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Marko DOŠLIĆ*

*SETTLEMENT FACILITATION BY ARBITRAL TRIBUNALS: BOOSTING EFFICIENCY OR ENDANGERING DUE PROCESS RIGHTS?***

The paper explores the concept of settlement facilitation by arbitral tribunals. After a brief overview of the relevant legislation regarding this practice, the paper focuses on different facilitating settlement measures that are available to arbitral tribunals. Finally, the author evaluates the advantages and disadvantages of arbitral tribunals encouraging the parties to find an amicable resolution of their dispute after the arbitration proceedings commence. While it is evident that an early settlement can significantly increase the dispute resolution process efficiency, are there also risks associated with the practice of settlement facilitation?

Key words: *Amicable solution. – Informed consent. – International arbitration. – Preliminary views. – Settlement facilitation.*

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* Junior Teaching Assistant, University of Belgrade Faculty of Law, Serbia, *marko.doslic@ius.bg.ac.rs*, ORCID iD: 0009–0006–1969–2993.

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1. INTRODUCTION TO SETTLEMENT FACILITATION IN INTERNATIONAL ARBITRATION

When analyzing the role of the arbitrator and hence the arbitral tribunal, it is commonly observed that their primary mission is to resolve disputes between parties and produce an arbitral award (Knežević, Pavić 2013, 89; Kröll, Kerkhoff 2023, 917; Perović Vujačić 2019, 138). By contrast, seeking an amicable solution is traditionally viewed as the goal of other forms of alternative dispute resolution mechanisms, such as mediation and conciliation (Kröll 2017, 209; Knežević, Pavić 2013, 226).

Mediation, which is the most widely used form of alternative dispute resolution besides arbitration, is a process in which the parties, with the help of an intermediary who has no power to finally settle the dispute, attempt to find an amicable solution to their dispute (Knežević, Pavić 2013, 226; Pavić, Đorđević 2014, 257). Therefore, a mediator, unlike an arbitrator, possesses only advisory powers and cannot impose a solution to the dispute on the parties (Knežević, Pavić 2013, 226; Pavić, Đorđević 2014, 257; Shaughnessy 2023, 1489).

Therefore, it is far from self-evident whether seeking an amicable solution by facilitating settlement during the arbitral process constitutes part of the arbitrator's mandate.

Firstly, what is understood to fall under the umbrella term "settlement facilitation"? When looking at the usual definition of what it means to facilitate, it is understood that it is the act of making something easier, or rather, helping bring something about (Garner 2004, 627). Therefore, when talking about settlement facilitation by the arbitral tribunal, this paper deals with "any activity by an independent third party (in this case the arbitrator) that may be of assistance to the parties for the purposes of reaching an amicable settlement of their dispute" (Taivalkoski, Toivonen 2020, 60).

One of the reasons why the arbitrator's role in settlement facilitation is controversial is that most national arbitration laws, as well as the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration[1] (Model Law), remain silent regarding the entitlement of an arbitrator to facilitate settlement (Kaufmann-Kohler

[1] Most national arbitration laws today are based on or have at least been heavily influenced by the UNICTRAL Model Law. In more detail: *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.*

2009, 193; Kröll 2017, 215; Wilske, Braüninger 2023, 355). There are however exceptions, such as the arbitration acts of India,[2] Japan,[3] and the Netherlands.[4]

The arbitrators themselves have different perceptions of settlement facilitation, based on their legal background. While arbitrators coming from common law backgrounds usually do not view the facilitation of settlement as part of their duties,[5] those coming from civil law jurisdictions are usually aware of the possibility of facilitating a settlement between the parties (Kröll 2017, 210). Furthermore, the parties tend to believe that the arbitrator does have a role in fostering settlement.[6]

Finding a universal answer to the dilemma whether an arbitrator can and whether he or she should facilitate settlement is important for multiple reasons. Firstly, there is currently no transnational consensus on the possibility and desirability of such a practice (Kaufmann-Kohler 2009, 189; Taivalkoski, Toivonen 2020, 59).[7] Furthermore, the importance of reaching a transnational consensus arises from the fact that multiple arbitration rules have addressed the issue in their latest versions, albeit in various manners.[8] At the same time, many jurisdictions encourage the state courts to promote settlement between the parties in dispute, leading some scholars to advocate similarly encouraging arbitrators (Berger 2018, 504; Kaufmann-Kohler 2009, 190). Finally, the question is very much of practical importance, as there are concerns that certain manners of arbitrator participation in settlement negotiations can endanger the duty of impartiality and therefore jeopardize the enforceability of the resulting arbitral awards.

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2 The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India), Sec. 30(1): "It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute..."

3 Japanese Law on Arbitration, Law No. 138 of 2003, Art. 38(4): "An arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties." (Sato 2008)

4 Dutch Arbitration Act 2015, Art. 1043: "At any stage of the proceedings, the arbitral tribunal may order the parties to appear in person for the purpose of [...] attempting to arrive at a settlement."

5 According to Stipanowich, Ulrich (2014, 6), in a study conducted by the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution amongst leading arbitrators in the US, more than 50% of respondents were not concerned at all with settlement.

6 Sussman (2021) reports that 78.38% of respondents replied "Yes" to the question "Do you think an arbitrator has a role in fostering settlement?"

7 For the opposite view, see Alleman 2022, 231.

8 For example, the DIS Arbitration Rules, the VIAC Rules, the Swiss Rules.

In an effort to answer these questions, this paper will look at the general possibility of arbitrators engaging in settlement facilitation, the different instruments available to them, as well as the desirability of settlement facilitation in general and of each particular instrument available to the tribunal.

2. THE ENTITLEMENT OF THE ARBITRAL TRIBUNAL TO ACT AS A SETTLEMENT FACILITATOR IN THE COURSE OF ARBITRATION PROCEEDINGS

Whether the arbitral tribunal should be allowed to facilitate settlements during the arbitration process can be explained from a theoretical standpoint, as well as through the current normative framework. From a theoretical standpoint, each arbitrator's power to engage in settlement facilitation is explained through the nature of their mandate. It is largely undisputed today that the arbitrator's mandate is hybrid in nature (Lew, Mistelis, Kröll 2003, para. 5–26; Born 2009, 1991; Gaillard, Savage 1999, 1122; Fan 2023, 995). On the one hand, it is defined by the contract between the parties and the arbitrator (*receptum arbitri*). On the other, the arbitrator's mandate is also judicial in nature (Lew, Mistelis, Kröll 2003, para. 5–26; Born 2009, 1991; Gaillard, Savage 1999, 1122). Arguments affirming the arbitrator's role as a settlement facilitator hence rely on the contractual nature of the arbitrator's mandate, the part of it that arises out of party autonomy. The parties are free to define the arbitrator's mandate as they see fit, including the possibility to act as a settlement facilitator. However, authors who do not perceive the arbitrator's mandate to include the duty to seek an amicable solution lean toward the quasi-judicial function of the arbitrators (Berger, Jensen 2017, 66–67). Therefore, "any discussion of that or another aspect of the arbitrator's role does involve or imply, consciously or unconsciously, a certain (subjective) idea or concept of arbitration itself – in other words a certain philosophy or 'view of the world' (*Weltanschaung*) of arbitration" (Lalive 2005, 557).

The analysis from a normative framework standpoint starts by looking at the applicable procedural law (*lex arbitri*) in each case. As previously mentioned, the Model Law does not mention the possibility of settlement facilitation by the arbitral tribunal. We are, therefore, of the opinion that settlement facilitation would be allowed in general, as long as it does not leave the award susceptible to annulment under one of the reasons listed in Article 34 of the Model Law. In any case, the parties are free to agree on the procedure to be followed by the tribunal, pursuant to Article 19(1) of

the Model Law. Therefore, if one party opposes the tribunal engagement in settlement facilitation, it should be avoided as the ensuing award could be "attacked" under Article 34(2)(a)(iv) of the Model Law,[9] as well as Article V(1)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC).[10]

The next step of the analysis should look at different arbitration rules that parties can incorporate into their arbitration agreements, which would allow the tribunal to actively seek settlement. The most affirmative position on settlement facilitation is undertaken by the rules of the German Arbitration Institute (DIS Arbitration Rules). Article 26 of the 2018 DIS Arbitration Rules reads that "unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues". Under the DIS Arbitration Rules, encouraging settlements is not only a possibility – it is rather the obligation of the arbitral tribunal. The arbitrators are encouraged to take a proactive approach by always searching for opportunities to reach an amicable solution. The DIS Arbitration Rules approach is actually in line with the proactive role undertaken by judges in the proceedings before the German courts (Busse 2020, 412–413).

Several other arbitral institutions also supply the arbitral tribunal with the power to facilitate settlement between the parties, although none of them explicitly encourage the tribunals to do so. Mutually similar provisions can be found in the 2021 ICC Arbitration Rules,[11] the 2021 VIAC Rules of Arbitration,[12] the 2021 Swiss Rules of International Arbitration,[13] and the 2023 CAM Arbitration Rules.[14]

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[9] Article 34(2)(a)(iv) Model Law: the composition of the arbitral tribunal or **the arbitral procedure was not in accordance with the agreement of the parties**, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law (emphasis added).

[10] Article V(1)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards: The composition of the arbitral authority or **the arbitral procedure was not in accordance with the agreement of the parties**, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (emphasis added).

[11] As an example of case management techniques recommended to an ICC arbitrator, it is provided in Appendix IV: (h) Settlement of disputes: (i): encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules (ii): where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Finally, there are a number of rules that do not mention whether a tribunal is entitled to facilitate settlements, but rather only deal with the possibility of issuing a consent-based award. The AAA Rules, the ICDR Rules, the LCIA Rules and the SIAC Rules, for example, all fall within this group.

Looking beyond the institutional rules of arbitration, facilitating settlements is also in line with the UNCITRAL Notes on Organizing Arbitral Proceedings,[15] the 1987 IBA Rules of Ethics for International Arbitrators,[16] the IBA Guidelines on Conflict of Interest in International Arbitration,[17] the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration).[18] Furthermore, the tendency toward seeking an amicable solution is present in the rules for pre-arbitration solving of construction disputes arising from projects based on FIDIC contracting terms.[19]

Considering that different arbitration rules provide tribunals with the power to take steps toward finding an amicable solution between the parties, it is our opinion that encouraging settlement – and under certain

[12] Article 28 (3): "At any stage of the proceedings, the arbitral tribunal is entitled to facilitate the parties' endeavors to reach a settlement."

[13] Article 19 (5): "With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps."

[14] Article 25 (3): "At any time in the proceedings, the Arbitral Tribunal may attempt to settle the dispute between the parties, including by inviting the parties to refer the case to the Mediation Service of the Milan Chamber of Arbitration."

[15] Paragraph 72: "In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. [...] Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations."

[16] Rule 8: "Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other".

[17] General Standard 4 (d): "An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings".

[18] Article 9.1: "Unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration."

[19] Namely, newer editions of FIDIC contracting terms expand the role of the Dispute Adjudication Board (DAB), which is no longer focused only on solving, but also on avoiding disputes between the parties and solving them amicably. Hence, the body is now called the Dispute Avoidance and Adjudication Board (DAAB).

conditions even getting directly involved in the parties' efforts to settle – should be possible, provided that the tribunal approaches such facilitation in a way that does not endanger its duty of independence and impartiality.[20] However, the conditions for ensuring that the tribunal stays impartial and independent need to be analyzed further.

3. MEASURES AVAILABLE TO TRIBUNALS FOR FACILITATING SETTLEMENTS

The result, as well as the legitimacy of undertaking efforts aimed at facilitating settlements during the arbitration proceedings, usually depends on the approach of the arbitral tribunal. The measures available to tribunals vary in the degree of the tribunal's participation in the settlement process; in methods that require the lowest amount of involvement, the tribunal merely mentions the possibility of settlement to the parties, while some methods entail the tribunal almost acting as a mediator (Berger, Jensen 2017, 60). Consequently, "the more a measure tends to resemble a mediation technique deviating from the 'normal tasks' of an arbitrator, the more likely it is to require explicit consent by the parties" (Kröll, Kerkhoff 2023, 928). The following paragraphs look at each of these methods individually and analyze the adequacy of each one.

3.1. Informing the Parties about the Possibility of Settlement

At any point during the arbitral proceedings, the tribunal can inform the parties that they are free to attempt to settle the dispute (ICC 2018, 11; Kröll, Kerkhoff 2023, 928; Collins 2003, 336). Merely informing the parties about this possibility clearly falls within the discretion of the tribunal to conduct the proceedings as it sees fit (Kröll, Kerkhoff 2023, 928).

While at first it may seem that informing the parties that they are free to attempt to settle is unlikely to yield a result, the parties often interpret such a "move" by the tribunal as an indication that neither of the parties will be entirely successful if the dispute is decided by an award (Petsche, Platte 2007, 96).

[20] The same conclusion is drawn by Berger and Jensen, Bjorklund and Vanhonnaeker, as well as Taivalkovski and Toivonen (Berger, Jensen 2017, 66–67; Bjorklund, Vanhonnaeker 2023, 1033–1034; Taivalkovski, Toivonen 2020, 59).

This is precisely the reason for the tribunal to indirectly attempt to propose settlement negotiations to the parties. After becoming aware that they will not be entirely successful, their willingness to attempt to reach a settlement might increase (Petsche, Platte 2007, 96).

3.2. Giving Preliminary Views on the Relevant Issues in Dispute and the Evidence Needed

The tribunal can also take a slightly more proactive approach by providing the parties with its preliminary views on the issues that will be relevant in the dispute and the evidence needed to rule on those issues (ICC 2023, 6; Kröll 2017, 217; Kröll, Kerkhoff 2023, 929).[21]

The reasoning behind the tribunal providing preliminary information about what it finds to be relevant in the dispute is that the parties to the dispute usually have a distorted view on the strength of their position, which can present an insurmountable obstacle on the road to settlement (Kröll 2017, 217–218). After being provided with the said information, it is to be expected that the parties and their counsels will be able to see the chances of their success in the dispute more objectively. After the parties gain a more realistic view of their respective chances, the possibility of reaching an amicable solution should increase significantly (Kröll 2017, 217–218; Taivalkoski, Toivonen 2020, 62–63).

To avoid any doubt that this technique might be viewed as prejudging the case, it is key to determine the appropriate time when the tribunal could provide such information. If the tribunal identifies these preliminary findings at a case management conference held between the written submissions and the oral hearing, it could streamline the hearing and clarify misunderstandings, all while indirectly inspiring settlement (Kröll, Kerkhoff 2023, 929–930).

Besides the positive effect that it could have on the efforts to reach an amicable settlement, the tribunal providing preliminary views of this kind also poses no additional effort for the arbitrators. Namely, it is reasonable to assume that arbitrators, after having read the submissions, documents and

[21] Such a mechanism is provided, for example, in Prague Rules Article 2.4., CEDR Rules Article 5.1.1. The tribunal taking this approach is also supported by Article 2(3)(a) of the IBA Rules on Taking Evidence in International Arbitration, which provides that: "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues that the Arbitral Tribunal may regard as relevant to the case and material to its outcome".

the witness statements, will form an opinion on the facts that they consider to be relevant for resolving the dispute. Informing the parties about the said opinion in no way constitutes prejudging a case (Raeschke-Kessler 2005, 530; Kröll 2017, 219; Kröll, Kerkhoff 2023, 929).

Whether the consent of the parties is necessary to utilize this measure will depend on the applicable arbitration rules. While prior consent would be required under institutional rules not mentioning the possibility of the tribunal engaging in settlement facilitation, the opposite would likely be true for the other two groups of rules (Kröll, Kerkhoff 2023, 930).[22]

3.3. Providing Preliminary Nonbinding Findings on Law or Facts on Key Issues

While similar to the above-mentioned measure, the giving of preliminary views basically involves an arbitral tribunal giving the parties its nonbinding and preliminary assessment of the issues in dispute in the arbitration.[23] The tribunal may give its preliminary views on the whole case or on specific issues (ICC 2023, 14; Allemann 2022, 239). This is not an uncommon practice in certain German speaking countries; the Commercial Court of Zurich, for instance, has utilized such a method since the early 20th century (Stutzer 2017, 598–599; Kozmenko, Groselj 2021). It is important to note that this technique could be applied at different points in time during the proceedings. The most controversial option would be providing early notion, before the evidentiary hearing takes place, where the case has not been fully pleaded (Taivalkoski, Toivonen 2020, 68). This can potentially be a problem as it raises concerns of unconscious arbitrator bias (Taivalkoski, Toivonen 2020, 68; Petsche, Platte 2007, 97), since the arbitrator might not look at the dispute objectively after already giving their view on the likely outcome. On the other hand, these concerns could be significantly reduced by providing a preliminary view following the evidentiary hearing. In that situation, the only chance the parties have at changing the tribunal's opinion is through their post-hearing briefs, hence the concerns of the tribunal's bias are not as justified (Kröll 2017, 220).

[22] Referring to the DIS Rules as the first group, and ICC, VIAC, Swiss and CAM as the second group.

[23] Such a mechanism is expressly provided for in the Prague Rules (Article 2.4.(e)), as well as the CEDR Rules (Article 5.1.2).

The reasoning behind this technique is essentially the same as the previous one. The parties can significantly benefit from knowing where the tribunal stands at any given time. Knowing the strength of their position in the tribunal's eyes can help them return to the negotiation table and seek a settlement.

As previously mentioned, the problems arising from this method include the parties doubting the tribunal's impartiality after notifying them of its preliminary views. It is reasonable to assume that the tribunal is less likely to "change its mind" after revealing to the parties where it stands. To avoid these concerns, it seems it is now generally accepted that the tribunal should aim to receive the parties' informed consent before giving preliminary nonbinding views on the likely outcome of the dispute (IBA Guidelines, General Principle 4(d); ICC 2023, 14; Kröll 2017, 221; Raeschke-Kessler 2005, 530; Busse 2020, 416; Berger, Jensen 2017, 69; Taivalkoski, Toivonen 2020, 68). The institutional rules that provide the possibility of the tribunal promoting settlement between the parties usually also require the parties' consent in order for the tribunal to be able to take this approach.[24] Informing the parties of the tribunal's early notions without receiving their consent could be seen as a violation of the rules on the independence and impartiality of the arbitrators.

Some authors also go even further, as they consider that the tribunal wishing to provide its preliminary views on the likely outcome of the proceedings "should obtain a waiver from each party of its right to challenge the impartiality of the arbitrators due to them providing an early neutral evaluation if settlement fails and the proceedings continue" (Berger, Jensen 2017, 72; Plant 2000, 146). The IBA Guidelines on Conflict of Interest in International Arbitration even provide that express consent to the tribunal assisting in the settlement efforts of the parties, by itself constitutes an effective waiver of any potential conflict of interest (IBA Guidelines, General Principle 4(d)). This would, of course, reduce the likelihood of the parties accepting such a method, but it would be a possible solution in line with the principle that a party can waive its procedural rights in arbitration proceedings.[25]

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[24] See ICC Rules, DIS Rules, Swiss Arbitration Rules.

[25] In *Tabbane v. Switzerland* (Tabbane v. Switzerland, App. No. 41069/12, ECtHR, 1 Mar. 2016), the European Court of Human Rights held that a party waiving its right to initiate set-aside proceedings is not a violation of Article 6 of the European Convention on Human Rights.

To best utilize this method, we believe that it is recommended that the tribunal, in each individual case, consult the relevant provisions of the *lex arbitri*, as well as the provisions of the law in which recognition and enforcement is likely to be sought, to avoid the possibility of the award's enforceability being endangered in the event that the settlement negotiations fail.

3.4. Proposing Settlement Terms

Tribunal involvement in settlement efforts is also possible through not merely encouraging the settlement, but rather directly engaging in the negotiation of settlement terms. One of the ways tribunals can do this is by proposing possible settlement terms to the parties, which can serve as a basis for future negotiations (Kröll 2017, 222; Allemann 2022, 239).[26] A proposal of this kind would usually follow the preliminary nonbinding view on the likely outcome of the case (Kröll 2017, 222). It is, of course, reasonable to expect that the tribunal will be in a better position than the parties to view the realistic state of the dispute and hence propose settlement terms that could be acceptable to both of them.

Suggesting the terms of settlement is, however, likely to cause potential bias of the tribunal. Therefore, to suggest a proposal of this kind, the tribunal would have to acquire prior explicit consent by the parties, regardless of the applicable procedural rules (Kröll, Kerkhoff 2023, 932). In the event that this proposal was preceded by a written request by the parties and the tribunal can reasonably explain how it arrived at the proposed terms of the settlement – there should be no obstacles to the tribunal proposing possible settlement terms (Kröll 2017, 222).

3.5. Chairing Settlement Negotiation Meetings

One of the possible consequences of the tribunal providing its preliminary views to the parties is that the parties may wish to engage in settlement discussions that take those views into account (ICC 2023, 16). It is also possible that the parties will agree to, or invite, the arbitral tribunal to chair those discussions (ICC 2023, 16).[27] To avoid possible issues arising from the

[26] See Article 5.1.3. of the CEDR Rules.

[27] See Article 5.1.4. of the CEDR Rules.

application of this technique, the arbitral tribunal should also obtain express consent from the parties (IBA Guidelines, General Principle 4(d); ICC 2023, 16; Plant 2000, 145).

However, even with the express consent of the parties, this method of facilitating settlement raises specific issues. As the role of the arbitrator chairing settlement negotiations closely resembles that of the mediator,[28] the degree to which the arbitration becomes mediation is going to depend on the degree of activity of the role that the tribunal takes on. Chairing settlement negotiations is usually going to entail much more than a purely technical role.

As the tribunal getting involved in the negotiations would closely resemble mediation (the so-called Arb-Med procedure) (Berger, Jensen 2017, 74), the question is whether an arbitrator is the right person to conduct such a procedure.[29] Unlike a mediator, an arbitrator (or rather, the tribunal) is tasked with solving the dispute even if the settlement discussions fail. Hence, the parties will generally be less open to conveying their true interests to an arbitrator than a mediator (Kröll 2017, 223). A tribunal chairing settlement discussions also poses the risk of arbitration turning into mediation in cases where that was not what the parties wanted (Berger, Jensen 2017, 74).

Since a tribunal undertaking chairing settlement conferences is never devoid of the risk that one party will consider such an activity to be unfair and biased, the tribunal should aim to obtain a waiver of the right to challenge the tribunal on this ground (Kröll, Kerkhoff 2023, 933).

3.6. Caucusing

In the case of caucusing, the border between arbitration and mediation is entirely erased. In addition to chairing settlement negotiations, the tribunal also partakes in caucusing, acting as a mediator. This includes meeting with the parties separately (caucusing) with the aim of finding room for an

[28] However, some rules expressly provide for the interchangeability of the roles of mediator and arbitrator in the same case. See SCC Mediation Rules Article 14 and CIETAC Arbitration Rules Article 47.

[29] This is why the ICC Commission Report on Facilitating Settlement in International Arbitration explicitly provides that a tribunal should not agree to chair settlement discussions if the arbitrators do not possess specific skills that would allow them to do so effectively and safely (ICC 2023, 16).

amicable solution to the dispute.[30] The main issue with caucusing is whether it endangers the parties' right to be heard (*audiatur et altera pars*), as the tribunal receives confidential information that would otherwise remain undisclosed (Shaughnessy 2023, 1504; Plant 2000, 143). Some authors argue that this is a textbook example of depriving the parties of this right, creating grounds for setting aside the award (Blackaby *et al.* 2015, 6.192; Born 2015, 1236). Namely, the arbitration remains arbitration even during caucusing and the tribunal is bound by the *lex arbitri*, including the guarantees of due process (Berger 2018, 512–513). However, on the other hand, some authors believe that a written consent of the parties can nullify these concerns (Berger, Jensen 2017, 74), while others even consider that the parties who agree to arbitrators acting as mediators may have waived any objection to their due process rights being violated (Shaughnessy 2023, 1504).[31]

There are certain institutional rules that deal with situations where caucusing was conducted, but the settlement negotiations failed. The CIETAC Arbitration Rules provide that the tribunal cannot use the facts revealed to it during the process of caucusing in the remainder of the arbitral process (CIETAC Rules 2015, Article 40(9)).[32] This solution, however, does not eliminate the risk of arbitrators being influenced by the facts revealed during caucusing (Kaufmann-Kohler 2009, 198). On the other hand, the Hong Kong Arbitration Ordinance provides that the tribunal, in this situation, would have to brief the other side on the information revealed during caucusing that could be relevant for the remainder of the dispute (Hong Kong Arbitration Ordinance, Article 33(4)). The pitfall of this option is that it reduces the likelihood of the parties being open with the tribunal during their discussions, as they would also effectively be talking with the other side (Kaufmann-Kohler 2009, 199).

Seeing as caucusing poses serious threats to the award's "life expectancy" and that there is no clear-cut solution to eliminate them, it is the author's opinion that tribunals should generally avoid caucusing as a method of facilitating settlements.[33]

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[30] Article 9.2. of the Prague Rules, for example, allows the tribunal to act as a mediator during the proceedings, provided that the parties gave prior written consent.

[31] Also see Yeoh, Ang 2012, 290–293.

[32] A similar solution is contained in Article 16 of the Serbian Law on Intermediation in Dispute Resolution, *Official Gazette of the Republic of Serbia*, 55/2014.

[33] Shaughnessy draws a similar conclusion (Shaughnessy 2023, 1503).

4. THE ADVANTAGES AND SHORTCOMINGS OF SETTLEMENT FACILITATION BY TRIBUNALS

When looking at the desirability of tribunals engaging in settlement facilitation, one needs to bear in mind the general tendencies of international arbitration, especially the discussion regarding the procedural economy and efficiency of the arbitral process. The main users of arbitration usually find that the need for a time and cost-efficient process leading to an adequately reasoned award is not met (Berger, Jensen 2016; Allemann 2022, 231). Typically, the process moves through several phases of written submissions, requests for the delivery of documents, often lengthy oral hearings, all followed by proceedings for setting aside, recognition and enforcement of the award. Under these circumstances, regardless of its advantages over lengthy and uncertain court proceedings, arbitration is losing its reputation as a time and cost-efficient dispute resolution method (Friedland, Brekoulakis 2018, 7–8; Allemann 2022, 231). Resolving the dispute early, based on the settlement of the parties, resolves many of these issues. This has also been recognized by users of international arbitration, as around 60% of the participants in a 2017 survey identified "greater emphasis on collaborative instead of adversarial processes for resolving disputes" as the number one priority in international arbitration moving forward (International Mediation Institute 2018, 21).

Furthermore, settlements can be particularly useful in disputes between parties that are in an ongoing business relationship, one that is to continue after the arbitration (Shaughnessy 2023, 1486). Solving such disputes with an award clearly marking one of them as the "loser" and the other as a "winner" can prove to be an inadequate decision (Fisher, Ury 2005, 6).

Therefore, there obviously is an interest of many arbitration users for increased efficiency of the proceedings and a number of disputes that would be better resolved by a settlement than by an award (Reeg 2017, 271–273), which shows that settlement itself is very beneficial in general. This does not, however, show us that it is the tribunal that should encourage it.

There are multiple advantages of the tribunal being the one to facilitate settlement. Firstly, the tribunal understands the core of the dispute better than a third party ever could, therefore duplication of work is avoided and considerable savings in time and cost are achieved (Kaufmann-Kohler 2009, 197; Allemann 2022, 232). Secondly, the tribunal is in a position to evaluate the right moment at which settlement becomes a realistic option (Kaufmann-Kohler 2009, 197). Finally, a settlement concluded during the arbitral process can lead to an award by consent (Model Law, Article 30; Krivoi, Davidenko 2015, 836), which is enforceable under the rules of the

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (Kaufmann-Kohler 2009, 197; Shaughnessy 2023, 1487–1488; Allemann 2022, 232). A settlement concluded outside arbitration, on the other hand, does not provide the same level of certainty regarding its future enforcement.

However, there are also clearly negative sides to tribunals getting involved in the parties' settlement efforts. These are especially prevalent if the settlement negotiations fail, and the arbitration needs to be continued before the same tribunal that attempted to get the parties to settle the dispute. In that case, the impartiality of that tribunal can be brought into question. These issues are drastically increased if the method used by the tribunal was caucusing. In such cases, due process rights are also endangered (Kaufmann-Kohler 2009, 197).

Therefore, to best utilize the advantages of settlement facilitation, while avoiding the potential pitfalls as best as possible, the tribunals engaging in settlement facilitation should follow certain recommendations (Wilske, Braüninger 2023, 355). Firstly, the arbitrators should never attempt to facilitate settlement if one of the parties opposes it (Reeg 2017, 275; Wilske, Braüninger 2023, 355; Collins 2003, 334). On the contrary, before engaging in settlement facilitation, the tribunal should acquire informed consent from both parties (Kaufmann-Kohler 2009, 204; Wilske, Braüninger 2023, 355; Collins 2003, 341; Plant 2000, 146). The tribunal should also not engage in caucusing (Kaufmann-Kohler 2009, 204; Reeg 2017, 275) as it simply carries too many risks to the parties' due process rights. Finally, if settlement negotiations fail and the arbitrator considers that they can no longer remain impartial, they should withdraw. If the threat of partiality were to materialize later on in the proceedings, settlement facilitation would be counter-productive in terms of the efficiency of the arbitral process, as it would entail additional costs and delays (Kaufmann-Kohler 2009, 204).

Therefore, the advantages of the tribunal engaging in settlement facilitation are very present and the parties can significantly benefit from them. However, some ways of approaching settlement encouragement can lead to problems if the conciliation process fails. By adhering to the above-mentioned recommendations, tribunals can boost efficiency and utilize the good sides of settlement facilitation while making sure to avoid the risks it entails.

5. CONCLUSION

With the recent legislative developments in international arbitration, it seems that it might not be necessary to ask the question whether a tribunal has the power to facilitate settlements. Whether a tribunal will perceive this as its power, and especially as its duty, is going to depend on the composition of that tribunal, i.e., on each individual arbitrator and the way they view its role.

It is, furthermore, evident that settlement facilitation brings numerous advantages, the main one being boosting the efficiency of the dispute resolution process. It is also undisputed that the specific position of the arbitrator makes them the perfect person to recognize the right moment when reaching a settlement becomes a realistic option for the parties.

On the other hand, a tribunal engaging in settlement facilitation is undoubtedly walking a thin line between arbitration and mediation. In order to remain in the domain of the arbitration process, the tribunal needs to constantly keep in mind where that line is drawn. If these precautions are followed, it appears that a proactive tribunal can reap the benefits of reaching a settlement early on, without risking the possibility of their impartiality being questioned in a later phase of the process or the enforceability of an award resulting from it, in the event that the conciliation does not work.

Therefore, in the author's view, there is no reason for settlement facilitation to be overlooked as a technique available to arbitral tribunals. Tribunals should be aware of the entire range of efficiency-enhancing methods that they have at their disposal. Furthermore, when considering case management techniques, the tribunal should not be bound by the legal or cultural background of its respective jurisdiction, but rather by what the parties' needs are and what is required by the case at hand. Settlement facilitation should, thus, be viewed as a natural part of the arbitral process – not only in jurisdictions that traditionally embrace settlement encouragement as a regular part of the dispute resolution process,[34] but also in those that have so far not had a culture of encouraging amicable resolution of disputes after the proceedings have commenced (Reeg 2017, 277).[35]

[34] Such as Germany and Switzerland.

[35] The author refers mainly to *common law* jurisdictions.

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