbitration also concerned a development agreement and was backward looking in its perspective. Claimants sought substantial damages plus injunctive relief and specific performance. The goal of the settlement discussions was to look forward and attempt to work out a new relationship between the parties. After two sessions, each about one and a half days in duration, the parties elected to have the arbitrators resume their original roles and to render an award. All of the arbitrators were present during joint and private sessions with the parties and their counsel. Because the settlement discussions were forward looking, information shared with the arbitrators did not bear on the merits of the dispute and did not affect the subsequent preparation of the award by the arbitrators.

## V. SOME GROUND RULES

The foregoing discussion focuses on post-dispute situations in which arbitration has ensued and the parties have not previously agreed that the arbitrator can perform any role other than the conventional role of arbitrator. From the discussion emerge some ground rules which parties, counsel, and arbitrators might consider. First, because the arbitrator's role is defined by the parties, whether ad hoc or by way of agreed upon institutional rules, the parties must agree expressly and in writing as to the role of the arbitrator in settlement discussions between the parties. Second, the arbitrator must agree to participate in settlement discussions only with the express written agreement of the parties and only in accordance with the terms and conditions of the parties agreement. Third, in the event the arbitrator must resume the arbitral role after participating in settlement discussions, the arbitrator should undertake to decide the matter only on the merits and only on the record. The arbitrator must take especial care not to add subconsciously to the arbitration record as a result of information acquired informally and off the record during settlement discussions. Fourth, the parties must expressly agree in writing or on the record that the arbitrator's participation in settlement discussions will not be asserted by any party as grounds for disqualifying the arbitrator or for challenging any award rendered by the arbitrator (unless, for example, on its face it is apparent that award is based on information outside the record

and learned by the arbitrator during settlement discussions). Fifth, all aspects of the settlement discussions will be kept confidential unless all parties and the arbitrator expressly agree otherwise in writing. Sixth, during settlement discussions, the arbitrator will not hint at the arbitrator's view of the evidence or the likely outcome if the arbitration goes forward. Seventh, the arbitrator must not judge the credibility of any witness on the basis of a) the witness having been a party representative during settlement discussions or b) anything said about or attributed to the witness during settlement discussions. This is important whether the settlement discussions occur before or after the evidentiary hearing where the witness testifies, or before or after filing of a written statement by witness. Eighth, the arbitrator must not judge a party's case in light of an intractable position of the party during settlement discussions, especially where the arbitrator perceives an apparently valid, objective basis for resolving the parties' differences. In other words, the arbitrator must not permit his or her impartiality to be compromised.

## VI. CONCLUSION

Participation by an arbitrator in settlement discussions raises knotty issues. But they can be effectively addressed.

Adversarial processes like arbitration cause parties to rush to the underlying contracts to find every conceivable breach, every basis for claims of bad faith, and every hint of deceit and fraud. The pathology of the process takes over. The process drives the parties. The parties do not drive the process.

If an appropriate procedure was available in connection with each administered arbitration whereby arbitrators could learn of each party's real interests and needs, a forward looking resolution might be facilitated, rather than having arbitrators focus solely on the past. If such a service was provided by arbitral institutions, it could indeed be salutary in appropriate cases.

If arbitral institutions, arbitrators, and counsel were to agree that they share some responsibility for assuring that the parties resolve their differences in the most expeditious and value-creating way, the time will have come to provide policies and procedures pursuant to which arbitrators and counsel can in appropriate circumstances feel free to discharge that responsibility.