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Clayton Utz / University of Sidney International Arbitration Lecture

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# When Arbitrators Facilitate Settlement: Towards a Transnational Standard\*

*Clayton Utz/University of Sydney International Arbitration Lecture*

by GABRIELLE KAUFMANN-KOHLER\*\*

## ABSTRACT

*In the last decades, the law and practice of international arbitration worldwide has increasingly evolved towards greater uniformity. There remain though a few trouble spots for which harmonization appears more difficult to achieve. The role of the arbitrator as settlement facilitator appears to be one of these trouble spots. At the same time, the search for increased efficiency is one of the main concerns of contemporary justice, including arbitration. Hence, the topic of this article which examines the present state of the law and practice to determine whether a uniform standard may be emerging and what its content may be.*

*On the basis of comparative research and field observation, the author notes that the cultural and legal background of an arbitrator may well influence the latter's tendency to actively contribute to the amicable settlement of the dispute or not.*

*The author then reviews the pros and cons of an arbitrator becoming involved in settlement facilitation. The main advantage is the increased efficiency of the dispute settlement process, while the main drawback lies in the threat to the impartiality of the arbitrator should the settlement fail.*

*In the light of her analysis, the author concludes that a transnational standard may well emerge on this issue as it has for many other topics of arbitration law in the recent past. She then sketches the contours of such standard. In brief, an arbitrator acting to facilitate settlement must seek the parties' informed consent to the process and safeguard due process and equal treatment and his or her impartiality. These requirements impose certain procedures which distinguish settlement facilitation in arbitration from mediation, yet make it a valuable tool to increase the efficiency of dispute resolution.*

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THIS LECTURE is devoted to the activity of arbitrators facilitating settlement. It seeks to establish whether current practice in international arbitration is moving towards a transnational standard. First, it defines the topic and sets out the reasons for reviewing it. Secondly, it addresses the present state of the law and practice, and then, thirdly, examines the pros and cons of an arbitrator facilitating settlement. Fourthly and last, it seeks to understand whether we are moving towards a uniform practice and, if so, what such a practice may be.

## I. WHAT IS ARBITRATOR-FACILITATED SETTLEMENT AND WHY STUDY IT?

The topic of this lecture deals with the arbitrator promoting settlement *within* arbitration proceedings that are already pending. It does not deal with separate proceedings of mediation or conciliation and arbitration, nor does it deal with other mechanisms in which different individuals act as arbitrator and as mediator or conciliator. In other words, it is concerned with cases in which the *same person* acts as both arbitrator and settlement facilitator in *one and the same* proceeding.<sup>1</sup>

The arbitrator can facilitate settlement in different ways. He or she can simply ask a few well-targeted questions at the right time, which may shed light on the weaknesses of a party's case and trigger settlement discussions between the parties. He or she can suggest to the parties to settle their dispute in direct negotiations. The arbitrator can also become more involved, and these are the situations of interest here. Indeed, the arbitrator can offer to provide his or her own assessment of the dispute, which will serve as a basis for the parties' direct negotiations, or even offer to assist them in their settlement discussions. He or she can do so either on his or her own motion or at the request of one or both parties.

Why review the legal significance of these situations and the role of the arbitrator as settlement facilitator? There are three main reasons why this topic deserves attention. First, it goes to the efficiency of dispute resolution. We live in a time when many complain that justice, be it judicial or arbitral, is too slow, too expensive, and too cumbersome. Furthering the efficiency of dispute settlement can obviously contribute to improving the administration of justice. The arbitrator taking the role of a conciliator or settlement facilitator may be one of the ways to increase such efficiency.

Secondly, this topic goes to the very core of arbitration. What is arbitration? What is the arbitrator's mission? Is it to resolve a dispute *by a binding decision*? Or

<sup>1</sup> See Hilmar Raeschke-Kessler, 'The Arbitrator as Settlement Facilitator' in (2005) 21 *Arb. Int'l* 323; Michael Schneider, 'Combining Arbitration with Conciliation' in *ICCA Congress Series No. 8* (Seoul 1996), p. 57; Klaus-Peter Berger, 'Integration of Mediation Elements into Arbitration: Hybrid Procedures and "Intuitive" Mediation by International Arbitrators' in (2003) 19 *Arb. Int'l* 387; Harold I. Abramson, 'Protocols for International Arbitrators who Dare to Settle Cases' in (1999) 10 *Am. Rev. Int'l Arb.* 1 at p. 3; Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (1996); David W. Plant, 'Mediation in International Commercial Arbitration: Some Practical Aspects' in (1998) *ILSA J Int'l and Comp. L* (Spring) 329; Christian Bühring-Uhle, Gabriele Scherer and Lars Kirchhoff, 'The Arbitrator as Mediator: Some Recent Empirical Insights' in (2003) 20(1) *J Int'l Arb.* 81.

is it simply to *resolve a dispute*? In the latter case, an arbitrator could promote settlement. In the former, he or she could not. These are fundamental issues that deal with the role of the judge or arbitrator in society.

Thirdly, this is a topic on which there appears to be no established transnational consensus so far. Starting with the New York Convention, followed by the UNCITRAL Arbitration Rules and the UNCITRAL Model Law, together with a series of national laws and institutional rules as well as soft law texts such as the IBA Rules on the Taking of Evidence, there has been a powerful wave of harmonisation of the law and practice of international arbitration in the last decades. The beauty of this harmonisation process is that it merges very different procedural cultures. This comes as no surprise. International arbitration is a place where arbitrators and counsel trained in different legal systems (along with the parties they represent) meet and work together to achieve a result – the resolution of a dispute. They have no choice but to find some common ground.<sup>2</sup> There are many examples of harmonisation in the law and practice of arbitration: separability of the arbitration agreement, *Kompetenz-Kompetenz*, limited remedies against the award, party autonomy, and document production, to name just a few.

In this vast movement of convergence, there remain a few trouble spots. The role of the arbitrator as settlement facilitator in international arbitration appears to be one of those remaining differences. Obviously, the goal is not to do away with all divergences in arbitration. Indeed, the world is richer as a result of differences. In domestic arbitration, especially in areas where a weaker party needs protection, national laws show many differences.<sup>3</sup> However, in international arbitration, where the activities giving rise to disputes are transnational or global in nature and where the participants come from different national and legal backgrounds or cultures, divergences are not desirable.

## II. THE STATE OF THE LAW AND PRACTICE

Before addressing the law and practice in international arbitration, it may be helpful to look to the state of the law in national courts. One may have doubts about the merits of referring to the practice of national courts when dealing with a topic pertaining to international arbitration and transnational notions. Regardless, experience and empirical research show that arbitration practitioners often approach the role of the arbitrator by referring to the rules applicable in their home courts.

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<sup>2</sup> See e.g., Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' in (2003) 36 *Vanderbilt J Transnational L* 1313 (providing citations of other writings on the harmonisation of international arbitration).

<sup>3</sup> For a discussion of the residual roles of national legislation at a time when, with the advent of globalisation, the power to regulate arbitration has shifted from states to private actors, see Gabrielle Kaufmann-Kohler, 'Global Implications of the U.S. Federal Arbitration Act (FAA): the Role of Legislation in International Arbitration' in (2005) 20 *ICSID Rev. – FILJ* 339.

(a) *State of the Law in National Courts*

In the Romano-Germanic tradition, it is part of a court's mission to seek to settle the dispute before it.<sup>4</sup> German courts, for instance, have a continuing duty throughout the proceedings to pay attention to settlement possibilities. In principle, they will call a pre-hearing settlement session with the parties in person (*Güteverhandlung*), during which they ask questions and assess the merits of the case. Such a session can also be held at a later stage of the proceedings, including at the appellate stage. Moreover, the court may refer the parties to another judge for conciliation purposes or even to out-of-court alternative dispute resolution (ADR).<sup>5</sup> The reason for this practice, which reflects a deeply rooted tradition,<sup>6</sup> is to increase the efficiency of dispute resolution. Indeed, it is thought that resolution through a settlement is preferable to resolution through a judgment.<sup>7</sup> The same approach prevails in certain parts of Switzerland<sup>8</sup> and in Austria.<sup>9</sup>

The French Code of Civil Procedure contains an express provision stating that conciliation falls within the scope of a court's attributions.<sup>10</sup> Yet, French judges are reluctant to become involved in the settlement of their own cases unless the parties specifically agree to their involvement. Usually, judges do not attempt to conciliate cases they are adjudicating, but, rather, choose to refer those cases to other judges for settlement, apparently out of a fear that the conciliation attempt could somehow dilute their judicial power.<sup>11</sup>

Traditionally, common law courts under the adversarial system have been entrusted with adjudicating, not settling, disputes.<sup>12</sup> As Judith Resnik eloquently

<sup>4</sup> See Martin Shapiro, *Courts: a Comparative and Political Analysis* (1981), pp. 2, 8–9, 126–127. See also, Thomas Clay, *L'arbitre* (2001), para. 207 et seq.

<sup>5</sup> See German Code of Civil Procedure (ZPO), s. 278. On this provision, see Adolph Baumbach, *Zivilprozessordnung* (2007), s. 278; Hans-Joachim Musielak, *Kommentar zur Zivilprozessordnung* (2007), s. 278.

<sup>6</sup> In particular, it can be traced back to s. 110 of the Jünger Reichsabschied of 1654 (available at [www.rzuser.uni.heidelberg.de/~cd2/drw/t/JRALaufs.htm](http://www.rzuser.uni.heidelberg.de/~cd2/drw/t/JRALaufs.htm)), which was the source of the Prussian General Code of Jurisdiction of 1793. That text stated that the judge was to act as conciliator to avoid 'losses of time and money' and 'the animosities and asperities that can easily occur'. It continued to state that the judge had to settle 'in all earnest' and at any moment of the proceedings. This provision was in essence integrated in s. 279 of the 1877 German Code of Civil Procedure.

<sup>7</sup> In particular, see Baumbach, *supra* n. 5 at s. 278 n. 6.

<sup>8</sup> See e.g., ZPO Zurich, arts. 62 and 118(1); Richard Frank, Hans Sträuli and Georg Messmer, *Kommentar zur zürcherischen Zivilprozessordnung* (1997), p. 424; see also, Swiss Civil Procedure Bill, art. 122(3); on this practice, see Peter Nobel, 'Vergleich und Urteil-Konkurrenz zweier Erledigungsformen' in Peter Gauch, Franz Werro and Pascal Pichonnaz, *Mélanges en l'honneur de Pierre Tercier* (2008), and Werner Wenger, 'The Role of the Arbitrator in Bringing about a Settlement' in *Best Practices in International Arbitration* (ASA Special Series, 2006), p. 139.

<sup>9</sup> See Austrian Code of Civil Procedure (ZPO), s. 204(1).

<sup>10</sup> See French Code of Civil Procedure (NCPC), art. 21, which is applicable to arbitration pursuant to NCPC, art. 1460.

<sup>11</sup> See François Ruellan, 'Les modes alternatifs de résolution des conflits: pour une justice plurielle dans le respect du droit' in (1999) *JCP G*, étude no. 19-135; Bruno Oppetit, 'L'arbitrage, médiation et conciliation' in (1984) *Rev. Arb.* 308; Yvon Desdevises, 'Remarques sur la place de la conciliation dans les textes récents de procédure civile' in (1981) *Recueil Dalloz, Chron.* 32, 241.

<sup>12</sup> See generally, John E. Coons, 'Approaches to Court Imposed Compromises: the Uses of Doubt and Reason' in (1964) 58 *Nw. UL Rev.* 750.

explained 25 years ago, until recently, the US legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially.<sup>13</sup> Along this same line of reasoning, rule 16 of the original 1938 Federal Rules of Civil Procedure, which dealt with pre-trial procedures, made no mention of settlement,<sup>14</sup> thus reflecting the notion that the drafters intended to limit the judge's pre-trial role to trial preparation.<sup>15</sup> This situation started to change in the early 1980s when Resnik and others helped launch a debate in the United States about 'judicial management' and 'managerial judges' that stemmed primarily from frustrations over the costs, delays and formalism of adjudication.<sup>16</sup> In 1983, a new provision of rule 16 of the Federal Rules of Civil Procedure allowed courts a measure of discretion concerning settlement:

In any action, the court may *in its discretion* direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as ... facilitating the settlement of the case.<sup>17</sup>

Rule 16 went on to provide that 'the participants at any conference under this rule may consider and take action with respect to ... the possibility of settlement or the use of extrajudicial procedures to resolve the dispute'.<sup>18</sup> As courts were participants in these pre-trial conferences, this rule allowed them to take action to promote settlement. The 1993 amendment to Rule 16 reinforced the courts' authority to take an active role in encouraging settlement:

At any conference under this rule consideration may be given, and the court may take *appropriate action*, with respect to ... settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.<sup>19</sup>

There are no express rules or limits set concerning what constitutes 'appropriate action', apart from the broad objectives provided at the beginning of rule 16, including the discouragement of 'wasteful pretrial activities'.<sup>20</sup> Therefore, it essentially lies within a judge's discretion to determine the appropriate measures for facilitating the resolution of the dispute before the court.

<sup>13</sup> Judith Resnik, 'Managerial Judges' in (1982) 96 *Harv. L. Rev.* 376.

<sup>14</sup> Fed. R. Civ. P. 16 (1938).

<sup>15</sup> See e.g., David L. Shapiro, 'Federal Rule 16: a Look at the Theory and Practice of Rulemaking' in (1989) 137 *U Pa. L. Rev.* 1969 at pp. 1980–1981.

<sup>16</sup> See e.g., Resnik, *supra* n. 13; Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (1984), p. 20; Marc Galanter, 'A Settlement Judge, not a Trial Judge': Judicial Mediation in the United States' in (1985) 12 *J. L. and Soc'y* 1.

<sup>17</sup> Fed. R. Civ. P. 16(a)(5) (1983) (emphasis added).

<sup>18</sup> Fed. R. Civ. P. 16(c)(7) (1983).

<sup>19</sup> Fed. R. Civ. P. 16(c)(9) (1993) (emphasis added).

<sup>20</sup> Fed. R. Civ. P. 16(a)(3) (1993).

Many US courts have made it common practice to have special judges handle settlements.<sup>21</sup> The main reason for referring a case to another judge for settlement is to avoid the parties feeling coerced into settling because the settlement initiative comes from the very person who may later adjudicate the dispute.<sup>22</sup> The US Model Code of Judicial Conduct specifically states that the courts should facilitate settlement, but that parties 'should not feel coerced into surrendering their right to have the controversy resolved by the courts'.<sup>23</sup> Admittedly, there is a fine line between a judge coercing settlement and a judge facilitating settlement. Nonetheless, the facts show that certain judges do settle their own cases and do not hesitate to caucus or meet separately with the parties.<sup>24</sup> Moreover, courts have seen involvement in settlement negotiations as being appropriate for a judge on numerous occasions.<sup>25</sup>

In the United Kingdom, the development in favour of ADR came in 1996 with the reforms proposed in the Woolf Report, which essentially proposed that the courts 'encourag[e] and assist ... the parties to settle cases or, at least, to agree on particular issues' and 'encourag[e] the use of ADR'.<sup>26</sup> This proposal was codified in rule 1.4 of the Civil Procedure Rules:

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes—...
  - (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.<sup>27</sup>

Therefore, the UK approach of allowing courts to get actively involved with settlement in the name of case management is not unlike that adopted in the United States under rule 16 of the Federal Rules of Civil Procedure.

<sup>21</sup> See Peter Lanka, 'The Use of Alternative Dispute Resolution in the Federal Magistrate Judge's Office: a Glimmering Light Amidst the Haze of Federal Litigation' in (2005) 36 *UWLA L Rev.* 71 at p. 88; R. Lawrence Dessem, 'The Civil Justice Reform Act: the Role of the Federal Magistrate Judge in Civil Justice Reform' in (1993) 67 *St. John's L Rev.* 799 at pp. 818–821.

<sup>22</sup> See Edward Brunet, 'Judicial Mediation and Signaling' in (2003) 3 *Nev. LJ* 232 at p. 248.

<sup>23</sup> Model Code of Judicial Conduct, Canon 3B(8) cmt (2003).

<sup>24</sup> See generally, Daisy Hurst Floyd, 'Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement' in (1995) 26 *Ariz. St. LJ* 45 at pp. 53–56; Galanter, *supra* n. 16 at p. 7; Harold Baer, Jr., 'History, Process, and a Role for Judges in Mediating their Own Cases' in (2001) 58 *NYU Ann. Sur. Am. L* 131; Sylvia Shaz Shweder, 'Judicial Limitations in ADR: the Role and Ethics of Judges Encouraging Settlements' in (2007) 20 *Geo. J Legal Ethics* 51.

<sup>25</sup> See e.g., *Wiley v. United Parcel Service, Inc.*, 11 Fed. Appx. 181, 182 (4th Cir. 2001); *In re Martinez-Catala*, 129 F.3d 213, 216–18 (1st Cir. 1997); *Johnson v. Shaker Heights City School District*, 2007 U.S. Dist. LEXIS 17963 (N.D. Ohio 2007) at \*5–10; *Bell v. Johnson*, 404 F.3d 997, 1005 (6th Cir. 2005). See also, Hurst Floyd, *supra* n. 24 at pp. 70–72 (discussing several cases where the trial judge's active involvement in settlement negotiations was deemed acceptable).

<sup>26</sup> See generally, Lord Woolf MR, *Access to Justice, Final Report* (1996), ch. 1, para. 7(d) and ch. 1, para. 16(b)–(c), available at [www.dca.gov.uk/civil/final/index.htm](http://www.dca.gov.uk/civil/final/index.htm). See also, Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice* (2nd edn, 1999), pp. 28–29.

<sup>27</sup> Civil Procedure Rules 1998 (CPR), Rule 1.4(1)–(2), available at [www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part01.htm#rule1\\_4](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm#rule1_4)

To summarise, with regard to judicial involvement in settlement, there is a strong movement in favour of settlement and away from adjudication for reasons of efficiency.

*(b) Arbitration Law*

Most national arbitration statutes are silent on the acceptability of an arbitrator becoming involved in settlement. This is true of the UNCITRAL Model Law, which has been adopted in, or has influenced to varying extents, the laws of a large number of countries. There are exceptions, however.<sup>28</sup> For instance, the Hong Kong and Singapore Arbitration Acts provide that the arbitrator may act as conciliator.<sup>29</sup> These provisions are undoubtedly the result of the influence of the Chinese tradition, which will be discussed in further detail below.

Institutional arbitration rules are also generally silent on the acceptability of an arbitrator becoming involved in settlement. Here again, there are a few exceptions, for instance, in Germany<sup>30</sup> and, predominantly, in Asia.<sup>31</sup> In the area of investment arbitration, the ICSID Arbitration Rules provide that the tribunal may hold a conference at the request of the parties 'to consider the issues in dispute with a view to reaching an amicable settlement'.<sup>32</sup>

The Code of Arbitration for Sports also is worth mentioning. Under the Code, the arbitral tribunal may conciliate in commercial disputes, but not in appeals from sanctions of sports governing bodies for disciplinary or doping offences.<sup>33</sup>

<sup>28</sup> There is in particular an exception in s. 27 of the Western Australia Commercial Arbitration Act 1985, which provides: '(1) Parties to an arbitration agreement ... (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or (b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire), whether before or after proceeding to arbitration, and whether or not continuing with the arbitration. (2) Where ... (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute, no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute. (3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1)' (emphasis added). Western Australia Commercial Arbitration Act 1985, s. 27 (Austl.), available at [www.austlii.edu.au/au/legis/wa/consol\\_act/caa1985219/s27.html](http://www.austlii.edu.au/au/legis/wa/consol_act/caa1985219/s27.html)

<sup>29</sup> Hong Kong Arbitration Ordinance (2000), s. 2B(1), provides that '[i]f all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator'. International Arbitration Act of Singapore (2002), art. 1 (1) adopts the same wording.

<sup>30</sup> DIS Rules, art. 32(1) ('At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute').

<sup>31</sup> For instance, CIETAC Arbitration Rules 2005, art. 40, provides that, 'where both parties have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings', and further, 'where conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award'. Beijing Arbitration Commission Arbitration Rules 2004 ('BAC Rules 2004'), art. 38, also provides that 'the arbitral tribunal may, at the request of both parties or upon obtaining the consent of both parties, conciliate the case in a manner it considers appropriate'. Under the special provisions for international commercial arbitration, BAC Rules 2004, art. 56, provides similarly.

<sup>32</sup> ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), rule 21(2).

<sup>33</sup> The Code provides for the possibility of conciliation in the context of the ordinary arbitration procedure (art. 42), but not of the appeals procedure.



Such offences are not eligible for separate mediation either.<sup>34</sup> The reason for excluding this category of disputes from negotiated settlement lies in the interests at stake. A doping sanction is comparable to a criminal sanction. It affects the rights of other competitors,<sup>35</sup> as well as the interests of the sports community and the public in general. It also raises issues concerning the fairness of the competition and public health. A settlement between a sports federation and an athlete about a ban for a doping offence would breach equal treatment between athletes, which is a fundamental principle of sports law.<sup>36</sup> A 'plea bargaining logic' (to use the terms of the Swiss Supreme Court)<sup>37</sup> would prevent the application of the law,<sup>38</sup> and would lead to an intolerable breach of equal treatment in view of the strong public interest component involved.<sup>39</sup> Regardless of the reason for excluding this category, this shows that there may be entire categories of disputes that do not lend themselves to settlement. This is an aspect that one needs to bear in mind when it comes to proposing a transnational rule on the role of the arbitrator as settlement facilitator.

A recent development also deserves attention in this context. The Guidelines on Conflicts of Interest of the International Bar Association (IBA) provide that an arbitrator's impartiality is not affected by his or her involvement in settlement, but that if settlement fails and the arbitration continues, the arbitrator should resign if he or she considers that he or she cannot perform his or her duties

<sup>34</sup> CAS Mediation Rules, art. 1; see Ousmane Kane, 'The CAS Mediation Rules' in Ian Blackshaw, Robert Siekman and Janwillem Soek (eds.), *The Court of Arbitration for Sport 1984–2004* (2006), p. 195, stating that the Code submits such disputes to the appeal arbitration procedure, 'given the need to have a position of principle rather than a negotiated solution for these issues'. In the same sense, see Christopher Newmark, 'Is Mediation Effective for Resolving Sports Disputes?' in Ian Blackshaw (ed.), *Mediating Sports Disputes, National and International Perspectives* (2002), pp. 78, 82 *in fine*.

<sup>35</sup> See Newmark, *supra* n. 34.

<sup>36</sup> See Antonio Rigozzi, *L'arbitrage international en matière de sport* (2005), no. 491.

<sup>37</sup> See the so-called 'Chinese Swimmers case', Swiss Federal Supreme Court, Judgment of 31 March 1999, 5P83/1999, published in *Digest of CAS Awards II, 1998–2000*, p. 767 at p. 771.

<sup>38</sup> See Rigozzi, *supra* n. 36, citing Bruno Oppetit, *Théorie de l'arbitrage* (1998), p. 36: 'en ce qu'elle tend d'avantage à un règlement en opportunité qu'en droit strict et en ce qu'elle cherche plus à dissoudre le litige qu'à le résoudre, la médiation ne contribue pas à valoriser la règle de droit'. Or in this author's free translation: 'Because it aims more at a settlement taking into account the interests involved rather than the legal positions and seeks to dissolve rather than resolve a dispute, mediation does not further the rule of law'.

<sup>39</sup> For the sake of completeness, one should mention that in certain jurisdictions, in particular France and Italy, disciplinary disputes other than doping cases are subject to (mandatory or optional) conciliation. See art. 19 of French Law no. 84-610 of 16 July 1984 on Sports (as amended) and art. 4 of the Regulations of the Chamber for Conciliation and Arbitration of Sports Disputes of the Italian National Olympic Committee; see also, descriptions in Rigozzi, *supra* n. 36 at no. 49; Bernard Foucher, 'Conciliation as a Way of Resolving Sports Related Disputes in France' in Blackshaw, *supra* n. 34 at p. 67; Jean-Christophe Lapouble, 'Sport, la nouvelle loi sur le sport numéro 2000-627 du 6 juillet 2000' in (2001) *JCP G Semaine Juridique (édition générale)*, 6 July, no. 23, pp. 1093–1099; Jean-Pierre Karaquillo, 'Le préalable obligatoire de conciliation devant le Comité national olympique et sportif français' in *Arbitration of Sports Related Disputes* (ASA Special Series No. 11, 1998), p. 59. One should also mention that, in practice, if one disregards the concerns about public interest and equal treatment, no rule prevents a settlement between an athlete and his or her governing body over a disciplinary sanction even in a doping case. See the examples provided by Rigozzi, *supra* n. 36, citing the 'Chinese Swimmers case', *supra* n. 37. See also, the settlement in the doping dispute between the skater Kyoko Ina and USADA: available at [www.usantidoping.org/files/active/resources/press\\_releases/PressRelease\\_10\\_25\\_2002.pdf](http://www.usantidoping.org/files/active/resources/press_releases/PressRelease_10_25_2002.pdf); [www.usantidoping.org/files/active/resources/press\\_releases/PressRelease\\_1\\_16\\_2003\[1\].pdf](http://www.usantidoping.org/files/active/resources/press_releases/PressRelease_1_16_2003[1].pdf).

objectively as a result of his or her involvement in the settlement attempts.<sup>40</sup> This development is interesting because the Guidelines were drafted on the basis of reports on national laws by a working group of practitioners in which all legal traditions were represented. It can thus be viewed as a synthesis of the different legal traditions involved.

Similarly, the IBA Rules of Ethics for International Arbitrators accept the idea of a tribunal 'making proposals for settlement', provided that the parties agree and the proposals are made 'to both parties simultaneously, and preferably in the presence of each other'.<sup>41</sup> Finally, another recent development deserves mention. The Centre for Effective Dispute Resolution (CEDR) has set up a Commission, co-chaired by Lord Woolf of Barnes and this author, to draft best practice guidelines on arbitrators' facilitating settlement.<sup>42</sup> These guidelines which, among other sources, are inspired by a first version of this article, are in the course of finalisation at the time of writing.

### *(c) Arbitration Practice*

In practice, what do arbitrators do, or not do, when it comes to settlement? Whether they become involved or not in the cases before them obviously depends on the dispute, on the wishes of the parties, and also on their own legal background or culture. Two illustrations demonstrate this last point.

The author recently carried out a review of over 60 consent awards issued under the ICC Rules between 2003 and 2006.<sup>43</sup> On the face of the awards reviewed, it was clear that the arbitrators had actively contributed to bringing about a settlement in 13 cases. Out of these 13 cases, six were presided over by a German or Swiss arbitrator. In addition, these cases involved seven party-appointed arbitrators of these two nationalities.<sup>44</sup> Furthermore, they comprised

<sup>40</sup> See IBA Guidelines on Conflicts of Interest in International Arbitration (2004), s. 4(d): 'An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings'.

<sup>41</sup> See IBA Rules of Ethics for International Arbitrators (1987), s. 8.

<sup>42</sup> CEDR Commission on Settlement in International Arbitration. See [www.cedr.com/index.php?location=/news/archive/20070710\\_277.htm](http://www.cedr.com/index.php?location=/news/archive/20070710_277.htm)

<sup>43</sup> Gabrielle Kaufmann-Kohler and Victor Bonnin, 'The Arbitrator as Conciliator: a Statistical Approach of the Relation between an Arbitrator's Role and his/her Legal Culture' in (2007) 18(2) *ICC Bull.* 81.

<sup>44</sup> One may object that Swiss nationality is, in any event, the one most represented in ICC tribunals ((2003) 14(1) *ICC Bull.* 12; (2004) 15(1) *ICC Bull.* 11; (2005) 16(1) *ICC Bull.* 9; (2006) 17(1) *ICC Bull.* 9; (2007) 18(1) *ICC Bull.* 10), and therefore no inference can be drawn on the role of an arbitrator's legal culture from these figures. This may be true for Swiss arbitrators. It is not for German arbitrators, who ranked only fifth among the most frequently appointed arbitrators, while English and French arbitrators are more often appointed and do not appear to be predominant among the tribunals contributing to the settlement of disputes.

tribunals composed of Latin-American nationals exclusively. Although the sampling is limited,<sup>45</sup> it is interesting to note that all of these arbitrators were from legal backgrounds where courts facilitate settlement.<sup>46</sup>

Another example of the influence of the legal culture of arbitrators in determining whether they participate in settlement is the practice of Chinese tribunals. At different points in time, Chinese philosophy has relied on two competing schools of thought that relate to social organisation and thereby to dispute settlement: Confucianism and legalism.<sup>47</sup> Legalists consider that social harmony can only be achieved by strict state control, which translates into top-down adjudicative resolution of disputes. Legalism was dominant until the third century BC, when Confucianism was imposed.<sup>48</sup> Confucianists consider that social harmony can only be achieved by the avoidance of disputes,<sup>49</sup> with the result that settlement becomes the only respectable way of resolving differences.<sup>50</sup> Consequently, the role of courts shifted towards conciliation and mediation as a primary objective, with adjudication being secondary.<sup>51</sup>

Bearing this background in mind, it is not surprising that Chinese arbitrators engage in settling disputes. This author investigated Chinese methodology in a series of interviews with Chinese arbitrators acting mainly for CIETAC, as well as for the Beijing Arbitration Commission and Wuhan Arbitration Commission.<sup>52</sup> According to the arbitrators interviewed, Chinese arbitrators systematically ask the parties at the beginning of the hearing whether they wish the tribunal to assist them in reaching an amicable solution. Although the exact percentage varies depending on the interviewee, one can estimate that the response is affirmative in about 50 per cent of the cases. Chinese arbitrators tend to engage in private

<sup>45</sup> This survey gives only a partial view. Indeed, for practical reasons, it was not possible to include settlements brought about with the assistance of the arbitrators that were not incorporated in a consent award and merely resulted in the withdrawal of a claim. Moreover, more comprehensive forensic research would have to review awards issued under the auspices of other institutions as well.

<sup>46</sup> For German and Swiss law, see discussion and citations *supra*; for the pertinent Latin American legal systems, see Brazilian Code of Civil Procedure, art. 125(iv) and Argentine Code of Civil Procedure, arts. 309, 843 and 849.

<sup>47</sup> See Simon Roberts and Michael Palmer, *Dispute Processes* (2nd edn, 2005), pp. 11–12.

<sup>48</sup> *Ibid.*

<sup>49</sup> The Chinese conception of social harmony is based on the concept of *Li*, which includes rituals that seek to 'facilitate communication and ... foster a sense of community'. Roger Ames and Henry Rosemont, *The Analects of Confucius: a Philosophical Translation* (1998), p. 51. On an axiological scale, *Li* is above the concept of *Fa*, which relates to a compulsive and punitive imposition of order. See Scott Donahey, 'Seeking Harmony: Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?' in (1995) *DRJ* (April) 74 at pp. 74–75; Bühring-Uhle, *supra* n. 1 at p. 276.

<sup>50</sup> In China, the art of compromise is called *Jiang*. See Jerome A. Cohen, Neil Kaplan and Peter Malanczuk, *Arbitration in China: a Practical Guide* (2004), pp. 1–50. See also, Johannes Trappe, 'Conciliation in the Far East' in (1989) 5 *Arb. Int'l* 173; Donahey, *supra* n. 49; James T. Peter, 'Med-Arb in International Arbitration' in (1997) 8 *Am. Rev. Int'l Arb.* 83 at p. 107.

<sup>51</sup> See generally, Roberts and Palmer, *supra* n. 47 at pp. 11–12; Sybille van der Sprenkel, *Legal Institutions in Manchu China* (1962), pp. 135–136. See also, Gabrielle Kaufmann-Kohler and Kun Fan, 'Integrating Mediation into Arbitration: Why it Works in China?' in (2008) 25 *J Int'l Arb.* 479; Kun Fan, 'Arbitration in China: Practice, Legal Obstacles and Reforms' in (2008) vol. 19/no. 2 *ICC Bulletin*.

<sup>52</sup> For a detailed discussion of the Chinese practice of combining mediation with arbitration, see Kaufmann-Kohler and Fan, *supra* n. 51.

meetings with the parties and in shuttle diplomacy. They do not hesitate to meet separately with each party. However, Chinese arbitrators appear to refrain from giving assessments of the merits of the case, because they consider that expressing an opinion on the outcome would be improper and would put their impartiality in jeopardy.<sup>53</sup>

### III. PROS AND CONS OF ARBITRATORS FACILITATING SETTLEMENT

This section examines what considerations determine the law and practice just set out. What is the underlying rationale? What are the advantages and drawbacks of the judge or arbitrator promoting settlement? The pros and cons are important because they ideally should shape the type of activity in which the arbitrator may engage in support of settlement, an issue to which we will return.

The main advantage obviously lies in the increased efficiency of the dispute resolution process. It encompasses all the benefits that usually are attributed to settled, rather than decided, outcomes. These benefits arise from any amicable settlement, be it reached in direct negotiation, by way of separate mediation, or with the assistance of an arbitrator. Is there an added value in having settlement facilitated by the arbitral tribunal in charge of deciding the dispute? The answer is 'yes', for at least three reasons. First, the arbitrator already knows the case. A third party mediator or conciliator who acts before or in parallel to the arbitration must acquire such knowledge, with the unavoidable duplication of work, additional expenses and delays. Second and foremost, the arbitrator is the master of the timing of the proceedings, and is in the best position to choose the appropriate moment to offer the tribunal's services for settlement purposes. This may often be after the exchange of written briefs and before the hearing. It may also be after a partial award. It should not be too early in the proceedings, when the arbitrators (and sometimes the parties as well) do not have a sufficient understanding of the issues. It should not be too late either; it should not be at a time when the parties have already spent too much on the arbitration and may no longer be willing to settle. Identifying the right moment is a question of judgment, and experienced arbitrators will generally know when the time is ripe. Finally, a settlement agreement entered into in the course of a pending arbitration may form part of a consent award and become enforceable under the New York Convention.

What are the disadvantages of arbitrator-facilitated settlement? There are several. The main one is the threat to impartiality. The fear is that, in the event that the settlement fails and the arbitration continues, the arbitrator will lose his

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<sup>53</sup> Interestingly enough, the practice of Swiss and German arbitrators is different. They do not caucus, out of a sense that this may breach due process, but readily provide evaluations or assessments of the possible outcome.

or her objectivity on account of the information he or she became privy to during the conciliation proceedings that is not part of the record. This threat appears to be more perceived than real. Indeed, only one case was identified that removed arbitrators or set aside or refused to enforce an award on the ground that an arbitrator became involved in settlement,<sup>54</sup> while there are many court cases that hold exactly the opposite – that the involvement of a judge in the settlement of his or her own cases is admissible.<sup>55</sup> The same ought to apply to an arbitrator.

The case law of the European Court of Human Rights (ECtHR) on the right to a fair trial under Article 6 of the European Convention on Human Rights is also helpful. Although not exactly on point, one decision is enlightening by analogy. An arbitrator had disclosed a conflict of interest, and the parties had accepted that he act nevertheless. One of them later challenged the award on the ground that the arbitrator actually did turn out to be biased as a result of his conflict of interest. The award was confirmed in the national courts, and the ECtHR refused to set aside this result. It held that the party had given its *unequivocal* consent to waive the requirement of impartiality. That unequivocal waiver had to be enforced, as it was ‘accompanied by sufficient guarantees commensurate to its importance’, given the representation of the parties by legal counsel.<sup>56</sup> This is the latest in a series of decisions coming from the ECtHR (in particular, the former Commission) that consider that procedural rights in voluntary arbitration can be waived insofar as minimum guarantees are respected.<sup>57</sup> For our purposes, it can be drawn from these cases (and the absence of others) that an arbitrator may engage in settlement discussions without incurring the risk of being challenged, provided he or she obtains the informed consent of the parties beforehand.

Another drawback to the arbitrator facilitating settlement is the risk of a breach of due process if he or she meets privately with a party. On this occasion, a party may reveal facts to the tribunal that are unknown to the other party. As a consequence, the other party may be deprived of its due process right to rebut those facts. There are three possible remedies to avoid such a breach. The first one is that the arbitrator may not use such facts if the arbitration continues. This

<sup>54</sup> See *Spier v. Calzaturificio Tecnica SpA*, 71 F. Supp.2d 279, 282 (S.D.N.Y. 1999) (refusing to enforce an award which had been set aside at the place of arbitration (Italy) on the grounds that the arbitrators had overstepped the powers attributed to them in the arbitration agreement, by getting the parties to settle certain issues, even though the parties had given them certain settlement powers). See also, in an English adjudication matter, *Glencot Development and Design Co. Ltd v. Ben Barrett & Son (Contractors) Ltd* (13 February 2001), discussed in Peter Talbot, ‘Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?’ in (2001) 67(1) *Journal of the Chartered Institute of Arbitrators* 221.

<sup>55</sup> See e.g., in the United States: *Wiley v. United Parcel Service, Inc.*, 11 Fed. Appx. 181, 182 (4th Cir. 2001); *In re Martinez-Catala*, 129 F.3d 213, 216–218 (1st Cir. 1997); *Johnson v. Shaker Heights City School District*, 2007 U.S. Dist. LEXIS 17963 (N.D. Ohio 2007), at \*5–10; *Bell v. Johnson*, 404 F.3d 997, 1005 (6th Cir. 2005); Swiss Supreme Court decision reported in ATF 131 I 113.

<sup>56</sup> *Suovaniemi v. Finland*, Application No. 31737/96, ECtHR.

<sup>57</sup> See also, *X v. Federal Republic of Germany*, Commission Decision of 5 March 1962, Application No. 1197/61, (1962) 5 YB 88; *Nordström-Janzon and Nordström-Lehtinen v. The Netherlands*, Commission Decision of 27 November 1996, Application No. 28101/95, DR 51, p. 112.

is the Chinese solution.<sup>58</sup> However, this solution does not eliminate the risk that the arbitrator may nevertheless be influenced by what he or she has heard. The second alternative is that the arbitrator discloses such facts to the other party if the arbitration proceeds. This is the Hong Kong solution.<sup>59</sup> This alternative may deter the parties from being open in the separate sessions and, thus, defeat the very purpose of such sessions. The third possibility is to refrain from private sessions altogether. Regrettably, this solution does away with what is often considered one of the most efficient mediation tools.<sup>60</sup> At the same time, it is undoubtedly the safest remedy. This solution will not only avoid the risk of a breach of due process, but will also help avoid an impairment of the confidence of the parties in the arbitrator. The IBA Rules of Ethics for International Arbitrators support this view, providing that the arbitral tribunal may make settlement proposals 'to both parties simultaneously, and preferably in the presence of each other'. The IBA Rules then point out that it is 'undesirable that any arbitrator discuss settlement terms with a party in the absence of the other', since this may result in the arbitrator's disqualification.<sup>61</sup>

These provisions in the IBA Rules influence the types of settlement activities an arbitrator can carry out. Such activities will differ from those of a mediator. The arbitrator will not be able to engage in full-fledged facilitative, interest-based mediation. His or her intervention is likely to be more evaluative and rights-based. Concretely, any settlement attempt by an arbitrator will not last as long as a true mediation – presumably one session of a few hours. Often parties will not settle then, but the attempt will trigger further direct negotiations, in many instances resulting in a settlement.

In any event, some mediators favour mediation with counsel only or with the parties only without counsel,<sup>62</sup> while others favour mediation without any

<sup>58</sup> CIETAC Arbitration Rules 2005, art. 40(8), provides that, 'where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings'. BAC Arbitration Rules 2004, art. 38(4), has similar provisions.

<sup>59</sup> Hong Kong Ordinance Act (2000), s. 2B(3), provides that, 'where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings'.

<sup>60</sup> On the advantages of separate meetings (*e.g.*, clarifications of the position, release of anger, assessment of acceptability of settlement options and reality testing), *see e.g.*, Bühring Uhle, *supra* n. 1 at pp. 206–208.

<sup>61</sup> IBA Rules of Ethics for International Arbitrators (1987), s. 8. The rule specifies that the tribunal (or the presiding arbitrator alone) may make proposals for settlement upon the parties' request or on his or her own suggestion to which the parties have consented. With respect to caucusing, it further specifies that 'any procedure is possible with the agreement of the parties'.

<sup>62</sup> *See* William D. Coleman, 'The Mediation Alternative: Participating in a Problem-Solving Process' in (1995) 56 *Ala. L.* 100 at p. 106. *See also*, Flavia Fragale Martins Pepino, 'Mediation and Reluctant Lawyers: Suggestions for Mediators' Approaches' in (2006) 5 *Appalachian J.L.* 241 at p. 246 (noting that the former option should be chosen only in extreme situations); Craig A. McEwen and Richard J. Maiman, 'Mediation in Small Claims Court: Achieving Compliance through Consent' in (1984) 18 *Law and Soc'y Rev.* 11 at p. 21 (asserting that the latter option increases the likelihood of compliance by the parties). *But see* Elizabeth Ellen Gordon, 'Attorneys' Negotiation Strategies in Mediation: Business as Usual?' in (2000) *Mediation Q.* (Summer) 383 (asserting that the former has been observed in actual mediations, but never the latter).

caucusing at all because private meetings 'may interfere with the opportunity for the parties to work with each other to resolve their own problems'.<sup>63</sup> The usefulness of this latter option of mediation without caucusing is particularly high when there is considerable distrust between the parties.<sup>64</sup> It also means that if the parties want full-fledged mediation resorting to all available mediation techniques, which normally takes place over several sessions, they should resort to the services of a separate mediator and not to those of an arbitral tribunal.

There are still a few other drawbacks. One is the risk that the parties may feel coerced into settlement. In addition to any possible pressure to settle that the tribunal might (unduly) exert, the very fact that the conciliation is conducted by the person who will adjudicate the dispute in the event of failure of the settlement may put pressure on the parties. One could call it conciliation 'in the shadow of a possible future award'.<sup>65</sup> This risk is mitigated if the arbitrator merely offers his or her preliminary views on the basis of the record as it then stands, making it clear that he or she has not heard the evidence yet and could still change his or her mind in the course of the proceedings. Beyond that, nothing can be done to completely eliminate this risk, which can also be a healthy incentive to reasonableness.

A further drawback is the concern that the parties may not candidly express their positions in a conciliation conducted by someone who may later rule on the dispute. This is certainly a legitimate concern. While such a concern does not outright condemn any attempt by the arbitrator to conciliate, it implies that such an attempt will not rely on a search for the underlying interests but, rather, will tend to be evaluative. This observation is in line with the consequences of earlier limitations on the arbitrator's settlement activities, especially in the absence of caucusing.

Finally, in the context of the considerations that go against an arbitrator's conciliation efforts, one must remember that certain categories of disputes may not lend themselves to settlement. Doping disputes in sports are one such category because of the public interest involved and the overriding principle of equal treatment of the athletes.

Similarly, one must ask whether investment treaty disputes are another such category because of the strong public interests involved.<sup>66</sup> Two aspects are

<sup>63</sup> See Abramson, *supra* n. 1 at p. 11. See also, Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* (1996), s. 3.2; Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: a Grid for the Perplexed' in (1996) 1 *Harv. Negot. L. Rev.* 7 at p. 51 (discussing all of these options when designing a mediation). But see Joseph B. Stulberg and B. Ruth Montgomery, 'Design Requirements for Mediator Development Programs' in (1987) 15 *Hofstra L. Rev.* 499 at p. 531 n. 109 (noting how some labour mediators say that people who help resolve labour disputes without caucusing 'are not really "mediating"').

<sup>64</sup> See Drew Peterson, 'Getting Together: Appropriate Dispute Resolution Alternatives' in (2002) 26 *AK Bar Rag*, (November–December) 8 (noting how this is the case in many family disputes).

<sup>65</sup> This expression derives, of course, from the phrase 'bargaining in the shadow of the law', coined by Mnookin and Kornhauser. See Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law' in (1979) 88 *Yale Lj* 950.

<sup>66</sup> One might also ask whether the fact that investment law is still unsettled on many issues and that every settlement is a lost opportunity to state the law are reasons to discourage settlement attempts. For a discussion of how settlement frustrates the development of key legal principles in another area, see e.g., Carrie Menkel-Meadow, 'For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference' in (1985) 33 *UCLA L. Rev.* 485 at pp. 500–502.

particularly striking when looking at the settlement practice in investment disputes. First, many disputes are settled by direct negotiations. Secondly, arbitrators do not engage in settlement facilitation. An analysis of ICSID cases shows that out of a total of 152 concluded cases (including six conciliation and 14 additional facility cases),<sup>67</sup> 32 proceedings were terminated pursuant to ICSID Arbitration Rules, art. 43(1), which provides that the parties can settle the dispute and request the discontinuance of the arbitration. It further shows that 10 were consent awards embodying the parties' agreed settlement under art. 43(2) of the ICSID Arbitration Rules, and one was an additional facility award (pursuant to Arbitration Rule 49(1) of the Additional Facility Rules).<sup>68</sup> In addition, 11 cases were discontinued upon the request of one party following a settlement in accordance with Arbitration Rule 44. Finally, three of the five conciliation cases ended with settlements. As a result, out of 152 concluded cases, 60 were resolved by way of a settlement; 15 of these cases were settled prior to the constitution of the tribunal or settlement commission, and four were settled after the issuance of an award on the merits, in particular in the context of a revision,<sup>69</sup> annulment<sup>70</sup> or resubmission after an annulment.<sup>71</sup> In short, a significant portion of investment disputes submitted to arbitration is resolved by amicable settlement, not to speak of the disputes that are settled before an arbitration is initiated.

By contrast, and although this might not be entirely reflective of the settlement activities deployed by investment arbitrators, research yields only one case in which an ICSID tribunal actively facilitated settlement. In an unreported contract arbitration, the tribunal offered its assistance to the parties, who had stated at the first session that they were willing to settle but unable to agree on the terms.<sup>72</sup> The president then acted as mediator during a few months, upon which the parties reached a partial settlement. In brief, a successful but very rare endeavour.

How can these two conflicting aspects be explained? It is true that investment arbitration is often the last resort once negotiations at all levels of government have failed and the 'cooling off period' has elapsed.<sup>73</sup> It is also true that a state

<sup>67</sup> The ICSID website was last consulted on 29 October 2008 (<http://icsid.worldbank.org>).

<sup>68</sup> See e.g., for a published example, *Antoine Goetz and others v. Republic of Burundi* (Case No. ARB/95/3), Award embodying the parties' settlement agreement of 10 February 1999, (French original in (2000) 15 *ICSID Rev. – FLJ* 457; English translation in (2004) 6 *ICSID Rep.* 5; (2001) 26 *YB Com. Arb.* 24 (excerpts)). This would be primarily asked for enforcement purposes, since the ICSID award so rendered will benefit from the Convention's provisions on recognition and enforcement, under which an award enjoys the same status as a final judgment of a court in the Contracting State in which the recognition or enforcement is sought.

<sup>69</sup> See *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo* (Case No. ARB/93/1).

<sup>70</sup> See *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt* (Case No. ARB/84/3); *Joy Mining Machinery Ltd v. Arab Republic of Egypt* (Case No. ARB/03/11).

<sup>71</sup> See *Maritime International Nominees Establishment v. Republic of Guinea* (Case No. ARB/84/4).

<sup>72</sup> See Eloise Obadia, 'How Proactive Arbitrators Really are in Conducting Arbitral Proceedings: an ICSID Perspective' in (1999) 16(2) *News from ICSID* (Fall), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ViewNewsLetters>

<sup>73</sup> See Barton Legum, 'The Difficulty of Conciliation in Investment Treaty Cases: a Comment on Professor Jack C. Coe's "Toward a Complementary Use of Conciliation in Investor-State Disputes, a Preliminary Sketch"' in (2007) 4(1) *TDM* (February).



seeking to settle an investment dispute faces political constraints that may lead to a 'disinclination to take responsibility for settlement when that burden can be assigned to an adjudicator'.<sup>74</sup> Indeed, while the board or management of a corporation makes a business decision to settle (subject, of course, to its accountability to shareholders), a state is likely to have to engage in a complex political, social and budgetary process. It is further true that a state may wish to avoid setting a precedent vis-à-vis other investors by voluntarily admitting its responsibility. Even if these considerations may well make the settlement of investment disputes more difficult than that of commercial disputes, the figures set out above demonstrate that they are no obstacle to settlements reached in direct negotiations. Hence, these considerations cannot explain why no settlement facilitation takes place in investment arbitration.

There must be other reasons. One reason may be that conciliation and mediation are not popular avenues in investment arbitration so far.<sup>75</sup> These methods of dispute settlement are not institutionalised as they are in commercial arbitration. Another reason may lie in the concerns about the risk of disqualification of arbitrators who have taken part in failed settlement initiatives. The risk is no different in nature from that found in the context of commercial arbitration, which was discussed above. However, it may be perceived as more acute. Still another reason may be the often more formal setting of investment arbitrations as opposed to commercial arbitrations, that does not lend itself to informal settlement initiatives, and possibly the legal background of counsel acting in many of these proceedings. However, none of these possible reasons present a bar to settlement facilitation as a matter of principle. In particular, the demands of equal treatment found in sports arbitration do not apply here, at least not to the same extent.<sup>76</sup>

In conclusion, one finds no convincing justification to consider that investment disputes as a category must be excluded from settlement facilitation. Because of their specificity, however, increased attention must be devoted to procedural safeguards.

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<sup>74</sup> See Jack C. Coe Jr., 'Toward a Complementary Use of Conciliation in Investor-State Disputes, a Preliminary Sketch' in (2007) 4(1) *TDM* (February) 29. See also, *ibid.* pp. 27–28 ('Settlements divert attention from the legal merits of the underlying controversy and may thereby shroud dubious levels of treaty compliance in ambiguity, producing less incentive for the states to institute corrective measures. Though arbitral tribunals typically have no power to order an end to an offending measure, states self-regulate in light of the pronouncements of tribunals and any liability that might flow therefrom. Reasoned adjudications thus provide law-makers guidance and stimulation not found in mediated agreements, the very point of which might have been to avoid such corrective influences. It is therefore reasonable to question whether states might not find conciliation to be too comfortable a blind, where bad habits might be perpetuated') (footnotes omitted).

<sup>75</sup> ICSID also offers Conciliation Rules that have only been used five times since 1982. On how conciliation might come to complement investment arbitration more systematically and routinely, see Coe, Jr., *supra* n. 74, and see Noah Rubins, 'Comments to Jack C. Coe Jr.'s Article on Conciliation' in (2007) 4(1) *TDM* (February), for a review of the usual elements put forward to explain the rare use of conciliation in investor-state disputes.

<sup>76</sup> See for the same difference between sports and investment arbitration observed in another context, Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' in (2007) 23 *Arb. Int'l* 276.

## IV. TOWARDS A TRANSNATIONAL STANDARD

Having determined where we stand by setting out the current law and practice, and the advantages and drawbacks, the next step is to examine where we are going from here and whether we are moving towards a transnational rule. There is no reason why the continuing process of harmonisation of international arbitration law should be stopped by the present issue. It is very likely that a transnational practice will develop over time on this topic, as it has for many other topics in the past.

To evaluate a legal evolution, it is often helpful to step back and look to the teachings of legal theorists and anthropologists on such matters. On the basis of the history of dispute settlement in all regions of the world, legal anthropologists observe a constant alternation between formal and informal dispute resolution methods.<sup>77</sup> At the beginning, a method of dispute resolution is always informal. The human search for predictability then generates more and more rules relating to that method of dispute resolution.<sup>78</sup> In the end, there are too many rules and the mechanism becomes too slow and cumbersome. It no longer meets the needs of its users, so the users turn to other methods of dispute resolution that are less formal,<sup>79</sup> and the cycle starts anew.<sup>80</sup>

This is what happened to court systems in general.<sup>81</sup> It explains the evolution of the role of the judge and the increased use of ADR, whether performed by the judge, by court-annexed mechanisms or otherwise. Among the ADR methods used in reaction to excessive formalism of the courts, one may count arbitration, which was favoured for its flexibility or lack of formalism. However, arbitration has gradually evolved towards incorporating more rules, thus becoming

<sup>77</sup> A good overview is provided by Roberts and Palmer, *supra* n. 47 at pp. 1–77, with many references.

<sup>78</sup> See Serge Guinchard, 'L'évitement du juge civil' in Jean Clam and Gilles Martin (eds.), *Les transformations de la régulation juridique* (1998), p. 221 at p. 226.

<sup>79</sup> See Susan Silbey and Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' in (1989) 66 *Denv. UL Rev.* 437 at pp. 472–496; François Ost, 'Jupiter, Hercule, Hermès: trois modèles du juge' in Pierre Bourdrez (ed.), *La force du droit* (1991), p. 241 at pp. 245–249 and 257–260.

<sup>80</sup> See Jerold S. Auerbach, *Justice Without Law?* (1983), pp. 14–15 (speaking of 'a recurrent dialectic between legality and its alternatives'); Thomas Schultz, 'Human Rights: a Speed Bump for Arbitral Procedures?' in (2006) 9 *International Arbitration L Rev.* 8 at pp. 8–9 (speaking of the 'conveyor belt' of new informal procedures becoming gradually more formalised); Jean-Pierre Bonafé-Schmitt, 'La médiation: du droit imposé au droit négocié?' in Philippe Gérard, François Ost and Michel van de Kerchove (eds.), *Droit négocié, Droit imposé?* (1996), p. 419 at p. 420; Philippe Fouchard, 'Alternative dispute resolution et arbitrage' in Charles Leben et al. (eds.), *Souveraineté étatique et marchés internationaux à la fin du 20e siècle* (2000), p. 95 at p. 112 and Philippe Fouchard, 'Où va l'arbitrage international?' in (1989) 34 *McGill LJ* 435 at p. 450 et seq.; Loïc Cadiet, 'Le spectre de la société contentieuse' in *Droit civil, procédure, linguistique juridique. Écrits en hommage à Gérard Cornu* (1994), p. 29.

<sup>81</sup> See Roberts and Palmer, *supra* n. 47 at pp. 2, 11; Lawrence M. Friedmann, 'Courts over Time: a Survey of Theories and Research' in Keith O. Boyum and Lynn Mather (eds.), *Empirical Theories about Courts* (1983), p. 9 at pp. 15–16; Lon L. Fuller, 'The Forms and Limits of Adjudication' in (1978) 92 *Harv. L Rev.* 353 at p. 356; William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' in (1993) 56 *MLR* 380; Frank E.A. Sander, 'Alternative Methods of Dispute Resolution: an Overview' in (1985) 37 *U Fla. L Rev.* 1 at p. 3; John H. Barton, 'Behind the Legal Explosion' in (1975) 28 *Stan. L Rev.* 567. See also, Jürgen Habermas, *Théorie de l'agir communicationnel, Pt 2, Pour une critique de la raison fonctionnaliste* (1987), pp. 391–410, in particular pp. 392–393.

proceduralised and judicialised.<sup>82</sup> As a result, arbitration is now often seen as being slow and expensive. This is when the search for more informal mechanisms begins again. Thus, it is likely that, as in the context of courts, users will seek new, more informal ways of resolving disputes. Resorting to separate mediation proceedings may be one option. The arbitrator acting as conciliator may be another. At the same time, it is equally likely that the users will need some predictability about these methods of dispute resolution, and, hence, related rules will emerge.

Rules are indeed emerging. We have uncovered bits and pieces of rules, pieces of the puzzle, throughout this lecture. If we now seek to assemble those pieces, what does the puzzle look like? In other words, what would the content of the rule on arbitrator-facilitated settlement be?

A viable rule must take account of the pros and cons addressed above and accommodate the sensitivities expressed in the different laws and practices. It must necessarily merge different traditions or else it will not gain wide acceptance. On this basis, and building up on the preceding analysis, one could articulate a rule with the following content:

- The arbitrator may facilitate settlement, provided that a number of safeguards are put into place. He or she may offer to facilitate settlement at any time during the proceedings on his or her own initiative or at the parties' request.
- The arbitrator may not begin to facilitate settlement unless he or she obtains the informed consent of the parties. Such informed consent will imply a waiver of the challenge of the arbitrator or of the award if the settlement fails. The requirement for consent is in conformity with the consensual nature of arbitration and the parties' procedural autonomy. The consent must be given to the principle of the arbitrator acting as settlement facilitator and to the procedure to be followed.
- As a rule, the arbitrator will not meet separately with the parties, and his or her involvement will be evaluative rather than facilitative. The process should also be kept simple and short.
- The arbitrator should respect the parties' freedom of decision and not force settlement.
- There may exist categories of disputes involving a strong public interest that do not lend themselves to settlement by an arbitrator. One of these categories may be doping and possibly other disciplinary matters in sports disputes, because conciliation would not be compatible with the general principle of equal treatment of athletes.
- If an arbitrator considers himself or herself as lacking objectivity as a result of the (failed) conciliation attempt, he or she should resign. This element of

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<sup>82</sup> This is one of the main themes of Oppetit, *supra* n. 38, *e.g.* at pp. 27–34. See also, Pierre Lalive, 'Arbitration: the Civilized Solution?' in (1998) 16 *ASA Bull.* 483; Jean-Baptiste Racine, 'Les dérives procédurales de l'arbitrage' in Clam and Martin, *supra* n. 78 at pp. 231–236 and Clay, *supra* n. 4 at pp. 169–170.

the rule is inspired by the IBA Guidelines on Conflicts of Interest. If such bias were to materialise in practice, the result would be counter-productive in terms of the efficiency of the dispute resolution process, which was the very reason for allowing the arbitrator to enter into a settlement attempt in the first place. Indeed, the replacement of an arbitrator necessarily entails delays and possibly extra costs. It is, therefore, hoped that such resignations will not occur in practice, the more so as the existence of this rule will encourage arbitrators to act cautiously.

Consequently, if the parties wish a different settlement process that goes beyond these safeguards, then they should resort to separate mediation or other ADR mechanisms and not involve an arbitral tribunal.

With these safeguards or limitations on the arbitrator's activities concerning settlement, it is submitted that settlement facilitation by the arbitral tribunal can be a helpful tool to improve the efficiency of arbitration. Because these proposed rules balance the pros and cons, because they merge the different traditions and practices, and because they are in line with the general evolution of dispute settlement, it is further submitted that the standards just set forth could gain increased acceptance with time and evolve into a transnational rule.

