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of Time into Arbitral Rules in Order for Parties
to Explore Settlement

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A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement

by LUCY GREENWOOD*

ABSTRACT

The growth of international commercial arbitration in recent years has contributed to a number of perceived problems within the system, in particular, the increasing 'judicialisation' of commercial arbitration and an attendant increase in costs. End-users appear to be dissatisfied with a process that, while it still delivers binding awards which are widely enforceable, increasingly does so at significant cost to the parties, both in terms of time and money. This article considers whether arbitral institutions should incorporate a short 'window' of time into their arbitration rules to allow parties to seek to resolve their dispute outside the arbitration. The author discusses the problems with so-called 'arb-med' or 'med-arb' and argues that, as an alternative, imposing a temporary suspension of proceedings during which settlement may be explored could, in some situations, provide an opportunity for disputes to be resolved quickly and cheaply, without derailing the arbitration process.

I. A 'SENSE OF CRISIS' IN INTERNATIONAL ARBITRATION

INTERNATIONAL COMMERCIAL arbitration is a dispute resolution system that can be adapted to suit the particular circumstances of each case, that has the force of national courts supporting, but not obstructing it, that produces awards that can be enforced relatively easily in numerous jurisdictions. Consequently, it is the dispute resolution mechanism of choice for the majority of cross-border commercial contracts.

Yet, in recent years, there appears to be increasing dissatisfaction with the increased time and cost of international arbitration, leading some commentators

* Foreign Legal Consultant, Fulbright & Jaworski LLP. The views expressed in this article are the author's own and do not necessarily reflect the views of Fulbright & Jaworski LLP.

to refer to a ‘sense of crisis’¹ in international arbitration.² There is an emerging trend which suggests that parties no longer believe that arbitration (particularly in terms of large complex disputes) is cheaper or quicker than litigation.³ The perceived increase in time and costs is usually attributed to a number of factors which include (i) the ‘over-lawyering’ of arbitrations; (ii) excessive disclosure; (iii) the length of hearings; (iv) the number of arbitrators; and (v) the increasing tendency to replicate court processes before the arbitral tribunal. Reference is less frequently made to the fact that, once commenced, arbitrations do not tend to settle as readily as court proceedings.⁴

II. USE OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES TO PROMOTE SETTLEMENT

Notably, the first solution proposed by a team of in-house counsel during a round table organised by *Global Arbitration Review* to debate the issue of increased time and cost of international arbitration was to ‘switch to ADR’, rather than try to

¹ C. Bühring-Uhle, Kirchoff *et al.*, *Arbitration and Mediation in International Business* (2nd edn, Kluwer Law International 2006), p. 127, available at www.kluwerarbitration.com.

² Dissatisfaction with elements of the arbitration process is not, however, new. Back in 1989, Lord Mustill observed ‘Are the [arbitration] proceedings any longer imbued by informality, or do they not have all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge’s power to bang together the heads of recalcitrant parties’. M. Mustill, ‘Arbitration: History and Background’ in (1989) 6 *J Int’l Arb.* 43 at p. 56.

³ See *e.g.*, the 2007 Fulbright & Jaworski Litigation trends survey, available at www.fulbright.com, which concluded ‘the overall trend among the survey respondents seems to be that international arbitration is not seen as offering significant cost benefits over litigation’. The survey also found that the percentage of respondents who believed that arbitration was quicker than litigation fell from 43% in 2006 to 11% in 2007. International arbitration may well never have been quicker and cheaper than litigation, but people clearly thought it was. See also ‘Super Conference: In-house Counsel Say International Arbitration Takes Too Long’, 27 May 2010, reporting that ‘in-house counsel feel strongly that international arbitration takes too long and costs too much’, available at www.insidecounsel.com/News/2010/5/Pages/SuperConference-Inhouse-Counsel-Say-International-Arbitration-Takes-Too-Long.aspx. During the Inside Counsel Conference on 26 May 2010, Roland Schroeder, senior counsel–litigation and legal strategy at General Electric Corporation, presented results of an informal survey of members of the Corporate Counsel International Arbitration Group (CCIAG), an alliance of more than 90 in-house attorneys from multinational companies interested in improving the way international arbitration is conducted. According to the CCIAG survey: 100% agreed or strongly agreed that international arbitration takes too long; 100% thought that lack of availability of arbitrators causes unnecessary delays; 80% blamed the arbitration panel for failing to enforce the agreed-upon timetable; 89% thought the arbitrators’ concern for process over efficiency unnecessarily delayed the process. Back in 2000, Fali S. Nariman stated: ‘Arbitration has lost that lightness of touch that characterized its early manifestations: motivated or reasoned decisions – majority, concurring and dissenting – are now increasingly long and turgid, and too full of legal learning’. See ‘The Spirit of Arbitration: the Tenth Annual Goff Lecture’ in (2000) 16(3) *Arb. Int’l* 261.

⁴ There are a number of possible reasons for the fact that arbitrations do not tend to settle as readily as court proceedings, including (i) unpredictability (it is often difficult, if not impossible, to predict how a tribunal comprised of three arbitrators from different legal backgrounds will decide an issue); (ii) there is usually no appeal so the thought of the arbitration dragging on is not a deterrent; (iii) although there is a convention in international arbitration that the loser pays the winner’s costs, this is not always the case, so costs are not such a deterrent; (iv) the fact that awards are usually confidential may inhibit settlement; and (v) there may have been attempts to resolve the dispute prior to commencing an arbitration, so there may be little interest in resolving the dispute following the issue of proceedings.

streamline arbitration procedure.⁵ Reflecting this approach, sophisticated parties are increasingly including multi-tiered dispute resolution clauses in their contracts.⁶

Multi-tiered clauses provide for certain steps to be taken prior to using a final binding mechanism to determine the dispute if, and only if, it is not capable of settlement by any other means. For example, a multi-tiered clause often provides for parties to negotiate informally, then go through formal mediation of the dispute prior to commencing an arbitration.⁷ Such clauses are a laudable attempt to resolve disputes before they reach an arbitration tribunal in the first place. Of course, it is difficult to determine how successful these clauses are in achieving these aims.

Admittedly, multi-tiered dispute resolution clauses have a number of drawbacks. By definition, there is a risk that an ultimate resolution of the dispute is delayed. With the risk of delay comes a likelihood of additional cost. There may be concerns about confidentiality, or about revealing a party's hand too early. Parties may simply not have enough information about each other's position to reach a decision on settlement. Alternatively, a recalcitrant party may be motivated to participate in the various tiers set out in the dispute resolution clause purely to delay a final determination of the dispute or to obtain a tactical advantage in any subsequent arbitration.

If the mediation or negotiation stage of a multi-tiered dispute resolution clause is successful, then the parties will be in possession of a binding settlement agreement, not an enforceable arbitral award. For some parties this will not be an issue, for others, the need to be able to enforce an award under the New York Convention might be an important consideration. It is possible to mediate, then appoint the mediator as arbitrator in order to turn the agreed settlement into an arbitration award by consent. However, unless an arbitration is already ongoing prior to the mediation, issues may arise when it comes to enforcing any such award. Where parties appoint the mediator as arbitrator after they have resolved their differences, views differ as to whether the resulting award is properly

⁵ See 'The Dynamic of Time and Cost: the Sequel', 15 July 2009, Vol 4, Issue 3, Global Arbitration Review, available at www.globalarbitrationreview.com.

⁶ See Lucy Greenwood and Jonathan Sutcliffe, 'Hybrid, Multi-tiered and Carve-Out Dispute Resolution Clauses', available at <http://arbitration.practicallaw.com/9-384-8595> (2009); Didem Kayali, 'Enforceability of Multi-tiered Dispute Resolution Clauses' in (2010) 27(6) *Arb. Int'l* 551.

⁷ For example, the LCIA standard multi-tiered dispute resolution clause (available at www.lcia.org) provides: 'In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within [...] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be [...].

The governing law of the contract shall be the substantive law of [...].

In any arbitration commenced pursuant to this clause, (i) the number of arbitrators shall be [one/three]; and (ii) the seat, or legal place, of arbitration shall be [City and/or Country].'

enforceable under the New York Convention.⁸ Accordingly, if the parties need any settlement to be reflected in an enforceable arbitral award, then they should ideally have commenced an arbitration prior to the mediation. This may cut across one of the key advantages of a multi-tiered dispute resolution clause – the possibility of avoiding an arbitration in the first place.

III. WOULD A SUBMISSION TO NATIONAL COURTS BE PREFERABLE?

In pursuit of the ideal that all disputes should be resolved ‘quickly, cheaply and justly’,⁹ an alternative to a complicated multi-tiered dispute resolution clause could be a simple jurisdiction clause.¹⁰ Where parties do not need to enforce an award under the New York Convention, but are able to enforce a court judgment through other avenues, then a submission to national courts could well result in a quicker determination of the dispute, depending on the jurisdiction concerned.

Certainly, a submission to national courts could provide a party with a greater chance of settling its dispute, particularly in the United States or England. Although precise statistics are difficult to unearth, it appears that in the United States only about 3 per cent of civil cases go to trial and in England only around 5 to 10 per cent of civil cases reach trial.¹¹ There is, as would be expected, some link between the cost of pursuing a case to judgment and its settlement rates, with more expensive court systems (such as those in England and the United States) having the highest settlement rates. In Germany, for example, where the cost of litigation is significantly cheaper than in England, a higher proportion of cases go to trial.¹²

Other factors also influence the settlement rate. In the United States, which has a high rate of settlement, parties are given many opportunities to mediate their disputes. The US courts are authorised to order mediation on the grounds of judicial economy and to save costs.¹³ Additionally, the nature of US court proceedings, in particular the extensive discovery phase and the possibility of

⁸ See Christopher Newmark and Richard Hill, ‘Can a Mediated Settlement Become an Enforceable Arbitration Award?’ in (2000) 16(1) *Arb. Int’l* 81 and Edna Sussman, ‘The New York Convention Through a Mediation Prism’, published in *Dispute Resolution Magazine*, Volume 15 Number 4, Summer 2009, also available at www.sussmanadr.com.

⁹ Simon Davies, ‘Controlling Costs in Commercial Litigation’, 19 June 2009 available at <http://old.judiciary.gov.uk/docs/costs-review/controlling-costs-commercial-litigation.pdf>. As Mr Davies observes: ‘It is easy to put in place a system that meets the first two of these three requirements – speed and cost. For example, we could require the parties to toss a coin or, as happened not long ago in a dispute between two New Zealand telecommunications companies, we could require their chief executives to take part in a best of three arm-wrestling match’.

¹⁰ As suggested by Lord Mustill in ‘Arbitration: History and Background’ in (1989) 6 *J Int’l Arb.* 43 at p. 56, ‘On the horizon as competitors are mediation, mini-trials and other forms of alternative dispute resolution and even (*mirabile dictu*) the courts themselves’.

¹¹ See Davies, *supra* n. 9.

¹² See *ibid.*

¹³ See Frank V. Williams, III, ‘Reinventing the Courts: the Frontiers of Judicial Activism in the State Courts’ in (2007) *Campbell Law Review* 591 at p. 664.

protracted appeals, means that cases tend to settle more readily. This is partly due to the cost of continuing the proceedings, but also because parties are more informed about their respective positions. Generally, by the time parties in a US proceeding are engaging in mediation, they have a good understanding of the other party's case.

The changes to the Civil Procedure Rules in England and Wales in the late 1990s are credited with having a significant impact on settlement rates in English civil proceedings. The Civil Procedure Rules placed great emphasis on 'front-loading' cases and litigation was intended to be viewed as a last resort. This is reflected in the sharp decline in originating proceedings in civil cases in England and Wales from 1995 to 2008, when the average number of cases issued dropped from over 120,000 to less than 20,000.¹⁴ The Civil Procedure Rules also imposed a duty on English judges to actively manage cases, which includes encouraging the parties to seek to resolve their disputes by alternative means.¹⁵ The English court has the power either (i) to ask the parties to engage in an ADR process prior to continuing to use the court's resources; or (ii) to penalise (generally by way of a costs sanction) a litigant who has failed adequately to engage in an appropriate ADR process. There is also express provision for the court to stay the case of its own volition to give the parties an opportunity to settle the case.¹⁶

In the English case of *Dunnett v. Railtrack*,¹⁷ although Railtrack won the case and was expecting to be awarded its costs, because Railtrack had refused to consider mediation when the judge at first instance suggested it, it was denied its costs. In *Halsey v. Milton Keynes General NHS Trust*,¹⁸ the English Court of Appeal held that European jurisprudence meant that the court could not order mediation as this would be infringing the parties' rights, but nevertheless courts should continue to adopt a 'robust' attitude to directing mediation.¹⁹

There has also been a move towards promoting the use of mediation in Europe. In April 2008, the European Parliament adopted a Mediation Directive (Directive 2008/52/EC)²⁰ to encourage and facilitate access to mediation in cross-border disputes. Among other things, the Directive gives judges in the

¹⁴ See www.justice.gov.uk/publications/docs/judicial-court-statistics-2008-03-chapt3.pdf.

¹⁵ CPR Rule 1.4 provides: '(1) The court must further the overriding objective by actively managing cases. (2) Active case management includes: (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently'.

¹⁶ See e.g., CPR Rules 1.4, 44.5 and 26.4, available at www.justice.gov.uk/civil/procrules_fin/index.htm.

¹⁷ [2002] 2 All ER 850.

¹⁸ [2004] EWCA (Civ) 576.

¹⁹ *Ibid.* para. 11.

²⁰ For a copy of the Directive, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>.

European Union the right to suggest, if appropriate, that parties mediate their dispute, and encourages Member States to promote mediation and to train and develop mediators and mediation services.

Yet, despite all the positives, a submission to the jurisdiction of a national court will often not be appropriate in the majority of international contracts, simply because in most cross-border contracts there is likely to be a strong desire for a neutral venue (i.e. a desire not to litigate in the courts of the other party) and a need to enforce any resulting award in another jurisdiction. Therefore, most cross-border contracts will continue to include arbitration clauses. Although arbitration is allegedly disliked by in-house counsel, the advantages it offers in terms of enforcement of awards are recognised and the alternatives are seen to be worse.²¹

It is melodramatic to assert that international arbitration is endangered. Its strengths (neutrality and enforceability) are sufficient to withstand a great deal of criticism. It is also unrealistic to say that the economic climate has created a 'perfect storm' within which mediation will thrive and litigation (and, presumably, arbitration) will wither.²² However, the flexible framework of international arbitration does mean that the international arbitration community is uniquely placed to respond to criticism. Arbitration practitioners and institutions have sought to address the concerns raised by users of arbitration, but there has been little visible change in recent years in how arbitrations are managed.²³

IV. EFFORTS TO ADDRESS THE PERCEIVED PROBLEMS WITH INTERNATIONAL ARBITRATION

The focus of efforts to improve international arbitral procedure has often been on the arbitral tribunal, rather than parties, their counsel, or the arbitration institutions. This is a heavy burden for a tribunal. Arbitrators face competing issues: the need to issue a binding, enforceable award, the need to observe due process and the need to maintain confidentiality. They also face competing claims on their time and, particularly in the current climate, criticism of the time taken to reach a final award and the cost of reaching that award. Facilitating (in whatever form) settlement of the dispute may not be high on a tribunal's agenda.²⁴ Indeed, for more prosaic reasons, neither counsel nor the tribunal may

²¹ David Hechler, Corporate Counsel, 'We Can Work it Out' (1 February 2010), available at www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437871408.

²² See www.mediate.com/articles/a_perfect_storm_is_gathering.cfm.

²³ See the discussion by Nicolas Ulmer, 'The Cost Conundrum' in (2010) 26(2) *Arb. Int'l* 246. Mr Ulmer recognises that 'laudatory ideas' are not easily put into practice.

²⁴ See Bernardo Cremades, 'Overcoming the Clash of Legal Cultures: the Role of Interactive Arbitration' in (1998) 14(2) *Arb. Int'l* 157 at p. 160: 'Traditionally, it was an agreed doctrine within the world of arbitration that an arbitrator's duty should not be mixed with any mediating activity or intent to reconcile. This was one of the greatest dangers widely highlighted in arbitration seminars as it was stated clearly that an arbitrator who initiated conciliation or mediation was exposed to the risk of an eventual challenge'. Mr Cremades notes the 'diversity' of opinions as to how active a tribunal should be in promoting settlement; see *ibid.* n. 8.

have settlement at the forefront of their minds.²⁵ Operating constantly in a highly adversarial environment tends to foster confrontation rather than co-operation. Arbitration practitioners often see cases in terms of victories and (unjust) defeats: a settled dispute does not fall neatly into these categories. A settled dispute, in the mind of an arbitration practitioner or an arbitrator may not necessarily be viewed as a 'success', although it should be.²⁶

The proposed solutions to the 'problems' with international commercial arbitration have generally been focused on improving efficiency within the process, rather than seeking to actively improve settlement rates of arbitrations.²⁷ The ICC *Report on Techniques for Controlling Time and Costs in Arbitration*²⁸ highlighted the need for arbitrators with 'strong case management skills' who are 'proactive'. The report recommended that the tribunal should:

consider informing the parties that they are free to settle all or part of the dispute at any time during the course of the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings ... The parties may also request the arbitral tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions take place.²⁹

In his article 'Breaking the Deadlock',³⁰ Arthur Marriott, QC, suggested streamlining the arbitral procedure (and strongly advocated the notion that arbitrators should suggest to parties that they consider settlement). However, Marriott's approach requires an assumption of responsibility by a tribunal and also, and perhaps more importantly, made certain assumptions about an arbitrator's role in a dispute. Many international arbitrators will view their

²⁵ See the discussion by Ugo Draetta, 'Leveraging the Arbitral Process to Encourage Settlement: Some Practical and Legal Issues' in M.A. Fernández-Ballesteros and David Arias (eds.), *Liber Amicorum Bernardo Cremades* (La Ley, 2010): 'Those conducting an arbitration may simply not have appropriate skills as negotiators necessary to reach a settlement. In extreme cases, this may be coupled with a lack of real interest in settling, especially by outside lawyers, who may have a financial interest in seeing the arbitration continue. Whether this gives rise to an unconscious bias in favour of continuing the proceedings when a settlement might be possible, or an unprofessional (and unethical) conscious effort to keep the dispute alive, may be impossible to discern'.

²⁶ It has been said that the settlement of a dispute through agreement of the parties 'is of the essence of the spirit of arbitration'. See K.P. Berger, 'The Settlement Privilege: a General Principle of International ADR Law' in (2008) 24(2) *Arb. Int'l* 265; Nariman, *supra* n. 3 at p. 267: 'until the resolution of a dispute by settlement is considered once again to be a constituent function of arbitration, ADR will take over and displace it as a pragmatic and workable alternative'. Christopher Koch and Erik Schäfer, 'Can it be Sinful for an Arbitrator Actively to Promote Settlement?' in (1999) *Arbitration and Dispute Resolution LJ* 153 at p. 184 *et seq.*

²⁷ The 2010 Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration simply states 'When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement' and does not refer to actively involving the arbitrators in settlement. See www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf.

²⁸ *Report on Techniques for Controlling Time and Costs in Arbitration*, ICC Publication 843, October 2007, available at www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

²⁹ *Ibid.* para. 43.

³⁰ Arthur Marriott, QC, 'Breaking the Deadlock' in (2006) 22(3) *Arb. Int'l* 411.

role as predominantly to produce an enforceable arbitral award and will act accordingly.³¹

V. ARBITRATIONS TEND NOT TO SETTLE

Whilst it is difficult to gather statistics on this issue, the perceived wisdom is that, for a variety of reasons, arbitrations do not settle as frequently as court proceedings. In the Queen's Bench Division of the English court (which deals with mainly civil cases) in 2008 only around 5 per cent of cases went to trial.³² Although we are not really comparing like with like, given the availability of summary proceedings in litigation and the other incentives to dispose of disputes outside the courtroom, the available statistics for arbitration show a marked difference. The Bühring-Uhle survey gives a settlement rate for international commercial arbitrations of 43 per cent.³³ The 2008 PricewaterhouseCoopers survey *International Arbitration: Corporate Attitudes and Practices* gave a settlement rate of 51 per cent.³⁴ Even if these figures are treated with caution, they reflect the general perception that arbitrations are not as susceptible to settlement as litigation proceedings.³⁵

How much of this is due to the unpredictability of arbitrations (essentially, the difficulty of predicting with any certainty how a tribunal comprised of arbitrators with different legal backgrounds will rule on a question of substantive law), and how much is due to the fact that parties are not generally reminded by tribunals to consider settling the dispute, is impossible to tell.

CEDR's³⁶ report on *Settlement in International Arbitration* contained a number of recommendations.³⁷ These included the following: that arbitrators should enforce multi-tier dispute resolution clauses; should remind parties at the first procedural conference that they can settle the dispute at any time; should discuss with the parties different ADR processes; should give a preliminary view on the merits

³¹ 'The arbitrator's central obligation is to resolve the parties' dispute in an adjudicatory manner': see Gary Born, 'Rights and Duties of International Arbitrators' in *International Commercial Arbitration* (Kluwer, 2009), ch. 12, p. 1615, citing Y. Fouchard, 'Relationships Between the Arbitrator and the Parties and the Arbitral Institution' in ICC, *The Status of the Arbitrator* (ICC Ct. Bull. Spec. Supp. 1995), p. 12. '[T]he arbitrator exercises a judicial function. His duties as a private judge are modeled on the duties of national judges': see also H. Hausmaninger, 'Rights and Obligations of the Arbitrator with regard to the Parties and the Arbitral Institution: a Civil Law Viewpoint' in ICC, *The Status of the Arbitrator* (ICC Ct. Bull. Spec. Supp. 1995), pp. 36, 44: 'the arbitrator's role – in contrast to that of the mediator and conciliator – seen primarily as an adjudicatory one'.

³² See www.justice.gov.uk/publications/docs/judicial-court-stats-2008-full.pdf. Of course, this statistic does not mean that 95% of cases in the Queen's Bench settled, as they may have been withdrawn, or disposed of by other methods.

³³ Bühring-Uhle, *supra* n. 1.

³⁴ PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices*, 2008, available at www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf. The CEDR Report, *infra* n. 37, cites Bucher in (1995) *ASA Bull.* 586, who estimated the settlement rate of arbitrations at approximately 50%.

³⁵ See generally, Draetta, *supra* n. 25.

³⁶ Centre for Effective Dispute Resolution.

³⁷ CEDR Commission on Settlement in International Arbitration, *Final Report* (November 2009) ('CEDR Report'), available at www.cedr.com.

(if both parties agreed); should chair settlement meetings and propose that parties make ‘offers to settle’ (to which cost sanctions could attach). The CEDR report also recognised the possibility of incorporating a mediation window into the existing arbitral process. However, it saw this ‘window’ as being part of a discussion between the arbitral tribunal and parties and counsel in relation to the various ADR processes available to them, rather than an imposition of this window as part of the arbitration procedure.³⁸

VI. MOVING AWAY FROM MED-ARB

There has been extensive discussion of the advantages and disadvantages of arbitrator-facilitated settlement (including the notion of ‘arb-med’ or ‘med-arb’, where the arbitrator actively mediates the dispute, or the converse, where the mediator then becomes the arbitrator).³⁹ What emerges from a review of the literature on the topic is that the cultural background of the arbitrator (and, to a lesser extent, the parties) will influence whether or not they will be comfortable adopting such techniques to settle the dispute.⁴⁰

The advantages of settling disputes are clear and unarguable, particularly within the scope of an existing arbitration (so that a consent award may be rendered, to give the additional benefits of enforcement).

The disadvantages, however, of employing the arbitrator to settle the dispute, while not numerous, are significant. Whilst advocating the use of arbitrators to facilitate settlement, citing the obvious ‘increased efficiency of the dispute resolution process’, Professor Kaufmann-Kohler identified certain disadvantages, including a ‘threat to impartiality’, a ‘risk of breach of due process’ and a ‘concern that the parties may not candidly express their positions’ before a tribunal who will ultimately rule on the dispute if the mediation fails. Other commentators are more vociferous in their disapproval of the process, asserting that it is impossible to reconcile the confidentiality issues which arise when the

³⁸ CEDR also recognised that arbitration institutions had a ‘pivotal role’ to play, and that they were in a ‘position to introduce new approaches and products into the market’.

³⁹ See especially, Gabrielle Kaufmann-Kohler, ‘When Arbitrators Facilitate Settlement: Towards a Transnational Standard’ in (2009) 25(2) *Arb. Int’l* 187.

⁴⁰ *Ibid.* p. 195. Professor Kaufmann-Kohler reviewed over 60 consent awards issued under the ICC Rules between 2003 and 2006. In 13 of those awards, the arbitrators had actively contributed to the settlement. Of those 13 awards, six were presided over by a German or Swiss arbitrator. Further, the 13 cases involved seven party-appointed arbitrators who were either Swiss or German. See Gabrielle Kaufmann-Kohler and Victor Bonnin, ‘The Arbitrator as Conciliator: a Statistical Approach to the Relationship between an Arbitrator’s Role and his/her Legal Culture’ in (2007) 18(2) *ICC Bull.* 81. Klaus Peter Berger, ‘The International Arbitrator’s Dilemma: Transnational Procedure Versus Home Jurisdiction’ in (2009) 25(2) *Arb. Int’l* 217 at p. 223, explains that a ‘core value’ of German practitioners is that ‘German arbitrators, counsel and parties tend to adopt the settlement-friendly approach of German judges’. Professor Berger characterises the German arbitrator’s approach as a ‘proactive attitude towards a potential settlement of the dispute’. See also, K.P. Berger, ‘The Settlement Privilege: a General Principle of International ADR Law’ in (2008) 24(2) *Arb. Int’l* 265; J. Langbein ‘The German Advantage in Civil Procedure’ in (1985) 52 *U Chicago L Rev.* 823. See Nicolas Ulmer, ‘The Cost Conundrum’ in (2010) 26(2) *Arb. Int’l* 233.

mediator and the arbitrator are one and the same person.⁴¹ The further possibility of the risk of appearance of bias was well-recognised in the English case of *Glencot Development and Design Co. Ltd v. Ben Barrett & Son Ltd*.⁴² However it is notable that although Judge Humphrey Lloyd, QC, pointed out the dangers of the appearance of bias caused by one person wearing two hats, he still concluded that whilst there were ‘risks to all when an adjudicator steps down ... and enters a different arena ... to perform a different function[, i]f a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking’.⁴³

There are also more practical concerns over one person wearing two hats. The qualities of a good arbitrator and a good mediator can differ enormously, and an assumption that an arbitrator will automatically be a good settlement facilitator is flawed. Both the legal and practical risks of arb–med or med–arb are eliminated if a neutral person is used to help resolve the dispute, or if the parties negotiate directly. Arb–med or med–arb’s problems should not mean that parties dismiss any chance of mediating within the framework of an arbitration.

CEDR considered that the tribunal should raise the possibility of settlement with the parties.⁴⁴ The success of the Civil Procedure Rules in England in reducing the caseload of the civil courts could be cited as a reason for imposing this burden on the arbitrator. However, a distinction must be drawn between the role of an arbitrator and that of a commercial judge. Unlike an arbitrator, a judge is a recipient of public resources which must be utilised to the maximum possible extent. An arbitrator does not operate under the same constraints. If an arbitrator is, understandably, merely concerned to deliver a binding decision then, clearly, there is no impetus on him or her to suggest, direct or even order the parties to seek to resolve their dispute by alternative means, or to impose a procedure upon the parties that results in a saving of time and costs.

Rather than imposing this burden on the tribunal, therefore, is there a greater role that the arbitral institutions can play to promote settlement within the confines of their rules?⁴⁵ One possibility would be for arbitral institutions to amend their rules to include a short stay of the arbitration, within which the parties could, if they wished, consider whether the dispute was capable of resolution by alternative means.

⁴¹ See, in particular, Jeff Kichaven, ‘Med-Arb Should be Dead’ in (2009) 2(1) *NYSBA New York Dispute Resolution Lawyer* (Spring), at p. 80.

⁴² [2001] All ER (D) 384, [2001] EWHC Technology 15.

⁴³ *Ibid.* para. 23.

⁴⁴ See Masood Ahmed, ‘Settlement in International Arbitration: Comments on the CEDR Settlement Rules’ in (2010) 76 *Arbitration* 2 at p. 269. The CEDR Report recognised that there were serious concerns over the tribunal acting as both a mediator and arbitrator if the mediation fails. See CEDR Report, *supra* n. 37 at para. 2.5.

⁴⁵ The CEDR Report, *supra* n. 37, acknowledges that ‘a number’ of arbitral institutions already take some of the steps recommended by the CEDR. The CEDR’s recommendations included drawing the parties’ attention to the ADR services provided by the institution and instructing case managers to initiate a discussion regarding settlement with the parties’ counsel when proceedings are commenced. In particular, the International Centre for Dispute Resolution often offers parties the opportunity to mediate their disputes outside the arbitration.

The incorporation of a fixed settlement window in institutional rules would not only take the onus of suggesting that the parties explore settlement away from the tribunal, it would also mean that the parties, if they were so minded, could explore different, more flexible, options to resolve the dispute. They would be able to move away from the notion of med-arb, and the notion that a tribunal bears some responsibility for promoting settlement, without moving away from the notion of settling the dispute altogether.

VII. A WINDOW OF OPPORTUNITY

The main virtue of presenting the parties with an obligatory settlement window incorporated within the arbitration procedure would be the fact that no one would bear the burden of suggesting it.⁴⁶ The parties would not be required to negotiate, or mediate, simply the possibility of doing so would be handed to them by virtue of a fixed settlement window incorporated into the institutional rules.⁴⁷ There would be no mandated discussion of the settlement window by the tribunal or the parties, it would simply form part of the procedural timetable. No inferences could be drawn by the tribunal in relation to whether or not the opportunity had been taken advantage of, indeed the tribunal would not even need to know whether or not settlement had been explored by the parties.⁴⁸

One question is when this hypothetical window should open? It should ideally be at a time after the tribunal has been established, once the parties have seen the initial pleadings, but before the cost-intensive phase of the arbitration begins. For example, there is no reason that the ICC Terms of Reference (which are settled by the tribunal at this stage of an ICC arbitration) could not incorporate a standard, obligatory, short (say two-week) window of time into the arbitral procedure.⁴⁹ Similarly, the LCIA Rules sets out time periods for the exchange of

⁴⁶ Koch and Schäfer, *supra* n. 26, whilst advocating the involvement of arbitrators in promoting settlement, recognise the difficulties that may ensue if a suggestion comes from the arbitrators: 'If the initiative comes from the arbitrators, the proposal should be made in such a way that neither of the parties has the impression that it has no choice but to agree to the conciliation. In other words, a party should never feel that by refusing the tribunal's suggestion to help the parties reach a settlement, it is putting itself at a disadvantage within the arbitral proceedings'. Of course, if the 'settlement window' is simply imposed on the parties, these difficulties do not arise.

⁴⁷ Although the Bühring-Uhle survey, *supra* n. 1, reported that mediation windows were rarely encountered in practice, it concluded that 'inserting mediation windows during arbitration proceedings is steadily gaining support as an effective way to harness the benefits of mediation without causing undue risk to the arbitral process'. It would certainly prove a 'unique selling point' for the institution that incorporated such a window of time into its rules. The CEDR Settlement Rules provide that the tribunal must impose a mediation window if requested by all parties (Rule 3.1). In this proposed scenario, the mediation window would already form part of the arbitral procedure by virtue of its incorporation into the institutional rules.

⁴⁸ An alternative would be to require the parties to report back at the end of the period as to the efforts they had made to settle the dispute. This might have the effect of encouraging parties to begin a dialogue.

⁴⁹ The ICC is already fairly prescriptive in relation to the Terms of Reference, which, under art. 18, must include: '(a) the full names and descriptions of the parties; (b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made; (c) a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed; (d) unless the Arbitral Tribunal considers it inappropriate, a list of

two rounds of written submissions; there is no reason why a two-week window of time could not be imposed on the parties at the end of the second round of submissions.⁵⁰ If the parties chose to take the opportunity to mediate, then they could extend the time period by agreement, if they did not, then the window would be short enough to have little or no effect on the arbitration timetable as a whole. By the time the parties have reached the Terms of Reference phase of an ICC arbitration or the procedural hearing phase of an LCIA arbitration, they have seen the other side's position, and they also have an idea of the costs of procedure (which tend to be significantly underestimated). Incorporating, essentially, a short 'cooling-off' period at this stage of an arbitration could well pay dividends, not just for the parties concerned, but also for the image of international arbitration generally, whilst taking just a little pressure off a beleaguered arbitral tribunal.

VIII. SIMPLY A CHANCE TO TALK

Ideally, in the hope that disputes could be resolved 'quickly, cheaply and justly',⁵¹ all parties would be represented by counsel who actively explored settlement opportunities, when appropriate, during the arbitral process. However, by its very nature, international commercial arbitration, as a highly adversarial process, makes dialogue difficult. Parties are rarely from the same legal culture, the substantive law of the arbitration may be alien to counsel, and even where it is not, it may be unclear how a tribunal comprised of lawyers from different backgrounds will rule on its application. It is unfair and perhaps unrealistic to expect arbitrators to act as settlement facilitators, or even to have lofty ideals of reducing the time and cost of international arbitration at the forefront of their minds.

What an arbitrator can do is establish a procedure that is suitable for the dispute before him or her. Were the arbitrator to be faced with an automatic window of time built into the procedural rules which govern the arbitration, then the matter would be largely taken out of his or her hands. Similarly, it would not be up to one party to suggest settlement talks, but both parties would be given a window within which to explore settlement. The insertion of a settlement window into the timetable of an arbitration would simply provide parties with a chance to talk. Whether they take that chance or not is, of course, a very different story.

issues to be determined; (e) the full names, descriptions and addresses of the arbitrators; (f) the place of the arbitration; and (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral Tribunal to act as amiable compositeur or to decide *ex aequo et bono*.

⁵⁰ See LCIA Rules, art. 15, available at www.lcia.org.

⁵¹ See Davies, *supra* n. 9.