Kluwer Arbitration Blog

Time to Listen and Act: Settlement Facilitation in Arbitration

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The advantages of parties settling their disputes are self-evident. While there are several settlement facilitation techniques that arbitral tribunals have developed (see Carrara, Sussman & Berger and Vysudilova & Kirtley), arbitral institutions have remained in the background. At the 8th ICC European Conference in March 2024, the message conveyed by the parties was loud and clear: arbitration rules should include language for settlement slots or windows. This would encourage the companies' management to manoeuvre settlement negotiations with more confidence once the arbitration has commenced. At the same time, such codification will incentivize arbitrators to familiarize themselves with settlement facilitation techniques and successfully employ them.

Recent Trends in Settlement Facilitation

Recent trends in settlement facilitation are reflected, for example, in the ICC's 2023 statistics, which show that while 870 cases were registered, as many as 364 cases were withdrawn before a final award was rendered, the absolute majority (90%) of which was based on the parties' joint request or a request by one party that was made without any objections from others. In addition, 34 proceedings ended with an award by consent. These statistics follow the 2021 amendments to the ICC Rules in Appendix IV on case management techniques, empowering the arbitral tribunal to encourage the parties to consider settlement.

More progressively, Article 26 of the 2018 DIS Arbitration Rules obliges the arbitral tribunal to discuss with the parties the possibility of amicable settlement of the dispute or of individual disputed issues.

Indeed, users appear to be increasingly willing to accept the role of an arbitrator in facilitating settlement irrespective of their geographical background (Berger & Jensen; see also 2021 Survey explained in "Arbitrator Techniques and their (direct or potential) Effect on Settlement").

Suggested Institutional Provisions

In light of the recent trends, the natural next step is for arbitral institutions to catch up and proactively welcome settlement prospects during arbitration proceedings.

To this end, the authors have proposed several draft provisions, each accompanied by an explanatory commentary. These provisions attempt to capture the relevant elements for settlement facilitation during arbitration proceedings.

Proposed Provisions

Paragraph (1)

> When drawing up the procedural timetable, the tribunal shall, in consultation with and with the agreement of the parties, include settlement windows during the procedure to provide the parties with sufficient opportunities to attempt to settle their dispute.

Paragraph (2)

> When a party approaches another party with a settlement proposal, whether during the settlement windows or otherwise, neither the other party/parties nor the tribunal may draw any inferences (whether from the content of the proposal or from the making of the proposal in itself) on the strength or weakness of any argument or claim that any of the parties may have raised in the arbitration.

Paragraph (3)

> To the extent that the tribunal has engaged in the facilitation of the settlement by applying generally practiced and recognized techniques in international arbitration, irrespective of the outcome, neither party will challenge the arbitrators or the award on the basis of the tribunal having prejudged the case, shown bias against or towards either of the parties or violated the parties' due process rights, as long as the parties have consented to the tribunal applying any of the said techniques.

Paragraph (4)

> In the event that the parties reach a settlement of all or part of their claims in the arbitration, the tribunal will be reasonably remunerated while taking into account the stage of the proceedings, the involvement of the tribunal, directly or indirectly, to facilitate the settlement and any other circumstances that the tribunal considers relevant for the [Court / Board] to take into account when fixing the tribunal's fees.

Short Explanation to the Provisions

Explanation to Paragraph (1)

The purpose of paragraph (1) is to inject into the arbitration rules the possibility that the parties may settle the dispute in arbitration, and to ensure that such possibility is put on the same level as other procedural steps.

Discussing settlement windows when establishing the procedural timetable will encourage all parties and tribunal members to consider settlement negotiations and facilitations at an early stage.

By providing settlement slots at different stages during the proceedings, the tribunal offers the parties an opportunity to settle without disrupting the procedural timetable and preventing slippage. Such windows can be found in status/midstream conferences between the parties and the tribunal to jointly discuss settlement possibilities, adjusted to the parties' needs.

While offering settlement slots may add additional steps to the proceedings, it is submitted that these will ultimately benefit the parties, as they allow all stakeholders to focus on key issues in order to be efficient and effective.

Such a provision could be easily incorporated into the existing institutional rules, for instance, in Article 24.2 of the ICC Rules, which requires the tribunal to establish a procedural timetable to be transmitted to the ICC Court. As the ICC Court takes into consideration the procedural timetable to establish the time-limit for rendering the award, already foreseen status/midstream conferences will not delay the timely submission of the draft award to the ICC Secretariat. Accordingly, arbitrators' fees will not be affected either. As such, paragraph (1) works in conjunction with paragraph (4).

Explanation to Paragraph (2)

The purpose of paragraph (2) is to avoid any resistance from participants in an arbitration, such as the management of a corporate party, who could consider taking a first step towards the other party to commence settlement negotiations as an admission of weakness.

In-house counsel often needs to overcome internal scepticism about taking the first step in settlement negotiations *vis-à-vis* their colleagues in management.

This provision will make sure that no adverse inference on any side's position can be drawn, irrespective of which side is taking the first step towards settlement negotiations.

Explanation to Paragraph (3)

This paragraph codifies the generally applied safeguards towards the tribunal and the award as aptly explained in the ICC Report, which has received positive attention, in particular from users, no matter their background.

Specific safeguards can be found in the 2009 CEDR report, which, among other recommendations, call upon arbitrators to avoid meeting with any party separately, or obtain information from any party which is not shared with the other. Techniques may consist of putting clarificatory questions to the parties after the first round of submissions in order to focus any upcoming document

disclosure procedure, witness selection, and the next round of submissions. They may also consist of expressing preliminary views by the tribunal (see Allemann), all while parties' consent is given for any of these techniques to be employed.

Including paragraph (3) in the arbitration rules will encourage arbitrators to engage in settlement facilitation without the fear of being perceived as biased or rendering challenged awards.

Explanation to Paragraph (4)

Incentive for the tribunal to get involved in facilitating settlements may be lower if remuneration is affected. Circumstances relevant to the tribunal's remuneration need to be set out by the tribunal itself for institutions that renumerate *ad valorem* can make an informed determination in fixing the fees.

Paragraph (4) ensures that the tribunal's contribution in facilitating a settlement is appropriately and fairly recognized by either directly (e.g., by providing preliminary views, if so requested and agreed by the parties) or indirectly (e.g., by putting the clarificatory questions to the parties; guiding them by streamlining the issues) leading to a settlement. After all, it requires a well-prepared arbitrator, engaged with the case from early on, to be able to meaningfully and actively contribute to a settlement.

Paragraphs (1) and (4) work together in ensuring the tribunal's initiative, encouraging it to take an active role in the settlement. It eradicates the risk of reticence from arbitrators as their work towards settlement will be fairly remunerated.

In discussions with in-house counsel and management, it became evident that in terms of budgeting, parties will have their budget corridors prepared at the outset of the arbitration proceedings for each step. They will see at which moment in the proceedings the cost effectiveness of settlement progress will be the highest. They will also anticipate the arbitration to progress until the final award. Therefore, remunerating a pro-active tribunal who has directly or indirectly contributed to the early termination of the arbitration by way of settlement will be a welcome cost-saving factor.

Following the ICC Rules example, this paragraph may be included in Article 38.2, which deals with the costs of the arbitration and the determination of the arbitrators' fees.

Conclusion

Including provisions as suggested above will have the effect of predictability at the time of contract conclusion, when the dispute resolution clause is drafted. Referring to arbitration rules that anticipate settlement windows as part of the proceedings will be considered attractive to users.

While parties with no settlement prospects are likely to rule out the possibility for settlement windows in the first place, cases with settlement potential will no longer be hindered to achieve that goal when procedural tools expressly provide for this possibility.

The above-mentioned consequences could also have the cascading effect of dispute avoidance, as both counsel and their clients will prepare for settlement discussions early on.

In sum, including settlement facilitation techniques in arbitration rules is not only advisable but also required by recent trends and practices. Users expect institutional rules to be updated to provide the most efficient mechanism for resolving their disputes. Until arbitration rules have been amended, the proposed provisions provide guidelines for inclusion in procedural orders.

This article reflects the personal views of the authors and in no way does it reflects the views of their affiliations or their employers, respectively. The authors thank Ms. Emily Hay for her careful review. Ms Niuscha Bassiri had earlier presented the draft provisions at the PCA – Supreme Court of India Conference on International Arbitration and the Rule of Law in September 2024.
