

# Arbitrator Techniques and Their (Direct or Potential) Effect on Settlement

By Edna Sussman and Klaus Peter Berger

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Arbitration has always sought to be responsive to user preferences. Such amendments to institutional rules as emergency arbitrators, expedited arbitrations and consolidation and joinder illustrate the constant evolution of arbitration procedures in response to user calls for such innovations to meet their needs. In recent years, there has been a constant call for a more expeditious and cost-effective dispute resolution process. Greater utilization of combinations of adjudicative and non-adjudicative processes has been repeatedly identified by users as preferred and as enabling the achievement of better outcomes. This 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 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.

## The Task Force

Working Group 4 was comprised of approximately 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 role as an arbitrator 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, phone calls instead of lengthy submissions, 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., are all of great importance and serve in many ways to facilitate 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 usual pro forma short session to set the hearing date;
- Including one or more mediation windows in the arbitration schedule so that there is a set time in the schedule for the parties to discuss whether a mediation would be productive without any concern by any party that it will be perceived as weak if it raises mediation;
- 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 need early guidance on such questions in order to assess their settlement options;
- Serious 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;

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- 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;
- 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;
- Greater use of sealed offers (also known 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.

The Working Group will review these measures with an eye towards explaining when and why they should be considered and provide practical guidance on their application.

## 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 is the arbitrator a service provider who should undertake a more active role and act as the dispute manager,<sup>1</sup> the settlement facilitator,<sup>2</sup> the town elder,<sup>3</sup> the collaborative arbitrator,<sup>4</sup> the interactive or proactive arbitrator?<sup>5</sup> Is there a continuum along with a series of possible measures that should be considered for each case?<sup>6</sup> 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?

Interviews were conducted by members of the Working Group with approximately 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. While responses in this number can only be viewed as anecdotal, we draw upon them for the valuable insights they offer. References to this 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.” Thus, a 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 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.

## 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” to “In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties.” 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 15(8): “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 more proactive measures. 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 rather are standard procedural techniques that may as a by-product also facilitate settlement.

## 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. While, as with all psychological influences, there are a considerable 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 confirmation bias: People interpret evidence so as to maintain their ini-

tial beliefs. As has also been shown however, not surprisingly, voluntary settlement is facilitated as parties become more realistic about their own prospects of winning. Early disposition of material issues, in-depth midterm 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 serve to alleviate the impact of the “sunk costs” fallacy. Parties that have already spent considerable time and money often feel 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”: The desire to obtain 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.

When considering which measures are most appropriate for the case before them, arbitrators may take into account the nature of these psychological impediments in deciding which techniques to choose in a particular case.

## 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. The working group noted that historically Chinese arbitrators have been more likely to engage in settlement discussions with the parties and arbitrators who follow 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).”<sup>7</sup> 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.<sup>8</sup>

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.

### 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 enforceability of an ultimate award.

Care should also be taken to continue to be and appear to be impartial and independent and minimize the likelihood that any party would come to a different view based on the arbitrator’s conduct. 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 Arbitration provides, “Informed 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. While maintaining the parties’ faith in the arbitration, the arbitrators and the process is essential, care should be taken not to be overwhelmed by unnecessary due process paranoia.

Ultimately, arbitration is about party control; 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.<sup>9</sup> 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 pro-

cess 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 comes into force making cross border mediated agreements enforceable, and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters enabling recognition and enforcement of civil and commercial judgments rendered by the courts of other states.

### Conclusion

Working Group 4 is hopeful that this work 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 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.”<sup>10</sup>

### Endnotes

1. 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).
2. Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 187, *Arb. Int’l*, Vol. 25, Issue 2 (2009).
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4. Catherine Kessedjian, *International Arbitration—More Efficiency for Greater Credibility*, in Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Nijhoff Publ. 2015).
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7. Shahla Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and West*, 1, *Harv. Negot. L. Rev.*, Vol. 16 (2011).
8. 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* (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 Background*, 79, *ICC Bulletin*, Vol. 18, No. 2 (2007).
9. *See, e.g.*, 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*, 43, *N.Y. Disp. Res. Lawyer*, Vol. 12, No. 1 (2019).
10. Berger and Jensen, *supra* note 6 at 917.