

Arbitrator Techniques and their (Direct or Potential) Effect on Settlement

In recent years, users of international arbitration have consistently called for a more expeditious and cost-effective dispute resolution process. In surveys such as the ones conducted by the IMI's Global Pound Conference Series in 2016–2017 and Queen Mary University along with White & Case in 2018,¹ a greater utilization of combinations of adjudicative and non-adjudicative processes, rather than arbitration as a standalone ADR process, has been repeatedly identified by users as preferred and as enabling the achievement of better outcomes. However, none of these surveys has explored in any detail the potential impact of the various procedural techniques available to international arbitrators on the chances of settlement by the parties. This deficiency in the available data led the Working Group to consider whether arbitrator and arbitration process choices might influence parties' ability to arrive at amicable resolutions.

Accordingly, Working Group 4, which is titled "Arbitrator Techniques and their (Direct or Potential) Effect on Settlement", was charged with assessing what procedural mechanisms might be used and what steps arbitrators could take, staying within their role as arbitrators, that may serve to have a favorable impact on the prospects of an amicable settlement among the parties.

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¹ *International Mediation Institute (IMI) Global Pound Conference Series 2016-17*, Cumulated Data Results, March 2016 – September 2017, Session 2 Question 5: Global Results, at 36, available at <https://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf>; *2018 International Arbitration Survey: The Evolution of International Arbitration*, Queen Mary University/White & Case, at 5, available at www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf.

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A. THE TASK FORCE

Working Group 4 was comprised of 25 practitioners from numerous jurisdictions around the world. Following discussion within the Group, it was concluded that the Group would address the utility of accepted case management techniques and arbitration procedures. The focus would be on the arbitrator staying within his or her judicial role and not switching hats by undertaking a role as a mediator, which is the subject of Working Group 5.

A great deal has been written about steps to promote efficiency and cost reduction in arbitration. Measures such as tailoring the arbitration clause, opting into expedited procedural rules, using innovative ways to select the chair, video-taped opening statements instead of lengthy submissions during the hearing, reducing the number of submissions, page limits, more vigorous control of document exchange, interim hearings, use of videoconferencing and other technological advances, use of the chess clock, etc., all serve to facilitate settlement. Other tools such as mock arbitrations² and final offer arbitration³ can also foster settlement.

However, in light of the many guides and articles on those subjects already available, the Working Group selected for examination a limited number of arbitration processes that are often underutilized but may directly or indirectly create opportunities for settlement. These measures include:

- A proactive first organizational meeting in which all appropriate possible procedural steps are discussed with the parties rather than the common *pro forma* short session to endorse a standard procedural order and set the hearing date (Appendix I at p. 13);
- One or more mediation/negotiation windows in the arbitration schedule so that there is a set time in the schedule for the parties to discuss whether a mediation or negotiation would be productive without creating party concerns that it will be perceived as weak if it raises mediation (Appendix II at p. 16);
- Analysis of whether formally or informally bifurcating damages or issuing interim decisions that are likely to have a significant impact on damages would lead to efficiencies and cost savings (for example, by reducing expert costs) and whether it would be reasonably likely to lead to settlement after the liability stage (Appendix III at p. 20);
- More robust considerations to narrowing the issues and to entertaining dispositive motions which resolve certain aspects of the case at an early stage, as parties often require early guidance on such questions in order to assess their settlement options (Appendix IV at p. 25);

² Edna Sussman and James Lawrence, *A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success*, 41 Fordham Int'l L. J. 1017 (2018).

³ Edna Sussman and Erin Gleason, *Everyone Can be a Winner in Baseball Arbitration: History and Practical Guidance*, N.Y. Disp. Res. Lawyer, Vol. 12, No. 1, at 28 (Spring 2019).

- Mid-arbitration reviews (Kaplan Openings) at which the parties meet with the Tribunal and work with the arbitrators to identify the key issues in dispute, both legal and factual (Appendix V at p. 30);
- Offering of preliminary views by the arbitrators at an agreed stage of the arbitration with the express consent of all parties, taking into consideration the possible impact on the arbitration going forward, and with the understanding that the preliminary views might change on further analysis (Appendix VI at p. 36); and
- Greater use of sealed offers (also known in the UK as *Calderbank* offers), which are written offers of settlement made by one party to another on a “without prejudice save as to costs” basis and shared with the Tribunal only after the decision on the merits and which serve as a basis for allocating the costs of the proceedings (Appendix VII at p. 41).

The Working Group has reviewed these measures with an eye towards explaining when and why they should be considered and to providing practical guidance on their application in the Appendices to this Report.

B. THE ROLE OF THE ARBITRATOR AND THE SURVEY

Over the past decade, there has been an evolving debate about the appropriate role for the arbitrator. Is the arbitrator simply appointed to manage the proceeding, receive the evidence and make a decision – thus, a role essentially limited solely to being a passive decision-maker – or should the arbitrator undertake a more active role and act as the dispute manager,⁴ the settlement facilitator,⁵ the town elder,⁶ the collaborative arbitrator,⁷ the interactive or proactive arbitrator?⁸ Is there a continuum along with a series of possible measures that should be considered for each case?⁹ Should options be discussed with the parties at the start of the proceeding so that a bespoke process can be developed for the case with the appropriate procedural steps which may directly or indirectly have an effect on settlement?

⁴ Paolo Marzolini, *The Arbitrator as a Dispute Manager – The Exercise of the Arbitrator’s Powers to Act as Settlement Facilitator*, in *The Arbitrator’s Initiative: When, Why and How Should It Be Used?*, ASA Special Series, No. 45 (2016).

⁵ Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 *Arb. Int’l* 187 (2009).

⁶ David Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 *Arb. Int’l* 375 (2008).

⁷ Catherine Kessedjian, *International Arbitration – More Efficiency for Greater Credibility*, in Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, at 1 (Nijhoff Publ. 2015).

⁸ Michael Schneider, *The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator*, in Brekoulakis et al. (eds.), *The Evolution and Future of International Arbitration*, 379 (Kluwer Law International 2016).

⁹ Klaus Peter Berger and J. Ole Jensen, *The Arbitrator’s Mandate to Facilitate Settlement*, 40 *Fordham Int’l L. J.* 887 (2017).

Interviews were conducted by members of the Working Group with 75 individuals, from jurisdictions around the world, to seek their reactions as to the arbitrator's role in settlement and to provide their thoughts on the specific techniques that had been selected by the Working Group for further examination. Polling questions were asked during the consultation sessions. While these responses can only be viewed as anecdotal, we draw upon them for the valuable insights they offer. References to the survey conducted by this Working Group are titled "Survey."

In response to the question "Do you think an arbitrator has a role in fostering settlement?", 78.38% responded "Yes" and 21.62% responded "No." Polling during the consultation sessions produced similar results with 80% responding positively. Thus, a strong majority of respondents recognized that arbitrators have a part to play in facilitating settlement. The comments expanded on the positive responses by explaining that the Tribunal: "Has an important role in helping the parties understand the procedural options to settlement, outside of the arbitral proceedings as well as within the arbitral proceedings;" "The arbitrator can have an active role provided this is in line with expectations/wishes of the parties;" "The arbitral proceedings can be framed in a manner favorable to possible settlements;" "An arbitrator plays a significant role in fostering settlement;" "It is the arbitrator's duty to encourage the parties to settle the dispute."

However, there are no uniform views. Numerous responses were submitted with such comments as: "An arbitrator has no role in fostering settlement – his or her role is to decide;" "The arbitrator is a service provider. You should only render a decision and not give advice;" "No active role unless the parties want it;" "There is a very limited role for an arbitrator to do things proactively."

Working Group 4 seeks to provide guidance on the techniques it reviewed that may be favorably considered by those who expressed all of the sentiments that are reflected in the Survey, both positive and negative, about the arbitrator's role in settlement.

C. THE ARBITRATOR'S AUTHORITY

No discussion of the arbitrator's role or consideration of a more proactive approach can be conducted without a review of the arbitrator's authority. The thought leadership on the evolving role of the arbitrator and the movement to greater acceptance of a more active role has been reflected in guidelines, rules, and practice notes by multiple organizations. Perhaps the most telling evidence of the evolution of thinking about the arbitrator's role in settlement is the change in the UNCITRAL Notes on Organizing Arbitral Proceedings from the 1996 version to the 2016 version, which evolved from "the Arbitral Tribunal should only suggest settlement negotiations with caution"¹⁰ to "[i]n appropriate circumstances, the Arbitral Tribunal may raise the possibility of a

¹⁰ Art. 12 UNCITRAL Notes on Organizing Arbitral Proceedings (1996), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-e.pdf>.

settlement between the parties.”¹¹ Many institutional rules and guidelines also refer to the arbitrator’s role in settlement:

- ICC Rules Appendix IV, h) (ii): “Where agreed between the parties and the Arbitral Tribunal, the Arbitral Tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.”
- IBA Guidelines on Conflict of Interest in International Arbitration General Standard 4(d): “An arbitrator may assist the parties in reaching the settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings” (with express agreement).
- Swiss Rules Article 19(5): “With the agreement of each of the parties, the Arbitral Tribunal may take steps to facilitate the settlement of the dispute before it.”
- German DIS Rules Article 26: “Unless any party objects thereto, the Arbitral Tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”
- Prague Rules Article 9.1.: “Unless one of the parties objects, the Arbitral Tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration;” Articles 9.2. and 9.3. allow “any member” of the tribunal “upon written consent of all parties” to “act as a mediator to assist in the amicable settlement of the case.”
- CIETAC Rules Article 47(1): “Where both parties wish to conciliate, or where one party wishes to conciliate and the other party’s consent has been obtained by the Arbitral Tribunal, the Arbitral Tribunal may conciliate the dispute during the arbitral proceedings.”
- Singapore International Arbitration Act Article 17(1): “If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.”

While the better view is that arbitrators always had inherent authority to conduct an arbitration with the use of all of the techniques identified in this Working Group’s product, the specific recognition of the arbitrator’s authority with respect to settlement in an increasing number of rules and guidelines should serve to satisfy any remaining concerns arbitrators may have about expanding their toolkit and to more frequently employ proactive measures aimed at fostering a settlement of the dispute. However, it is important to add that the techniques being considered by the Working Group are quite different from actively taking on the role of a mediator but for the most part are standard procedural techniques that may as a by-product also facilitate settlement.

¹¹ Art. 12 UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf>.

D. PSYCHOLOGICAL IMPACT OF ARBITRATION PROCEDURAL MEASURES

An area not often considered is the impact of measures taken by arbitrators which can counter unconscious psychological impediments to settlement.¹² While, as with all psychological influences, there are a number of unconscious obstacles to settlement, the Working Group notes a few impediments where arbitrator techniques may serve to deflect or at least minimize the psychological barrier.

For example, study after study has demonstrated that litigants and their counsel do not accurately predict case outcomes. The principal culprits that lead to this predictive failure are referred to as the “optimistic overconfidence” bias: people are simply overconfident in their predictions concerning the outcome of future events, including outcomes in litigated disputes; the egocentricity bias: the tendency to assess the strength of the case in a self-interested or egocentric manner; and the confirmation bias: people interpret evidence so as to maintain their initial beliefs. As has also been shown, not surprisingly, voluntary settlement is facilitated as parties become more realistic about their own prospects of winning. Early disposition of material issues, in-depth mid-term reviews of the case by the arbitrator with the parties and providing preliminary views, early on or after the taking of evidence, are some of the measures that can be taken to assist parties in overcoming these biases.

Arbitrators addressing issues earlier in the process also serves to alleviate the impact of the “sunk costs” fallacy. Parties that have already spent considerable time and money may feel that they already have so much invested in the process that they are less likely to settle and choose instead to take the adversarial process through to the end. While considered a “fallacy” that has no rational economic justification, the fallacy persists; earlier resolution of material issues and attention to focusing the parties on the issues of importance to the arbitrator sooner would decrease the amount of “sunk costs” and thus diminish the impact of this fallacy.

Greater and earlier interaction with the arbitrator may also serve to foster settlement by providing “procedural justice” in the litigants’ view and enabling them to have their “day in court” or their “day before the arbitrator,” an appreciation which has proven to foster acceptance of resolution. It may also serve to address the litigants’ “equity-seeking”, i.e., the desire to obtain

¹² See Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 *American Rev. Int’l Arb.* 487 (2013); Edna Sussman, *Unconscious Impediments to Settlement and the Proactive Arbitrator*, *Liber Amicorum George Bermann* (2021, forthcoming); Randall Kiser, *Psychological Attributes of Decision Errors*, in *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, 89 (Springer Publ. 2010) (reviewing numerous psychological attributes of decision errors); Andrew J. Wistrich and Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 *S. Cal. L. Rev.* 101 (2013); Lee Ross and Andrew Ward, *Psychological Barriers to Dispute Resolution*, in Zanna (ed.), *Advances in Experimental Social Psychology*, Vol. 27, at 255 (Academic Press 1995); Richard Birke and Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 1 *Harv. Neg. L. Rev.* 1 (1999); Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 *Ohio State J. on Dispute Resolution* 281 (2006).

equity in the face of having been badly treated, either by satisfying that desire or forcing a recognition that the arbitrator may not perceive the equities exactly the same way.

Arbitrators may also delve into the mediator's toolbox without stepping out of the role of the arbitrator.¹³ These mediator techniques, too, serve to counter unconscious biases. Some examples come to mind, such as reframing or making the parties step into the other party's shoes. None of them would seem to exceed the arbitrator's authority or jeopardize the award. Like mediators, arbitrators can also engage in active listening by repeating and recapturing accurately what has been presented. Validation that one has been understood, particularly where those statements are made directly to the parties by a third party neutral, can assist parties in coming to closure.

Like mediators, arbitrators can also ask probing questions. Some mediators rely heavily on relaying their evaluation of the dispute and offering a mediator's solution. But many highly effective mediators prefer trying to "empower" the parties to resolve their dispute among themselves, without getting to an evaluative stage in the mediation by asking questions and raising awareness of other perspectives of the law and/or the facts. In arbitration, a great deal can be accomplished in terms of assisting the parties to more accurately assess their likelihood of success just by asking questions, a process eminently suitable for an arbitrator.

An arbitrator can endeavor to ensure that the party representatives who are actually in a position to foster settlement are present for critical sessions in the arbitration such as the first case management conference or the mid-case review. Article 24(4) of the ICC Rules specifically allows the Tribunal to "request the attendance at any case management conference of the parties in person or through an internal representative." The arbitrator may also want to ensure that principals who have not seen each other since their dispute arose are present and may arrange that they sit near each other, forcing an interaction that may overcome their differences.

What makes sense in a particular case will, of course, vary. Every case presents new facts, new law, new people, and new psychology. Therefore, the arbitrator's responses must always be tailor-made.

E. DIFFERENCES IN CULTURES

Given the global nature of international arbitration, the Working Group asked whether the arbitrator's role is dictated, and whether it should be dictated, by the arbitrator's geographic, cultural or legal background.¹⁴ The Working Group noted that historically Chinese arbitrators have been more likely to engage in settlement discussions with the parties, and arbitrators who follow

¹³ See Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 Arb. Int'l 387, 400 et seq. (2003); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, World Arbitration and Mediation Review, Vol. 7, No. 2 (2013).

¹⁴ See Klaus Peter Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective*, 25 Arb. Int'l 217 (2009).

the Germanic model often provide preliminary views with the agreement of all parties; a perception echoed by many of the Survey respondents.

However, recent studies suggest that there is increasing harmonization across cultures with respect to the role of the arbitrator. For example, a survey of arbitrators across cultures demonstrated that approximately 74% of arbitrators, both East and West, shared the view that it was “appropriate for the arbitrator to suggest settlement negotiations to the parties,” and 58%, both East and West, thought it was “appropriate for the arbitrator to actively engage in settlement negotiations (at both parties request).”¹⁵ It has been said that with the current global mix of national origin, legal qualification, and place of practice of international practitioners, the East-West differences, in fact, are “often very subtle” and with the continuing melting pot of ideas, concepts, and approaches across jurisdictions, future generations of arbitration practitioners will not depend so much on East versus West concepts of appropriate arbitrator conduct.¹⁶

Thus, while legal and geographical culture still has influence, it should not be viewed as limiting the arbitrator’s choice in crafting a process most suitable for the dispute at issue as long as care is taken to ensure that there is no breach of any governing ethical, legal or rule-based principle and the parties are consulted and have confirmed their agreement to the process.

F. CAUTIONARY NOTES

The world of international arbitration is global and so subject to different applicable substantive and procedural laws, different ethical constraints, and different approaches by courts to enforcement issues. Addressing the impact of all of these differences on the particular techniques discussed was beyond the scope of the project. Care must be taken in deciding how to use the various techniques available to arbitrators to ensure that they are in compliance with all applicable laws, all ethical obligations, and will not jeopardize the enforceability of an ultimate award. Importantly, arbitrators should never give the impression to the parties that they are more interested in the parties entering into a settlement agreement than they are to decide the dispute through a final award.

Care should also be taken to continue to both be, and appear to be, impartial and independent and to minimize the likelihood that any party would lose faith in the arbitrator’s impartiality and independence based on the arbitrator’s conduct in promoting settlement. The parties’ informed consent for the use of techniques with respect to which such consent would be advisable may protect the arbitrator from a challenge based on the use of the technique. Explanation (d) of General Standard 4 of the IBA Guidelines on Conflict of Interest in International

¹⁵ Shahla Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and the West*, 16 Harv. Negot. L. Rev. 1 (2011).

¹⁶ Stephan Wilske, *Significant Differences in International Arbitration in the “East” and the “West”: Myth, Reality, or Lost in Globalization?* in Chang-fa Lo et al. (eds.), *Legal Thoughts Between the East and the West in the Multilevel Legal Order, Economics, Law and Institutions in Asia Pacific*, 543 (Publ. Springer Singapore 2016). *But see*, Gabrielle Kaufmann-Kohler and Victor Bonnin Reynes, *Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator’s Role and Legal Background*, ICC Bulletin, Vol. 18, No. 2, at 79 (2007).

Arbitration provides that “[i]nformed consent by the parties to such a process [settlement of the dispute] prior to its beginning should be regarded as an effective waiver of a potential conflict of interest.” But loss of faith by a party may lead to challenges based on other and unrelated grounds. However, while maintaining the parties’ faith in the arbitration, the arbitrators and the arbitration process is essential, care should be taken not to be overwhelmed by unnecessary due process paranoia.¹⁷

Ultimately, arbitration is a creature of contract or a treaty; and party autonomy must prevail over other considerations. A comprehensive conversation with the parties at the first organizational conference to review options and design the arbitration would enable the parties working with the arbitrators to tailor the process to the particular dispute. Such early joint planning would serve the dual goals of maintaining party autonomy and ensuring that arbitration is responsive to user needs. Further, this would allow parties to anticipate in advance the procedure to be applied and avoid arbitrators making suggestions during the process that are unexpected and may lead to significant time spent trying to determine what the suggestion signified.

Heeding user calls for greater process creativity will enhance the utility and attractiveness of arbitration in the dispute resolution spectrum as the Singapore Convention on Mediation,¹⁸ which has entered into force on 12 September 2020, makes cross-border mediated agreements enforceable, and the Hague Judgements Convention¹⁹ will enable recognition and enforcement of civil and commercial judgments rendered by the courts of other States.

¹⁷ See Klaus Peter Berger and J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, 32 *Arb. Int’l* 415 (2016).

¹⁸ Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC Bulletin, Issue 3, at 42 (2018); United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention on Mediation”), adopted on 20 December 2018, available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

¹⁹ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 (not yet in force), available at <https://www.hech.net/en/instruments/conventions/full-text/?cid=137>; David P. Stewart, *The New Hague Judgments Convention*, N.Y. Disp. Res. Lawyer, Vol. 13, No. 1, at 23 (Spring 2020).

G. CONCLUSION

Working Group 4 is hopeful that the Survey and the analysis of the data and feedback generated by it will enable arbitrators and parties to consider measures for promoting effective and efficient arbitrations within a framework that includes consideration of the impact process decisions might have on settlement. As it was aptly noted previously by one of the co-chairs of the Working Group: “Techniques to facilitate settlement of the dispute should belong to the arsenal of every international arbitrator in order to diversify the services which the arbitration community is able to provide to its users.”²⁰ The Working Group also has provided as an Annex to this report a check list that may be helpful to arbitrators in considering these techniques.

²⁰ Berger and Jensen, *supra* note 9 at 917.

APPENDIX I

I. THE FIRST ORGANIZATIONAL MEETING

The first organizational meeting, also known as the first case management conference or the first preliminary hearing, is crucial to achieving an efficient and well-run arbitration. It is also essential if tailored approaches that suit the particular dispute, such as the ones suggested for consideration by the Working Group, are to be implemented.

A. THE SURVEY

The Survey did not inquire as to practices with first organizational meetings, a subject the Group had not identified for review at first place. However, as the work on this project developed, it became clear that it was essential to include a discussion of this first meeting as the preliminary and essential first step to an engaged Tribunal that can helpfully promote settlement. It is only at a comprehensive first organizational meeting that all of the options available for the conduct of the arbitration can be explored with the parties. While there is nothing to preclude introducing additional steps to the process later, it will, in many cases, be more difficult as the schedule will have been set, the parties will have worked towards the established schedule and towards the process steps that had been agreed.

B. THE OPPORTUNITY

The first organizational meeting presents an opportunity for the Tribunal to get a real sense of the parties and what they view as important, both in terms of the merits and process. The Tribunal can start developing a relationship with counsel as well as getting a sense of counsel and how they work together. The Tribunal can address any cultural differences and develop common expectations as to the conduct of the arbitration. The Tribunal can invite party representatives to attend the session, thereby encouraging a more active client engagement and participation in decision-making. Discussion and guidance by the Tribunal can lead to consensus as to the framework of the proceeding.

A properly conducted first organizational meeting creates a forum for presenting a brief initial merits overview by the parties. Even with detailed earlier submissions, a discussion on the merits can assist in framing the arbitration procedures. For example, an early merits discussion with the parties can help the Tribunal in exploring more effectively whether bifurcation would be appropriate, whether an early resolution of certain issues would be helpful, or whether it would be helpful to set a mediation window or to suggest a mid-arbitration review. When a thorough discussion is undertaken at the first organizational session, there is no assumption that the arbitration would simply proceed, as often presumed, with the submission of a series of successive memorials, with document disclosure taking place after the first set of submissions, to be followed by the hearing, and often post-hearing submissions. Rather an actual review of available procedural measures would be undertaken in light of the specifics of the case at hand.

The importance of the first organizational meeting has been recognized and is mandated in many arbitration rules. It is the subject of UNCITRAL's excellent Notes on Organizing Arbitral Proceedings and has become common practice. However, too often, those meetings are brief and address only the dates for when the hearing will be held. The first procedural order has often already been delivered by the arbitrators to counsel or prepared by counsel and delivered to the Tribunal without any discussion as to how to structure the arbitration. This common *pro forma* conduct of a first engagement with the parties is a missed opportunity.

C. THE FIRST PROCEDURAL ORDER

The first procedural conference presents the first opportunity to consider departing from the typical process in order to capture the opportunity afforded to the Tribunal to work with the parties to develop the most appropriate process. Consideration should be given as to whether it would be appropriate, in a particular case, to have the Tribunal send a draft first procedural order that provides only for some of the mechanical aspects of the arbitration. Thus, the skeleton procedural order may address such basics as to how the Tribunal wants documents to be submitted, how translations should be handled, or what should be included in a witness statement. But other aspects of the process would not be assumed and would be discussed and resolved at the first session.

The Tribunal may raise in its initial communications with the parties to consider at the first case management any process steps appropriate to the case, such as those suggested by the Working Group as available to arbitrators that might foster a settlement. Early discussion of such techniques as setting mediation windows, conducting mid-arbitration reviews, providing preliminary views, deciding dispositive motions, or enabling a sealed offers process are most likely to be employed if they are discussed at the first procedural conference so that submissions are drafted in light of those process steps and the parties are prepared to participate with the Tribunal in employing these techniques. Thus, the various options reviewed by the Working Group can be incorporated into the structure of the arbitration when and where appropriate. Following the first organizational meeting, the final and detailed first procedural order, which covers all aspects of the arbitration, should be prepared by the Tribunal for review and approval by the parties.

References

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- Gabrielle Nater-Bass, *The Initial Discussion with the Parties: How Should It Be Done? Which Topics Must Be or May Be Addressed?*, in *The Arbitrator's Initiative: When, Why and How should It Be Used?*, ASA Special Series, No. 45 (2016)
- Cecilia Carrara, *How to Productively Conduct a Case Management Conference – Well begun is Half Done*, N.Y. Disp. Res. Lawyer, Vol. 12, No. 1, at 43 (Spring 2019)

APPENDIX II

II. THE MEDIATION WINDOW

Eighty percent of users of arbitration at a conference held in 2014 and comprising 150 delegates from over 20 countries, voiced their desire to have arbitration institutions and Tribunals explore in the first meeting what other forms of dispute resolution may be appropriate to resolve the case. In addition, over two thirds of the users at that conference desired a cooling-off period during the arbitration proceeding to make a good faith attempt to settle using a mediator. While users have expressed their interest in early discussion of mediation, it has not yet become common or accepted practice for arbitrators to introduce the subject. The mediation window is a technique that affords the parties that opportunity.

A. THE MEDIATION WINDOW DEFINED

A mediation window can be structured as suggested in the CEDR Rules for the Facilitation of Settlement in International Arbitration: “[A] period of time during an arbitration is set aside so that mediation can take place during which there is no other procedural activity.” This structure would require a pause in the arbitration to allow the parties to focus on the mediation and to allow for the development of potential solutions without the conflicting simultaneous pursuit of adversary positions. The pause should be time-limited, so as not to unduly prolong the arbitration. A period of time ranging from three to eight weeks has been utilized.

Alternatively, a mediation window can simply be a time set in the procedural schedule when the parties will discuss whether or not it would be useful to conduct a mediation. The mediation would proceed simultaneously with the arbitration and would create no delay in the schedule. This mediation window process is intended to prompt the parties to consider an amicable resolution through mediation. If this process is used, the parties may be advised that the mediation window must be scheduled sufficiently in advance of the hearing and that it will not interfere with the hearing dates set. These will not be adjourned for the parties’ continuing discussions.

B. THE OBJECTIVE OF THE MEDIATION WINDOW

Ideally, the mediation window will provide the opportunity for the parties to resolve the entire dispute. However, a mediation may also serve to resolve parts of the dispute, identify issues for early resolution, narrow the issues, maintain relationships, and streamline the proceeding.

The insertion of a mediation window in the schedule at the start of the arbitration, which forces the conversation to take place, counters the continuously expressed concern of parties that if they are the ones to suggest mediation or the commencement of settlement discussions, it is a show of weakness that may damage their negotiating position. Indeed, in a recent survey of barriers to settlement, over 60% of the respondents from both East and West geographies believed that “parties hesitating to make the first move toward settlement” is a “highly relevant/significant” barrier to achieving an amicable resolution. While to those who practice in jurisdictions where mediation is commonplace, this may seem somewhat surprising, experience suggests that it is often

a concern regardless of familiarity with mediation. For jurisdictions where mediation is just beginning to emerge, as is the case in many countries, one can well imagine this to be a significant barrier. The mediation window resolves that obstacle.

C. WHEN TO RAISE THE MEDIATION WINDOW

Optimally, the mediation window is raised at the first conference with the parties. The discussion of the objectives for the mediation, a determination of the best timing for the mediation window and its structure will serve to develop a process most suitable and helpful for the particular dispute.

D. TIMING

Ultimately, a mediation is most likely to succeed at a time that the parties are able to realistically assess the relevant facts and legal principles, the likely outcome and what a reasonable compromise might be, as well as the likely expense in terms of legal costs and damage to reputation, commercial relationships, and other non-monetary factors. If it is concluded that conducting the mediation after the filing of the initial pleadings is too early, in a traditional international arbitration with two successive rounds of submissions, a mediation conducted after the first round of submissions may be optimal. In some cases, the parties may wish to wait until after the exchange of documents, but while they may then be better informed as to their position, it will decrease cost savings.

The notion that a parallel mediation should be limited to a certain window should also be questioned. Rather, it may make sense that the mediation run parallel to the arbitration throughout, or after a certain point in the process. For example, the new ICDR rules anticipate a concurrent mediation that may commence at the beginning; a parallel mediation may also occur after a mediation step is unsuccessful, but the mediator stays in place. Parallel mediation may also occur when a mediation window is set early in the process, but the parties are encouraged to consider leaving the mediation process running in parallel even if they do not settle during the initial window, or to open another window later in the proceeding.

E. SELECTION OF THE MEDIATOR

Appointing the arbitrator with full knowledge of the issues in dispute as the mediator may be tempting as being most cost-effective and efficient. Whether this is a viable option depends on the jurisdiction of the seat, the likely jurisdictions of enforcement, and the applicable institutional rules. Such a process is accepted in some jurisdictions and not in others where it may even be a basis for challenge or vacatur of an award. It is permissible in some jurisdictions and under some institutional rules if the parties enter into a comprehensive informed consent to such a procedure. However, there are also significant practical concerns as to the efficacy and appropriateness of having the same individual serve in both capacities. Accordingly, the mediator chosen to serve during the arbitration may be the arbitrator, but the choice is generally to retain a different individual, which also has the benefit of allowing a parallel process. Working Group 5 explores the pros and cons of using the same individual as both arbitrator and mediator.

F. AUTHORITY OF THE ARBITRATOR TO SUGGEST CONSIDERATION OF A MEDIATION WINDOW

Arbitration is a creature of contract and the arbitration clause provides the scope of the arbitrator's authority. While an arbitrator probably does not have the authority to require the parties to mediate, the arbitrator's inherent authority to conduct the arbitration process and assist the parties in the resolution of their dispute encompasses the authority to suggest considering alternative dispute resolution mechanisms. On being asked "Do you raise settlement as an option at the first conference?", 56% of the Survey respondents said "Yes" and 44% said "No." When asked if they raised settlement as an option later in the arbitration, 62% said "Yes" and 38% said "No." Yet in-house counsel tell us that they want a mediation window set at the start of the case if at all, rather than having mediation sprung on them later in the proceeding when they do not know what it means in terms of the outcome.

However, the mediation window is not as well known yet or accepted. Only a small percentage of the respondents to the Survey discussed the possibility of a mediation window at the first conference with the parties. In response to the question "Do you set a mediation window at the first conference that requires the parties to consider mediation at a set time in the schedule?", 24% said "Yes" and 76% said "No." Similarly, in response to "Do you schedule a mediation window at the first conference that builds a pause into the arbitration to allow the parties to try to mediate?", 12% said "Yes" and 88% said "No." However, quite a few from diverse jurisdictions thought it would be a good idea. As one respondent stated, "I believe it might be necessary and a good way to promote settlement." In response to polling during the consultation sessions 90 % thought the arbitrator should propose a mediation window during the arbitration.

An increasing number of institutional rules and guidelines expressly provide for such guidance to the parties. For example, Section 29 of the ICC Mediation Guidance Notes specifically references a mediation window and states: "[I]t may be appropriate for the arbitration to be stayed to allow time for conducting the mediation." The ICC Rules Appendix IV in its 2021 version provides that the arbitrator may "encourage the parties to consider settlement of all or part of the dispute (...) through any form of amicable dispute resolution methods (...) such as, for example, mediation (...)" Article 19(5) of the Swiss Rules provides: "With the agreement of each of the parties, the Arbitral Tribunal may take steps to facilitate the settlement of the dispute before it." Section 26 of the German DIS Rules provides: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues." UNCITRAL 2016 Notes on Organizing Arbitral Proceedings provides: "In appropriate circumstances, the Arbitral Tribunal may raise the possibility of a settlement between the parties."

G. SAMPLE CLAUSE

If the mediation window is established as part of the arbitration proceedings, it will simply be reflected in the schedule for the arbitration. If the mediation window is established to create the opportunity for the parties to consider mediation, the following clause may be considered for the first procedural order:

On the date set in the annexed schedule, the Parties will meet and confer with respect to whether they would like to engage in a mediation or other settlement discussions with respect to this arbitration. The [institution name] will be glad to assist in this process. The arbitrators will not be part of any mediation or settlement discussions between the Parties. The Parties will not communicate to the Tribunal with respect to such mediation or settlement discussions, other than advising of any settlement. If a mediation is agreed by the Parties, it will be scheduled for an early date, so as not to jeopardize the hearing dates. No adjournment of the hearing date will be granted on the grounds that a mediation or settlement efforts are ongoing.

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APPENDIX III

III. DAMAGES: PROCEDURAL CONSIDERATIONS

A. DAMAGES PROCEDURE AND IMPACT ON EFFICIENCY AND SETTLEMENT

While some arbitration cases involve specific performance and other non-monetary relief, the award of monetary damages is the primary means by which the rights of the parties in international arbitration are compensated. This requires quantifying the legal claims and assigning them an economic value by determining the loss suffered and transposing the loss or damage into a monetary figure. Depending on the nature of the claim, this can be a relatively straight forward exercise or a highly complex one.

B. GENERAL TECHNIQUES

The effective resolution of complex quantification issues benefits when, from the outset of the proceedings, the Tribunal and the parties work together to create a procedure designed to provide the Tribunal with the evidence it needs to properly address and decide the quantum of damages.

At the same time, the parties' ability to predict the range of potential damages in an arbitration with reasonable certainty is a major settlement driver. Settlement ranges can be significantly narrowed by a decision on jurisdiction and liability or a subset of those issues with a major impact on damages, which we refer to as issue bifurcation.

Working Group 4, therefore, considered the extent to which formally or informally bifurcating damages or issuing interim decisions that are likely to have a significant impact on damages would lead to efficiencies and cost savings (for example, by reducing expert costs), and whether it would be reasonably likely to lead to settlement after the liability stage.

It is important to note that, depending on the damages case, techniques that aid in narrowing the damages range and the quantification process include many of those that are discussed generally in this Report. This may entail early tribunal engagement through a robust case management conference, the use of dispositive notions to narrow the damages issues, and the use Kaplan openings/mid-arbitration conferences to create a be-spoke focused procedure.

A discussion of those techniques which are covered in other sections of this Report will not be repeated here, but it is important to keep in mind that up-fronting issues and giving the parties and their experts guidance is particularly important in cases involving complex forward-looking damages calculations including lost profits and the income earning valuation of assets. When viewed through a quantification lens, these techniques are geared at ensuring that the Tribunal, the parties, and the experts focus on the details of the damage's principles and quantification techniques early, well in advance of the hearing. This allows the Tribunal to provide guidance to the experts and counsel so that it has the information it needs to understand and appreciate the damage issues.

A robust procedural hearing allows the parties and the Tribunal to consider the procedure to be applied to damages and the interaction of the experts to ensure that the parties and their experts engage on the quantification issues and to consider whether it would be appropriate to bifurcate either the entire damages case or certain issues that would have a significant impact on the damages case.

In cases involving party-appointed damage experts where there is a mid-term conference, part of the conference will typically be for the party-appointed experts to address their initial reports and to agree or for the Tribunal to decide the rest of the procedure. This helps to ensure that the Tribunal has the information it requires to decide the damages issues and to avoid the need for the Tribunal to request additional information after the hearing, as increasingly has occurred in complex damage cases. Difficult procedural questions arise when issues are raised post hearing and especially when the proceedings are closed. This seems to happen most often with quantum issues where the Tribunal finds after the hearing is closed (perhaps in formulating its award) that it does not have the necessary information to quantify the damages or decides that it does not agree with the approach to quantum taken by the party-appointed experts.

This is less likely to happen when the Tribunal fully engages with the parties on the damage's issues throughout the process. When the case involves party-appointed quantum experts, this means creating a structure for an effective dialogue between the Tribunal and the party-appointed experts and considering whether the appointment of a Tribunal expert or the bifurcation of proceedings is likely to lead to a more robust quantification, without creating undue delays or significantly increased costs.

C. BIFURCATION

Bifurcation is the process by which proceedings are divided into separate phases to allow for a decision on one phase before considering issues relevant to the next phase. Common bases for bifurcation are between jurisdiction and merits/quantum, or between jurisdiction/merits and quantum. Cases raising both potentially outcome determinative jurisdictional issues and complex quantum issues may even be trifurcated, but this is unusual.

Most international arbitration rules expressly grant the Tribunal the power to bifurcate proceedings, and in others, this is covered by the general powers conferred upon the Tribunal.²¹ The IBA Rules provide that the Tribunal should promptly identify issues appropriate for

²¹ See, e.g., HKIAC Administered Arbitration Rules 2018 (Art. 13(1)); ICC Rules of Arbitration 2021 (Art. 22(1) and (2)) and Art. 24(3)); LCIA Arbitration Rules 2020 (Art. 14(1)); SCC Arbitration Rules 2017 (Art. 23(1)); UNCITRAL Arbitration Rules 2013 (Art. 17(1)). See also Gary Born, *International Arbitration: Law and Practice*, 345 (Kluwer Law International 2015).

preliminary determination and encourage the systematic organization of arbitral proceedings by issues or phases.²²

The bifurcation of damages allows the parties, their counsel, experts, and the Tribunal to focus fully on the quantification exercise taking into account the issues decided in the liability phase. In complicated quantification and valuation cases, particularly those involving income-producing assets or lost profits claims, bifurcating the damages phase is likely to yield a more meaningful valuation given the numerous projections on which the quantification rests. These financial projections are often interconnected and difficult to make without a prior determination of the factual and legal underpinnings on which they are based. On the other hand, bifurcation can lead to certain inefficiencies where liability and quantum are so intertwined that issues and evidence need to be addressed twice.

Factors that may be considered in deciding whether to bifurcate include whether bifurcation will:

- Encourage settlement;
- significantly reduce the time and cost of the quantum phase;
- narrow the scope of the dispute on quantification of damages;
- significantly improve the reliability of the damage's calculation; or
- result in the repetition of evidence and issues where liability and quantum questions are too intertwined to be effectively separated.²³

Ultimately, when and if the damages phase should be bifurcated depends on the precise circumstances of each case. The question as to whether bifurcation is appropriate has typically been approached primarily from the standpoint of efficiency. However, while efficiency is obviously an important goal, the decision whether to bifurcate the quantum phase will also be influenced by whether bifurcation will allow for a more robust quantification of damages and also by whether it is likely to encourage settlement.

Improved Quantification. It may be difficult to undertake an appropriate valuation of an income-producing asset or to properly quantify forward-looking damages involving lost profits without bifurcating. The valuation or quantification is highly dependent on factors that are decided in the liability phase, and it is difficult for the parties, the experts, or the Tribunal to undertake a nuanced quantification without knowing these factors.

Depending on the complexity of the valuation and the variables required, it can be difficult, for example, for a Tribunal to properly undertake a DCF valuation of an income-producing, asset-based range of possible valuation dates, multiple cash flows based on different risks and other factors that are dependent on decisions taken on the merits, and discount rates based on a wide range of theories addressed in the merits. Bifurcating quantification allows the Tribunal to engage

²² See IBA Rules on the Taking of Evidence in International Arbitration 2020, Art. 2.

²³ See GAR Damages Guide, Procedural Issues.

with the parties and their experts in a focused dialogue about quantification based on a known set of variables, which more closely mirrors how such a valuation would be undertaken in the real world.

This makes it important that when a case is bifurcated, the Tribunal is clear on what will be exactly decided in the liability phase with a focus on deciding those issues that are necessary for an efficient resolution of the quantum issues in the damages phase. This means that the Tribunal may decide to address certain damage-related issues in the merits phase because those issues are important for quantification. However, this should not result in a mini-quantification exercise creeping into the merits phase. One of the major benefits of bifurcation is to limit the time and cost of quantum experts by either eliminating the need (when claims are denied on the merits) or at least limiting and focusing their efforts. This is not achieved if the liability phase is run so that quantum experts become heavily involved on the sidelines. However, this is highly case- and fact-specific and there is no one size fits all solution to the bifurcation of cases.

Increased Likelihood of Settlement. Bifurcation of liability and damages gives the parties significant information from the liability phase. The decisions taken in the liability phase allow the parties to narrow the damages range and provide a basis for settlement. As a result, many cases where the damages are bifurcated, do settle after the liability phase for this reason. This is also a good time for the parties to consider a mediation to improve the settlement possibilities.

D. ISSUE BIFURCATION

Another approach to narrowing the damages range and allowing a more robust damages quantification phase without formally bifurcating the whole damages case is to bifurcate issues. In many cases, the parties and the Tribunal will be able to identify one or more issues that will have a major impact on the damages case, allow the parties and the Tribunal to address the damages case more efficiently and, at the same time, give the parties important information to potentially advance a settlement. For example, this can include the date of valuation or whether a damages limitation clause will be enforced. Deciding these issues upfront will both narrow the damages and quantification issues to be decided and potentially lead to settlement.

E. REVERSE BIFURCATION

Reverse bifurcation is where damages issues are considered before the merits. Lucy Reed has suggested the possibility of hearing the damage issues first in appropriate arbitration cases, which is an approach applied in U.S. civil litigation where issues are raised about whether damages can be proved at all or were limiting the case to where damages can be proved is likely to narrow the issues in dispute.

F. CONCLUSION

Damages are the most important part of any arbitration for most parties. Using techniques that ensure the efficient quantification of damages and upfront damage issues provides for more efficient resolution of damage claims and at the same time encourages settlement by allowing the

parties to narrow the range of possible outcomes. In appropriate cases, the bifurcation of damages or issues related to damages facilitates the effective resolution of complex damage claims by allowing the parties and their experts to undertake the quantification analysis based on full information as it would be the case in the real world and at the same time provides the parties with information that allows them to settle the dispute more effectively.

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APPENDIX IV

IV. SUMMARY DISPOSITIONS

The general grant of discretion to the arbitrators under institutional rules has long provided support for the inherent authority of the Tribunal to make summary adjudications. In practice, however, it was generally believed that arbitrators were reluctant to hear and grant dispositive merits motions other than with respect to jurisdiction. This hesitation can be caused by several concerns: Many major arbitration rules historically lacked explicit rules authorizing arbitrators to entertain dispositive motions; it was feared that summary disposition of a case may render the resulting award vulnerable to challenges before courts; and the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding.

A. THE SURVEY

Contrary to much of the literature on the subject, the Survey results suggest that, at least in some cases, arbitrators were willing to decide issues in advance of a full merits hearing. In response to the question “Do you isolate and decide preliminary issues (other than jurisdiction)?”, 84% said “Yes” and 16 % said “No.”

The survey comments were resoundingly in favor of the procedure. As one respondent stated: “Yes, depending on the case. I think that preliminary determination can be a really powerful tool when appropriate, and done correctly.” Several respondents noted that it was their usual practice: “As a matter of course, I encourage parties to identify such issues and establish ways of resolving those issues;” “I ask at the initial conference whether there are any preliminary issues that could be dispositive or might narrow the issues to be considered. If there are, I set a briefing schedule to address those issues as early in the proceeding as possible.”

Several respondents noted the impact on settlement that a decision on preliminary issues can have, whether granted or denied, and even if it does not dispose of the entire case. As the respondents to the Survey stated: “This is likely to have an impact on the parties’ willingness to move forward with the proceedings. Therefore, it could be beneficial provided it can be completed in an efficient manner and without prolonging the proceedings;” “They can be very helpful to the parties in assisting them in resolving the dispute, or in streamlining the process to focus on the critical issues;” “Isolating issues, deciding some first, may help the parties to settle – particularly if you take the most important issues first, the need for the case disappears;” “That’s a possibility I do consider. It helps the parties have an understanding of where their case stands – which can push them to seek a settlement.”

One respondent was specific as to the nature of the issues that he found to be most appropriate for summary disposition: “It depends on what the parties file. There could be preliminary issues on interpretation of the contract, non-compete etc., resolving proper meaning of unambiguous terms up front, statute of limitations; in one case focusing on who had knowledge of what by a certain date seemed to be dispositive on certain issues, so there was witness testimony

on these bifurcated issues which helped to greatly streamline issues later on in the process, and certain arguments were abandoned by both parties. These motions did not always result in preliminary awards, but became a way of focusing on what everybody agreed to were more efficient ways of focusing the Tribunal's attention." In addition to the statute of limitations, and meaning of unambiguous contract provisions, other issues often flagged as particularly suited to early disposition include *res judicata* and collateral estoppel, standing and preemption, waiver and estoppel, and failure to comply with a contractual claim or notice procedure.

While the overwhelming majority favored early dispositions, several comments reflected continuing hesitancy. One respondent pointed out the balance an arbitrator should strike in deciding whether or not to permit substantive early motion to be submitted: "Yes, provided it is in the interest of time and cost efficiency AND that the preliminary issue can be determined without having to go through the totality of the case." Other survey respondents were more negative. Survey respondents stated: "Seldom;" "Reluctant to isolate preliminary issues;" "They rarely determine the matter other than jurisdiction." In addition, respondents in certain jurisdictions were concerned that a disposition on less than all of the claims would allow an immediate appeal of that early disposition, thus, delaying rather than expediting the resolution of the arbitration.

Early resolution is intended to, and properly handled often will, reduce time and costs. With the focus on reducing time and cost in arbitration over the last several years, the respondents were asked if they had seen a change: "Are you seeing greater consideration of early decisions on material issues?" The responses were virtually evenly split with 49.3% saying "Yes" and 50.7% saying "No." With the increasing attention to and acceptance of early resolution of merits issues, it would be expected that the mechanism will be increasingly utilized in the future.

B. AUTHORITY

The International Bar Association ("IBA") Rules on the Taking of Evidence in International Arbitration recognized the possibility of summary dispositions and have long encouraged arbitrators to look for opportunities for early determination. Article 2(3) states in relevant part: "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) for which a preliminary determination may be appropriate." Rule 41 of the ICSID rules has long provided that a party could "file an objection that the claim is manifestly without legal merit." Rule 29 of the 2016 SIAC rules provided that a party could apply for early dismissal of the claim or defense which was manifestly without legal merit or outside the jurisdiction of the Tribunal. Also, Rule 33 in the 2013 rules of the American Arbitration Association ("AAA") expressly authorized motions likely to succeed and dispose of or narrow the issues in the case. However, it is only very recently that other major arbitral institutions have specifically incorporated rules providing for early adjudications and thus provided clear authority to the Tribunal.

In Article 22 of the 2021 revisions to the ICC Rules, the ICC added language to its general grant of authority to the Tribunal to "adopt such procedural measures as it considers appropriate." The rule now specifies that such measures "may include one or more of the case management techniques described in appendix IV." Appendix IV, which reviews certain case management

techniques, proposes, *inter alia*, “rendering one or more partial awards on key issues when doing so may genuinely be expected to result in a more efficient resolution of the case.” The LCIA in its November 2020 rule revisions provides in Rule 22.1 (viii) that the Tribunal has the power to determine any claim or defense that is outside the jurisdiction of the Tribunal or “is inadmissible or manifestly without merit.” The ICDR in its 2021 rules revision provides in Article 23 that a party may request leave “to submit an application for disposition of any issue presented by any claim or counterclaim in advance of the hearing on the merits.” These recent changes in the rules of leading arbitral institutions will inevitably lead to greater use of the practice. As one Survey respondent stated: “This should be done more,” and now it undoubtedly will.

C. AVOIDING INCREASED COSTS

Several respondents cautioned that controlling which motions were made was essential to ensure that early applications were appropriate and would not just serve to increase time and cost. While it may be that in some jurisdictions or in the context of some arbitral fora, it is customary to permit the filing of any application the parties seek to submit, it is more commonly the practice to screen motions before they are submitted lest they increase cost and time, a concern repeated by several respondents. As one respondent noted: “Rarely [dispositive motions]. I often find that bifurcation does not really save time. It in fact creates more work for the parties/lawyers. If the bifurcation issue is cast narrowly, it may result in duplicative work, revisiting the same evidence. It would only be useful if there is a discrete issue which could be determinative for the whole case plus the evidence are ready or readily available.” Others, while generally positive on the process, cautioned: “Yes, [early disposition] where appropriate and when they are likely to be meritorious and will not simply add to time and cost.” Another respondent described a useful practice: “Generally, before full briefing, unless it is established at the first session with the parties that it is a worthwhile motion, I do require a short letter and a response setting forth why the issue can be decided on a preliminary basis, has merit, and would reduce the time and cost of the proceeding.” The ICDR rules address this concern in Article 23 of the 2021 rules by specifying that: “The Tribunal shall allow a party to submit an application for early disposition if it determines that the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits.”

Whether there are issues that would lend themselves to early resolution is a subject for discussion at the first conference with the parties. Those that are considered by the Tribunal to be of sufficient merit are authorized at that time. Those which present complex fact issues requiring a hearing on the merits, or which would not eliminate any aspects of the presentations that would be required at the merits hearing and thus would not reduce time and cost, may be rejected at that time. However, in specific cases, there may be countervailing considerations which would cause the arbitrator to permit the filing of the motion even if it does not appear likely to be successful. For example, there may be cases in which the parties’ arguments with respect to whether or not the motion should be filed makes it clear that the parties need a resolution of the motion in order to achieve a settlement. In such a case, while the motion itself may not be cost effective, in the context of the totality of the case, considerable time and expense can be saved if the dispositive motion increases the chances of settlement. Respondents to polling during the consultation

sessions supported such considerations with 80% saying that arbitrators should consider the impact on settlement in deciding whether to allow preliminary motions to be made.

D. SCREENING THE MOTIONS

In some cases, the discussion at the conference will not be sufficient to inform the decision as to whether to permit the filing of a motion and written submissions requesting leave may be appropriate. Moreover, not all applications for summary disposition come to light at the first conference. The Tribunal's first procedural order can include specific directions as to the manner in which leave should be sought before a full-fledged motion is submitted. Provisions that can be incorporated in the order may read as follows:

The Party wishing to present a substantive motion shall first submit a letter to the Tribunal, up to three pages in length, demonstrating that the motion is likely to dispose of a claim, or otherwise materially narrow the issues in the case. Within five business days, the other Parties may state their position in a letter of comparable length. The Tribunal will then decide whether to allow the motion to be submitted.

Or alternatively:

No Party shall file any motion, other than with respect to disclosure [or discovery], without first submitting a letter not to exceed three pages to the Tribunal (a) setting forth the nature of the motion that the party proposes to file, (b) providing a brief statement of the factual and legal bases for such motion, (c) confirming that there are no factual issues that would be material to the determination of the motion, (d) explaining why it is believed that the motion is meritorious, (e) describing how its resolution would advance the efficient resolution of this proceeding, and (f) obtaining leave from the Tribunal for such filing. Upon the submission of such a letter, the other Parties shall have five business days [or such other period of time as the Tribunal may determine] to respond with a letter not to exceed three pages. The application will be decided on the papers or, at the Tribunal's discretion, on a conference call to be scheduled.

E. STANDARD TO APPLY

The arbitrator may be well advised to inquire as to what standard should be followed in determining the outcome of the application. The standard applicable to determinations of applications for summary adjudications vary across different countries (and even across different states in the United States). . And some jurisdictions may have no such standards and no provision for summary adjudication. Some arbitrators may feel that they are not bound by any such court-based standard. Others may be concerned about its applicability and may inquire as to whether the standard should be viewed as procedural or substantive in determining what standards should be applied. These considerations demonstrate that arbitrators would be well advised to at least

consider whether and how they want to address the question of the standard to be applied in resolving the application.

F. FINAL CONSIDERATIONS

As in so many aspects of the arbitrator's role, the exercise of good judgment is crucial. Each case must be reviewed in light of its particular facts. An ill-advised consideration of a dispositive motion or a grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits arbitration is intended to provide. Thus, arbitrators must carefully consider its merits before granting a motion and should ensure that due process considerations are observed. For example, an arbitrator should consider whether a request by one party for further document production in advance of resolution of the motion should be granted. Nonetheless, dispositive motions are a powerful tool available to streamline proceedings, and arbitrators should not shy away from meritorious dispositive motions that will reduce time and cost. If arbitration is to deliver on its promise of offering a faster and cheaper dispute resolution mechanism, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defenses that are legally insufficient at the earliest opportunity.

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APPENDIX V

V. MID-ARBITRATION REVIEW

A. THE SURVEY

International arbitrations are often front-loaded, with the Tribunal having to work itself through voluminous written submissions and a multitude of witness statements and expert reports before the first hearing. Reasons for this front-loading are the complexity of the disputes in an increasingly complex business world and the parties' tendency to bury the Tribunal under an avalanche of all conceivable arguments, since they do not know yet which will appeal to the Tribunal when it decides the dispute.

It may, therefore, be a sensible idea to insert into the schedule of an arbitration a mid-term meeting of the Tribunal and counsel, to be held long before the first hearing. Often referred to as a Kaplan Opening after Neil Kaplan, who suggested it, such a meeting may help to save time and costs by providing all participants with an increased and early focus on the relevant legal and factual issues of the dispute. The presentations and discussions with the Tribunal may also have an indirect effect on settlement by reducing judgmental overconfidence of the parties and triggering settlement talks between them inside or outside the hearing room.

In spite of these obvious advantages, the Working Group received mixed responses to the question "Do you give an in-depth review mid-arbitration?" Only 35% of the respondents indicated that they do, in fact, provide such review, while 65% responded that they do not. During the consultations session none of the respondents thought it should be suggested often but 60% said it should be sometimes and 30% said it depends.

Those who are skeptical provided the following comments, which reflect the traditional skepticism against any kind of preliminary view by the Tribunal, no matter at which stage of the proceedings:

"No, that would violate rules against predisposition – better to hear all the evidence;"

"Not done as it would indicate a bias by the Tribunal;"

"I'm not sure how this could be useful if done independently from interim decisions;"

"I had an experience as counsel when the Tribunal gave a preliminary view and the other party changed its case. It created confusion and delay. I am not comfortable of giving a preview of the decision as it could be disruptive."

Those who are more open to such an approach responded:

"If parties ask, I would consider it with caveats;"

“Mini-Kaplan-opening. This can be good and I have tried it, but Neil’s protocol leaves it too late. However, it can be a good time if you have a mini-hearing on some other point scheduled, as this kind of oral review can help you to address difficult issues such as the document production requests;”

“I only recently became aware of the practice of mid-arbitration reviews, and I’m concerned about giving any indication to the parties of my position on the issues prior to completion of the hearing. In almost all of my cases, my opinion of the validity of the parties’ positions prior to the hearing was totally different from my final award. I plan on researching mid-arb reviews to see how they are used and whether there is some process that might be useful to the parties without revealing my initial opinions;”

“What I sometimes do is providing parties with specific guidance for second round of briefs;”

“Yes, this can help the Parties to focus on the key issues, whether factual or legal, for a better preparation of their hearing.”

B. HOW DOES A KAPLAN OPENING WORK AND WHAT ARE THE BENEFITS?

The idea of a Kaplan Opening was developed by the well-known Hong Kong based international arbitrator Neil Kaplan, who served as a High Court Judge in Hong Kong before he commenced his arbitration career. He describes the Kaplan Opening in the following words:

“At a convenient time in the arbitration, probably after the first round of written submissions and witness statements but well before the main hearing, the Tribunal should fix a hearing at which both counsel will open their respective cases before the Tribunal. They may be required to serve skeleton arguments in advance. After the openings any expert witness should make a presentation of his or her evidence and explain the areas of difference from the expert of like discipline on the other side.”²⁴

Thus, while often perceived as a forum for providing preliminary views, Kaplan’s description makes it clear that the main purpose pursued with this proposal is neither a preliminary view by the Tribunal nor the proactive promotion of a settlement of the dispute. While the first may be premature, depending on the legal and factual complexity of the case, the latter may be a useful side effect, especially with respect to peripheral matters, but it is not the primary purpose of a Kaplan Opening.

Rather, the underlying idea for Neil Kaplan’s proposal is to provide an additional tool for making arbitration proceedings more efficient. The nature of the Kaplan Opening may best be described as an early, face-to-face dialogue between the participants of the arbitration, allowing for a much more efficient preparation of the hearing. Essentially, the Kaplan Opening is intended

²⁴ Neil Kaplan, *If It Ain’t Broke, Don’t Change It*, 80 *Arbitration* 172, 174 (2014).

to ensure a better-informed Tribunal, allowing it to better understand the case early in the proceedings, so that it can take better informed case management decisions (for example, identifying where evidence may be unnecessary and where legal issues require a specific response).²⁵

Neil Kaplan himself lists seven main advantages which follow from his idea of a mid-term meeting between the Tribunal, the parties, and possibly also their experts:

- “1. It will ensure that the whole Tribunal will read into the case at a far earlier stage than hitherto.
2. It will enable the Tribunal to understand the case from that point on, and will inform its subsequent case preparations.
3. It will enable the Tribunal to have a meaningful dialogue with counsel about peripheral points, unnecessary evidence and gaps in the evidence.
4. It will facilitate the Tribunal in putting points to the parties which they will then have time to consider and to respond to.
5. It will enable the Tribunal to meet and discuss the issues far earlier than hitherto and thus meet the aspirations of the Reed Retreat.
6. It will assist in ensuring speedier and, I would suggest, better awards.
7. Bringing the parties together, with their trial counsel, well in advance of the hearing, means that there is a chance that at least part of the case may be settled, or points of disagreement minimised.”²⁶

The idea of the Kaplan Opening forces all participants to think outside the box: What matters is not only the traditional question as to *how long* the opening shall be, but also *when* it should be held. It is true that traditionally, the opening statement is intended to “open” the final hearing. However, there is no reason why an opening argument would have to wait until after the final round of briefs. Earlier openings may well advance many of the benefits listed by Neil Kaplan as a justification for his proposal. Nor does an early opening argument preclude counsel from making (shorter) opening statements at the beginning of the hearing.²⁷

The fact that the Tribunal and counsel have a personal meeting to discuss the case earlier than usual can also have an important psychological effect. It serves to mitigate the aggressive tone in which counsel sometimes formulate their written submissions:

“Much of what is produced as a result of this aggressive display is not helpful to the Tribunal. It is worth pointing out that whereas it is easy to

²⁵ IBA Arb40 Subcommittee (ed.), *Compendium of arbitration practice*, 12 (October 2017).

²⁶ Kaplan, *id.*; *see also* Arif Hyder Ali, Jane Wessel, et al., *Chapter 5: Initial Procedural Conference*, in *The International Arbitration Rulebook: A Guide to Arbitral Regimes*, 351, 358 (Kluwer International 2019).

²⁷ Alexandre de Gramont, *Open and Shut: The Innovative Use of Opening Argument in International Arbitration*, N.Y. Disp. Res. Lawyer, Vol. 10, No. 1, at 55, 56 (Spring 2017).

write offensively it is far harder to replicate this verbally in front of three arbitrators and the other side without losing credibility or sympathy.”²⁸

Neil Kaplan’s idea may be taken a step further by devising an arbitration in two halves, separated by a “case review conference.” The procedural steps for the arbitration are planned only up to the case review conference, which separates the two halves. At that conference, the Tribunal will have a discussion with the parties on the issues and evidence necessary to determine the parties’ requests for relief. Based on that discussion, the Tribunal will issue procedural directions for the second half of the arbitration concerning matters such as document production, further written submissions, and any discrete points suitable for accelerated determination. This approach allows the Tribunal to adopt more tailored procedures for the remaining steps leading to the merits hearing, and it permits the parties to tailor their submissions in light of guidance provided by the Tribunal.²⁹

C. PRACTICAL TIPS

As with preliminary views, the efficient use of the Kaplan Opening requires two things: Clear, uncoerced consent by the parties to such a mid-term meeting, and early transparency by the Tribunal as to its exact timing and structure.

Another important issue is the “synchronization” of the mid-term meeting and the final hearing. The Tribunal needs to avoid protracted and lengthy arguments arising from such a meeting which may thwart the underlying premise of the Kaplan Opening, for example, with respect to the question which issues that may have surfaced during the mid-term meeting are to be prioritized in the subsequent hearing.

Finally, making efficient use of the Kaplan Opening requires that the members of the Tribunal are willing to familiarize themselves with the legal and factual issues of the case earlier than usual. The Kaplan Opening should, therefore, always be combined with internal deliberations of the Tribunal. The date for these deliberations could be fixed in the initial procedural calendar of the arbitration, thus, combining the Kaplan Opening with the “Reed Retreat.”³⁰

Provided that these basic prerequisites for the efficient use of the Kaplan Opening are met, the Tribunal may use the case review conference to:

- Identify the key issues in a case and those upon which it requires further submissions and evidence in the parties’ second round of written submissions;
- set page limits for reply written submissions;

²⁸ Kaplan, id.

²⁹ Constantine Partasides and Scott Vesel, *A Case Review Conference, or Arbitration in Two Acts*, 81 *Arbitration* 167 (2015).

³⁰ See Lucy Reed, *The Kaplan Lecture 2012, Arbitral Decision-Making: Art, Science or Sport?*, 30 *J. Int’l Arb.* 85, 95 (2013).

- identify issues as being suitable for accelerated determination;
- resolve any issues relating to document disclosure requests, along with directing the parties to make brief submissions to the Tribunal as to the relevance of their document requests to the issues in disputes and/or answer the Tribunal's questions on their document requests;
- consider whether it is appropriate at this stage of the proceedings to narrow the issues in dispute between the experts;
- give more specific directions for the organization of documents for the main hearing;³¹
- allow the parties and the Tribunal to focus on the damages issues.

Ultimately, the success of Neil Kaplan's idea rests upon the Tribunal's ability to make counsel understand that the use of a Kaplan Opening does not mean that they lose control of the proceedings – something that no counsel likes – but that *both*, the Tribunal and counsel, will benefit from it by allowing to focus, much earlier than usual, on the critical issues of the case.

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³¹ See IBA Arb40 Subcommittee (ed.), *Compendium of arbitration practice*, 13 (October 2017).

APPENDIX VI

VI. PRELIMINARY VIEWS

A. THE SURVEY RESPONSES AND PROS AND CONS

Whether and to what extent international arbitrators should provide the parties with preliminary views of all or some of the disputed issues in the case before them, has been debated for a long time. In the Survey, almost 80% of the respondents answered that they do not offer preliminary views to the parties.

Very often, this issue is put in the context of the common law/civil law divide with respect to the proactive promotion of settlements by the Tribunal, whereas in fact this may be more relevant to Germanic jurisdictions rather than the whole of the civil law.

In jurisdictions like Germany, the German-speaking part of Switzerland (Zurich), or – albeit to a lesser extent – the Netherlands and Austria, preliminary views by the Tribunal have helped to pave the way to a settlement of the parties’ dispute in many cases. The preliminary view serves to reduce the parties’ usual judgmental overconfidence, which often stands in the way of an agreement to settle the dispute. Even if they do not lead to a settlement, preliminary views may provide the parties with a more realistic picture of the relevant issues of their case and the Tribunal’s view of them.

The insights gained into the Tribunal’s thinking provide the parties with an opportunity to better understand the strengths and weaknesses of their own case. Unlike an arbitration in which the Tribunal remains silent until it issues its final award, the parties have a chance to improve their submissions on their weak arguments should the arbitration continue without a settlement. Preliminary views expressed by the Tribunal may, thus, give the parties an opportunity to make a better and more efficient use of their fundamental right to be heard.

In addition, getting – for the first time – an objective outside view of their case may also provide the parties with an incentive to take precautionary financial measures concerning the potential risks arising out of the dispute. Thus, if a party realizes, after having listened to the Tribunal’s preliminary view, that the risks of losing the case are higher than it thought at the outset of the proceedings, that party may provide for accruals in the company’s balance sheet.

Preliminary views are, therefore, yet another element of the overarching theme of “early transparency.” That transparency relates not only to the procedural rules of the game, but also to the substantive issues of the dispute, at least insofar as the Tribunal deems them relevant for resolving the dispute.

In spite of these potential advantages of preliminary views, they are still seen with great skepticism in countries like France, the French-speaking part of Switzerland (Geneva) as well as many other civil and common law countries. Here, the role of the arbitrator is seen as that of a dispute decider and not of an active dispute resolver. Settlements take place outside the hearing

room and active involvement of the Tribunal in the promotion of a settlement of the case is seen as outside that role and as a potential ground for challenge of the arbitrator.

This cautious view is reflected in the Survey. Only 31% of the respondents said that they discuss settlement options with the parties. This reluctance is also reflected in some comments received from respondents of the Survey:

“Arbitrator should not take any role in fostering settlement. It has to be the initiative of the disputing parties. Arbitrator’s role is just to decide and not to prevent as he or she has the power only to record the settlement and not promote it;”

“The arbitrator is a service provider. He should only render a decision and not give advice;”

“Some French arbitrators take a view that they are only there to decide the case – no role to help with settlement.”

In polling during the consultation sessions only 16% strongly supported the proposition that arbitrators should suggest the possibility of offering preliminary views, while 22% supported, 16% were undecided and 34% opposed. However, even in those jurisdictions where there has historically been a reluctance, the tide may be turning (or at least not so strongly against). That is also reflected in a show of hands at the *Fordham International Arbitration and Mediation Conference 2016*, which has indicated that a surprising number of common law practitioners present (around 70%) saw a role for arbitrators in the facilitation of settlement in international arbitration proceedings.

B. THE NEED FOR A PRAGMATIC VIEW AND FOR UNCOERCED PARTY CONSENT

From a more practical perspective, this issue is less complex. It should be dealt with outside the context of the much debated and too dogmatic civil law/common law divide. Ultimately, it boils down to one pragmatic question: *Do the parties want the Tribunal to provide them with a preliminary view?* If yes, why should the Tribunal not do it? While it is true that, first and foremost, it is the arbitrator’s mandate to *decide* the parties’ dispute, that mandate is not limited to decision-making if the parties want to extend it. After all, party autonomy is the basic pillar of every arbitration. This view is reflected in a comment of one of the respondents of the Survey:

“As long as both parties have intent to settle and have agreed to have arbitrator assisting in their settlement, the arbitrator should help and foster the settlement between parties.”

The basic prerequisite of an informed (and uncoerced!) consent for any activities by the Tribunal related to settlement promotion has rightly been emphasized in the IBA Guidelines on Conflict of Interest in International Arbitration:

“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 an effective waiver of a potential conflict of interest.”³²

The need for informed consent must not be confused with pushing the parties to agree to a settlement. The Tribunal should never give the impression to the parties that they are more interested in the parties entering into a settlement agreement than they are to decide the dispute through a final award. What the arbitrators should do is look for overt or covert signals from the parties with respect to their interest and willingness to be assisted in their settlement efforts by the Tribunal. This careful practical approach is again reflected in some comments from participants in the Survey:

“Passive role. Parties should be asking for it before arbitrators ask for it;”
“Most arbitrators in my experience weren’t actively involved in fostering settlement as they considered it a matter inter se the disputing parties. However, each arbitrator was certainly encouraging if the possibility of settlement was brought to his/her attention.”

C. HOW DO PRELIMINARY VIEWS WORK: ARTICLE 5.1 OF THE CEDR RULES

The core role of the preliminary view in the context of settlement promotion by international arbitrators is reflected in the CEDR Rules for the Facilitation of Settlement in International Arbitration.³³ This soft law instrument was issued in November 2009 by the Centre for Effective Dispute Resolution (“CEDR”), an ADR institution from the common law world. This is remarkable given that Article 5.1 of the CEDR Rules provides an accurate blueprint of the proactive settlement approach practiced in jurisdictions like Germany and the German-speaking part of Switzerland:

- “1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:
- 1.1. *provide all Parties with the Arbitral Tribunal’s preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;*
 - 1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;

³² Explanation (d) of General Standard 4 of the IBA Guidelines on Conflict of Interest in International Arbitration.

³³ CEDR Rules for the Facilitation of Settlement in International Arbitration, available at <https://www.cedr.com/wp-content/uploads/2021/03/Rules-Settlement-Arbitration.pdf>; see for an introduction Georg von Segesser and Christopher Boog, *The new CEDR Rules for the Facilitation of Settlement in International Arbitration – A very useful and welcome tool* (January 07, 2010), available at <http://arbitrationblog.kluwerarbitration.com/2010/01/07/the-new-cedr-rules-for-the-facilitation-of-settlement-in-international-arbitration-a-very-useful-and-welcome-tool-2/>.

- 1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;
- 1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.”

It is important to recall that preliminary views are separate from discussion of actual settlement – although both may be done, discussion of settlement is a step further than preliminary views. As reflected in Article 5.1.1 of the CEDR Rules, any discussion of possible settlement terms at the settlement conference is typically preceded by an early neutral evaluation, i.e., by the Tribunal’s preliminary view of the legal issues. Before providing the parties with this preliminary view, the Tribunal will make it very clear to the parties that it retains the right to change its view should the arbitration proceed. Looking at the timeline of an arbitration in which no settlement is reached, the Tribunal’s preliminary evaluation cannot be more than a ‘snapshot’ view of the legal issues as they present themselves at the moment the preliminary view is given by the Tribunal.

Article 5.1.4 of the CEDR Rules shows that the Tribunal’s endeavors to promote settlement, which typically starts with the Tribunal’s preliminary view, may culminate in a ‘settlement conference’ if the Tribunal has ensured itself that this is what the parties want. In that conference, the Tribunal and the parties openly discuss the chances of reaching a settlement agreement and its possible content. During such a meeting, the Tribunal will sometimes even present a proposal of possible settlement terms to the parties which is based on the preliminary view. A settlement agreement may then be concluded by the parties during or subsequent to the meeting. That agreement may then be converted by the Tribunal into an award on agreed terms if all parties so wish.

D. OTHER PRACTICAL ISSUES

Depending on the nature of the case, the degree of proactivity of the Tribunal, and the parties’ wishes, the Tribunal may use a decision-tree analysis or other means of visualization to support its preliminary view of the legal issues of the case.

However, the Tribunal will always avoid providing its preliminary views and legal considerations to the parties in writing. Unlike the parties’ giving of ‘informed consent’ and waiver of their right to challenge the arbitrators, the Tribunal’s preliminary views and further facilitation activities are always conducted ‘off the record’, i.e., without a transcript being taken. This serves two important purposes. It underlines the preliminary and non-binding nature of the Tribunal’s considerations. At the same time, it takes account of the fact that if the arbitration continues, a party may otherwise feel inclined to refer to recorded statements made by the arbitrators or the other party during the settlement conference. In fact, all statements made by the parties during this process should be subject to the transnational principle of ‘settlement privilege’ to preserve the parties’ confidence in such negotiation-driven ADR processes.

E. THE INCREASED BURDEN FOR THE TRIBUNAL

It is often overlooked that the preliminary view of the legal issues of the case which is required for an efficient settlement facilitation places a heavy burden on the arbitrators. They must be familiar with all the factual and legal aspects of the matter before they can provide a preliminary evaluation of the case and enter into a detailed discussion of the legal aspects of the dispute with the parties. This problem is reflected in one of the comments received from a respondent to the Survey:

“When [I] don’t know much about the issues, [I] can’t really help the parties to settle.”

Before they tackle a settlement of the case, the arbitrators need to have a complete grasp of the dispute with all its legal facets and issues, which usually requires a comprehensive test of the logical cogency of the parties’ respective cases. In addition, they must have identified and understood the underlying economic interests of the parties, which sometimes can only be ascertained by reading between the lines of counsels’ briefs. In other words, proactive settlement facilitation is incompatible with the reality of the ‘hands-off arbitrator’. It should be noted, however, that this role should not be confused with that of the mediator, who is generally freer to discover and explore a broader range of interests that can lead to settlement in the privacy of caucus sessions with the parties.

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APPENDIX VII

VII. SEALED OFFERS

A. THE SURVEY RESPONSES

The Survey responses suggest that sealed offers are not widely used, but they are enthusiastically endorsed by those who use them. 27.5% of the respondents responded “Yes” to the question “Do you use sealed offers?”, while 72.5% responded “No.”

The comments received suggest that there is no East-West distinction, but there is much greater familiarity with the procedure and use in common law jurisdictions. Those who endorsed the use of sealed offers stated: “[I]t helps get parties clear of dug in positions;” “My advice is to use them more often. They often play a critical role in creating the right conditions for settlement.” One in-house respondent stated: “A big YES!” However, the most common response was: “It is up to the parties to use sealed offers;” “Have not seen it yet;” “Have not seen in practice.” While not commonly used, Survey respondents generally indicated an openness to utilizing the procedure with several responses similar to “No objection to it, but it hasn’t come up;” “I might be open to it depending on how it’s carried out;” “I think sealed offers will increase in use – make sense.” This acceptance of the process was qualified by some who noted they would only use sealed offers “if agreed by the parties.”

B. WHAT IS A SEALED OFFER?

A “sealed offer” or “*Calderbank* offer”³⁴ is a written settlement offer made by one party to another on a “without prejudice save as to costs” basis. It is “without prejudice” because it is not to be brought to the attention of the Tribunal until after the decision on liability and quantum is made. In institutional arbitration, the written offer is often deposited with the arbitral institution. Paragraph 270 a) to h) of the *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*³⁵ contains rather detailed instructions as to how sealed offers should be used in ICC arbitrations. The Note advises the party relying on the sealed offer to request the Secretariat of the ICC Court in an accompanying letter to treat the sealed envelope as confidential and not to transmit it to the Tribunal until the latter has resolved all issues of liability and quantum and is ready to consider the allocation of costs. Other arbitral institutions do not have such detailed rules on sealed offers.

Due to this late disclosure to the Tribunal only after the decision is taken, the offer does not influence the decision on the merits. The fact that a sealed offer cannot prejudice a party’s

³⁴ Named after the UK case of *Calderbank v Calderbank*, [1975] 3 All ER 333 (EWCA), whose holding was later formalized in Part 36 of the English Civil Procedure Rules (CPR) 1998.

³⁵ ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration of January 1, 2021, available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>.

position due to non-disclosure, until and unless it becomes pertinent on the issue of legal fees and costs, should serve to alleviate the reluctance of parties to make such an offer.

The offer is made “save as to costs” because it is intended to be considered by the Tribunal in allocating costs. Though not binding, the Tribunal may, contrary to the “costs follow the event” rule, which is applicable in many jurisdictions and under many institutional rules, consider the party’s unreasonable refusal of the sealed offer in allocating the costs. If the party rejected the offer and obtained a more favorable award, the rejection would be justified. If the rejecting party lost or obtained a less favorable award than the offer, the Tribunal may order it to pay the other party’s costs from the date the offer was open for acceptance. However, the Tribunal retains its discretion in the allocation of costs to consider all facts it believes are relevant to that determination. The ICC Note specifically states that “[f]or the avoidance of doubt, the Arbitral Tribunal retains discretion to decide what weight, if any, should be given to correspondence marked ‘without prejudice save as to costs’ and received from the Secretariat.”

As the Survey respondents who have used the technique in their cases have reported, sealed offers can have a direct effect on the parties’ willingness to settle. If a party runs the risk of bearing the costs of the arbitration, a party has an increased incentive to accept a settlement offer. At the same time, if a party sees a chance that it could avoid to bear the costs of the arbitration, a party has an incentive to make a reasonable settlement offer. It has been reported that in some arbitrations the recoverable costs of both parties may come to represent 30 to 40% or more of the amount in dispute.³⁶ Thus, the amount in question can be considerable and likely to be taken seriously into account in deciding whether to accept or reject the offer. Therefore, sealed offers may provide a strong incentive for settlement.

C. HOW ARE SEALED OFFERS MADE?

Leaving aside the rather detailed instructions in the ICC Note, sealed offers do not normally follow formal procedures.³⁷ As a fundamental requirement, the parties must agree on the use of that technique, either at the outset of the arbitration, for example in the Terms of Reference, or at a later stage of the proceedings.

A sealed offer of settlement must be labelled “without prejudice save as to costs,” and must state that the offer is intended to have cost consequences. It will usually set out the terms of the offer, including the date by which any settlement payment would be made. The offer should clearly state whether the offer includes legal costs up to the date of the offer, including arbitrators’ fees/expenses and institutional costs. The offer should also be unconditional and not subject to

³⁶ Christopher Seppälä, Paul Brumpton and Mariele Coulet-Diaz, *How More International Arbitrations Can be Amicably Settled* (April 19, 2017), available at <http://bit.ly/39bIwvx>.

³⁷ See for a sample letter of a sealed offer and timelines of a poor and sensible sealed offer procedure OLSWANG, *Using Calderbank Offers to Protect Your Costs in Arbitration Proceedings*, available at <https://singaporeinternationalarbitration.files.wordpress.com/2012/05/guidance-note-using-calderbank-offers-to-protect-your-costs-in-arbitration-proceedings.pdf>.

approval by other bodies (board of directors). The offer will usually also state the time limit with which the offer must be accepted.³⁸

The offer will be passed in a sealed envelope at an appropriate time to a trusted third party, or the Tribunal. The party submitting the offer must make it very clear when exactly the Tribunal shall be allowed to take note of the contents of the offer. In ICC arbitrations, the parties may provide that the Tribunal must submit a draft award without cost decision to the ICC Court before the Court is authorized to submit the sealed offer to the Tribunal. Sealed offers must also be sufficiently precise, so as to allow the Tribunal to assess whether the settlement offer was equal or even better for the successful party than the final decision by the Tribunal on the merits.

D. ADVANTAGES AND DISADVANTAGES OF SEALED OFFERS

Depending on their timing, sealed offers have a strong potential to avoid lengthy and costly arbitration proceedings due to their indirect effect to promote settlement described above. Such offers are sometimes also used as a tactical tool of pressure to push a party towards settlement due to the fear of cost shifting. More generally, that strategic aspect of sealed offers may enhance the negotiation process between the parties throughout the arbitration proceedings until they reach their objectives or a compromise.

Sealed offers may also have effects that go beyond the settlement of the dispute. They may work as a “reality check” for the parties to evaluate their case factually and legally and may help them to enhance their focus on the significance of the Tribunal’s cost decision. In cases in which this technique has been agreed upon between the parties early on in the arbitration proceedings, that early agreement serves as a permanent reminder of the parties’ continued commitment to enhance the efficiency of the arbitration process in terms of costs and time.

Sealed offers also have some disadvantages. They may be used as a tool of suppression of justice or unfair treatment of a financially weak party. The not-well financed party may accept the offer, though it may be prejudicial, for fear of costs in the context of uncertainty of the outcome.³⁹ Also, many jurisdictions are not familiar with the concept of sealed offers. Having parties, counsels, or arbitrators who are unfamiliar with this practice may negatively impact its consequences.

³⁸ See for these details of sealed offers KC Lye, *Sealed offers in international arbitration* (September 2016), available at <https://www.nortonrosefulbright.com/en/knowledge/publications/b1bf16b3/sealed-offers-in-international-arbitration>.

³⁹ Jayems Dhingra, *It Is Time to Unseal Sealed Offers in International Arbitration: As a Negotiation Strategy or Pressure Tactics?*, 28 Arb. Int’l 511 (2012).

E. TIPS FOR USING SEALED OFFERS

For the very reason that sealed offers are unknown in many jurisdictions, especially in the civil law world, parties to international arbitrations should consider the following practical tips before deciding whether to use this technique in a given case:

- Know your audience (opposing side, arbitrators) before proposing settlement by “sealed offer” mechanism.
- Consult an attorney who is familiar with the practice of sealed settlement offers before proposing an offer. Be aware of the consequences of the sealed settlement offer before you make or rely on it.
- Study the procedural rules of the arbitral seat. Some jurisdictions may not permit sealed offers or provide for cost consequences of the sealed offers⁴⁰ which may limit the Tribunal’s discretion in deciding the costs.
- Consider discussing with the adversary the mechanism of sealed offers before commencing the proceedings; try to reach an agreement for the settlement offer, for example in the Terms of Reference, to authorize the Tribunal to decide the allocation of arbitration costs if the offer is rejected. By early discussion of the sealed offer, you give the adversary enough time to consider and revisit the offer with the progress of the case and within the time limit of the offer.
- Require the Tribunal to notify the parties when it decides the merits in order to then disclose the offer to be taken into account when the Tribunal decides the costs.
- Consider the weaknesses and strengths of the case before making or responding to the sealed settlement offer.
- Explain the scope of the settlement in connection with what it covers, including what claims, what costs or interests, the payment date, the date of calculating the costs, legal costs, arbitrators’ and arbitration fees, and time limit for responding to the offer.
- State clear, precise, and detailed (but succinct) terms in the sealed settlement offer to be sufficient to only a “yes” or “no” answer, without the need of further clarifications to the recipient.

⁴⁰ The New Zealand Arbitration Act 1996 Section 6(2)(a) referred to sealed offers which reads “Costs and expenses of an arbitration (...) (2) Unless the parties agree otherwise, the parties shall be taken as having agreed that (a) if a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the Arbitral Tribunal is no more favourable to the other party than was the offer, the Arbitral Tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and (b) the fact that an offer to settle has been made shall not be communicated to the Arbitral Tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses,” available at <http://www.legislation.govt.nz/act/public/1996/0099/latest/whole.html#DLM403296>; the FRCP have a similar rule in litigation which reads “[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” Fed. R. Civ. P. 68(d).

- Define clearly the scope of the issues covered by the offer in order not to create a reason for *unconscionability* that may affect the agreement settlement based upon the sealed offer.
- Provide the recipient with the necessary available documents to enable it to weigh the merits of the offer in light of the available evidence, with the constraints of the legal privileges.
- Allow the recipient to partially accept the sealed settlement offer. In other words, if the offer covers a number of claims, make it clear to offer separate terms of settlement for each claim, so that the adversary can settle all or some of these claims and hence, limit the scope of dispute which in turn reduces the costs of the proceedings.
- State clearly and in a detailed manner the consequences of accepting or rejecting the sealed settlement offer, especially in connection with the allocation of costs to enable the adversary to make an informed decision towards the offer.
- Clearly label the sealed offer with “without prejudice save as to costs” in order to assure the confidentiality of the offer and not to disclose until appropriate time.
- Do not disclose the sealed settlement offer to the Tribunal until the award on the merits is issued in order to avoid the impact of the sealed offer upon the Tribunal in deciding the merits award.
- Consider a sealed settlement offer, however complex the case is. The more complex the case, the more the need to save costs.
- Be aware that arbitrators *may* advise the parties at the beginning of the proceedings to consider sealed settlement offers.
- As a Tribunal confronted with a rejected sealed offer, cautiously decide the allocation of costs. In other words, rejecting the sealed offer, even if the offer was more favorable than the merits award, should not be used presumptively to shift the costs. The conduct of both parties should always be taken into consideration. The rejection is nothing but one factor to be taken together with others in deciding on the allocation of costs.
- Be aware that accepting or rejecting the sealed offer should not be used as a sign of weakness or strength of the merits of the case.

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APPENDIX VIII

CHECKLIST FOR WORKING GROUP 4: ARBITRATOR TECHNIQUES AND THEIR (DIRECT AND POTENTIAL) EFFECT ON SETTLEMENT

General considerations

- √ Consider how your decision/action might impact the parties' better understanding of the case and assessment of risk.
- √ Consider how your decision/action might potentially foster settlement.
- √ Consider how a more streamlined cost-effective arbitration might aid the parties in achieving a settlement.
- √ Consider what steps you can take as an arbitrator to have a positive impact on the possibility of settlement.
- √ Consider whether your actions might remove unconscious impediments to settlement.
- √ Consider suggesting that the parties consider some of the process steps discussed below.
- √ Consider your authority to take the action you are considering and whether this could impact your appearance of impartiality or the enforceability of the award.
- √ Consider when and how to broach a possible process step geared at settlement with the parties.

I. The first organizational meeting

- √ Have party representatives, i.e. in-house counsel, been invited to attend?
- √ Should the parties be given an opportunity to briefly present their case?
- √ Should consideration be given to reviewing the issues to be decided?
- √ Should consideration be given to upfronting certain issues that could reduce time and cost and potentially promote settlement (either procedural or on the merits)?
- √ How many rounds of submissions are appropriate for the case and should page limits be considered?
- √ Disclosure:
 - Should there be a discussion of the scope of disclosure that the parties plan to seek?
 - At what point in the timetable is it appropriate to conduct the exchange of documents?
 - Should a virtual meeting be tentatively scheduled in the timetable to discuss document disclosure disputes?
- √ Should the inclusion of a mediation/negotiation window in the timetable be raised?
- √ Should the scheduling a mid-arbitration review be considered?
- √ Should consideration be given to the possibility of the Tribunal providing preliminary views?

- √ Should the question of the availability of the sealed offer mechanism be raised?
- √ Should the subject of settlement be raised?

II. Mediation/Negotiation window

- √ Should the Tribunal raise the possibility of providing for a mediation/negotiation window in the timetable for the arbitration?
- √ Should the Tribunal review how the mediation/negotiation window process works?
- √ Where in the timetable should the mediation/negotiation window be inserted?
- √ Should the mediation be conducted at an early stage and run parallel to the arbitration?
- √ How many mediation/negotiation windows should be planned for in the timetable?
- √ Should there be a pause in the timetable for the mediation/negotiation window?
- √ Review of the limitations on the arbitrator's knowledge of any mediation.

III. Damages considerations

- √ Should consideration be given to bifurcating damages from liability?
- √ Should consideration be given to assessing damages first?
- √ In light of the particulars of the case, would early education of the Tribunal with respect to aspects of the damages claimed be useful?
- √ Should the Tribunal consider dispositive motions or discussing issues with the parties that could focus and narrow the damages range?
- √ Has consideration been given to the appropriate timing for damages and quantification to be addressed initially, including at a mid-arbitration conference?
- √ Should the schedule include a meet and confer for the experts to narrow the issues and identify areas of agreement been considered? If so, when? Who should attend? How should the result be memorialized for the Tribunal?
- √ Would it be useful to have the damages analysis reviewed with the Tribunal in advance of the hearing in the event that additional calculations might assist the Tribunal and could be requested in advance?
- √ Would it be appropriate to retain a tribunal expert?

IV. Summary dispositions

- √ Are there issues that lend themselves to early resolution?
- √ Would the resolution of those issues facilitate the parties' assessment of their risk and potentially foster settlement?
- √ Are there fact issues that make it inappropriate to resolve the issue on early submissions?
- √ Would any exchange of information be required before the issue can be resolved?
- √ Would a hearing be required in order to resolve the issue?

- √ Would the resolution of the issue resolve the entire arbitration or would it only resolve a particular issue and not reduce time and cost overall? Could it nevertheless provide useful information for settlement?
- √ Should a short letter requesting leave to apply for a summary disposition be required?
- √ Should consideration be given to what standard should be applied in determining a motion for summary disposition?

V. Mid-arbitration review

- √ Would a mid-arbitration review be appropriate and useful in a particular case?
- √ Should a mid-arbitration review be suggested for discussion at the first organizational meeting?
- √ When should the mid-arbitration review be conducted?
- √ Will the mid-arbitration review be conducted before or after documents are exchanged?
- √ Does the mid-arbitration review require any additional submissions?
- √ What should be presented at the mid-arbitration review?
- √ Who will present at the mid-arbitration review?
- √ Will it be just argument or some witness evidence as well?
- √ Will experts be presented at the mid-arbitration review?
- √ When will the tribunal deliberate with respect to the mid-arbitration review?
- √ Would it be helpful to identify and/or narrow the issues at or following the mid-arbitration review?

VI. Preliminary views

- √ Should the possibility of authorizing the Tribunal to offer preliminary views be raised?
- √ Have appropriate and necessary consents been provided by the parties?
- √ When in the procedural timetable would preliminary views be offered?
- √ How should the preliminary views be framed as they are delivered to the parties?
- √ Will the arbitrator use any tools, such as a decision tree analysis, to assist the parties' in their understanding?
- √ Should the Tribunal advise as to what further evidence is required to arrive at a particular conclusion?
- √ Can/should the arbitrator propose settlement options?
- √ Confirm that preliminary views are not final views and may be subject to change and will not be recorded in writing or in a transcript.
- √ Confirm that there will be no *ex parte* communications (except in certain limited circumstances and in certain receptive jurisdictions and only after a different procedure is extensively discussed and is the subject of informed consent).

- √ Review the fact that the role of the arbitrator in providing preliminary views is not the same as the role of the mediator who is generally freer to discover and explore a broader range of interests.
- √ If the matter is settled, will the parties seek to have the resolution recorded in a consent award?

VII. Sealed offers

- √ Should the availability of the sealed offer mechanism be raised at the first organizational meeting?
- √ Since many are not familiar with the sealed offer procedure, should the Tribunal inform the parties about how the sealed offer process works and suggest reviewing the available materials describing the process?
- √ Should the Tribunal review whether and when the parties have agreed to use the sealed offer process.
- √ Who will hold the sealed offer in confidence until the appropriate time for it to be delivered to the Tribunal?