ARBITRATOR AS A SETTLEMENT FACILITATOR: AN ILLUSORY DIVIDE?

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A. INTRODUCTION

The law and practice of international arbitration have increasingly evolved towards greater uniformity. But the question of whether and to what extent an arbitrator can or should get involved in the parties' settlement efforts has been the subject of controversy. In essence, the reason for these controversies lies with the different perceptions of the arbitrators' role.

What is the role of the arbitrators? Is it to resolve the dispute *"by a binding decision"*? Or is it simply "*to resolve the dispute",* which also includes the facilitation of the settlement? Some practitioners suggest that arbitrators are mere "*decision-makers*". To them, dispute resolution is about winning and losing but not about settling. Others expect the arbitrators to facilitate (or at least raise the possibility of) settlement.

Should the arbitrators involve in the parties' settlement efforts, or is it a *faux pas*? What is the appropriate degree for arbitrators to facilitate the parties in resolving their disputes by way of settlement? How must such involvement be exercised?

It has been argued that the views on the arbitrators' role diverge depending on the legal backgrounds of the participants in international arbitration. This article acknowledges that this might be the case. However, this article also submits that the major factor behind this divergence is not driven by the legal reservations of one legal tradition against the arbitrators' involvement in settlement facilitation. Instead, it is the suspicion and unfamiliarity of the concept for some participants in international arbitration. Rather than cultural backgrounds, the parties' objectives must play a role in determining whether or not the arbitrators should facilitate settlement.

B. HISTORICAL DICTONOMY: ARE ARBITRATORS "DISPUTE DECIDERS" OR "DISPUTE RESOLVER"?

It has been suggested that the parties understanding of the role of the arbitrators still deeply rooted in the traditional role of the judges in their own jurisdictions.[1] And based on different perceptions in diverse legal cultures, the perceived role of the arbitrator ranges from absolute approval to unconditional rejection of the arbitrator's encouragement of settlement negotiation.

To provide a background, below, a summary of the role of the judges in settlement facilitation will be explained.

I. Practice in Civil Law Jurisdictions

In civil law tradition, the role of the judge is not confined to decision making but also encompasses the active promotion of settlement of the dispute. [2] Thus, the judges are perceived as "*dispute-resolver*", not mere "*dispute-decider*".[3] However, to what extent the judges are involved in the settlement discussion varies.

In Turkey, the judges' role in the amicable settlement is minimal. Upon completion of the exchange of written submissions, the Turkish judge determines the disputed and undisputed issues and encourages parties for the settlement.[4] Yet, the Turkish judge does not contribute to the settlement negotiations.

In some jurisdictions, the judges are more proactively involved in the settlement negotiations. German courts, in principle, call the parties to attend the pre-hearing settlement session (*Güteverhandlung*) in person together with their principles.[5] In these sessions, the German

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1 Klaus Peter Berger, 'The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusin', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2018, Volume 35 Issue 5) p. 504; Gabrielle Kaufman-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 Arbitration International (2009), p. 189.

2 Klaus Peter Berger, 'The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusin', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2018, Volume 35 Issue 5) p. 504.

3 Klaus Peter Berger, 'The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusin', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2018, Volume 35 Issue 5) p. 504.

4 Article 137(1) of the Turkish Civil Procedural Code "Following the exchange of petitions, a preliminary investigation hearing shall be conducted. […] The court encouradges parties to settlement for the disputes that the parties can freely dispose […]."

5 Zivilprozessordnung [ZPO] Section 278(1) ("*At every stage of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue*.").

judges give their preliminary opinion on the merits of the case and ask further questions to the parties, revealing both sides' strengths and weaknesses.[6]

Canton Zurich adopts a very similar approach. Zurich judges invite the parties to attend a hearing called "*Referentenaudienz*", generally after the first round of written submissions.[7] In *Referentenaudienz*, the judge, based on the documents, assess each party's claims and prepares a preliminary analysis of the case, and particularly highlights both parties' weaknesses and strengths as much as possible.[8] After that, the parties comment on the judge's findings, which generally leads the parties to start settlement negotiations. Where necessary, the Zurich judge - with parties' consent - may even engage in caucusing (holding *ex parte* meetings with the parties) to facilitate the settlement.[9]

As an extension, it is not infrequent that the German parties ask the arbitral tribunal to conduct *Güteverhandlung* or Swiss parties to ask for *Referentenaudienz.* The reason for this practice is to increase the efficiency of the arbitral procedure. It is a commonplace to say that an early settlement is more efficient than a resolution through an arbitral award/court judgement.

II. Practice in Common Law Jurisdictions

Historically, common law judges argued that they had been entrusted to adjudicate, not settling disputes.[10] From their view, the role of the judge is limited to deciding the dispute through judgement, which does not justify any involvement related to the settlement.[11]

The common law judges arguably perceived addressing the settlement option to the parties as humiliation. They state that each side of the dispute is a sophisticated commercial party who should have already considered the settlement option beforehand.[12]

The general reservation of common law tradition to the judge's role as a settlement facilitator mainly involves the loss or perceived loss of impartiality. In their view, the arbitrator's

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6 Austrian courts also adopt a very similar approach. Austrian judge, either by the request of one party or ex officio, attempts to find an amicable solution for the dispute in the first hearing. Zivilprozessordnung [ZPO] Section 204(1), ("*At the oral hearing, the court may, either at the request of a party or ex officio, attempt an amicable settlement of the entire dispute or certain aspects thereof.*"). Alexander Petsche and Martin Platte, "*Chapter II: The Arbitrator – The Arbitrator as Dispute Settlement Facilitator*", in Christian Klausegger, Peter Klein et al. (eds.), Austrian Arbitration Yearbook 2007, p. 89.

7 Verbatim translation: "*the audience of the judge in charge*"

8 Hansjörg Stutzer *"Settlement Facilitation: Does the Arbitrator have a Role? The "Referentenaudienz" – the "Zurich-Way" of Settling the Case",* ASA Bulletion Vol. 35 No. 3, p. 599.

9 Hansjörg Stutzer *"Settlement Facilitation: Does the Arbitrator have a Role? The "Referentenaudienz" – the "Zurich-Way" of Settling the Case",* ASA Bulletion Vol. 35 No. 3, p. 600.

10 John E. Coons, "*Approaches to Court Imposed Compromises: The Uses of Doubt and Reason* Northwestern University Law Review (1964) p. 750.

11 Karl-Heinz Böckstiegel, "Past, Present, and Future Perspectives of Arbitration", (2009) 75 Arbitration 2, p.2. Judith Resnik, "Managerial Judges" Harvard Law Review, (1996) p. 376.

12 Joshua Karton, The Culture of International Arbitration and The Evolution of Contract Law (2013), p. 196.

involvement in settlement negotiations would necessarily require conducting *ex parte* discussions, which would impact their impartiality.[13] Also, common law practitioners historically believed that the arbitrator's preliminary views on the merits of the case create discomfort. In their view, the arbitrators might not want to change their preliminary views based on the fear of drawing conflicting conclusions; and the parties might be of the view that the prior assessment has unduly influence the arbitrators' decision.[14]

However, the common law perception has been changing. Due to the frustration on costs, delay, formalism, a serious debate about the efficient management of the proceedings with promoting the settlement came into the picture.[15] For example, a new provision was added to the United States Federal Law empowering judges to promote and consider taking action on the settlement.[16] And judges became required to manage their cases in the United Kingdom actively. To facilitate settlement, they, *inter alia*, started to give indications about their assessment of the merits and by engaging in the settlement discussions.[17]

The shift towards settlement facilitation has become so apparent that Lord Wold suggested that: *"[n]obody who is sensible enjoys litigation and therefore if the court can assist them in resolving their dispute without the need for going through the process that must be beneficial to them."*[18]

III. Practice in International Arbitration

Although the positions of common and civil law traditions are closer today, it would be over simplistic to deny the persistence of cultural differences. The international arbitration conducted by English parties in London is still quite different from an international arbitration conducted by German parties in Frankfurt. However, we can equally observe that each of these arbitrations *more like each other* than the litigation cases before English courts and German courts.

The international arbitration process has gone a long way toward evolving something of a culture of its own. Case management methods used by arbitral tribunals to conduct the proceedings have changed significantly over the time. Gone are the days when the arbitrator runs an arbitration before him/her like an old-fashioned judge, remaining silent until he/she

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13 Hilmar Raeschke-Kessler, "The Arbitrator as Settlement Facilitator", 21 Arbitration International 4 (2005), p. 525

14 Judith Gill, "The Arbitrator's Role in Bringing about a Settlement – an English View", in Markus Wirth (ed.), Best Practices In International Arbitration, ASA Special Series No. 26, July 2006, p. 159

15 Judith Resnik, "*Managerial Judges*" Harvard Law Review, (1996) p. 376.

16 Fed. R. Civ. P. 16(c).

17 English Civil Procedure Rules (CPR) Part 1 at 1.4(2)(e) and (f).

18 Lord Woolf, *Mediation in Arbitration in the Pursuit of Justice*, (2009) Arbitration 75(2), p.169.

renders his/her judgment to the parties' surprise. Today, *inter alia*, IBA Rules,[19] UNIDROIT principles,[20] UNCITRAL Notes on Organising Arbitral Proceedings[21] , and some institutions arbitration rules[22] allow the arbitrators to facilitate the settlement.

In parallel with these developments, the idea that arbitrators may act as settlement facilitators is increasingly accepted also in common law jurisdictions. For example, US courts have held that "*an arbitrator is not precluded from developing views regarding the merits of a dispute early in the proceedings, and an award will not be vacated because he expresses those views".* Likewise, in England, the practice has evolved towards arbitrators involving in settlement facilitation after the Wolf reform in 1999. In his speech, Lord Wold emphasised that "*arbitrators should see it as part of their role to help facilitate a settlement"* and be *"more proactive in the delivery of justice, and in particular they should have in the forefront of their minds the need to assist the litigants before them to resolve their dispute if this is at all possible at the first and earliest stage."*[23]

Therefore, hesitation towards arbitrators' involvement in settlement facilitation appears not to be solely based on legal impediments. Instead, such reluctance may be based on the habits of the players of the international arbitration or their scepticism and unfamiliarity with the concepts foreign to them. Rather than remaining distant from the concepts developed in different legal regimes, the users of international arbitration must impart lessons from the experience of the others to assess whether some other instruments would be suitable for their case. In other words, to the extent that there is no legal impediment in arbitrators' involvement in settlement facilitation, the (tactical) objective of the parties for each case must dictate the degree of settlement facilitation.

C. Methods of Settlement Facilitation

It is not easy to generalise the best practice rules for settlement facilitation in international arbitration. Nonetheless, a number of standards and ground rules, particularly the Centre for

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19 Article 2(3) of the 2010 IBA Rules on the Taking of Evidence which provides: "*The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:*
(a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
(b) for which a preliminary determination may be appropriate."

20 Rule 24.1 of the ALI/UNIDROIT Principles provides: *"The court, while respecting the parties' opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible."*

21 Section 72 of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings provides: *"In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal."*

22 *E.g.* ICC Arbitration Rules, Appendix IV, section (h)(ii), provides that, *'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'.*

23 Lord Woolf, Mediation in Arbitration in the Pursuit of Justice, (2009) 75 Arbitration 2, p. 172

Effective Dispute Resolution ("CEDR") Settlement Rules,[24] have emerged to guide arbitrators to find the right balance in settlement facilitation during the arbitration process.[25]

Accordingly, the arbitrator may (i) provide its preliminary views on the case and what will be necessary in terms of evidence from each party in order to prevail on those issues; (ii) where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation; (iii) where requested by the parties in writing, chair one or more settlement meetings attended by representatives of the parties. Furthermore, (iv) if requested by both parties, the arbitrator may open a "mediation window" to enable settlement by mediation or any other ADR methods.[26]

It is important to note that it is a necessary condition for any arbitral tribunal assisting during settlement negotiations that the parties have specifically requested and agreed to such assistance.[27] The degree of involvement depends exclusively on the joint wishes of the parties and may be tailored to meet their expectations.

I. Preliminary Analysis of the Merits of the Parties' Cases

1. Concept

One of the most important facilitation that the arbitrators might provide is its *prima facie* analysis of the parties' submission. This process generally takes place after the parties' first round of written submissions.

The arbitral tribunal generally starts with a summary of the relevant facts, distinguishing between undisputed and disputed facts. Then, the arbitral tribunal can turn to the analysis of the merits of the case. At this stage, the arbitral tribunal explains the issues that – in its view - are relevant to the case and material to the outcome. After that, the arbitral tribunal may explain which party has the burden of proof concerning each issue; and to what extent the parties have sustained their burden of substantiation and proof.

When making the *prima facie* analysis, the arbitral tribunal does not express *prima facie* views in issues where the parties rely on witness testimony or expert reports. This is because the

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24 The Centre for Effective Dispute Resolution ("CEDR") Settlement Rules is one of the most useful set of rules to this effect. It aims to step towards establishing a transnational standard for encouraging the settlement of disputes in international arbitration

25 Pierre Lalive, "*The Role of Arbitrators as Settlement Facilitators – A Swiss View*", in Albert Jan van den Berg (ed.), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series No. 12/2004 Beijing (Kluwer Law International, 2005), p. 562.

26 Article 5(3) of the CEDR Settlement Rules.

27 IBA Guidelines, General Standard 4 (d)

value of the fact and expert witness will be assessed during the evidentiary hearing, following the cross-examination.

When explaining its *prima facie* analysis, the arbitral tribunal puts particular emphasis on the written evidence submitted; it is his prime source of cognizance, which might be changed in light of the new evidence.

2. Potential Safeguards

The most important safeguard is obtaining both counsel's and principals' express written consent to engage in settlement negotiation before taking any step towards.[28] There is a fine line between encouraging and forcing settlement, and the arbitrators should never force the parties for settlement against their intentions.[29]

Informed consent is not only important for safeguarding the enforcement of the final award but also for the success of the settlement negotiations. It is said that the parties are more willing to settle their case if the arbitrators make them feel that they are taken seriously.[30]

The arbitrators should also obtain a clear waiver from both parties of their right to challenge the arbitrators on the alleged lack of independence and impartiality due to the arbitrators' *prima facie* views. This waiver is the most important guarantee for unjustified challenges against the arbitrators. Having said that, it is equally important to note that if the arbitrator, as a result of its involvement in settlement negotiation, doubts its ability to remain independent and impartial in the future course of the arbitration, he/she must resign once the settlement negotiations fail.[31]

In addition, the arbitral tribunal should not engage in caucusing (ex parte communication with the parties). Caucusing would inevitably lead to the arbitral tribunal learning from one party certain facts or views that the other party is not privy to – thus violating the right to be heard or due process in general. In order not to jeopardy the enforceability of the arbitral awards, the exclusion of caucusing seems to be the best solution. This is also what has been suggested by IBA Rules[32] and CEDR Settlement Rules[33].

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28 Article 8 of the IBA Rules of Ethics for International Arbitrators, whereby the arbitral tribunal may make proposals for settlement *"[w]here the parties have so requested, or consented to a suggestion by the arbitral tribunal."*

29 Michael Collins, "*Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them*", Arbitration International, Vol. 19 Issue 3, p. 334.

30 Hilmar Raeschke-Kessler, "*The Arbitrator as Settlement Facilitator*", 21 Arbitration International 4 (2005), p. 531.

31 General Standard 4(d) of the 2004 IBA Guidelines on Conflicts of Interest;
See also Article 7 CEDR Settlement Rules.

32 IBA Rules of Ethics for International Arbitrators, Article 8.

33 Article 5(2) of the CEDR Settlement Rules.

3. Advantages

To begin with, providing a preliminary analysis of the parties' submissions may increase the parties' trust in the arbitral tribunal. The psychological effect on each party, having the feeling that the arbitral tribunal has accurately understood its positions and takes them seriously, is one of the most important factors to put further trust in the arbitral tribunal. This might also induce the parties to try to recognise and take the position of their opponent seriously.

Secondly, after having heard the arbitral tribunal's *prima facie* analysis, the parties are in a much better position to predict the possible outcome of the arbitration. This will lead to a new analysis of their situation and a new risk assessment. The new analysis of the parties' situation based on the information received from the arbitral tribunal might help the parties realize that their position is better/worse than anticipated. By understanding the strengths and weaknesses of their cases in the eyes of the arbitral tribunal, the parties may stop adopting intransigent positions and look for a way for settlement. And if the dispute resolves by a settlement, the parties will save significant time and costs.

Thirdly, even if the parties' settlement attempts fail, there is nothing lost. This is because the arbitral tribunal has, already at an early stage of the proceedings, gained a full view of the details of the case, which is certainly helpful for leading the further course of the proceedings. In addition, the parties will have a better understanding what are the relevant and material issues to the resolution of the dispute. Thus, in their next submissions, the parties will focus on these points instead of making a long submission on the issues the arbitral tribunal believes are irrelevant.

D. CONCLUSION

Whether and to what extent the arbitrators should be involved in settlement facilitation might have been governed by the legal culture in the parties' home jurisdictions. But these cultures have been evolving. Today both civil and common law tradition considers arbitrator's involvement in settlement facilitation as a useful tool. Hence, the current reservations for the arbitrators' involvement in settlement facilitation are predominantly fueled by the parties' suspicion and unfamiliarity with these case management techniques. Rather than remaining distant from the concepts developed in different legal regimes, the users of international arbitration must impart lessons from the experience of the others to assess whether some other instruments would be suitable for their case.

There is still no way to answer the question of whether and to what extent the arbitrators should be involved in settlement facilitation with any degree of certainty and finality. The needs of one case can be significantly different from the other. However, the decisive factor must be the parties' will and needs of the case instead of an illusory divide between common and civil law traditions.

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