

The Australian

www.ciarb.net.au

ADR Reporter

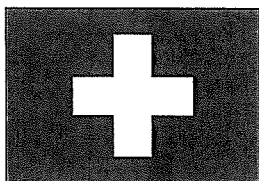
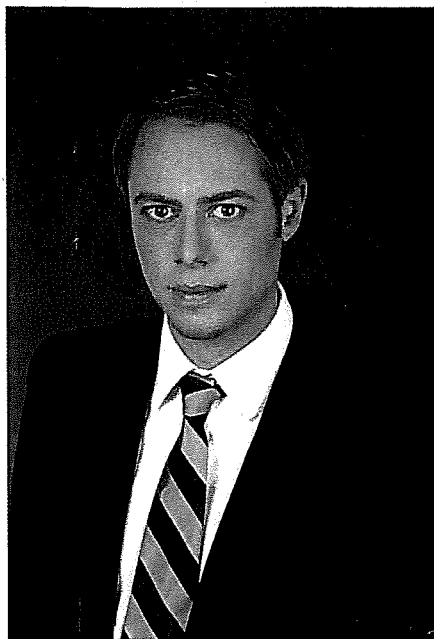


Quarterly Bulletin of The Chartered Institute of Arbitrators Australia
Issue No 18 - June 2012

**2012 Diploma Course:
Success in Kuala Lumpur**

The Petronas Towers in Kuala Lumpur - Photograph: Michael Sanig

How caucusing and other elements of mediation fit into International Commercial Arbitration



Niklaus Zaugg is a past winner of the CI Arb Book Prize for the best research essay, in the LLM subject International Commercial Arbitration, at the University of Sydney Law School. This is the research paper he wrote to win the prize.

1. Introduction

A major issue that has been raised in the context of International Commercial Arbitration (ICA) in recent years is that arbitration proceedings have become increasingly costly and time consuming.¹

For comparably small disputes the introduction of so-called expedited procedures by several arbitral institutions is regarded as a possible means to make arbitrations more efficient again.²

In the context of larger and more complex arbitrations, efficiency is more likely to be improved by a proactive involvement of the arbitral tribunal trying to facilitate an amicable resolution of the dispute.³

Dispute resolution mechanisms that incorporate mediative elements may start as ordinary arbitrations that result in enforceable arbitral awards. Such processes are generally known as Arb-Med proceedings.⁴ In contrast, parties to a Med-Arb process first try to settle their dispute by mediation and entitle the mediator to subsequently act as arbitrator if no settlement can be reached.⁵ Given the

requirement of a pre-existing litigious claim, it is questionable whether an agreement reached during the preliminary mediation stage of a Med-Arb process can be validly converted into an internationally enforceable arbitral award.⁶ This issue does not arise in the context of Arb-Med where parties first initiate arbitration proceedings. It is this kind of hybrid procedure the following considerations will therefore focus on.

It will first be examined whether the integration of caucusing as one of the main features of "classic mediation" into arbitration proceedings is an appropriate means to encourage parties to settle their dispute. Following these considerations, a short outline is given of other forms of Arb-Med processes that are sometimes used in the context of ICA. It will be explained why the goals of hybrid processes are overall most likely to be achieved where arbitral tribunals offer a preliminary evaluation of the case. Finally, the questions of how mediation elements seem to be best integrated into arbitration will be addressed in the light of this evaluative approach.

The following considerations are based on the assumption that the disputes are generally suitable to be resolved by settlement.⁷ The term "mediation" and expressions related thereto are understood in a broad sense. For the purpose of this essay, "mediation" is therefore used as synonym for "facilitation" as well as "conciliation". Also, for the sake of ease, reference is generally made to "the arbitrator" although arbitral tribunals are often composed of several arbitrators (usually three).⁸

2. Caucusing and Arbitration

In a "classic mediation" the mediator assists the parties to amicably resolve a dispute by considering the opposing parties' interests rather than the legal grounds of their claims.⁹

As a feature of this purely interest based process, the mediator generally meets separately with the parties to identify the parties' positions and possible grounds for a settlement.¹⁰ It is this caucusing practice and its suitability for arbitration proceedings that the following considerations will focus on.

The main concerns in relation to caucusing
(Continued on page 18)

regard the issues of impartiality and natural justice.¹¹ It has been mentioned that arbitrations, including Arb-Med processes, result in the issuance of a binding and enforceable award.¹² Consequently, any form of arbitration requires stricter standards than mediation with respect to the protection of the parties' minimal procedural rights.¹³ It is against this background, the integration of caucusing into arbitration proceedings must be examined.

Caucusing implies the (potential) risk of parties trying to unduly influence the arbitral tribunal.¹⁴ Even the mere possibility of receiving confidential information during *ex parte* meetings may be perceived by the parties as an element affecting the arbitrator's impartiality in the ongoing arbitration.¹⁵ An increase in challenges made on the ground of an alleged bias could be the consequence.¹⁶ This would fundamentally prejudice the goal of more cost and time effectiveness in international arbitration.

The right to natural justice entails a party's right to be heard not only on all relevant points the arbitral tribunal intends to consider for the reasoning of the award but also on all allegations made by the other party.¹⁷ Caucusing prevents the parties from commenting on each other's arguments and thus appears to affect the very core of the parties' right to be heard.

A survey of the grounds relied upon in the context of appeals made against international arbitral awards issued in Switzerland shows that the violation of the right to be heard¹⁸ was the reason that was most frequently invoked before the Swiss Federal Court in the past 20 years.¹⁹ In spite of the low rate of success of these appeals (3.9%), parties dissatisfied with the outcome of an arbitration process and counting on the supposedly broad scope of application of the right to be heard do not appear to be overly hesitant to make use of it when challenging arbitral awards.²⁰ This ground for appeal would be likely to become even more popular if caucusing found its way into ICA.

The scope for potential challenges on the grounds of partiality and violation of natural justice considerations could possibly be narrowed if the parties waived such right in relation to the arbitrator's engagement in caucusing activities. Due to the considerable implications caucusing may have on what the parties generally consider to be 'fair arbitration proceedings', it is generally admitted that an arbitral tribunal's entitlement to engage in such practices ought to be, as a minimum requirement, covered by a well-informed,²¹ express, and written consent of the parties.²² Such arrangements seem to be an effective means to inhibit parties from subsequently questioning the arbitrator's impartiality for the sole reason of his participation in *ex parte*

meetings. This observation, by all means, seems to be valid as long as the arbitrator's actions fall within the "reasonable conduct expected of a mediator".²³

However, it remains unclear whether a waiver of the 'no caucusing' rule²⁴ - even if based on an express and written consent given by well-informed parties - would be deemed to be effective in a more general manner by local courts deciding upon the annulment or the enforcement of international arbitral awards.²⁵ It is generally admitted that the operability of the principle of party autonomy, although being prevalent in ICA, is limited by certain minimal requirements assuring procedural fairness and compliance of arbitral proceedings with the public policy and the mandatory laws of the country in which the seat of the arbitration is located.²⁶ Against this background, a party who was prevented from commenting on the other party's assertions made during *ex parte* meetings may claim before an enforcing state court that a waiver of the 'non-caucusing' rule cannot have validly implied a waiver of its fundamental right to be heard and that, as a consequence, it was not able to sufficiently present its case.²⁷ This line of reasoning may gain further momentum in cases where the prohibition for judges and arbitrators to meet the parties separately in the course of ongoing proceedings is considered a part of the public policy and the mandatory laws effective in the country of the seat of the arbitration.²⁸

Even in jurisdictions where caucusing is not principally considered irreconcilable with the preservation of the parties' most fundamental procedural rights, the applicable laws seem to offer little guidance as to how best address some of the open issues that may arise when an arbitrator hears the parties separately.²⁹ So far, apparently only the laws of Hong Kong and Singapore provide for explicit rules regarding caucusing within international arbitration proceedings. Whereas these provisions so far seem to have had little relevance in practice,³⁰ a well-established practice of caucusing in the context of ICA can be found in China.³¹



2.2 Caucusing in China

The Chinese international arbitration law puts emphasis on the arbitrator's role as conciliator without however explicitly specifying whether or not caucusing is admitted in arbitration proceedings.³²

The CIETAC³³ Arbitration Rules (2005) (CIETAC Rules) leave a maximal scope of action to the arbitrator by stipulating that "[t]he arbitration tribunal may conciliate the case in the manner it considers appropriate".³⁴ Hence, the Chinese legal framework does not

appear to prevent an arbitrator from meeting the parties separately.

CIETAC arbitrators address the issue of a potential violation of the right to natural justice and concerns regarding their impartiality by treating the information obtained in separate meetings off the records for the purpose of the ongoing arbitration.³⁵ However, it cannot be excluded that, in particular in international arbitrations where the parties are not familiar with the Chinese practice of caucusing, the arbitrator's judgement may nevertheless be perceived as influenced by the parties' allegations made during *ex parte* meetings.³⁶

This fear may discourage parties from providing the arbitrator with a candid and comprehensive outline of their case during the "mediation window" and may thus frustrate the very purpose of organising *ex parte* meetings altogether.³⁷



2.2 Caucusing in Hong Kong and Singapore

The laws of Hong Kong and Singapore explicitly provide for the arbitrator's capacity to engage in separate meetings with the parties.³⁸

In both legislations, the parties' agreement to permit an arbitrator to engage in caucusing activities necessarily implies a waiver to challenge the arbitrator by reason of this kind of activity.³⁹

Hence, the concern of an increase in arbitrator challenges due to an arbitrator's potential impartiality deriving from its engagement in "shuttle diplomacy"⁴⁰ appears to be effectively dealt with.

Moreover, the ICA statutes of Hong Kong and Singapore address the issue of a potential violation of the parties' right to be heard by compelling the arbitrator to disclose any information received during *ex parte* meetings considered "material to the arbitration proceedings" if the settlement attempts remain unsuccessful.⁴¹

However, the parties' views on what has to be considered 'material' to the arbitration proceedings may vary considerably in a given case. It thus remains unclear to what extent this rule may effectively operate as an impediment to challenges of arbitral awards on the ground of an alleged violation of a party's right to be heard.

Moreover, the strict application of the mandatory obligation to disclose all relevant information gained during separate meetings seems to undermine the principle of confidentiality and thus appears to affect the very core of mediation processes.⁴² It may therefore be queried whether, in these

(Continued on page 19)

circumstances, caucusing may still constitute an effective means to successfully settle international arbitration disputes.

It appears that both in Hong Kong and Singapore the common lawyers' reluctance to allow for mediative elements in court or arbitral proceedings has so far prevented parties and arbitrators from using the statutorily stipulated caucusing option more frequently.⁴³

Given the lack of a thorough reality check, it is dubious whether the approach taken by the legislators of Hong Kong and Singapore provide for a satisfactory solution for the integration of caucusing into ICA proceedings without either compromising the parties' fundamental procedural rights or the very purpose of mediative instruments.

2.3 Are there other approaches to allow caucusing in arbitration?

A possible way to deal with the conflict between an effective mediation within arbitration proceedings and the protection of the parties' right to natural justice could imply the arbitrator's obligation to resign if no settlement between the parties is achieved.⁴⁴

In such a case the newly constituted arbitral tribunal would *a priori* not be aware of any communication made during *ex parte* sessions and could thus not even remotely base any of its considerations on such information when drafting the final award.

However, the replacement of an arbitrator following an unsuccessful mediation is likely to occur at a rather late stage of the arbitral proceedings. The need for a new arbitrator to get familiar with all factual and legal aspects of the case from scratch may again substantially extend arbitration proceedings. As a consequence, arbitrations would not become less costly.

It has been suggested that, rather than being appointed subsequently to a failed mediation attempt undertaken by its predecessor, a "back-up" arbitrator may be nominated at a significantly earlier stage of the proceedings.⁴⁵

The idea behind this approach seems to be that, although precluded from having access to any communication made and information revealed during *ex parte* meetings, the early appointed additional arbitrator would, from the very beginning of the arbitration, be able to get familiar with the case due to his participation in all open sessions held between the parties and the arbitral tribunal.⁴⁶

Even though, in relation to the above approach, a material amount of time may be saved with this mechanism, the early participation of an additional arbitrator implies extra costs irrespective of the outcome of the mediation.⁴⁷ It is therefore unclear whether

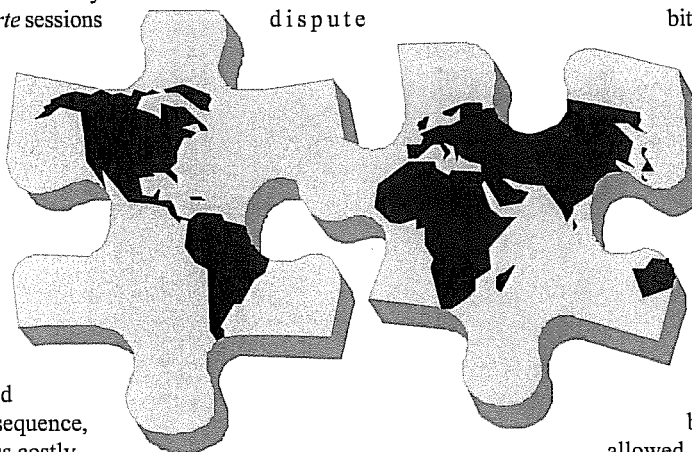
such an approach would be perceived as an appealing option by businesses anxious to curb their legal costs generated by their involvement in international arbitration proceedings.

The aim of having arbitral awards issued by someone who did not previously engage in mediation and caucusing could also be achieved if an independent person from outside the arbitration was entrusted with the task of mediating.⁴⁸

The advantage in relation to the suggestions mentioned above would be that the impartiality of the arbitral tribunal and the respect of the parties' procedural rights would be ensured without requiring the arbitral tribunal or some of its members to resign as a result of unsuccessful mediation attempts. The arbitrator's know-how of the case could thus in any event be preserved.

However, the parties may be reluctant to allow an external expert acting as mediator. It is the arbitrator they entrust with the resolution of their dispute, which is why they may not wish this task to be delegated to anybody else.⁴⁹

In addition, an independent mediator would first have to be agreed upon and subsequently need to become familiar with the dispute



and the parties' respective positions. The accumulation of additional cost and time, in particular due to duplicated work, would again not be conducive to more efficient arbitration proceedings.

Considering the above, the parties' procedural rights and their interest in cost and time effective arbitrations are probably best protected if caucusing does not become a part of international arbitral proceedings at all. Even though *ex parte* meetings continue to be considered by some as an element necessary to successful settlement facilitation,⁵⁰ the experience in some civil law countries shows that international arbitral tribunals are able to achieve high rates of settlements without resorting to the practice of caucusing.⁵¹ Hence, the goal of making arbitrations more efficient ought to be pursued by adopting other forms

of hybrid proceedings.

3. Other Forms of Arb-Med

3.1 The mere suggestion of settlement negotiations

As the "lowest common denominator" of what should be allowed in the context of Arb-Med, legal authors seem to agree that an arbitrator should be permitted to *suggest* settlement negotiations.⁵²

The value added of an arbitral tribunal reminding the parties of the possibility to negotiate is not obvious at the outset. The parties are at any time free to negotiate among themselves and they are usually aware of this possibility.

However, the parties' hesitation to make the first step towards settlement negotiations is frequently regarded as a significant obstacle to an amicable resolution of the dispute.⁵³

The arbitrator's proposal of settlement negotiations could thus considerably contribute to the overcoming of deadlocks. Moreover, such a suggestion often implies the arbitrator's view that neither party is likely to entirely prevail if no settlement can be reached.⁵⁴ This is likely to induce the parties to amicably resolve the dispute rather than to fight the arbitration "through to the bitter end"⁵⁵

General attempts to encourage settlements do however not imply any guidelines as to how the parties may amicably resolve their dispute and what a possible settlement may look like.

In the absence of any sort of starting point or assessment offered by an independent body, the parties may find it difficult to get the ball rolling. Such difficulties are more likely to be overcome if the arbitrator was allowed to engage more proactively in the settlement process.

3.2 The baseball arbitration

Based on the mechanism used for salary disputes between baseball players and their clubs in the US Major League Baseball, the parties to a so-called Baseball Arbitration (also known as "Final Offer Arbitration") agree to submit each a final offer for the settlement of the dispute to the arbitral tribunal.⁵⁶

Based on the parties' agreement, the arbitral tribunal is obliged to issue a final award corresponding to one of the parties' submission, and it is not allowed to modify one of these offers or to opt for a compromise solution lying in between them.⁵⁷

As a result, a party submitting too extreme a position to the arbitral tribunal incurs a high risk that its submission will be disregarded. In

(Continued on page 20)

order to enhance the chance to win the case, the parties are therefore usually reluctant to make unreasonable offers.

This elimination of extreme elements is clearly conducive to settlement.⁵⁸ The settlement rate of 90% reportedly reached in the US Major League Baseball confirms that Final Offer Arbitrations are highly efficient.⁵⁹

Baseball Arbitrations thus appear to encourage the parties to adjust their claims in *quantity* but seem to be less useful where arbitral tribunals have to decide upon a party's liability on a "yes or no basis".⁶⁰

Moreover, as the arbitrator has to choose one out of two - possibly bad - offers, the parties are usually not provided with an elaborated assessment of the strengths and weaknesses of their respective claims. A legally exact and equitable resolution of the dispute can therefore not always be ensured.⁶¹ Parties trying to avoid such a decision may find themselves constrained to settle and to make concessions they would not have made in other circumstances.

3.3 The Envelope Procedure

Arbitrators may also wish to bring mediation elements into the arbitration proceedings by trying to facilitate a settlement between the parties *after* having elaborated a final award. In such a case, the signed and sealed arbitral award is put into a closed envelope.⁶² Subject to the parties' continuing agreement, the arbitrator then conducts a mediation process without disclosing to the parties the content of the award. If the mediation fails, the parties are served with the prepared binding arbitral award.⁶³

This method does not leave any room for concerns regarding the respect of the parties' procedural rights or the tribunal's impartiality. Due to the timing of the mediation sequence it is impossible that the arbitrator's binding award is unduly influenced by any consideration based on the parties' allegations in the mediation.

Moreover, the closed envelope technique implies an important incentive to settle where parties wish to continue their business relationship or, due to their cultural background, by all means favour an amicable resolution of the dispute over adjudication.⁶⁴

However, it is questionable whether parties less familiar with this form of conciliation⁶⁵ would accept an arbitrator, who is exactly aware of the potential outcome of the arbitration, to act in the role of a mediator. Moreover, there is a considerable drawback in relation to time and cost. A full and formal award cannot be elaborated without comprehensive arbitration proceedings.

Hence, lengthy arbitrations and considerable costs caused by the required procedural steps,

such as the exchange of (several) party memorials or the taking of written and oral evidence are not necessarily avoided with this approach. As a consequence, even if a settlement is reached, the parties have to cover the costs of an ordinary arbitration.

Nothing however hinders an arbitrator from trying to facilitate settlement by other means prior to putting the elaborated award into an envelope. Rather than an exhaustive remedy, the closed envelope technique may thus frequently be considered by parties as a

the parties' positions.⁶⁶

Such a preliminary view may be followed by the arbitrator's participation in settlement negotiations.⁶⁷

By sharing its preliminary evaluation of the dispute with the parties, the arbitral tribunal may considerably narrow the range for negotiations and a possible settlement. The arbitrator's thoughts about the risks and chances of each party's case may serve as a starting point or give new momentum to ongoing negotiations. If it is emphasised

that - due to the lack of comprehensive evidence - no decision has been made so far, the parties will generally not feel constrained to settle.⁶⁸

Even if a settlement is not achieved, a preliminary assessment assists the parties in identifying and focusing on issues considered relevant by the arbitral tribunal.⁶⁹ This makes the arbitration process generally more predictable, accountable and eventually more cost effective.

It is to a large extent up to the arbitrator to determine in due consideration of the singularity of each case what a preliminary assessment should include and what issues should rather not be raised at this stage of the proceedings. Some parties may expect the arbitrator to give a rather detailed legal analysis of the dispute. Others may wish to get a mere impression of the arbitrator's "feeling" of the case. Some constellations may allow the arbitrator to communicate its thoughts at an early stage of the proceedings whereas, in other circumstances, this may not appear to be appropriate until a first oral hearing has taken place. Meeting the parties' expectations in this respect requires flexibility, experience and the arbitrator's ability to gain a good sense of the case.⁷⁰

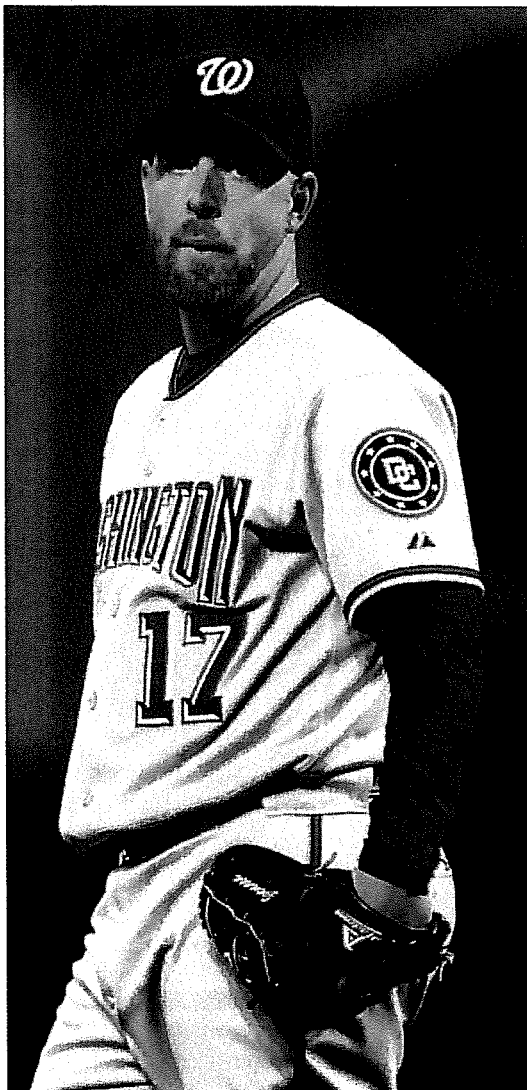
As a general rule, settlement services are most likely to be successful if they are offered subsequently to the first exchange of memorials and possibly prior to the evidentiary hearing.⁷¹

It is only based on the parties' factual and legal allegations and the documentary evidence offered that the arbitral tribunal is usually in a position to make a reliable first assessment of the case.⁷²

Considering the money and time already spent, settlement initiatives may however not appear to be particularly appealing to the parties if they are made after the evidentiary hearing.

Most concerns in the context of the evaluative approach - commonly raised by lawyers with a common law background⁷³ - regard the arbitrator's actual or perceived impartiality.⁷⁴ These fears have not proven to

(Continued on page 21)



Baseball arbitration was featured in Issue 14 (March 2010) of *The ADR Reporter*

last resort to prevent the arbitral tribunal from adjudicating the dispute.

3.4 The Evaluative Approach

Eventually, the arbitral tribunal may encourage settlement by providing the parties with a preliminary evaluation of the case. This often implies the identification of the principal issues considered relevant for the outcome of the case and a first assessment of the legal and evidentiary strengths and weaknesses of

materialise in practice if an arbitrator proceeds in a sufficiently cautious manner.⁷⁵

It is inevitable that an arbitrator makes his own preliminary assessment of a case in one form or another. It does therefore not appear how parties acting in good faith may validly put into question an arbitrator's impartiality based on the mere fact that the arbitrator, for the sake of transparency, decides to share his view with the parties rather than to leave them in the dark about his thoughts until the issuance of the award.

It is also often feared that parties may be forced into settlement by the fact that the arbitrator acting as conciliator issues a binding award if settlement attempts fail.⁷⁶ However, the experience in the court systems in civil law countries shows that an objective assessment of the risks and chances of the parties' submissions does generally not make them feel constrained to settle.⁷⁷ This fear appears to be even less justified in arbitration than court litigation.

Whereas settlement often results in considerable savings for the parties and a reduction of the state courts' workload, there seem to be few economic incentives for arbitrators to exert undue settlement pressure. Admittedly, an arbitrator may be inclined to expect future appointments if respondents with arguably weak cases, in particular, show satisfaction over a successfully facilitated settlement of a dispute.

Empirical evidence however shows that, as a rule, arbitrators refrain from "splitting the baby".⁷⁸ This again seems to underpin the assumption that there is rather little potential for forced settlements in the context of ICA.

It is sometimes also put into question whether parties are willing to make a reasonable settlement proposal in the presence of the arbitral tribunal. It is assumed that parties may refrain from doing so out of fear that, in an ongoing arbitration, this may be regarded as a partial admission by the arbitral tribunal.⁷⁹

This concern is addressed by the Centre for Effective Dispute Resolution Rules for the Facilitation of Settlement in International Arbitration (CEDR Rules) preventing the arbitrator from taking into consideration any allegations made by the parties during the conciliation period.⁸⁰

Moreover, as it is also suggested by the CEDR Rules, the arbitrator after having given a preliminary evaluation of the case, although otherwise remaining in charge of the arbitration, does not necessarily conduct the subsequent settlement negotiations unless the parties explicitly entitle him to do so.⁸¹ Even in this latter event, the parties could easily avoid making settlement proposals themselves by delegating this task to the arbitrator and by

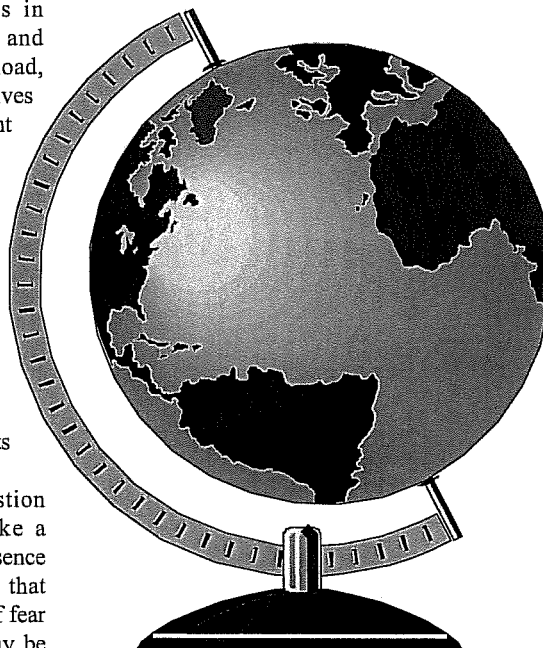
entrusting him to draw the lines of a possible settlement.⁸²

It appears that the concerns raised in relation to the evaluative approach can be appropriately dealt with if an arbitrator observes certain guidelines when engaging in conciliation. Given the apparent advantages mentioned above, this form of hybrid process thus appears most suitable to generally improve the efficiency of ICA.

How to Integrate Mediation into Arbitration

There seems to be a broad consensus that an arbitrator should not engage in conciliation unless such activities are backed by the parties' agreement.⁸³

However, it still remains rather uncertain in what form the consent must be given to minimise the risk of challenges against awards and arbitrators. This may depend on the sort of mediation activities an arbitrator intends to engage in. The applicable standards are not the



same in cases where the parties waive some of their procedural rights to allow the arbitrator to engage in caucusing as in circumstances where the arbitrator constrains himself to the mere suggestion of settlement negotiations.⁸⁴

The following considerations are made in the light of the evaluative approach, which is regarded by the author to be the most promising form of Arb-Med.

Sometimes an oral or even a silent agreement is considered a sufficient basis to validly entrust the arbitrator with the facilitation of a possible settlement.⁸⁵ According to a different view, the parties' written consent is necessary, possibly even at the occasion of two different stages of the arbitration.⁸⁶

In addition to an arbitrator's initial empowerment to conciliate, a written

agreement is sometimes further required for the entitlement to continue acting as an arbitrator in case the settlement attempts previously undertaken fail.⁸⁷

In any event, a party or an arbitrator opposing a potential challenge on the ground of an arbitrator's unsolicited engagement in conciliation could encounter considerable difficulties to evidence an oral agreement. To be on the safe side, any consent by the parties in relation to the arbitral tribunal's ability to act as a conciliator should therefore be given in writing.

The broadest acceptance of settlement facilitation within ICA could probably be reached if the main features and basic rules of Arb-Med were incorporated into the rules of international arbitration institutions. Based on their broad experience, arbitral institutions are in a position to elaborate provisions that appropriately address the parties' needs and expectations.⁸⁸ The parties would comply with the requirement of the written form as soon as institutional rules were referred to in arbitration agreements that necessarily need to be concluded in writing, too.⁸⁹

The prerequisite of an informed consent of the parties⁹⁰ seems to suggest that an arbitrator should not be permitted to act as a conciliator unless - after having made the parties aware of the features of Arb-Med proceedings - explicitly authorised to do so (*opt-in* mechanism). This requirement goes relatively far and it must be feared that it excludes a considerable number of parties from the benefits of hybrid processes.

The parties may also be made familiar with the peculiarities of Arb-Med if they are appropriately advised by their respective legal counsels when negotiating the arbitration agreement. This task does not necessarily have to be carried out by the arbitrator, nor does it seem to be practicable to impose on arbitral tribunals the duty to double-check whether the legal advice previously provided by the parties' respective lawyers was sufficient. Given that a party agreement entitling an arbitrator to conciliate is considerably less likely to be achieved *during* the process than *beforehand*,⁹¹ the validity of such arrangements ought not to depend on whether or not arbitral tribunals take any sort of measure to assure that the parties are adequately informed on Arb-Med processes.

The efficiency of arbitrations is thus most likely to be improved on a broad basis if the arbitrator's ability to give a preliminary evaluation of the case is considered a rule rather than an exception.

This could be achieved by incorporating provisions on Arb-Med into institutional rules on a default or *opt-out* basis. As the evaluative approach does usually not imply a waiver of the parties' right to natural justice⁹², a party

(Continued on page 22)

agreement given *beforehand* by choosing institutional rules providing for the arbitrator's entitlement to conciliate must be considered sufficient.

That way, the parties could still benefit from the arbitrator's unconditional flexibility in determining the right moment and the appropriate way to deliver a first assessment of the case. Any step taken by the arbitrator that would go beyond a mere preliminary evaluation - such as the suggestion of concrete terms for a possible settlement - could still be designed as *opt-in* provisions.⁹³ Based on the principle of party autonomy,⁹⁴ the parties would in any event be free to adjust the agreed conciliation mechanism at any time during the arbitration.

Conclusion

There seems to be a broad consensus that the issue of arbitrations becoming increasingly time and cost intensive can be tackled effectively by encouraging the parties to settle their dispute.

However, there is still a broad range of different opinions as to *how* this could be achieved without compromising the parties' procedural rights.

It is questionable whether the arbitral tribunal's engagement in classic mediation and caucusing is compatible with the parties' right to natural justice and the requirement of arbitrator impartiality. Any efforts made to address these concerns appear to either impair the very essence of classic mediation or to frustrate the purpose of having more cost- and time-effective arbitrations. As a consequence, it seems advisable not to integrate the practice of caucusing into arbitration proceedings at all.

The arbitrator's entitlement to offer the parties a preliminary evaluation of the case is an effective means to significantly enhance the chance of having disputes resolved amicably⁹⁵ without at the same time compromising the parties' procedural rights.

Interestingly, the degree of acceptance of this form of Arb-Med among practitioners with different legal backgrounds surpasses the frequency of its current use.⁹⁶ The partly "unexplored" potential of this technique makes it appear even more promising with regard to the goal of rendering arbitrations more efficient. Concerns related to the arbitrator's impartiality and the parties' need to conduct negotiations without being unduly forced into settlement can be taken into account by introducing international guidelines providing for minimum standards to be respected by arbitrators engaging in conciliation.⁹⁷

A first step towards more uniformity in the field of Arb-Med has been made by the Centre for Effective Dispute Resolution (CEDR) by the establishment of the Rules for

the Facilitation of Settlement in International Arbitration.

The requirement of a written agreement for the arbitrator's entitlement to conciliate could conveniently be complied with if these rules were incorporated into the parties' written arbitration agreement. Although based on a broad consensus of practitioners and arbitral institutions covering all parts of the world⁹⁸, it is unclear whether parties negotiating commercial agreements are already aware of the possibility to make the CEDR Rules a part of their arbitration agreement.

If a critical number of international arbitral institutions integrated provisions along the lines drawn by the CEDR Rules into their institutional rules on an *opt-out* basis, the idea of achieving more efficiency through evaluative conciliation could be promoted on a broader basis and more prominently. As a consequence, cost and time effectiveness could again become one of the appealing assets of international commercial arbitration.

Niklaus Zaugg is the Executive Secretary (Geschäftsführer) of the Center for Conflict Resolution (CCR) at the Faculty of Law at the University of Lucerne in Switzerland.

Endnotes

¹ Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (2010) at 150, 222; Loukas A. Mistelis and Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration* (2006) at [5-2].

² See for instance the ACICA Expedited Arbitration Rules (2008) or the Expedited Procedure according to Art 42 of the Swiss Rules of International Arbitration (2006).

³ Nottage and Garnett, above n 1 at 223; Mistelis and Lew, above n 1 at [5-43].

⁴ Nottage and Garnett, above n 1 at 179.

⁵ Alan L. Limbury, 'Hybrid Dispute Resolution Processes - Getting the Best while Avoiding the Worst of Both Worlds?' (2010) at 5, available on http://www.cedr.com/?location=/library/articles/20100128_274.htm (last accessed on 20 May 2011).

⁶ Gino Lörcher, Enforceability of Agreed Awards in Foreign Jurisdictions (2001) 17(3) *Arbitration International* 275 at 280.

⁷ See Gabrielle Kaufmann-Kohler, When Arbitrators Facilitate Settlement: Towards a Transnational Standard - Clayton Utz/University of Sydney International Arbitration Lecture (2009) 25(2) *Arbitration International* 187 at 193-194, 200 where sports disputes, due to third party interests involved, are mentioned as an example of disputes ineligible for mediation.

⁸ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th ed, 2009) at [4.18].

⁹ Tanja Sourdin, *Alternative Dispute Resolution* (3rd ed, 2008) at [3.05].

¹⁰ Luke Nottage, 'The Procedural Lex Mercatoria: The Past, Present and Future of

International Commercial Arbitration' [2003 =] (2006) 06/51 *Sydney Law School Research Paper* at 22, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838028&download=yes (last accessed on 20 May 2011); Nottage and Garnett, above n 1 at 180.

¹¹ Ibid at 22-23; Redfern and Hunter above n 8 at [1.140].

¹² If a settlement can be reached, the arbitral tribunal can issue an "award by consent"; see Art 26 of the ICC Rules of Arbitration.

¹³ Jacob Rosoff, Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings (2009) 26(1) *Journal of International Arbitration* 89 at 93.

¹⁴ Ibid at 92.

¹⁵ Haig Oghigian, The Mediation/Arbitration Hybrid 2003 20(1) *Journal of International Arbitration* 75 at 77; Nottage and Garnett, above n 1 at 180.

¹⁶ See e.g. the English case of *Glencot Development & Design v Ben Barrett* (2001) BLR 207.

¹⁷ Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) at [4.85, 4.86];

¹⁸ See Art 190(2)

(d) of the Swiss Federal Statute on Private International Law 1987.

¹⁹ Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland - An Updated Statistical Analysis (2010) 28(1) *ASA Bulletin* 82 at 86.

²⁰ Ibid at 87-88.

²¹ In relation to the potential difficulty in scrutinising the requirement of an "informed consent", see below.

²² Nottage and Garnett, above n 1 at 183.

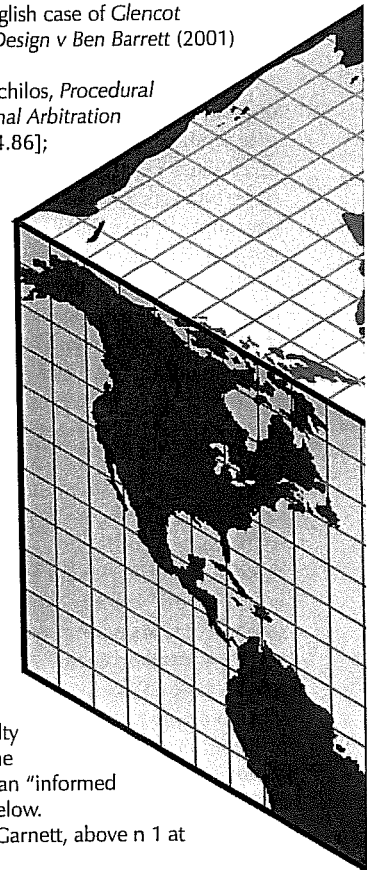
²³ Rosoff, above n 13 at 94 fn 28; see also the judgement of the High Court of New Zealand in *Duncan & Davis Nurseries New Plymouth Ltd. v Honnor Block Ltd.* (2005) CIV 2005-404-2513 at [8, 10] where it was considered relevant whether or not the parties, when waiving the right to challenge, were aware of the situation that could give rise to doubts regarding the arbitral tribunal's impartiality.

²⁴ Nottage and Garnett, above n 1 at 183.

²⁵ Nottage, above n 10 at 23.

²⁶ See Redfern and Hunter, above n 8 at [6.11-6.16]; see also *Suovaniemi v Finland*, Application No. 31737/96 cited in Kaufmann-Kohler, above n 7 at 198.

(Continued on page 23)



²⁷ See Art V(b) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (NYC).

²⁸ See Redfern and Hunter, above n 8 at [6.14-6.16].

²⁹ Nottage and Garnett, above n 1 at 181; Kaufmann-Kohler, above n 7 at 193.

³⁰ Nottage and Garnett, above n 1 at 181-182.

³¹ Gabrielle Kaufmann-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China* (2008) 25(4) *Journal of International Arbitration* 479 at 488.

³² Pursuant to Art 51 of the *Chinese Arbitration Law 1995*, arbitral tribunals are even obliged to do so upon the request of the parties.

³³ I.e. the China International Economic and Trade Arbitration Commission.

³⁴ See Art 40(3) of the CIETAC Rules.

³⁵ See Art 40(8) of the CIETAC Rules.

³⁶ See Kaufmann-Kohler, above n 31 at 491.

³⁷ *Ibid.*

³⁸ See s 2B of the *Hong Kong Arbitration Ordinance 1997* as well as s 17 of the *Singapore International Arbitration Act 2001*.

³⁹ Rosoff, above n 13 at 99.

⁴⁰ See Kaufmann-Kohler, above n 7 at 197.

⁴¹ See s 2B(3) of the *Hong Kong Arbitration Ordinance 1997* as well as s 17(3) of the *Singapore International Arbitration Act 2001*.

⁴² Rosoff, above n 13 at 100.

⁴³ Nottage and Garnett, above n 1 at 182.

⁴⁴ Such an obligation could be stipulated in the parties' arbitration

agreement or a subsequent agreement based on the "recommendation" made in s 8 of the IBA Rules of Ethics for International Arbitrators (1987).

⁴⁵ Limbury, above n 5 at 9.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Michael McIlwraith and John Savage, *International Arbitration and Mediation - A Practical Guide* (2010) at [4-030].

⁴⁹ Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration* (1998) 14(2) *Arbitration International* 157 at 164, fn 12.

⁵⁰ Nottage and Garnett, above n 1 at 182.

⁵¹ Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator* (2005) 21(4) *Arbitration International* 523 at 535.

⁵² Michael Collins, *Do International Arbitral Tribunals have any Obligations to Encourage*

Settlement of the Disputes Before Them? (2003) 19(3) *Arbitration International* 333 at 334.

⁵³ Shahla F. Ali, *Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement among Arbitration Practitioners in East Asia and the West* (2010) 19(2) *Pacific Rim Law Journal* 243 at 266.

⁵⁴ Collins, above n 52 at 334.

⁵⁵ *Ibid.*

⁵⁶ Christian Borris, *Final Offer Arbitration from a Civil Law Perspective - How to Play Baseball in a Soccer Country* (2007) 24(3) *Journal of International Arbitration* 307 at 308.

⁵⁷ David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited* (2008) 24(3) *Arbitration International* 375 at 383.

⁵⁸ Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes* (1999) 3 *The American Review of International Arbitration* 383 at 388-389.

⁵⁹ Borris, above n 56 at 308.

⁶⁰ Rivkin, above n 57 at 383.

⁶¹ Borris, above n 56 at 315.

⁶² Limbury, above n 5 at 7.

⁶³ Klaus Peter Berger, *Integration of Mediation Elements into Arbitration - 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators* (2003) 19(3) *Arbitration International* 387 at 395.

⁶⁴ See Oghigian, above n 15 at 78. The fact that all cases in which the author applied the envelope technique were successful may also be explained by the Japanese nationality of the parties involved and the general preference given by these parties to the amicable resolution of disputes; cf. Nottage, above n 10 at 22.

⁶⁵ In particular parties with a civil law background appear to accept conciliation only if no final decision has been made when judges or arbitrators give their preliminary assessment of the case.

⁶⁶ See Art 5(1) of the CEDR Rules for the Facilitation of Settlement in International Arbitration (2009) (CEDR Rules).

⁶⁷ *Ibid.*; Christian Bühring-Uhle, Gabriele Scherer and Lars Kirchhoff, *The Arbitrator as Mediator - Some Recent Empirical Insights* (2003) 20(1) *Journal of International Arbitration* 81 at 86.

⁶⁸ See Alexander Brunner, *Handelsrichter als Vermittler zwischen Wirtschaft und Recht* (2006) 102 *Schweizerische Juristenzeitung* 428 at 431.

⁶⁹ Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed, 2010) at 182.

⁷⁰ Berger, above n 63 at 400-401.

⁷¹ Luke Nottage, *Arb-Med in Australia: The Time has Come* (December 2007) 5 *ADR Reporter* 8 at [7].

⁷² Berger, above n 63 at 401.

⁷³ Nottage above n 10 at 22.

⁷⁴ Collins, above n 52 at 337.

⁷⁵ Apparently, the Italian case in *Spier v Calzaturificio Tecnica SpA*, 71 F. Supp.2d 279 (S.D.N.Y. 1999) remains the only example of a successful challenge under these circumstances; see Kaufmann-Kohler, above n 7 at 198.

⁷⁶ *Ibid.* at 200.

⁷⁷ The entitlement of courts to facilitate settlements by giving the parties a preliminary view on the factual and legal aspects of a dispute is a long and well established practice of the commercial court in Zurich based on ss 62 and 118(3) of the former *Zurich Civil Procedure Act 1976*. An according provision has been incorporated into Art 223(2) of the new *Swiss Federal Civil Procedure Act 2011* which entered into force on 1 January 2011; See also Brunner, above n 68 at 431.

⁷⁸ Stephanie E. Keer and Richard W. Naimark, *'Arbitrators Do Not "Split the Baby"'* (2001) 18(5) *Journal of International Arbitration* 573 at 574, 578.

⁷⁹ McIlwraith and Savage, above n 48 at [4-030].

⁸⁰ Art 3(4) of the CEDR Rules.

⁸¹ Art 5(1.4) of the CEDR Rules.

⁸² See Art 5(1.3) of the CEDR Rules.

⁸³ See Art V(1)(d) of the NYC which stipulates that the enforcement of an award may be refused if the arbitral procedure was not in accordance with the agreement of the parties; see also Nottage and Garnett, above n 1 at 249-250; Kaufmann-Kohler, above n 7 at 198; Collins, above n 52 at 335.

⁸⁴ See above.

⁸⁵ See Berger, above n 63 at 393 with further references in fn 36 as well as Rule 47 of the Japanese Commercial Arbitration Association Rules 2004 (JCAA Rules) and Art 38 paras 4 and 5 of the *Japanese Arbitration Act 2003*.

⁸⁶ See Nottage and Garnett, above n 1 at 182-183.

⁸⁷ See The Chartered Institute of Arbitrators (Australia) Submission upon a Review of the International Arbitration Act 1974 at 18, available on [www.ag.gov.au/.../\(3A6790B96C927794AF1031D9395C5C20\)~Submission...CIARB.../Submission+of+CIARB.PDF](http://www.ag.gov.au/.../(3A6790B96C927794AF1031D9395C5C20)~Submission...CIARB.../Submission+of+CIARB.PDF) (last accessed on 20 May 2011).

⁸⁸ See the Final Report of the CEDR Commission on Settlement in International Arbitration (2009) at [4.5.4], available on www.cedr.com/.../arbitration_commission/Arbitration_Commission_Doc_Final.pdf (last accessed on 20 May 2011).

⁸⁹ Redfern and Hunter, above n 8 at [2.13-2.21].

⁹⁰ See Collins, above n 52 at 341.

⁹¹ See Nottage and Garnett, above n 1 at 182.

⁹² See above.

⁹³ See Art 5(1.3) of the CEDR Rules.

⁹⁴ See Redfern and Hunter, above n 8 at [6.08-6.09].

⁹⁵ See Ali, above n 53 at 270-272 where reference is made to a survey revealing that a more realistic view about the parties' chances of winning was considered to be the most important incentive for settlement.

⁹⁶ Bühring-Uhle, Scherer and Kirchhoff, above n 67 at 87.

⁹⁷ See Nottage and Garnett, above n 1 at 150-151.

⁹⁸ See Appendix 5 to the Final Report of the CEDR Commission on Settlement in International Arbitration (2009).