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The Arbitrator's Mandate To Facilitate Settlement

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THE ARBITRATOR’S MANDATE TO FACILITATE SETTLEMENT

Klaus Peter Berger & J. Ole Jensen***

ABSTRACT

The discussion whether an international arbitrator’s mandate includes the facilitation of settlement between the parties is not new. For the past decades, it has unfolded between those who believe in settlement facilitation as an efficient means to end the parties’ dispute and those who consider such activities incompatible with the arbitrator’s judicial role as a “private judge.” Up to now, this discussion has remained deeply rooted in domestic conceptions of what the arbitrator’s role should and should not be. This Article argues that it is past time to throw these culturally shaped beliefs overboard. In the interest of the much-debated quest for increased efficiency in the arbitral process, international arbitrators should realize and appreciate that settlement facilitation is not incompatible with their mandate and can be a highly useful tool to resolve the parties’ dispute in a time- and cost-efficient manner. To further this understanding of the arbitrator’s mandate, this Article offers tried and tested tools that allow international arbitrators to facilitate settlement without overstepping their mandate or risking a challenge by the parties.

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I. INTRODUCTION

“Procedural efficiency,” “case management,” and “proactivity” – these buzz words currently dominate the realm of international arbitration. Most stakeholders have realized that a considerable decrease of the time and costs an international arbitration requires is vital to its future success. There is widespread agreement that crucial to ensuring procedural efficiency is a decisive and proactive arbitral tribunal.¹ There is less agreement regarding another important means of increasing efficiency: settlement facilitation by the arbitrator.

Whether an arbitrator can and should take a proactive approach and get involved in the parties’ settlement efforts has been the subject of a controversial debate throughout the past decades.² To a large

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1. Cf. Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 ARB. INT’L 415, 416 (2016) with further references.

2. See generally Michael E. Schneider, *Combining Arbitration with Conciliation*, in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 57–100 (Albert Jan van den Berg ed., 1998); Michael Hwang, *The Role of Arbitrators as Settlement Facilitators – Commentary*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 571–81 (Albert Jan van den Berg ed., 2005); Pierre Lalive, *The Role of Arbitrators as Settlement Facilitators – A Swiss View*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 556–64 (Albert Jan van den Berg ed., 2005); Fali S. Nariman, *The Role of Arbitrators as Settlement Facilitators – Introduction*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 531–32 (Albert Jan van den Berg ed., 2005); Arthur L. Mariott, *Arbitrators and Settlement*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 533–46 (Albert Jan van den Berg ed., 2005); Christian Bühring-Uhle, Gabriele Scherer & Lars Kirchhoff, *The Arbitrator as Mediator*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 135–43 (Christopher R. Drahozal &

extent, this debate has not yielded definitive answers. At its core lie differing perceptions of the arbitrator's mandate. Is his or her role limited to *deciding* the parties' dispute by rendering an award or should he or she endeavor to *resolve* it, which may include getting involved in settlement discussions between the parties? The answer to that question still markedly depends on the legal backgrounds of those who participate in the debate. While common law arbitrators are more inclined to view their role solely as decision-makers, lawyers with a civil law background follow a more liberal approach and advocate a proactive arbitral role in the parties' settlement attempts.³

Historically, such clashes of the civil law and common law traditions have existed in many areas of international arbitration.

Richard W. Naimark eds., 2005); Judith Gill, *The Arbitrator's Role in Bringing About a Settlement – An English View*, in *BEST PRACTICES IN INTERNATIONAL ARBITRATION* 155–65 (2006); Bernd Ehle, *The Arbitrator as a Settlement Facilitator*, in *WALKING A THIN LINE: WHAT AN ARBITRATOR CAN DO, MUST DO OR MUST NOT DO* 79–95 (2010); Christopher Harris, *Arbitrators and Settlement – A Common Law Perspective*, in *THE ARBITRATORS' INITIATIVE: WHEN, WHY, AND HOW SHOULD IT BE USED?* 89–98 (Domitille Baizeau & Frank Spoorenberg eds., 2016); Paolo Marzolini, *The Arbitrator as a Dispute Manager – The Exercise of the Arbitrator's Powers to Act as Settlement Facilitator*, in *THE ARBITRATORS' INITIATIVE: WHEN, WHY, AND HOW SHOULD IT BE USED?* 99–119 (Domitille Baizeau & Frank Spoorenberg eds., 2016); Thomas Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, *PENN. ST. YEARBOOK ON ARB. AND MEDIATION* 1–31 (6 ed. 2014); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 *AM. REV. INT'L ARB.* 1–17 (1999); Christopher Koch & Erik Schäfer, *Can It Be Sinful for an Arbitrator Actively to Promote Settlement?*, *ARB. DISP. RES. L.J.* 153–84 (1999); Michael Collins, *Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 *ARB. INT'L* 333–43 (2003); Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 *ARB. INT'L* 523–36 (2005); Daniele Favalli & Max K. Hasenclever, *The Role of Arbitrators in Settlement Proceedings*, 23 *MEALEY'S INT'L ARB. REP.* 21–30 (2008); Renate Dendorfer, *Aktives Vergleichsmanagement – Best Practice oder Faux pas schiedsrichterlicher Tätigkeit?*, *GER. ARB. J. (SCHIEDSVZ)* 276–83 (2009); Ugo Draetta, *Leveraging the Arbitral Process to Encourage Settlement: Some Practical and Legal Issues*, *INT'L BUS. L.J.* 487–96 (2009); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 *ARB. INT'L* 187–205 (2009); Lucy Greenwood, *A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement*, 27 *ARB. INT'L* 199–210 (2011); Sophie Nappert & Dieter Flader, *A Psychological Perspective on the Facilitation of Settlement in Int'l Arb. – Examining the CEDR Rules*, 2 *J. INT'L DISP. SETT.* 459–70 (2011); Klaus Peter Berger, *Promoting Settlements in Arb.: Is the "German Approach" Really Incompatible with the Role of the Arbitrator?*, 9 *NY DISP. RES. L.* 46–49 (2016); Miloš Olík & Michal Čáp, *Comparison of Settlement Efforts by Arbitrators and Mediators*, 82 *INT'L J. of ARB., MEDIATION, AND DISP. MGMT.* 250–53 (2016).

3. Cf. JOSHUA KARTON, *THE CULTURE OF INT'L ARB. AND THE EVOLUTION OF CONTRACT LAW* 196 (2013); Siegfried H. Elsing, *Procedural Efficiency in Int'l Arb.: Choosing the Best of Both Legal Worlds*, *GER. ARB. J. (SCHIEDSVZ)* 114, 117 (2011).

Today, in a world in which all stakeholders have realized and accepted the need for efficiency and predictability, most of these clashes have been resolved in a more or less pragmatic fashion.⁴ Instead of the legal background influencing an arbitrator's procedural conduct, there is an "increasing convergence of approaches used by chairpersons in international arbitration [which] increases the predictability of the international arbitral process."⁵ Indeed, it can be considered a hallmark of the modern international arbitrator that he or she is able to adopt different styles of procedural conduct, depending on the specificities and intricacies of the case: "By drawing on a variety of legal traditions but wedding themselves to none, truly transnational arbitrators can promote the effective resolution of disputes by offering unique procedural solutions tailored to the parties' needs."⁶

There is no reason why settlement facilitation by international arbitrators should be an exception. This Article argues that what should guide the arbitrator who is faced with the question whether to facilitate settlement between the parties are not his or her legal upbringing and cultural convictions. Neither should misconceptions about what settlement facilitation actually is deter arbitrators from exploring that option.⁷ Rather, the arbitrator should solely be guided by what the parties and the intricacies of the case require. Recent surveys and developments indicate that parties in many cases require their arbitrators to facilitate settlement between them.⁸ This Article advocates that this need should not be discarded as incompatible with the arbitrator's mandate. Rather, it is compatible with the arbitrator's judicial role as a decision-maker that he can get involved in settlement discussions with the parties.⁹ By elaborating on the

4. A prominent example is the success of the IBA Rules on the Taking of Evidence in International Commercial Arbitration 2010. INT'L BAR ASS'N ["IBA"], IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

5. Albert Jan van den Berg, *Organizing an International Arbitration: Practice Pointers*, in LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 415 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014).

6. Donald Francis Donovan, *The International Arbitrator as Transnational Judge*, 7 WORLD ARB. & MED. REV. 193, 198 (2013); cf. Klaus Peter Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective*, 25 ARB. INT'L 217–38 (2009).

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

approaches currently employed in practice, this Article offers the transnational arbitrator tried and tested procedural tools to enhance the efficiency of international arbitration by facilitating settlement between the parties.¹⁰

II. TO ENCOURAGE, PROMOTE OR FACILITATE SETTLEMENT? THE ARBITRATOR ROLE CONTINUUM

To a considerable extent, the debate regarding the arbitrator's role in parties' settlement efforts can be traced back to inconsistent terminology and fundamental misunderstandings.¹¹ The terms "to encourage," "to promote," and "to facilitate" settlement are often used interchangeably.¹² At other times, they are used to indicate differing degrees of arbitral involvement in the parties' settlement discussions.¹³ Such terminological ambiguity acts as a catalyst for the ongoing controversial debate. If there is no uniform understanding of what settlement facilitation is and means, there is a danger that any discussion about this issue results in little more than two ships passing in the night. This makes it imperative to develop a clear understanding of the differing degrees of arbitrator involvement in the parties' settlement efforts before moving on to discussing its details. However, rather than getting hung up in abstract definitions, the focus should be on what it is that international arbitrators do or can do in their attempts to help the parties settle the case.

A similarly pragmatic approach has been suggested to avoid misunderstandings caused by the use of different terminology in the context of international business mediation.¹⁴ While some strictly distinguish between "facilitative," "evaluative," and "transformative" mediation styles, others emphasize the "nature of mediation as a fluid and dynamic process."¹⁵ To avoid such terminological quarrels, it has

10. See *infra* Part V.

11. Cf. Ehle, *supra* note 2, at 83; Berger, *The International Arbitrator's Dilemma*, *supra* note 6, at 223; Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 46.

12. Cf. Mariott, *supra* note 2, at 533–37; Ehle, *supra* note 2, at 79; Draetta, *supra* note 2, at 487–91; Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 46–47.

13. See Hwang, *supra* note 2 at 572.

14. Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT L. REV. 7, 9 (1996) ("[A]lmost every conversation about mediation suffers from ambiguity, a confusion of the 'is' and the 'ought.'").

15. See generally KLAUS PETER BERGER, *PRIVATE DISPUTE RESOLUTION IN INT'L BUS.: NEGOTIATION, MEDIATION, ARB.* 11–25 (3d ed. 2015).

been suggested to view the mediator's role as a continuum.¹⁶ The mediator should not be chained to one particular style and adhere slavishly to an abstract role model, but should adopt a pragmatic approach. He or she should be ready to take the role of a facilitative, evaluative or transformative mediator, or adopt a blend of these styles, depending on what the parties and the dispute require.¹⁷

Applied to international arbitration, the arbitrator's role in the parties' settlement efforts may also be viewed as a continuum – a spectrum of how far the arbitrator becomes involved in the parties' settlement efforts. At one end of that *arbitrator role continuum* is the lowest possible degree of involvement: none. A large number of arbitrators, especially from the common law world, believe that they should not even mention the possibility of settlement to the parties, let alone become involved in any meaningful way. They perceive it as belittlement to tell sophisticated commercial parties, who will likely have considered their options beforehand, that they are free to settle the dispute.¹⁸ In their opinion, the fact that parties initiate an international arbitration means that they want a binding decision on their dispute.¹⁹ If anything, these arbitrators assume that the parties will take up the issue of settlement among themselves outside the hearing room, without the need for the arbitral tribunal to assist them in their efforts.

The next step on the continuum is the arbitral tribunal's abstract proposal that settlement may be an option. Section h(i) of Appendix IV to the ICC Rules 2017 suggests that arbitral tribunals inform the parties "that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods."²⁰ Most international arbitrators seem to accept this as part

16. Riskin, *supra* note 14, at 44.

17. See *id.* at 44-45; cf. CHRISTIAN DUVE, HORST EIDENMÜLLER & ANDREAS HACKE, *MEDIATION IN DER WIRTSCHAFT* 88 (2d ed. 2011).

18. KARTON, *supra* note 3, at 106 (discussing reports of English and Australian arbitrators who state this as the reason why they are reluctant to mention settlement at all).

19. Cf. *id.* at 106 (quoting an Australian arbitrator: "International arbitration is expensive and time consuming. Invariably, the parties try to negotiate. It would be outstanding if they didn't try to negotiate. Arbitrations are a last resort. It's pretty naïve to say to the parties, 'Have you considered trying to resolve this amicably?' You know they got big law firms involved. Of course they know the ropes. It is very, very occasionally appropriate to say something.").

20. App. IV, Sec. h (i), *Rules of Arbitration of the International Chamber of Commerce, in force as from 1 March 2017*, in ICC, *ARBITRATION RULES AND MEDIATION RULES* 62, 63 (2017); see also ICC COMM'N ON ARB. AND ADR, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARB.* 11 (2d ed. 2012); THE AAA CODE OF ETHICS FOR ARBITRATORS IN

of their mandate.²¹ Indeed, there is little that would speak against simply informing the parties that they might consider settling the case. On the other hand, this information *alone* may not go a long way to actually encourage settlement. As indicated above, parties will almost always be aware of the option to negotiate a settlement.

The part of the continuum where the arbitral tribunal actually contributes in a meaningful way is laid out in Section h(ii) of Appendix IV to the ICC Rules 2017, which states that “where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute.”²² This provision acknowledges the intrinsic value of facilitating settlement between the parties. However, it does not provide any concrete examples of what these “steps to facilitate settlement” may look like. One of those steps is provided for in Article 2(3)(a) IBA Rules of Evidence 2010: “The Arbitral Tribunal is encouraged to identify to the Parties . . . any issues that the Arbitral Tribunal may regard as relevant to the case and material to its outcome.” Such an early evaluation can be an important step to stimulate settlement between the parties as they realize their chances to succeed in the arbitration.

Another step further on the continuum is for the arbitral tribunal to conduct a full-fledged settlement conference with the parties. The Centre for Effective Dispute Resolution (“CEDR”), an independent British commercial ADR provider, has published a helpful soft-law instrument in that regard. The CEDR Rules for the Facilitation of Settlement in International Arbitration 2009 (“CEDR Rules”)²³ clarify that in a settlement conference, the arbitral tribunal not only discusses the chances of a possible settlement with the parties, but also its

COMMERCIAL DISPUTES, Canon IV.F (2004), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.

21. Kaufmann-Kohler, *supra* note 2, at 188; Draetta, *supra* note 2, at 493; cf. Matthias Pitkowitz & Marie-Therese Richter, *May a Neutral Third Person Serve as Arbitrator and Mediator in the Same Dispute?* 225–30, 227, GER. ARB. J. (SCHIEDSVZ) (2009); cf. OLIVER FROITZHEIM, *DIE ABLEHNUNG VON SCHIEDSRICHTERN WEGEN BEFANGENHEIT IN DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT* 666 (2016).

22. See ARB. RULES OF THE GERMAN INSTITUTION OF ARB. Section 32.1 (1998) (“At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute”); see also, COURT OF INNOVATIVE ARB. RULES, Art. 13.4 (2015) (“After consulting the parties and if neither party objects, the Arbitrator is authorized to attempt to bring about a settlement to the dispute”).

23. CEDR RULES FOR THE FACILITATION OF SETTLEMENT IN INT’L ARB. Art. 5 (1.1)-(1.4) (2009), available at https://www.cedr.com/about_us/arbitration_commission/Rules.pdf.

potential contents.²⁴ The arbitral tribunal thus becomes immediately involved with the parties' settlement efforts and discusses with them in a dialectic manner how the case is best to be settled.

Finally, on the far end of the continuum, there is caucusing. The practice of caucusing involves separate meetings by the arbitral tribunal with each party in order to get a better understanding of the background of the dispute and the parties' respective interests, thus increasing the options for settlement.²⁵ This approach is gleaned from mediation practice and is intended to "overcome the 'negotiator's dilemma', which makes parties withhold information because they cannot be sure that the other side does not behave opportunistically."²⁶ While potentially very effective, such caucusing, when used in arbitration, raises important due process issues in regard to the parties' right to be heard and the prohibition of *ex parte* communications with the arbitral tribunal.²⁷

It is here where the lines between arbitration and mediation start to blur. Parties may have Kafkaesque feelings about an arbitration-turned-mediation without them becoming entirely aware of it at the time.²⁸ To avoid any confusion, the use of mediation techniques *in* the arbitration must be strictly distinguished from ADR proceedings which are conducted *separately* from the arbitration. Such separate proceedings may take place before, during or after the arbitration.

If they are conducted *before* the arbitration the entire process is often referred to as "Med-Arb."²⁹ Under the "Med-Arb" approach, arbitration is only initiated if the prior mediation has not led to a settlement between the parties. If the parties have so agreed, the same individual that has acted as mediator may then also act as arbitrator in

24. *Id.* at art. 5 (1.3).

25. Schneider, *supra* note 2, at 90.

26. BERGER, PRIVATE DISPUTE RESOLUTION *supra* note 15, at 12–3.

27. *See infra* Section V.D.

28. Such transformations of the arbitral process into an entirely different process like mediation or conciliation mainly happen in Chinese arbitrations, *see* CHINA INT'L ECON. AND TRADE ARB. COMM'N ARB. RULES Art. 41.1 (2015), ("With the consents of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate.") *See also* Kaufmann-Kohler, *supra* note 2 at 196.

29. *See* Dona Ross, *Med-Arb/Arb-Med: A More Efficient ADR-Process or an Invitation to a Potential Ethical Disaster?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2012 352, 359 (Arthur W. Rovine ed., 2013); Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 NY DISP. RES. L. 71, 72 (2009).

the subsequent arbitration.³⁰ Nevertheless, the proceedings remain formally separate and the arbitration constitutes an entirely new process. Similarly, some arbitration laws explicitly allow the arbitral tribunal to conduct mediation or conciliation *during* the arbitration, provided the parties consent.³¹ Article 5(3.1) of the CEDR Rules clarifies that for that purpose “[t]he Arbitral Tribunal shall insert a Mediation Window in the arbitral proceedings,” resulting in what is often referred to as “Arb-Med-Arb.”³² Even though these proceedings are conducted during the arbitration and sometimes by the same individuals that are serving as arbitrators—which, in itself may pose considerable problems—such dispute resolution processes are strictly separate from the arbitration. The same is true for ADR proceedings conducted *after* the arbitration. In processes like “Arb-Med”³³ the arbitration ends with a non-binding award, giving the parties a basis to negotiate a settlement in subsequent mediation proceedings.

Contrary to such separate proceedings, this Article focuses on what an arbitral tribunal may legitimately do *in* an arbitration without changing the process into something else. For the present purposes, “settlement facilitation” shall refer to any aspect on the arbitrator role continuum, from mentioning the possibility of settlement in an abstract way to conducting caucus sessions.

III. A GROWING USER APPETITE FOR SETTLEMENT FACILITATION IN INTERNATIONAL ARBITRATION

It is a truism that international arbitration provides the parties with the freedom to tailor the proceedings to their specific needs and to select arbitrators accordingly. Sociological studies have found that, for a long time, parties have not exercised this freedom in terms of

30. BERGER, *PRIVATE DISPUTE RESOLUTION* *supra* note 15 at 15-11.

31. *See, e.g.*, Arbitration Ordinance, (2014) Cap. 609, 13, Section 33(1) (H.K.) (“If all parties consent in writing, and for so long as no party withdraws the party’s consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.”); Singapore International Arbitration Act (Cap 143A, 1994), Section 17(1); The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India), Section 30(1) (“[W]ith the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.”).

32. *See* Dilyara Nigmatullina, *The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study*, 33 J. INT’L ARB. 37 (2016).

33. *See* Ross, *Med-Arb/Arb-Med*, *supra* note 29; *cf.* Stipanowich & Ulrich, *supra* note 2, at 10, 25-28.

appointing arbitrators specifically for their settlement facilitation skills.³⁴ In these studies, whether the arbitrator had the “[a]bility to encourage settlement between the parties” was seen as one of the least relevant criteria for arbitrator selection.³⁵ That data has supported the traditional common law view that arbitrators should be reluctant to get involved in the parties’ settlement efforts.³⁶ Today, it appears more difficult for opponents of settlement facilitation to rely on empirical data. Indeed, newer data suggests that parties’ selection patterns have significantly changed over the past years. The candidate’s approach to settlement facilitation and his or her abilities in this regard have become an important aspect in the selection process of arbitrators.³⁷

The reasons for this change are connected to a global shift in how parties to international commercial contracts prefer to resolve their disputes. Historically, the growth and success which arbitration has witnessed since the 1960s was mainly caused by the procedural straightjackets, particularities and limits to party autonomy in domestic procedural laws. Because of these pitfalls, commercial parties regarded international arbitration as a highly attractive alternative to state court litigation. Today, the tide appears to be turning. Now that the “alternative” international arbitration has become the norm for cross-border disputes, the process is faced with ever increasing competition from other means of dispute resolution, such as negotiation, conciliation and mediation. These processes are

34. Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth*, 28 *ARB. INT’L* 161, 167 (2012); cf. QUEEN MARY UNIVERSITY & WHITE & CASE, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 26 (2010), available at <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> (which does not mention the arbitrator’s approach to settlement facilitation as one of the “influences on choice of co-arbitrators”).

35. Schultz & Kovacs, *supra* note 34 at 167.

36. Cf. KARTON, *supra* note 3. See also Draetta, *supra* note 2, at 493; Siegfried H. Elsing, *Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds*, *GER. ARB. J. (SCHIEDS VZ)* 114-23, 117-18 (2011); BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *infra* note 59, at 2007; FROITZHEIM, *supra* note 21, at 665; cf. McIlwrath, *infra* note 37, at 908.

37. Ema Vidak-Gojkovic, Lucy Greenwood & Michael McIlwrath, *Puppies or Kittens? How To Better Match Arbitrators to Party Expectations*, in *AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION* 2016 61, 64-65 (Christian Klausegger et al. eds., 2016); cf. Michael McIlwrath, *Selecting Arbitrators for Commercial Oil & Gas Industry Arbitrations*, in *THE LEADING PRACTITIONERS’ GUIDE TO INTERNATIONAL OIL & GAS ARBITRATION* 901, 908 (James M. Gaitis ed., 2015).

viable “alternatives to the alternative” and thus become increasingly attractive for the users of international arbitration.³⁸

The *Global Pound Conference Series 2016-17* provides valuable insights in this regard.³⁹ This series of more than thirty conferences across the globe asks its participants (commercial parties, counsel, arbitrators, mediators and other stakeholders) for their experience and needs regarding alternative dispute resolution. The result is an unprecedented set of data, indicating how parties to international commercial contracts prefer to resolve their disputes today and in the future. Once all conferences have been concluded, this data will be published as “The GPC Series Final Report” at the end of 2017. The conferences that have taken place in 2016 already indicate what the final results may look like.⁴⁰

In the seven conferences that have taken place in 2016,⁴¹ more than 600 stakeholders have answered important questions in regard to their dispute resolution preferences. One question they were asked is what role they want their dispute resolution providers (i.e. arbitrators, mediators and judges) to take.⁴² A clear majority answered that, while they initially do not have a preference, they “seek guidance from the providers regarding optimal ways of resolving their dispute” when such a dispute arises.⁴³ This indicates that parties are in principle open to settlement suggestions beyond the specific dispute resolution process they are in at that moment.

In terms of dispute resolution policies, the participants indicated that currently the most effective commercial dispute resolution

38. Cf. Klaus Peter Berger & J. Ole Jensen, *It Takes Pressure to Form Diamonds: The Changing Landscape of Dispute Resolution and Its Implications for International Arbitration*, KLUWER ARB. BLOG (May 23, 2016), <http://www.kluwerarbitrationblog.com/2016/05/23/>.

39. See GLOBAL POUND CONFERENCE, <http://www.globalpoundconference.org> [hereinafter GPC].

40. See *Cumulated Data Results: March to December 2016*, GLOBAL POUND CONFERENCE 2016-17, http://www.globalpoundconference.org/Documents/Aggregated%20Data%20Report%20GPC_28Dec.pdf (showing the aggregated results of 2016).

41. The conferences that have taken place in 2016 were the GPCs in Singapore (March 17-18, 2016), Lagos (June 30, 2016), Mexico City (August 29, 2016), New York (September 12, 2016), Geneva (September 29, 2016), Toronto (October 15, 2016) and Madrid (October 20, 2016).

42. See GPC, *supra* note 39, at 13. Session 1, Question 4: “What role do parties involved in commercial disputes want providers to take in the dispute resolution processes?”

43. *Id.* That option received a total popularity ranking of 63%, followed by “[t]he providers decide on the process and the parties decide how the dispute is resolved” (38%) and “[t]he parties decide how the process is conducted and how the dispute is resolved (the providers just assist)” (34%).

processes were those that combined adjudicative with non-adjudicative elements.⁴⁴ This indicates a growing user-interest in settling disputes during adversarial proceedings in an amicable way, ideally with the assistance of the adjudicator. In line with that, there was a clear majority who thought that “[g]reater emphasis on collaborative instead of adversarial processes for resolving disputes” is going to have the most significant influence on the future of dispute resolution.⁴⁵ Looking at the combination of these results, it becomes clear that parties increasingly seek dispute resolution methods that are not purely adversarial. Rather, they appreciate the possibility of combining adjudicatory with non-adjudicatory mechanisms.

This trend is also reflected in the growing number of escalation or multi-tier (“cascade”) dispute resolution clauses that are being included into international commercial contracts.⁴⁶ These clauses foresee the mandatory completion of a negotiation and/or mediation stage before arbitration proceedings may be initiated. Their purpose is that only a very limited number of disputes arising between the parties remain to be settled in adversarial arbitration proceedings, while the majority of them will have been settled amicably without the need to initiate arbitration.

Two other surveys indicate that parties may be increasingly interested in arbitrators with the skill to facilitate settlement. The first was conducted with more than 200 internationally active US arbitrators.⁴⁷ It indicates that throughout the past five to ten years, the number of cases settled in the course of international arbitrations has been increasing significantly.⁴⁸ Thus, there is a clear trend to seek a collaborative solution to disputes even if they have already resulted in adversarial proceedings. The second survey involved in-house counsel of Fortune 1,000 companies and concluded that saving time

44. *Id.* That option received a popularity ranking of 57%. It was followed by the adoption of “[p]re-dispute or pre-escalation processes to prevent disputes” (42%) and “[n]on-adjudicative dispute resolution methods (mediation or conciliation)” (39%).

45. *Id.* at 104 (“What innovations/trends are going to have the most significant influence on the future of commercial dispute resolution?” That option received a total popularity ranking of 60%. It was followed by “[c]hanges in corporate attitudes to conflict prevention” (53%) and “[h]armonisation of international laws and standards for dispute resolution systems” (29%).

46. See Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22 *ARB. INT’L L.* 1 (2006).

47. Stipanowich & Ulrich, *supra* note 2, at 2. The survey was conducted by the College of Commercial Arbitrators and Straus Institute for Dispute Resolution in 2013.

48. *Id.* at 17–18.

and money are the most important reasons why parties turn to alternative dispute resolution.⁴⁹ While there are many ways in which time and money can be saved, settlement facilitation goes a long way towards that end.

First and foremost, settlement facilitation provides efficiency to the resolution of the parties' dispute. Instead of going through the entire process of an international arbitration, the parties conclude their dispute at an earlier stage, often after the taking of evidence. In addition, parties do not have to appoint a new individual to conduct a mediation to arrive at a settlement. Rather, arbitrators are already at the parties' disposal and are familiar with the facts of the case as well as the commercial background of the dispute.⁵⁰ Second, arbitrators are in a far better position than the parties to pick the right moment in which to provide settlement facilitation. While the parties can only choose unilaterally when to put that option on the table and often feel a disadvantage in the mere fact that they propose settlement, the arbitral tribunal can evaluate the right moment from a neutral perspective.⁵¹ Third, a settlement in the course of an arbitration provides security and predictability to the parties as the settlement contract may be turned into a consent award or award on agreed terms.⁵² Thus, the result parties take away from a collaborative resolution of their dispute is as enforceable as that of adversarial arbitral proceedings. Finally, if an ongoing business relationship is at stake, parties will in many cases prefer an amicable settlement over an adversarial outcome.⁵³ This not only saves the short-term legal costs for conducting the arbitration, but may create large revenues in the medium and long term if parties can continue their business relationship. For these reasons, parties from civil law jurisdictions sometimes even *expect* the arbitral tribunal to suggest a reasonable

49. *Id.* at 8 ("Respondents to a 2011 survey of corporate counsel in Fortune 1,000 corporations identified each of the following goals as among the reasons companies choose ADR (alternative or appropriate dispute resolution) over litigation: saving time (70.9% of respondents); saving money (68.7%); allowing parties to resolve disputes themselves (52.4%); limiting discovery (51.5%); preserving privacy and confidentiality (46.8%); and preserving good relationships (43.5%). Each of these goals is likely to be effectively served—indeed, perhaps best served—by a negotiated settlement of disputes occurring as early as possible after a dispute arises." [footnotes omitted]).

50. Kaufmann-Kohler, *supra* note 2, at 197.

51. *Id.*

52. *See id.* at 197; *see also* Draetta, *supra* note 2, at 487.

53. *See* Draetta, *supra* note 2, at 491; *see also* JEFFREY WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 105 (2012).

settlement when the time is ripe.⁵⁴ For them, there is no doubt that this is part of the arbitrator's mandate. In China, for instance, approximately fifty percent of parties explicitly request settlement facilitation from the tribunal during their arbitration.⁵⁵

Globally, all of this indicates the parties' growing appetite for more collaborative elements in the arbitral process.⁵⁶ Parties from both civil and common law jurisdictions acknowledge the benefit of ending adversarial processes in an amicable way. Settlement facilitation provides an efficient, cost- and time-saving option to achieve that goal. Accordingly, many parties now require the skill from their arbitrator to be able to facilitate settlement between them.⁵⁷ If those parties do not find what they are looking for in international arbitration, there is a possibility that they will turn to other methods of ADR such as mediation or conciliation.⁵⁸

IV. RECONCILING SETTLEMENT FACILITATION WITH THE ARBITRATOR'S JUDICIAL ROLE

If parties require settlement facilitation, what is there to stop arbitrators from providing it? The answer to that question depends on one's conceptual understanding of the arbitrator's mandate. Today, it is largely undisputed that the arbitrator's mandate has a hybrid nature.⁵⁹ On the one hand, it is defined by the parties' contract with the arbitrator (*receptum arbitri*) in which parties are free to shape the arbitrator's mandate in any way they see fit. In that sense, the arbitrator is a service provider to the parties. On the other hand, the

54. SIEGFRIED H. ELSING, *ARBITRATION IN GERMANY* 690–92 (Karl-Heinz Böckstiegel, Stefan Michael Kröll, & Patricia Nacimiento eds., 2d ed. 2015).

55. Kaufmann-Kohler, *supra* note 2, at 196.

56. Stipanowich & Ulrich, *supra* note 2, at 28–29.

57. *See supra* note 37.

58. *See* Berger & Jensen, *It Takes Pressure to Form Diamonds*, *supra* note 38; *cf.* Fali S. Nariman, *The Spirit of Arbitration: The Tenth Annual Goff Lecture*, 16 *ARB. INT'L* 261, 267 (2000) (“[U]ntil the resolution of a dispute by settlement is considered once again to be a constituent function of arbitration, ADR will take over and displace it as a pragmatic and workable alternative.”).

59. JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 5–26 (2003) (“The mixed or hybrid theory has become the dominant world-wide theory as elements of both the jurisdictional and the contractual theory are found in modern law and practice of international commercial arbitration.”); *cf.* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1991 (2d ed. 2014); FOUCHARD, GAILLARD, *GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 1122 (Emmanuel Gaillard & John Savage eds., 1999).

arbitrator's role also has a judicial dimension. Arbitrators perform a 'quasi-judicial' function and must adhere to the mandatory rules of the applicable *lex arbitri*.⁶⁰ The combination of these two aspects to the arbitral mandate make the international arbitrator a "private judge."⁶¹

In regard to settlement facilitation, some focus on the party autonomy aspect of the arbitrator's mandate and consider that mandate to comprise anything that helps the parties to resolve their dispute.⁶² If parties are best served with a settlement conference, this is what the arbitrator will provide. The opponents of settlement facilitation have a narrower understanding of the arbitrator's mandate and focus on its judicial side. They see it as the arbitrator's sole task to *decide* the parties' dispute, not to settle it.⁶³ To them, arbitration is about winning and losing, not about discussing options for an amicable settlement.

Conventional wisdom ascribes the latter view to the common law tradition.⁶⁴ However, even some civil law jurists are convinced that "prodding parties towards settlement is not part of the arbitrators' mandate."⁶⁵ If these voices acknowledge any arbitral role in settlement facilitation, it never extends beyond the very beginning of the arbitrator role continuum, i.e. proposing settlement to the parties in an abstract way.⁶⁶ Anything beyond such a simple proposal is

60. Cf. RG, *Judgment of 29 November 1904* [1905] RGZ 59, 247, 249; *Jivraj v. Hashwani* [2011] UKSC 40, [para. 41] (appeal taken from EWCA).

61. Cf. Jan Schäfer, *The Arbitrator as a Private Judge*, in WALKING A THIN LINE: WHAT AN ARBITRATOR CAN DO, MUST DO OR MUST NOT DO: RECENT DEVELOPMENTS AND TRENDS 19, 22 (Guy Keutgen ed., 2010).

62. Ehle, *supra* note 2; cf. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 40 n.17 (1996) ("Pierre Lalive . . . hardly ever decided a case. They would all be settled at some point. And that takes a lot of skill . . . from the chairman.").

63. Hwang, *supra* note 2 at 571; Collins, *supra* note 2 at 343; cf. Abramson, *supra* note 2 at 2.

64. Draetta, *supra* note 2 at 493; Siegfried H. Elsing, *Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds*, GER. ARB. J. (SCHIEDSVZ) 114–23, 117–18 (2011); BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 59, at 2007; FROITZHEIM, *supra* note 21, at 665; cf. McIlwrath, *supra* note 37, at 908.

65. *Berlin event considers arbitrator and counsel ethics*, GLOBAL ARB. REV. (Oct. 17, 2016), <http://www.globalarbitrationreview.com/article/1069407/berlin-event-considers-arbitrator-and-counsel-ethics>.

66. Collins, *supra* note 2, at 343; BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 59, at 2006; Catherine A. Rogers & Jeffrey C. Jeng, *The Ethics of International Arbitrators*, in LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 175, 204–

incompatible with their conception of the arbitrator's mandate. To them, the arbitrator's role as a private judge means that his or her mandate is limited to providing a binding decision on the parties' dispute.⁶⁷

It is true that a final decision on the parties' dispute is the arbitrator's main and original mandate.⁶⁸ However, contrary to the opponents of settlement facilitation, the arbitral mandate is not confined to decision-making. Even with a focus on the arbitrator's judicial role, such a *narrow* understanding of that role does not reflect contemporary practice before most domestic courts around the world. Rather, a comparative analysis of different procedural laws indicates that it is an important aspect of the role of judges in many jurisdictions to facilitate settlement between litigating parties. This has traditionally been the case in jurisdictions of the "Germanic" background, i.e. Austria,⁶⁹ Germany,⁷⁰ and Switzerland⁷¹. It is also the approach of other civil law jurisdictions, such as Belgium,⁷² France,⁷³ Italy,⁷⁴ and the Netherlands⁷⁵.

05 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014); cf. JEFFREY WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 105 (2012).

67. Cf. Stipanowich & Ulrich, *supra* note 2, at 6.

68. Ulrich Theune, *DIS Rules*, in *INSTITUTIONAL ARBITRATION: ARTICLE-BY-ARTICLE COMMENTARY* 203, 262 (Rolf A. Schütze ed., 2013); cf. PATRIK SCHÖLDSTRÖM, *THE ARBITRATOR'S MANDATE* 324 (1998); LEW, MISTELIS & KRÖLL, *supra* note 59, at 279; BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 59, at 1985.

69. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] Section 204(1), sentence 1 (Austria) ("At the oral hearing, the court may, either at the request of a party or *ex officio*, attempt an amicable settlement of the entire dispute or certain aspects thereof."). (authors' translation). This provision applies to arbitrators by analogy. Cf. Ehle, *supra* note 2 at 81; BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 59 at 2006.

70. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Section 278(1), *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.). ("At every stage of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue.").

71. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 19, 2008, art. 197 (Switz.). ("Litigation shall be preceded by an attempt at conciliation before a conciliation authority").

72. CODE CIVIL [C. CIV.] art. 731 (Belg.).

73. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 21 (Fr.). ("To conciliate parties is part of the mandate of the judge.").

74. CODICE CIVILE [C.C.] art. 185 (It.).

75. DUTCH CODE OF CIVIL PROCEDURE art. 87 (1) ("The court may, at the request of the parties or one of them or *ex officio*, in all cases and at any stage of the proceedings, order an appearance of the parties at the hearing in order to attempt a settlement.") (authors' translation).

However, most opponents of settlement facilitation in international arbitration fail to acknowledge that even in the main common law jurisdictions judges are now encouraged to facilitate settlement between the parties. In England and Wales, Section 1.4 (1) and (2)(f) of the Civil Procedure Rules (“CPR”) provides that the court must “help . . . the parties to settle the whole or part of the case.” In the United States, the efficacy of this approach has also been acknowledged:

In this business-like system of civil procedure the tradition is strong that the court promotes compromise. The judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved.⁷⁶

Accordingly, US federal district judges are encouraged to facilitate settlement between the parties before them.⁷⁷ In fact, state courts in many common law jurisdictions frequently facilitate settlement, which may go as far as conducting caucuses.⁷⁸ Thus, the argument that settlement facilitation is incompatible with the arbitrator’s *judicial* role does not reflect judicial reality in many jurisdictions. Rather, it is a hallmark of civil procedure rules around the world that it is part of the judge’s mandate to help the parties before him or her to arrive at a settlement.

Another concern some have in regard to settlement facilitation is that arbitrators might abdicate their mandate to decide the parties’ case by using settlement between the parties as a short cut.⁷⁹ They fear that parties may feel coerced into settling even though they would prefer an award.⁸⁰ Of course, arbitrators “should never give the impression to the parties that they are more interested in the parties engaging into a settlement agreement than they are to decide the dispute through a final award.”⁸¹ An arbitrator employing settlement facilitation as a way to enhance the efficiency of the proceedings must

76. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823–66, 831–32 (1985) (citations omitted).

77. See D. MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* (1986); cf. DEZALAY AND GARTH, *supra* note 62, at 168 (“The [US] judge serves as a case manager [and] settlement adviser.”).

78. Kaufmann-Kohler, *supra* note 2, at 191–92; cf. Harris, *supra* note 2, at 89.

79. Hwang, *supra* note 2, at 572; Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64, at 118; Theune, *supra* note 68, at 262.

80. Kaufmann-Kohler, *supra* note 2, at 200.

81. ELSING, *ARBITRATION IN GERMANY*, *supra* note 54, at 2.

be very conscious of the parties' wants and needs. Under no circumstances should the arbitrator force settlement negotiations upon parties who are not interested in them. But as long as the arbitral tribunal obtains the "informed consent" of the parties prior to taking any settlement facilitation measures,⁸² there is no room for the concern that the measure is *forced* upon them. In any case, this concern is met by the opposing observation that some arbitrators do not facilitate settlement simply because they cannot or do not want to sacrifice the hours of arbitrating that an early settlement would entail.⁸³

At the end of the day, whether settlement facilitation is compatible with the hybrid nature of the arbitrator's mandate comes down to a simple question: where is the harm of providing it, if (a) this is what the parties want in a given case; (b) their legitimate expectations with respect to the scope of the tribunal's initiative are met; and (c) their mandatory due process rights are preserved? Just as party autonomy allows the parties to tailor their dispute, the contractual nature of arbitration allows them to shape the arbitrator's mandate. This makes the arbitrator's mandate a flexible creature, to a large part defined by what parties want it to be. If the parties require active involvement by an arbitrator in their settlement efforts, settlement facilitation becomes part of the arbitrator's mandate.

Indeed, as party expectations change and develop,⁸⁴ the general concept of the arbitrator's mandate may evolve accordingly.⁸⁵ In light of the civil procedure rules outlined above, it is not surprising that "there is generally no blanket prohibition even in [common law] systems against arbitrators proposing settlement of the parties' dispute."⁸⁶ Quite to the contrary:

Many arbitrators, arbitration practitioners and scholars are now recognizing that the traditional paradigm of the arbitrator as single-minded adjudicator must be refined to incorporate a broader concept of the arbitral role, including active case management at all stages of the proceeding, early resolution of

82. Cf. IBA, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 11 (2014) ("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.").

83. Cf. Stipanowich & Ulrich, *supra* note 2, at 7.

84. See *supra* Part III.

85. Cf. *Agrimex Ltd v Tradigrain SA* [2003] EWHC 1656 (Comm), para 31.

86. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 59, at 2007.

some or all issues, and activities that set the stage for settlement.⁸⁷

This broad understanding of the arbitrator's *judicial* role is now acknowledged in many modern arbitration laws,⁸⁸ arbitration rules⁸⁹ and soft law instruments⁹⁰. These laws and rules explicitly endow the arbitral tribunal with the power to facilitate settlement, should the parties require it. Particularly noteworthy in this regard are the CEDR Rules, which provide a transnational standard and have already received a good amount of attention by commentators.⁹¹ Significant are also the changes made to the UNCITRAL Rules of Organizing Arbitral Proceedings. These Notes restate the current practice of conducting international arbitrations and reflect the views of the civil and common law practitioners who were part of the Working Group preparing the Notes. While the 1996 version of these Notes merely stated that “[a]ttitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement”,⁹² the updated 2016 version now acknowledges that “[i]n appropriate circumstances, the arbitral tribunal may raise the possibility of a

87. Stipanowich & Ulrich, *supra* note 2, at 29; cf. Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64, at 118 (“Th[e] objections raised against the involvement of arbitrators in settlement attempts cannot, and must not, prevail over the obvious advantages that emphatic promotion of settlements brings, in particular, time and cost efficiency and greater acceptance by the parties.”).

88. The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India), Section 30(1) (“It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute”); [Japanese Arbitration Law], Law No. 138 of 2003, art. 38(4) (Japan) (“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”); Art. 1043 Dutch Arbitration Law 2015 (“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”); the arbitration laws of Singapore and Hong Kong are to the same effect. *See supra* note 31.

89. Schiedsgerichtsordnung [DIS] [Arbitration Rules], July 1, 1998, DIS Rules, Section 32(1); Court of Innovative Arbitration [CoIA], October 1, 2015, CoIA Rules, Section 13(4).

90. CEDR RULES; Canon IV (F) AAA CODE OF ETHICS 2004; Art. 8 IBA RULES OF ETHICS 1987.

91. Cf. Nappert and Flader, *supra* note 2; Draetta, *supra* note 2, at 495 n.7; Ehle, *supra* note 2, at 86–87; Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64 at 118; Greenwood, *supra* note 2, at 206–07; Stipanowich & Ulrich, *supra* note 2 at 1 fn 4; Andrey Panov & Sherina Petit, *Amicable Settlement in International Arbitration*, in *THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2015* (GAR ed., 2015).

92. UNCITRAL, UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS 1996 12 para. 47 (1996), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html.

settlement between the parties.”⁹³ Though this is still a rather cautious approach, it reflects the general perception that the arbitrator’s judicial mandate is, in principle, compatible with becoming involved in the parties’ settlement efforts.

In light of all these considerations, an arbitrator should no longer be viewed as a one-dimensional decision-maker. Rather:

An arbitrator, is an arbitrator, is an arbitrator, whose function it is, not merely to adjudicate the dispute, but also to help resolve it amicably with the co-operation of the parties. . . . ‘Arbitration’ must never be considered as excluding from its purview the settlement of a dispute before the arbitrator: because this is of the essence of *the spirit* of arbitration.⁹⁴

Thus, *whether* arbitrators may facilitate settlement between the parties is not the decisive question anymore. The decisive question is *how* specifically international arbitrators may be involved while at the same time complying with the judicial part of their mandate to safeguard due process between the parties. This is what the following section is concerned with.

V. AVAILABLE TOOLS FOR THE FACILITATION OF SETTLEMENTS

This last section will address certain methods and techniques international arbitrators can employ at different stages of the arbitration to facilitate settlement between the parties. Along the arbitrator role continuum,⁹⁵ the present section will consider the concerns opponents of settlement facilitation may have regarding the parties’ due process rights. It is hoped that thus, regardless of their cultural background, international arbitrators will acknowledge that settlement facilitation can provide valuable efficiency without sacrificing due process.

93. UNCITRAL, UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS 2016 12 para. 72 (2016), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e-pre-release.pdf>.

94. Nariman, *The Spirit of Arbitration*, *supra* note 58, at 267 (emphasis in original).

95. *See supra* Part II.

A. Mentioning settlement to the parties

Most arbitrators agree that, at any stage of the proceedings, they can suggest that the parties may attempt a settlement.⁹⁶ For some arbitrators, this has become a routine question at the initial case management meeting. Arbitrators opposing even mentioning settlement at this stage of the proceedings assume that parties are sophisticated enough to negotiate a settlement without the arbitrator making them aware of that option.⁹⁷ Their approach is based on the assumption that parties do not want to waste more time and money on settlement attempts. Rather, they seek a definitive outcome of their dispute. Neither will they be interested in saving their business relationship as they would not have initiated arbitration if that relationship could be saved. This makes those arbitrators reluctant to even mention settlement to the parties.

Indeed, whether mentioning settlement facilitation to the parties makes sense may well depend on what the parties have been through before they have initiated arbitration. If they have already unsuccessfully completed several steps of an escalation clause and/or tried to mediate the dispute, there is less chance that they will be interested in settlement facilitation. In all other cases, there is little that speaks against at least mentioning the possibility of settlement to the parties.

B. Providing an early neutral evaluation

A technique that is not immediately aimed at bringing about a settlement, but often leads to it, is providing an early neutral evaluation. In an early neutral evaluation, the arbitral tribunal shares its preliminary views on the entire case or individual issues with the parties at an early stage of the proceedings. This allows the parties to tailor their submissions to what the arbitral tribunal considers the crucial points of the case and can thus help to expedite the proceedings considerably. In addition, once the parties know the arbitral tribunal's tendency in regard to specific issues, settlement efforts are usually more successful as each party is aware of the strengths and weaknesses of its case.⁹⁸ This is reflected in one Swiss arbitrator's approach:

96. See *supra* note 17.

97. See *supra* notes 14-15.

98. Cf. Kaufmann-Kohler, *supra* note 2, at 188.

I think that it is helpful after the first or second exchange of briefs, that you sit together with the parties and that the arbitrators—but generally only if the parties agree to it—present their preliminary opinions on the basis of the evidence that has so far been produced ... I call them preliminary views conferences.⁹⁹

This approach has also been adopted in the CEDR Rules. Art. 5 (1.1) CEDR Rules allows the tribunal to:

provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues.¹⁰⁰

Before the arbitrators provide their preliminary views, it is essential to obtain all parties' consent.¹⁰¹ Under no circumstances may the arbitral tribunal's views be imposed upon a party that, for whatever reasons, does not want to hear them. Even with such consent, some arbitrators are hesitant to provide an early neutral evaluation. For example, Chinese arbitrators, known for their traditional sympathy for settlement facilitation, do not provide an early evaluation "because they consider that expressing an opinion on the outcome would be improper and would put their impartiality in jeopardy."¹⁰² Other international arbitrators have similar concerns:

As one put it, if the arbitrators were to share their preliminary opinions on any point of fact or law: "In my view you could overturn the award. You can't indicate that you've made up your mind until the end of the arbitration." Another interviewee, a former judge, said: "You have to be careful because you don't know enough about the case, you have to do it very cautiously. I came closest to it as a judge, and people then say 'He made up his mind against us.'"¹⁰³

These concerns about the appearance of bias are overrated. An early neutral evaluation does not lead to the arbitrator making up his or her mind before the conclusion of the case. Rather, arbitral decision-making is a long and continuous process.¹⁰⁴ Having indicated their *preliminary* views to the parties at a certain point in

99. KARTON, *supra* note 3, at 107.

100. *Cf.* Art. 2 (3) IBA RULES OF EVIDENCE, *supra* Part II.

101. Schneider, *supra* note 2, at 76.

102. Kaufmann-Kohler, *supra* note 2, at 197.

103. KARTON, *supra* note 3, at 106; *cf.* Gill, *supra* note 2, at 159.

104. Schneider, *supra* note 2, at 76; *cf.* FROITZHEIM, *supra* note 21, at 668.

time during the proceedings will not deter international arbitrators from arriving at diametrically opposed *final* conclusion in the award in case a thorough review of all submissions and evidence so requires. Nevertheless, to avoid any appearance of bias, arbitrators should expressly reserve their right to reconsider their position and make it very clear to the parties that the arbitral tribunal is still open to all submissions and views after having provided an early evaluation.¹⁰⁵ In addition, arbitrators 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. If these safeguards are in place, there is no reason for concern regarding the parties' due process rights in connection with an early neutral evaluation.

Finally, a practical concern about early neutral evaluation by international arbitrators may be that it is too early for the arbitral tribunal to have thoroughly reviewed the case file: "the principal risk for an arbitrator [providing preliminary views] is not the appearance of bias or pre-judgment but the revelation of the arbitrator's ignorance of the [f]ile."¹⁰⁶ Such considerations may well lead some arbitrators not to suggest an early neutral evaluation. However, the perceived extra-effort of reviewing the case file at an early point in the arbitration should not be misunderstood as wasted time if the parties do not reach a settlement. Quite to the contrary, an early evaluation of the issues at stake is an ideal way to take charge of the process and may be critical for streamlining the proceedings and providing a bespoke procedure for the individual dispute.¹⁰⁷ Thus, if an early evaluation does not lead to settlement, it will in any case greatly assist the parties and the tribunal to focus on the key issues at stake.

C. Conducting a settlement conference

A measure that is more directly aimed at facilitating settlement than an early neutral evaluation is a settlement conference between the arbitral tribunal and the parties. Often, such settlement conferences are referred to as the "Germanic" approach to facilitating

105. Ehle, *supra* note 2, at 82; Schneider, *supra* note 2, at 76.

106. Schneider, *supra* note 2, at 76 (quoting Alain Hirsch).

107. Berger & Jensen, *Due Process Paranoia and the Procedural Judgment Rule*, *supra* note 1, at 431.

settlement.¹⁰⁸ Section 32.1 DIS Rules 1998 serves as a proxy for this approach.¹⁰⁹ It states that “[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.” This provision is rooted in Section 278 (1) German Code of Civil Procedure which includes a similar provision for state court judges.¹¹⁰ To better understand its significance, three points deserve mentioning. First, the reference to “every stage of the proceedings” means that it is a continuing task of the arbitral tribunal to evaluate the case and propose a settlement conference whenever it considers the moment to be right. Second, Section 32.1 DIS Rules 1998 is not formulated as an obligation (“should” rather than “shall”). It thus makes settlement facilitation a *nobile officium* of the arbitral tribunal, while at the same time protecting the arbitrators against the accusation of partiality if they act under the provision.¹¹¹ Finally, that the arbitral tribunal should “seek to encourage” settlement means that a settlement conference must not be imposed on the parties against their will. Nevertheless, some understand this requirement as “empowering the arbitral tribunal to present *proprio motu* its own settlement proposals” without the need “to obtain the parties’ approval in advance.”¹¹² That understanding is in line with the fact that, in many cases, Section 32.1 DIS Rules 1998 only reflects the parties’ pre-existing expectations.¹¹³ However, there will always be parties that are either not familiar with settlement conferences or who have their reasons for not wanting them in a given case. Thus, before conducting a settlement conference, arbitral tribunals must always—and in practice usually do—obtain the parties’ express consent to this process, including under Section 32.1 DIS Rules 1998.¹¹⁴

In the settlement conference, the arbitral tribunal explores and discusses the chances for and the possible content of a settlement agreement with the parties in a dialectic and interactive process.

108. Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, *supra* note 2, at 525; Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 46.

109. See DEUTSCHE INST. FÜR SCHIEDSGERICHTSBARKEIT, ARBITRATION RULES (1998), sec. 32.1, available at <http://www.disarb.org/en/16/rules/dis-arbitration-rules-98-id10>.

110. Cf. *supra* note 70.

111. See ELSING, ARBITRATION IN GERMANY, *supra* note 54, at 3; see also Favalli & Hasenclever, *supra* note 2, at 22.

112. Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64, at 118.

113. See ELSING, ARBITRATION IN GERMANY, *supra* note 54, at 1.

114. See *id.* at 3.

Often, the party-appointed arbitrators play an important role in these discussions because a party may be more likely to understand (and accept) the arguments of the tribunal if they are presented to it by the arbitrator it has appointed.¹¹⁵ The ideal result of such a conference is a settlement agreement concluded by the parties, either with the assistance of the arbitral tribunal or outside the hearing room.

Significantly, despite their common-law origin, the CEDR Rules also adopt this “Germanic” approach in Art. 5 (1):

Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:

...

1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;

1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;

1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.¹¹⁶

The main concern about such settlement conferences is that arbitrators make themselves vulnerable to challenges. A settlement proposal may be regarded as a sign of bias towards one party, as such a proposal will usually point out a weakness in at least one party’s case.¹¹⁷ However, actual bias because of a participation in settlement conferences is very infrequent.¹¹⁸ Indeed, anecdotal evidence suggests that instances in which parties divulge sensitive information during settlement negotiations which they have not presented in their submissions are “extremely rare.”¹¹⁹ In any case, this concern can be

115. Hilmar Raeschke-Kessler, *Making Arbitration More Efficient: Settlement Initiatives by the Arbitral Tribunal*, 30 INT’L. BUS. LAW 158, 161 (2002); Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 46.

116. *See supra* note 23.

117. *See* Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT’L 157, 162 (1998); Kaufmann-Kohler, *supra* note 2, at 197-98; ELSING, *ARBITRATION IN GERMANY*, *supra* note 54, at 3.

118. Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64, at 118.

119. *Id.*

rebutted by acquiring all parties' consent before conducting a settlement conference. If all parties give their informed consent and waive any right to challenge the arbitral tribunal because of its participation in a settlement conference, the parties are barred from any challenges on these grounds.¹²⁰

Under the DIS Rules, such a waiver may be dispensable as the existence of Section 32 DIS Rules 1998 already protects the arbitrators against any challenges.¹²¹ A waiver may also be dispensable where the DIS Rules do not apply, but the seat of the arbitration is in Germany. Even without an express waiver of the right to challenge an arbitrator, German courts have repeatedly denied challenges because of an arbitrator's involvement in a settlement conference to which the parties had previously consented:

The fact that an arbitrator has participated in settlement negotiations with the parties and has supported a settlement proposal which is far away from the expectations of the party that challenges him, does not justify, in and of itself, doubts as to his independence and impartiality. Rather, from the perspective of a reasonable party, this would be the case only if that party could have the legitimate impression that the conduct of the arbitrator is based on bias or arbitrariness. If a settlement shall be reached during settlement negotiations, the arbitrator must be granted considerable leeway for his [or her] own proposals. The considerations which the arbitrator makes in such a context must not be regarded as final determinations of the legal issues at stake, but as mere thought-provoking impulses for the parties' settlement negotiations. If one of the parties discovers errors in the tribunal's arguments and proposals, it may always argue against them and reject a settlement based on those arguments or proposals and may, through further submissions and motions for the taking of evidence, try to make the arbitrators change their minds.¹²²

120. See Kaufmann-Kohler, *supra* note 2, at 198; see also Theune, *supra* note 68, at 263; Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 47.

121. ELSING, *ARBITRATION IN GERMANY*, *supra* note 54, at 3; Favalli & Hasenclever, *supra* note 2, at 3-4.

122. Oberlandesgericht [OLG][Highest Regional Court] Jan. 3, 2008, ZEITSCHRIFT SCHIEDSVERFAHREN [SCHIEDSVZ]102, 104, (2008) (Ger.) (authors' translation; citations omitted); cf. Oberlandesgericht [OLG][Highest Regional Court] Apr. 27, 2006, ZEITSCHRIFT SCHIEDSVERFAHREN [SCHIEDSVZ]329, 331, (2006) (Ger.).

In all other cases, the significance of obtaining such a waiver is expressed in the official explanation of General Standard 4 (d) of the IBA Guidelines on Conflict of Interest 2014:

[T]he arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.¹²³

Indeed, in light of the ever-increasing number of challenges and the misuse of that right by some parties,¹²⁴ the arbitral tribunal should always obtain the parties' *informed consent* and waiver of any challenges connected to the tribunal's settlement efforts before it conducts a settlement conference. Once this consent and the waiver are obtained, there is nothing that would speak against conducting a settlement conference.¹²⁵

D. Using mediation techniques, in particular caucusing

Finally, at the far end of the arbitrator role continuum is the use of tools borrowed from mediation.¹²⁶ The classic example is caucusing.¹²⁷ Caucusing is the most controversial settlement facilitation technique on the arbitrator role continuum. As caucusing occurs in the arbitration itself, not as a separate Arb-Med or Arb-Med-Arb process,¹²⁸ the parties' due process rights are in full force.¹²⁹ Of particular concern in regard to caucusing is the parties' right to be heard. If the arbitral tribunal holds private sessions and listens to what one party has to say in the absence of the other, that party may reveal

123. IBA, *supra* note 82, at 10.

124. *Cf.* GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 33-34 (Günther J. Horvath & Stephan Wilske eds., 2013).

125. Kaufmann-Kohler, *supra* note 2, at 198.

126. *See generally* Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: "Hybrid" Procedures and "Intuitive" Mediation by International Arbitrators*, 19 ARB. INT'L 387-403 (2003); *cf.* Cremades, *supra* note 117, at 162; Berger, *Promoting Settlements in Arb.*, *supra* note 2 at 48; Olík and Čáp, *supra* note 2 at 252.

127. *See supra* Part II.

128. Ehle, *supra* note 2, at 82; *cf. supra* Part II.

129. Berger, *Promoting Settlements in Arb.*, *supra* note 2, at 48.

facts to the members of the tribunal the other party is unable to rebut.¹³⁰ Such an *ex parte* conversation is a textbook example for a violation of the right to be heard and usually constitutes a ground to vacate the award.¹³¹

Some are of the opinion that this concern can be alleviated by obtaining all parties' consent that caucusing may be conducted:

Since flexibility is the main advantage of the arbitral process, separate meetings with the parties should therefore not be definitely ruled out, for example in order to overcome final obstacles in the way of a settlement. Any initiative for unilateral caucusing during settlement negotiations in which the arbitral tribunal participates should come from the parties and all parties have to agree on this method.¹³²

Indeed, if it is true that the parties are free to shape the arbitrator's mandate in any way they see fit,¹³³ why should party autonomy not allow them to contract out of their right to be heard and validly agree that the arbitral tribunal may conduct caucuses?

This is where the second prong to the arbitrator's mandate comes into play, namely his or her judicial mandate to safeguard the parties' mandatory due process rights. In light of the paramount importance of the parties' right to be heard as a core due process (or *natural justice*) right, it is doubtful whether state courts would confirm an agreement to waive the right to be heard. Indeed, courts have been hesitant in allowing parties to waive other due process rights. In the famous *Dutco* case, for instance, the French *Cour de Cassation* has declared that parties cannot waive their right to each select an arbitrator.¹³⁴

130. Kaufmann-Kohler, *supra* note 2, at 198; Gill, *supra* note 2, at 159; cf. Olík and Čáp, *supra* note 2, at 252.

131. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 6.192 (6 ed. 2015); GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 1236 (2 ed. 2015). Compare to the *ex parte* conversations by a party-appointed arbitrator in the maritime boundary arbitration between Croatia and Slovenia which have become known as the "Sekolec Scandal." See Alison Ross, *Poisoned Waters?*, 10 GAR 5–14 (2015).

132. Raeschke-Kessler, *Making Arbitration More Efficient*, *supra* note 115, at 161; cf. Reinmar Wolff, *Verzicht auf rechtliches Gehör im Schiedsverfahren*, in PRIVATAUTONOMIE UND IHRE GRENZEN IM WANDEL 171–82, 180 (Michael Nueber, Dominika Przeszlowska, & Michael Zwirchmayr eds., 2015).

133. See *supra* Part IV.

134. *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction*, Cour de Cassation (1^{er} Chambre Civile), Pourvoi N° 89-18708 89-18726, Jan. 7, 1992 [1992] Rev de l'Arb 470; cf. Klaus Peter Berger, *Schiedsrichterbestellung in Mehrparteienschiedsverfahren: Der Fall "Dutco Construction" vor französischen Gerichten*, RIW 702–07, 703 (1993).

Similarly, the Ninth Circuit Court of Appeals has held that mandatory provisions, such as the parties' right to a judicial review of the arbitral award in set aside proceedings, cannot be waived by party agreement.¹³⁵ However, both courts have emphasized that this only applies to waivers in the parties' arbitration agreement, i.e. before the dispute has arisen. Since the question of caucusing usually only comes up in regard to settlement facilitation when the arbitration is already on the way, it may be possible for parties to waive their right to be heard in that respect and provide their *informed consent* to conduct caucuses. Indeed, when confronted with a specific situation in which the arbitral tribunal considers caucusing key to arriving at an amicable solution, the parties are in a position to determine the specific impact of a waiver of their right to be heard in exchange for the increased possibility that they achieve a settlement.

However, caucusing also raises concerns regarding the arbitrator's impartiality (the second core *natural justice* requirement). It is the purpose of a caucus session that parties feel free to disclose information they otherwise would not have revealed. Accordingly, the arbitrator will learn facts in caucusing which are not contained in the case file of the arbitration.¹³⁶ In some cases, these facts may indicate a different outcome to what the case file would require. While the arbitrator will be conscious to ignore all information obtained in caucusing when deciding on the merits, there is a non-negligible risk that the arbitrator will not be able to entirely exclude these facts from his or her intellectual decision-making process.¹³⁷ This risk alone suffices to create the appearance of bias. Therefore, caucusing should be avoided even if all parties' consent has been obtained.¹³⁸ This is in

135. *In re: Wal-Mart Wage and Hour Employment Practices Litigation* 737 F.3d 1261 (9th Cir. 2013).

136. Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, *supra* note 2, at 525; Ehle, *supra* note 2, at 83; Elsing, *Procedural Efficiency in International Arbitration*, *supra* note 64, at 118; cf. Gill, *supra* note 2, at 158–159.

137. The influence of the unconscious on arbitral decision-making has been discussed to a considerable extent. See, e.g., Christopher R. Drahozal, *Behavioral Analysis of Arbitral Decision Making*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 319–337 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Lucy Reed, *The 2013 Hong Kong International Arbitration Centre Kaplan Lecture: Arbitral Decision-Making: Art, Science or Sport?*, 30 J. INT'L ARB. 85–99 (2013); Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487–514 (2013); Rebecca K. Helm, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL L. STUD. 666–692 (2016).

138. Kaufmann-Kohler, *supra* note 2, at 204; Berger, *The International Arbitrator's Dilemma*, *supra* note 6, at 224.

line with the CEDR Rules which state in Art. 5 (2.1) that “[t]he Arbitral Tribunal shall not meet with any Party without all other Parties being present.” Fortunately, the prohibition of caucusing does not constitute a real threat to the success of arbitrators’ initiatives to foster a settlement between the parties as the success rate of the other methods on the arbitrator role continuum is already high.¹³⁹

VI. CONCLUSION

For more than fifty years, there has been a debate whether it is appropriate for international arbitrators to facilitate settlement. The recent tectonic shift in the dispute resolution landscape towards more collaborative methods of ADR suggests that now the time has come to put that debate to bed and embrace settlement facilitation as an efficient way to end the parties’ dispute. The growing interest in resolving disputes amicably puts international arbitrators at a crossroads. Either provide what the parties require and offer settlement facilitation within the limits of the parties’ legitimate expectations and due process rights – or lose them to competitive alternatives such as mediation, conciliation and similar collaborative methods of ADR. In terms of settlement facilitation, there is no reason to bow down and leave the field to these “alternatives to the alternative.” While it is true that, first and foremost, it is the arbitrator’s mandate to *decide* the parties’ dispute, that mandate is not limited to decision-making. Rather, settlement facilitation has become a genuine additional part of the modern arbitrator’s mandate. In line with that change, most practitioners have overcome the common law/civil law divide. They facilitate settlement where the parties and the case so require – regardless of their cultural background and legal upbringing. This is reflected in the CEDR Rules which, it is hoped, will grow to become the “IBA Rules of Evidence” for settlement facilitation by international arbitrators. It is also reflected in a show of hands at the *Fordham International Arbitration and Mediation Conference 2016*, which has indicated that a surprising number of common law practitioners do see a role for international arbitrators in the facilitation of settlement in international arbitration proceedings.

Today, it seems to be understood that the preferable approach, also in this area of international arbitration law, is pragmatic rather than dogmatic. The question is not *whether* arbitrators should or

139. Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, *supra* note 2, at 535.

should not facilitate settlement from a conceptual point of view. It is *how* they can best assist the parties to resolve their dispute: either by rendering a final award or assisting them in achieving a negotiated settlement if and to the extent that they so wish. Hence, techniques to facilitate settlement of the dispute should belong to the arsenal of every international arbitrator in order to diversify the services which the arbitration community is able to provide to its users.

