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Facilitating Settlement in International Arbitration



Facilitating Settlement in International Arbitration

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Contents

| | |
|--|-----------|
| Introduction | 4 |
| I. Evolution of the arbitrators' role on settlement | 4 |
| II. Facilitating settlement via on-going case management techniques | 6 |
| 2.1 First case management conference and mid-stream conferences | 6 |
| 2.2 Bifurcation | 7 |
| III. Mediation/settlement windows | 7 |
| 3.1 How should the idea of a mediation window be raised? | 8 |
| i) By the parties? | 8 |
| ii) By the arbitral tribunal? | 9 |
| iii) By the arbitral institution? | 10 |
| 3.2 Timing/duration of the mediation window? | 11 |
| 3.3 Should the arbitration be paused while the mediation takes place? | 13 |
| IV. Preliminary views/chairing of 'settlement conferences' | 13 |
| 4.1 Preliminary views | 14 |
| 4.2 Chairing a settlement conference | 16 |
| Conclusion | 17 |
| Acknowledgements | 18 |
| Relevant ICC DRS Publications | 19 |

Introduction

1. The role of the arbitral tribunal in facilitating settlement of the parties' dispute has evolved in recent years. While arbitrators in some jurisdictions are accustomed to being proactive in this respect, the traditional viewpoint in most jurisdictions has been that the role of the arbitral tribunal is to decide the case in an enforceable award. Consistent with this view, the parties remained free to negotiate and settle their dispute should they wish to do so, but that was not something the arbitral tribunal should seek to encourage, facilitate or, least of all, become directly involved with. This view was motivated by concerns that taking on such a role would negatively impact the tribunal's neutrality vis-à-vis the merits of the dispute or the parties' perception of it.
2. This traditional view has, however, evolved as demonstrated by the way in which the [ICC Arbitration Rules](#) themselves and other publications now address the topic. The debate has now moved from whether arbitrators (and arbitral institutions) should take steps to facilitate settlement, to how that should be done. This Report on 'Facilitating Settlement in International Arbitration' (the 'Report') seeks to give guidance on this topic.

I. Evolution of the arbitrators' role on settlement

3. The ICC Commission Report '[Controlling Time and Costs in Arbitration](#)', first published in 2007, noted in paragraph 43 that:

'The arbitral tribunal should consider informing the parties that they are free to settle all or part of the dispute at any time during the course of the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings.'

Additional provisions recommended an early case management conference (not yet provided for in the ICC Arbitration Rules in force at that time) to which a representative from within each party's organisation should be encouraged to attend.

4. This ICC Commission Report was published around the same time as the report of the CEDR Commission on Settlement in Arbitration ('the CEDR Report').¹ The CEDR Report sets out several recommendations to parties, arbitrators and arbitral institutions, all aimed at increasing the prospects of parties to arbitration proceedings being able to settle their disputes without the need to proceed through to the conclusion of arbitral proceedings. Three principles underpinned those recommendations:

2.4.1 An arbitral tribunal has a primary responsibility to produce an award, which is binding and enforceable.

2.4.2 Unless otherwise agreed by the parties, the arbitral tribunal, assisted by the arbitral institution where applicable, should also take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute.

2.4.3 In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the parties separately, or obtain information from any party which is not shared with

1 [CEDR Commission on Settlement in International Arbitration - Final Report](#) (www.cedr.com, Nov. 2009). The Centre for Effective Dispute Resolution (CEDR) Commission was co-chaired by the English Judge Lord Woolf and the Swiss arbitrator Professor Gabrielle Kaufmann-Kohler and its members were leading arbitration and ADR practitioners from around the world. The report was accompanied by a set of rules for the facilitation of settlement in international arbitration.

the other parties, unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award or unless the parties explicitly consent to this approach and its consequences.'

5. While the CEDR Report was well received — and few took issue with these core principles — arbitral practice continued largely as before.
6. In 2012, ICC updated its [Arbitration Rules](#) to include a case management conference as well as a new [Appendix IV](#) entitled 'Case Management Techniques'. Those techniques included a paragraph on settlement, adopting the recommendation from the ICC Report on [Controlling Time and Costs in Arbitration](#) and adding at paragraph (h)(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.'
7. In 2014, ICC Commission published the '[Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives](#)'. This Guide included a section entitled 'Settlement Considerations', describing how settlement methods under the [ICC Mediation Rules](#) and case management techniques in arbitration can be used to facilitate settlement. The section concludes:

'Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.'
8. In the [ICC 2021 Arbitration Rules](#), the wording of Appendix IV evolved further, and rather than simply informing parties that they were free to settle their disputes, arbitrators were empowered to 'encourage the parties to consider settlement'.
9. This change in attitude is supported by the ICC Task Force Pilot Survey results which show that almost 70% of participants are of the view that arbitrators should inform the parties about ADR options during the first case management conference.
10. A similar survey response was reported by the IMI Mixed Mode Taskforce report on 'Arbitrator Techniques and their (Direct or Potential) Effect on Settlement' (the 'IMI Arbitrator Techniques Report').²

'In response to the question "Do you think an arbitrator has a role in fostering settlement", 78.38% responded "Yes" and 21.62% responded "No". Polling during the consultation sessions produced similar results with 80% responding positively. Thus, a strong majority of respondents recognized that arbitrators have a part to play in facilitating settlement. The comments expanded on the positive responses by explaining that the Tribunal: "Has an important role in helping the parties understand the procedural options to settlement, outside of the arbitral proceedings as well as within the arbitral proceedings"; "The arbitrator can have an active role provided this is in line with expectations/wishes of the parties"; "The arbitral proceedings can be framed in a manner favourable to possible settlements"; "An arbitrator plays a significant role in fostering settlement"; "It is the arbitrator's duty to encourage the parties to settle the dispute".'

2 The International Mediation Institute (IMI) [Mixed Mode Taskforce](#) was set up to examine and seek to develop model standards and criteria for ways of combining different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation, arbitration, or adjudication) with non-adjudicative methods that involve the use of a neutral (e.g., conciliation or mediation), whether in parallel, sequentially or as integrated processes. The report of Working Group 4 'Arbitrators and Settlement' (16 Nov. 2021) is entitled '[Arbitrator Techniques and their \(Direct or Potential\) Effect on Settlement](#)'. See also the '[Summary Article](#)' of the report by E. Sussman and K.P. Berger.

11. There is now significantly less concern than there was a few years ago about an arbitral tribunal being aware that the parties are seeking to arrive at a settlement, whether through mediation or otherwise. Understandably, what has not changed, is the concern that whatever steps are taken by an arbitral tribunal to facilitate settlement, such steps should not expose the arbitrators to challenge, or jeopardise the enforceability of their award.

II. Facilitating settlement via on-going case management techniques

2.1 First case management conference and mid-stream conferences

12. The first case management conference ('CMC') is often perceived as the ideal time for the arbitral tribunal to ensure that its first procedural order and the accompanying procedural timetable are purpose-built and include steps that provide for efficient management of the proceedings as well as facilitate settlement.³ Ideally, in-house counsel/client representatives would also attend this first case management conference.
13. Case management techniques do not stop at the first CMC. The arbitral tribunal may wish (or the parties may suggest to the tribunal) to schedule further procedural meetings after key stages in the arbitration (e.g. after the parties' first exchange of pleadings or memorials, after document disclosure, or after a tribunal decision on a strategic preliminary issue). Mid-stream conferences have become far easier to arrange logistically given the recent increased use of video conferencing for arbitration hearings.
14. At each of these mid-stream conferences, the arbitral tribunal may wish to check in with the parties on whether their initial positions have changed or developed as the arbitration has progressed. The arbitral tribunal may also discuss with the parties the issues it considers relevant based on available documents to date, and provide guidance to the parties on the issues to be addressed in further submissions or at the hearing. The value of such mid-stream conferences is that parties are given an opportunity to confirm or re-assess their expectations of the outcome, potentially narrowing the gap between both sides and encouraging potential settlement.⁴

³ Some in-house counsel raised a concern that if arbitrators raise settlement issues later in the proceedings, this can raise concerns about their actual or perceived neutrality.

⁴ A 'Kaplan Hearing' is one form of mid-stream conference, at which the parties present their initial case that the tribunal can question and based upon which further procedural orders may be made. The objective is for more focused proceedings and to give the parties insight into the tribunal's questions.

2.2 Bifurcation

15. Several case management techniques that are primarily aimed at efficiency of the arbitral process overlap with techniques that may facilitate settlement. For example, it may be efficient for liability and quantum issues to be bifurcated and at the same time, the arbitral tribunal's partial award on liability (or other preliminary issue) may help the parties to settle all other issues without the need for a further award.⁵
16. However, whether bifurcation is efficient (or on the contrary leads to a lengthier and less efficient arbitral process) has to be assessed on a case-by-case basis.

III. Mediation/settlement windows

17. To date, mediation has proven to be the most popular and successful ADR tool for commercial disputes. Securing effective access to mediation during arbitration proceedings is clearly an important initiative that parties, arbitral tribunals and arbitral institutions can take to facilitate settlement of disputes. Access to mediation during arbitration can be facilitated by the use of mediation windows.
18. The [ICC Mediation Guidance Notes](#) describe the utility of mediation windows in the following terms:
 - '29. Where mediation takes place in the course of arbitration proceedings, it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation (such a stay or pause in the proceedings is sometimes referred to as a mediation window). This enables the parties to focus on the mediation without being distracted by the need to take steps in the arbitration and incurring the costs of those steps when a settlement may be imminent. In other cases, the parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.
 30. The suggestion that mediation be used during the arbitration proceedings may be made by one of the parties. Whether or not it is helpful to build a mediation window into the timetable for the arbitration proceedings — and, if so, when that window should occur — is also a topic which may be discussed between the parties and the arbitral tribunal at the first and subsequent case management conferences provided for in Article 24 of the [ICC Arbitration Rules](#).'
19. There is support for mediation being undertaken while arbitration proceedings are pending, provided that the mediation does not unacceptably delay the arbitration proceedings.⁶ As noted in the [ICC Mediation Guidance Notes](#), mediation windows are an important way of achieving this.

5 Appendix IV(a) to the [ICC Arbitration Rules](#) provides: 'Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case'. ['Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives'](#) provides (at p. 11): 'Bifurcation. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration'.

6 A mediation window may not affect the arbitration timetable at all if steps in the arbitration are not suspended during the window. The mediation window may have a minimal impact on the overall length of the arbitration if it takes place during a period in the arbitration where there is in any event a significant gap between procedural steps.

20. There are a number of matters for parties and their counsel, arbitrators and arbitral institutions to consider in the context of mediation windows. These include how and by whom the idea of a mediation window be raised (Section 3.1), the timing and duration of the window, and whether all steps in the arbitration should be paused during the window (Section 3.2).

3.1 How should the idea of a mediation window be raised?

i) By the parties?

21. Ideally once arbitration proceedings have been commenced, the parties would discuss and agree to mediate either immediately or at some later point in the arbitration proceedings.
22. Unfortunately, once a dispute has arisen, the parties to the dispute often find it hard to reach agreement on such issues. Instead, parties tend to adhere to the dispute resolution procedure that was agreed to pre-dispute and recorded in the contract between them that has given rise to the dispute. In-house counsel are therefore looking for assistance so that they can get to mediation more effectively, without the fear of looking weak by proposing it to the other side.
23. The utility of a contractual clause providing for a mediation window to be included into the arbitration procedure could be considered. Such a clause (which would form part of the dispute resolution provisions) would commit the parties to use mediation during the arbitration proceedings in accordance with an agreed mediation window procedure as set out in a protocol.
24. This approach has similarities to the multi-tier dispute resolution clause, which provides for mediation before arbitration, but with the main difference being that a mediation window clause/protocol would provide for mediation to take place at some point in time after the arbitration proceedings have commenced rather than before.⁷
25. A mediation window clause and protocol would ensure that mediation does take place at a specified point in time during the arbitration. The protocol could specify when that time should be, selecting a moment that the parties anticipate will be ripe for settlement — e.g., after the first round of substantive submissions have been filed and the parties have had the opportunity to reasonably assess the merits of the case. The protocol could also specify other matters such as whether the arbitration proceedings should be suspended while the mediation takes place, and in what circumstances the mediation should come to an end.
26. Making important choices at the contract drafting and negotiation stage, however, potentially limits the number of contracts where such clauses will appear. Many businesses will either not be advised on such complexities by their lawyers (who may themselves not be well informed on such matters) or will not be sufficiently motivated to negotiate such complex dispute resolution provisions in their contract (other commercial issues may well be considered more important). Many lawyers understandably subscribe to the view that when it comes to dispute resolution clauses, a simple clause is preferable.⁸

⁷ In theory, a dispute resolution clause could provide for mediation to take place both before arbitration, and again at some point in the arbitration proceedings (in cases where the first mediation did not result in a full settlement of the dispute). In practice, while parties may, and should, be open to consider using mediation a second time for the same dispute, they are unlikely to wish to contractually commit to do so.

⁸ It would of course be possible for parties to a dispute to agree to a mediation window protocol after arbitration proceedings have been commenced. This, however, does not overcome the reluctance that some parties feel in proposing mediation at all — suggesting a mediation protocol to the other party is little different to suggesting mediation itself.

27. In addition, because the protocol will need to set out what is to happen and when, the parties will be required to make choices at a pre-dispute stage about the timing of a mediation window, and whether the arbitration proceedings should be suspended. In the same way that multi-step clauses often commit parties to using mediation at time that is not the most opportune for settlement,⁹ a mediation window clause/protocol may bring parties to mediation at a sub-optimal moment in the arbitration. Parties may be required to commit in advance to a suspension of the arbitration proceedings during the mediation window, when in the context of the actual dispute that arises, such suspension is disadvantageous for one or other party.
28. Flexibility in the timing of a mediation window is crucial. A mediation window protocol could leave open choices for the parties to make once the arbitration has commenced. While this is a possibility, given the risk that the parties will be unable to reach agreement, the protocol would still need to provide a default position on when the mediation window should occur.

ii) By the arbitral tribunal?

29. In 2009, the CEDR Report directed the following recommendation at arbitrators:
- '4.2.2 Where necessary, discuss with the parties and their counsel the different ADR processes which might assist and discuss with them ways in which such processes might be accommodated within the arbitral process (for example by way of a "mediation window" during the proceedings).** This form of discussion may be particularly useful where one or more of the parties or counsel is not familiar with mediation or other ADR processes, or where the parties come from different legal traditions.'
30. As noted above, the [2021 ICC Arbitration Rules](#) include as a case management technique, arbitrators encouraging the parties to consider settlement of their dispute. However, there is no obligation on an arbitral tribunal under the [Arbitration Rules](#) to raise the possibility of a mediation window with the parties and practice in this regard varies significantly.
31. While many arbitrators from different legal cultures consider it appropriate to raise the topic of a mediation window at an early case management conference, this is still only done in a minority of cases. A majority of arbitrators still do not consider it appropriate — if they have even given the issue any thought — to take responsibility for raising the issue of a mediation window.
32. Where a tribunal does raise a mediation window with the parties, there are generally three likely outcomes.
- All parties agree that a mediation window would be useful and the discussion then moves to when it should be inserted into the procedural timetable, and whether other steps in the arbitration should or should not take place during the window.
 - All parties agree that a mediation window is not needed, either because they do not wish to use mediation, or because they consider that any mediation can take place independently and without being provided for in the arbitration timetable.
 - In the most common outcome, one party will express interest in a mediation window and the other(s) will say it is not needed.
33. While it should be incumbent on arbitrators to ask parties about a possible mediation window, as a rule (to which there may be exceptions), it would generally not be appropriate for a tribunal to provide for a mediation window in the arbitration timetable absent the agreement of all parties.

⁹ Namely after direct business to business settlement negotiations have failed, but before the issues in the case have been set out and the merits adequately assessed.

iii) By the arbitral institution?

34. Several arbitral institutions now offer both arbitration and mediation services in which they administer a mediation concurrently with the arbitration. Some have implemented these packaged offerings through rule changes (e.g., AAA/ICDR, CPR),¹⁰ whereas others have developed protocols outside their rules structure (e.g., SIAC/SIMC, Vietnam International Arbitration Centre/Mediation Centre).¹¹
35. Typically, the arbitral institution administers the mediation under its mediation rules, with an independent mediator appointed concurrently with the institution's ongoing administration of the arbitration under its arbitration rules. In most instances, the parties agree to the concurrent administered processes by (i) adopting model clauses that incorporate the protocols, (ii) adhering to these protocols in the terms of reference, or (iii) in the case of the institutions that have implemented the process through rule changes, implicitly by adopting that institution's rules. These offerings provide a fully-evolved protocol for the conduct of mediation during a mediation window or a parallel mediation process, which parties will agree to in a dispute resolution clause.
36. Institutional protocols that have been developed to provide for mediation windows typically have the following key features:
- a) An institution-administered mediation window protocol typically provides for the submission of the parties' dispute to mediation by an independent mediator¹² under the rules of the relevant mediation centre at a defined point in the arbitration proceedings.¹³ Some parties consider

10 The International Institute for Conflict Prevention and Resolution (CPR) provides a [Model Clause and Protocol for Concurrent Mediation-Arbitration](#), also involving an independent neutral who acts in parallel to the arbitral tribunal. The CPR concurrent mediation regime is a form of ongoing parallel mediation. The AAA/ICDR have adopted [rules](#) that now provide for concurrent mediation on an [opt-out basis](#).

11 See e.g. the 2014 SIAC-SIMC '[Arb-Med-Arb Clause](#)', with a dispute resolution clause providing for the appointment of an independent mediator who conducts a mediation under the SIMC Mediation Rules during an institutionally supported mediation window. Pursuant to the [SIAC-SIMC Arb-Med-Arb Protocol](#), the mediation window is scheduled during the arbitration proceedings after the exchange of the Notice of Arbitration and the Response to the Notice of Arbitration, at which point the proceedings are suspended for a maximum of eight weeks for the mediation to be conducted. The Vietnam International Arbitration Center (VIAC) offers two different mechanisms with the Vietnam Mediation Center (VMC): (i) the [VIAC Med-Arb Combo](#), which is a mediation window whereby a mediation is conducted after arbitration is initiated and the arbitration proceedings are suspended; and (ii) the [VIAC Arb-Med-Arb Protocol](#) (introduced in 2020), whereby the mediation will proceed in parallel to the initial phase of the arbitration during which a response to the request for arbitration will be filed and the arbitral tribunal is constituted. In both cases the arbitration process is administered by VIAC under its Rules of Arbitration and the mediation is conducted by independent mediators appointed under the VMC Rules of Mediation. For a discussion of different forms of hybrid mechanisms and clients' preferences see V. Giorgadze, '[Can hybrid mechanisms bridge gaps in arbitration and mediation?](#)' (Kluwer Blog, 25 Apr. 2021). This article presents results of a [2020 Survey](#) conducted by the Singapore International Dispute Resolution Academy (SIDRA), which covered hybrid dispute resolution mechanisms.

12 To avoid possible confusion, this ICC Report refers to both the protocols and rules described in this section of the Report as 'Institution-Administered Mediation Windows'. The SIAC/SIMC and the Vietnam Center have adopted the 'Arb-Med-Arb' nomenclature for their protocols, but this Report recognises that in some jurisdictions, such as North America and in some respects in Europe, the terminology 'Arb-Med', 'Med-Arb' or 'Arb-Med-Arb' carries a connotation of a single neutral switching hats between arbitrator and mediator roles in the same matter. The 'Institution-Administered Mediation Window' protocols described in this section of the Report, including those offered by SIAC/SIMC and the Vietnam Center, do not involve such hat-switching, but, rather, they are an institutionally supported process featuring a separate and independent mediator functioning during the pendency of an arbitration.

13 Both the [SIAC-SIMC Arb-Med-Arb Protocol](#) and the [VIAC Arb-Med-Arb Protocol](#) place the mediation window early on in the arbitration proceedings, just after the exchange of the notice of arbitration and the response or, in the case of VIAC, it commences after the filing of the request for arbitration and runs in parallel with the constitution of the tribunal and the filing of the statement of defence (the initial response of the Respondent).

that a mediation conducted after the first exchange of submissions in the arbitration provides a context where the parties are well-informed as to their respective positions but a negotiated resolution still may save considerable time and costs.

- b) The mediator can be appointed by the institution or jointly by the parties.
- c) The arbitration proceedings will often be suspended automatically for a period of time that will not exceed a certain defined period during which the mediation will be undertaken.
- d) If the parties settle the dispute through mediation, they have the option of requesting an award by consent from the arbitral tribunal.
- e) If the parties do not settle their dispute through mediation, the arbitration proceedings will automatically resume at the end of the time period allocated for the mediation.

37. Arbitral institutions can make a significant difference. The CEDR Report expressed the same view:¹⁴

'4.5 Arbitral institutions have a pivotal role to play for several reasons:

4.5.1 It is their rules that are incorporated into the parties' contracts by way of the arbitration agreement. These rules can be structured in a way which facilitates settlement discussions between the parties.

4.5.2 Arbitral institutions can inform the arbitrators that they appoint as to the approach that those arbitrators should take to the encouragement and facilitation of settlement initiatives.

4.5.3 Case managers within the institution are often the first point of contact for the parties once a decision to refer a dispute to arbitration has been taken. They continue to be a contact point for the parties, independent from the tribunal. At all stages they are in a position to check with the parties the status of settlement negotiations and, where appropriate, make suggestions to progress settlement initiatives. In a similar way, they can communicate separately with the tribunal regarding the same matters.

4.5.4 Arbitral institutions are in a position to introduce new approaches and products into the market.'

3.2 Timing/duration of the mediation window?

- 38. It is fair to assume that parties will generally want to settle their disputes sooner rather than later. The earlier the settlement, the sooner the parties are released from the disruption in terms of time, costs, and relationships that the dispute is causing.
- 39. This suggests that the sooner mediation can take place the better. However, in order for the mediation to have a reasonable prospect of producing a settlement, the parties must have the information they need to undertake a risk analysis and assess the relative merits of any settlement terms on offer.
- 40. The time at which the parties have that information can vary widely, depending on the nature of the dispute and the factors that are influencing settlement. In some cases, commercial imperatives may trump the importance of a legal assessment of the likely outcome in an arbitral award. In other cases, an assessment of legal issues, of the evidence (including expert opinion), and of issues of quantum may be needed before decisions on settlement can be made.

14 Final Report of the CEDR Commission on ['Settlement in International Arbitration'](#), supra note 1.

41. This suggests that flexibility as to the timing of a mediation window is valuable. If a protocol stipulates that the mediation window should take place after the first round of substantive submissions in the arbitration, that might prove to be the perfect time, or it might prove to be too early or even later than necessary.
42. What is indisputable is that the sooner the parties consider when mediation might take place, the wider their options will be and the more chance there is of finding the optimum time.
43. Consideration of the length of any mediation window gives rise to an important distinction between two alternative approaches to the mediation itself.
 - The mediation is to take place over a relatively short period (usually a number of weeks), often with preparation for one or more mediation sessions at which negotiations take place.
 - The mediation is to be an on-going process, without any predetermined endpoint, with dialogue continuing for as long as it takes to reach agreement (or until one or both parties, or perhaps the mediator, conclude that further discussions are not worthwhile).
44. This Report considers both approaches, with the latter given the title 'on-going parallel mediation'.
45. Different mediators, parties and legal counsel will have different views as to whether a longer open-ended mediation process is more likely to produce a settlement in a given case than a shorter more-focused procedure. Much will depend on the nature of the parties and the dispute. Longer procedures can provide more time for each party to reflect and work privately (or with the mediator) on specific issues, but also bring the risk that key decision makers will repeatedly be faced with an option to defer a decision on settlement until a later stage (i.e. to 'kick the can down the road'). Shorter procedures may not provide the opportunity for a considered step-by-step approach to the negotiation but can increase the incentives for settlement at the conclusion of a time-limited mediation (i.e. 'do it now or not at all').
46. The introduction of concurrent mediation into ICDR arbitration on an opt-out basis is relatively recent (March 2021),¹⁵ but early reports suggest that parties are generally choosing to opt-out of the automatic appointment of a concurrent mediator. One of the advantages of the [ICC Mediation Rules](#) is that they offer complete flexibility in this regard. Whether there is to be an 'on-going parallel' mediation process, or a shorter time limited mediation process is something that the mediator and the parties can discuss, and which can then be reflected in the note that the mediator produces under Article 7 of the [Mediation Rules](#).¹⁶

¹⁵ See supra note 10.

¹⁶ Art. 7, 'Conduct of the Mediation' provides: '1. The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted. 2. After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules. 3. In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality. 4. Each party shall act in good faith throughout the mediation'.

47. Where a more typical time-limited mediation process is envisaged, the length of the mediation window that is needed is likely to be a number of weeks (e.g. 4-8 weeks). In considering the length of window, the key considerations are likely to be:
- The time needed for the mediation to be set-up and to run its course.
 - If the arbitration is to be suspended during the window, the impact of the delay on the time when a final award can be rendered.

If the arbitration proceedings are not suspended, and the mediation procedure runs in parallel, then there is no 'window' as such, although the parties may still seek to agree in advance a time in the arbitration process at which a mediation will commence.

3.3 Should the arbitration be paused while the mediation takes place?¹⁷

48. Where a shorter time-limited mediation is to take place, the parties may find a genuine window in the arbitration proceedings to be helpful. This will enable them and their advisers to focus on the mediation without being distracted by competing deadlines in the arbitration.
49. If the arbitration proceedings are put on hold while the mediation takes place, this is likely to result in the arbitration timetable taking longer to get to an award, which may or may not be unappealing, particularly to a claimant. Whether any delay is meaningful in the context of the timetable for the full arbitration process will vary from case to case. And if any pause in the arbitration procedure is timed after the parties have completed a major milestone, it may also have limited impact on the overall duration of the proceedings.
50. If a longer open-ended mediation procedure is used, it will rarely be appropriate to suspend the arbitration as the idea is that the two should run in parallel, with developments in the arbitration hopefully increasing, rather than reducing, the prospects of settlement.

IV. Preliminary views/chairing of 'settlement conferences'

51. When an arbitral tribunal works with the parties to include a mediation window in the arbitration procedure, it is taking steps to make sure that the arbitration does not create an obstacle to settlement.
52. This section considers how an arbitral tribunal can, in appropriate cases, go further and take active steps to assist the parties in arriving at a settlement. This is of course dependent on the members of the tribunal having acquired the requisite skills and experience to take these steps without jeopardizing the arbitration or the award.
53. While, as already noted, the role of the arbitral tribunal in facilitating settlement (including by raising the topic of a mediation window) is now broadly accepted by the international arbitration community, it remains far more controversial for an arbitral tribunal to take the further step of expressing preliminary views on the merits (Section 4.1), or the yet further step of chairing a settlement conference with the parties (Section 4.2).

¹⁷ The term 'pause' is used as a mediation window would not result in a formal 'stay' of the arbitration proceedings. It would simply be a period when the procedural timetable would not provide for other substantive procedural steps, thereby allowing the parties to focus their efforts on a mediation that takes place at some point during the period of the window.

4.1 Preliminary views

54. An arbitral tribunal giving preliminary views is a common technique for practitioners in Germany and other German speaking countries where this technique is a part of judicial proceedings. Harmonisation is a process whereby international arbitration practice develops by importing for the benefit of all, techniques which have already proved successful in specific regions. Introducing an express power of an arbitral tribunal to share preliminary views was one of the notable initiatives in the 'Prague Rules' which were first published in 2018.¹⁸ Should the practice of giving of preliminary views and the chairing of settlement conferences be adopted to become standard international arbitration practices?

55. The giving of preliminary views basically involves an arbitral tribunal giving the parties its non-binding and preliminary assessment on the issues in dispute in the arbitration. The tribunal may give its preliminary views on the whole case, or on specific issues. This goes beyond the uncontroversial practices of many proactive arbitrators which was encouraged in the ICC Commission Report '[Controlling Time and Costs in Arbitration](#)':

'a tribunal that has made itself familiar with the details of the case from the outset can be proactive and give appropriate, tailor-made suggestions on the issues to be addressed in documentary and witness evidence, the areas in which it will be assisted by expert evidence, and the extent to which disclosure of documents by the parties is needed to address the issues in dispute.'¹⁹

It also goes beyond the type of discussion that takes place at a conventional mid-stream conference or 'Kaplan Hearing' (as described at paras 13-14 above).

56. Once an arbitral tribunal has given its preliminary views, the parties will not only better understand the strengths and weaknesses of their respective cases, but — and perhaps most importantly — they will understand how the tribunal which will ultimately decide their case views the merits. This highlights the important difference between the giving of preliminary views by a tribunal, and an early neutral evaluation given by an independent third party (a tool which is discussed earlier in this report). While both preliminary views and early neutral evaluation assist the parties to better understand the merits of the case, preliminary views have the additional value of being the views of the tribunal that will decide the case.

57. It is generally accepted that an arbitral tribunal requires the express agreement of the parties in order for it to have the authority to give its non-binding preliminary views on the merits. In other words, it is not sufficient for a tribunal to rely on a general implied duty to facilitate settlement as

18 The preamble to the [Prague Rules on the Efficient Conduct of Proceedings in International Arbitration](#) describes them as follows: '[The Rules] are intended to provide a framework and/or guidance for arbitral tribunals and parties on how to increase efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings. The Prague Rules are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute'. Art. 2.4 provides: 'The arbitral tribunal may at the case management conference or at any other stage of the proceedings, if it deems it appropriate, indicate to the parties: ... (e) its preliminary views on (i) the allocation of the burden of proof between the parties; (ii) the relief sought; (iii) the disputed issues; and (iv) the weight and relevance of evidence submitted by the parties.' And Art. 2.5: 'Expressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality and cannot constitute a ground for disqualification.'

19 ICC Report '[Controlling Time and Costs in Arbitration](#)', para. 28.

the source of its authority to give preliminary views.²⁰ In contrast, express party agreement is not required for an arbitral tribunal to be proactive in the manner described in the ICC Commission Report '[Controlling Time and Costs in Arbitration](#)' (at para. 28 quoted above).

58. One reason for the need for express party consent (which is best given in writing) is the potential concern that having expressed its preliminary views on the merits, an arbitral tribunal no longer has an open and impartial mind and could be subject to confirmation bias on material issues. This concern could lead to a later challenge of a tribunal's award. So, as noted in the IBA Guidelines on Conflict of Interest in International Arbitration, the solution is 'informed consent':

'The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest.'²¹

59. The way in which an arbitral tribunal goes about giving preliminary views will vary from case to case, influenced significantly by the experience and preferences of the arbitrators on the tribunal. There are nonetheless a few common approaches that would appear to be widely adopted:²²
- a) Preliminary views are only given once the arbitral tribunal has an adequate understanding of the issues on which it is expressing its view.
 - b) The parties' express agreement should be obtained, with care taken not to pressure the parties into giving consent.
 - c) The arbitral tribunal should make it clear that the views expressed are preliminary and are only applicable at the time they are given and on the basis of the materials presented to date; accordingly the arbitral tribunal retains the right to change its views as the arbitration proceeds.
 - d) The arbitral tribunal should give its views orally, with no transcript made. This emphasises the preliminary and non-binding nature of the views expressed.
 - e) The views expressed by the tribunal and any comments made by the parties at the session where those views are expressed should be 'off the record' and subject to 'settlement privilege'.²³
 - f) The arbitral tribunal may use a decision tree analysis or other means of visualisation to support the views it sets out.²⁴
60. There are potential advantages (i) and potential disadvantages (ii) to a tribunal giving preliminary views.
- i) Preliminary views can provide an effective tool to help the parties settle. The parties obtain a better understanding of their chances of success and are therefore able to find an adequate settlement. Even where the giving of preliminary views does not lead to a settlement, it may increase the efficiency of the proceedings as it will enable the parties to focus on the aspects that are crucial to the tribunal.

20 Such party consent might, for example, be given via the parties' express agreement that the [Prague Rules](#) (or at least Art. 2.4 of those Rules) should apply to their arbitration.

21 Explanation (d) of General Standard 4, [IBA Guidelines on Conflict of Interest in International Arbitration](#) (also cited in the [IMI Arbitrator Techniques Report](#) supra note 2).

22 IMI Arbitrator Techniques Report, Appendix VI 'Preliminary Views', Sections D and E.

23 The term 'settlement privilege' is used here to describe the privilege that attaches to communications aimed at arriving at a negotiated settlement of issues in dispute. It is also referred to as 'without prejudice privilege'.

24 If the views are given orally, the decision tree analysis would be shown to the parties as visual aid, but not given to them to retain.

- ii) If parties have a different legal background, even the discussion of preliminary views may be controversial and therefore needs to be handled with particular sensitivity. Parties may feel committed to agree to preliminary views being given if it is proposed by an arbitral tribunal, even if they do not actually wish for it to take place. And the giving of preliminary views brings potential risks for the enforceability of an award if not conducted properly.
61. Greater familiarity of arbitrators, counsel, and parties with the way in which preliminary views can be safely used to facilitate settlement will be beneficial. At all times, the risk of undermining the enforceability of the tribunal's award should be avoided.

4.2 Chairing a settlement conference

62. One of the possible consequences of the arbitral tribunal giving its preliminary views is that the parties may wish to engage in settlement discussions that take those views into account. It is also possible that the parties will agree (or invite) the arbitral tribunal (or perhaps the presiding arbitrator alone) to chair those discussions.
63. Chairing a settlement conference is a yet further step that a tribunal (or the presiding arbitrator of a three-person tribunal) can take to help the parties with settlement. It has a different quality from the giving of preliminary views, since the terms of settlement may be motivated by factors other than the legal merits of the case that have been the subject of those preliminary views. For example, the ability of a party to pay an award, issues around enforceability and the terms of a renegotiated contract are all topics that might come up during a settlement conference.
64. Before taking this further step, an arbitral tribunal should again obtain the parties' express consent. Arbitral tribunals should not seek such consent unless they have the skills to chair settlement discussions effectively and safely (such skills may have been acquired through practice as a mediator). And importantly, any settlement conference should be subject to 'settlement privilege'.²⁵
65. The CEDR Report identifies the chairing of settlement conferences as a potential role for an arbitral tribunal.

'4.2. Steps that arbitrators can take within the context of most existing arbitral rules include the following:

(...) 4.2.5 If both parties agree, chair one or more settlement meetings attended by internal representatives of the Parties (or other persons with authority to negotiate and settle) at which possible terms of settlement are negotiated. The involvement of one or more members of the tribunal or a neutral chairperson can improve the chances of settlement discussions proving successful. Upon the request of the parties, the members of the arbitral tribunal or the chairperson may submit to the parties proposed terms of settlement. Arbitrators should not meet with the Parties separately or obtain any information from one Party which is not shared with the other Parties. The arbitrators must also avoid putting pressure on the parties to settle.'

66. This extract from the CEDR Report highlights an important distinction between this role of chairing an all-party settlement conference and the very different role of mediating, with the latter potentially involving private meetings with all parties.²⁶ When an arbitrator takes on the role as mediator, the process is often referred to as 'med-arb' (though many different terms are used).

²⁵ In practice this means that if no settlement is arrived at and the tribunal proceeds to produce an arbitral award, no party may refer to, and the tribunal may not rely upon, positions taken or disclosures made in the course of the settlement conference.

²⁶ While the ability of a mediator to meet privately with a party (i.e. to caucus) is common in most jurisdictions, there are some which use this technique less, preferring to use joint all party meetings where possible.

67. The pros and cons of this practice, which remains rare in most jurisdictions, are much debated — largely because the practice gives rise to very significant risks that the enforceability of any arbitral award will be undermined. Those risks principally arise because an arbitrator, who meets with one party in private and receives information that is not shared with any other party, will be acting contrary to the generally accepted due process principle that such private discussions should not take place. Discussion of a med-arb process, which should be approached with great caution, goes beyond the scope of this Report.²⁷

Conclusion

68. This Report describes techniques that are known to be effective in facilitating settlement in arbitration proceedings. Not all of these techniques will be appropriate for every case or for all parties, counsel or arbitrators. A careful selection of the most appropriate technique should be made, considering all of the circumstances, including the skills and experience of the arbitrators in implementing each technique.
69. The Report reflects current thinking and practice. It is anticipated that new approaches and practices will continue to develop in the coming years, just as we have seen the development over the past 10-15 years (as described in paras. 1-11 above). It is therefore hoped that this will be a living report, which will be updated in the future to provide further assistance on settlement facilitation to all involved in the arbitration process.

²⁷ For those interested in this topic, published articles are numerous. Appendix 2 to the [CEDR Report](#) entitled 'Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement' gives a summary of the key issues and potential solutions.

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Advisory Board, chaired by **Gabrielle Kaufmann Kohler** and comprised of **Cyril Dumoulin, Alya Ladjimi, Michael McIlwrath, Edna Sussman, Hannah Tumpel**.

The Task Force was structured in four Tracks who held 14 further smaller track-specific meetings. Track 1 'decision trees and protocols' led by **Ulrich Hagel, Pierrick LeGoff** and **Donny Surtani**. Track 2 'ADR Services' led by **Sara Aranjo, Eric Franco** and **Lindy Patterson**. Track 3 'settlement in arbitration' led by **Kelvin Poon, Andres Romero-Delmaestro** and **Anke Sessler**. Track 4 'national courts and ADR' led by **Adrian Cole, Funmi Roberts, Valentina Wong**.

In addition, the Report draws on several further input:

- Approximately 35 sample cases were collected by the **ICC ADR Centre** and the Commission Secretariat to demonstrate how ICC ADR Services have been or could be used.
- A series of approximately 30 'Virtual In-house Counsel Open-Mic Sessions' moderated by **Aisha Nadar** and **Kathleen Paisley**, were held and created a platform for diverse and globally based corporate users and candidly discuss their views on early and effective dispute resolution and discussed the work and recommendations proposed by the Task Force.
- An ICC Pilot Survey on Practice and Preferences in ADR and Arbitration prepared by **Tuuli Timonen** and **Marlen Estevez Sanz** were held over summer 2021 and sought input from 533 participants and users of ICC Dispute Resolution Services.
- A questionnaire was sent to all **ICC National Committees** to learn about court initiatives or innovative projects from national legislators or institutions on the use of ADR, as well as to identify specific dispute resolution needs in their respective jurisdictions.

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Relevant ICC DRS Publications

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[2021 Arbitration and 2014 Mediation Rules](#)

[Arbitration Clauses](#)

[Mediation Clauses](#)

[Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration \(1 Jan. 2021\)](#)

[Guidance on Mediation of Belt and Road Disputes \(2019\)](#)

[2015 Expert Rules](#)

[Suggested clauses referring to the ICC Rules for the Administration of Expert Proceedings](#)

[Suggested clause providing for ICC as appointing authority for expert proceedings](#)

[2015 Dispute Board Rules](#)

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2014 [Mediation Guidance Notes](#)

2012 [Techniques for Controlling Time and Costs in Arbitration \(Second Ed.\)](#)

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