



Settlement in Arbitration: The Changing Role of Arbitrators

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Arbitrators as Adjudicators or Settlement Facilitators?

Settlement of Disputes

- ▶ Relatively common: about one-third of all commenced arbitrations are withdrawn, dismissed or end with a consent award
- ▶ Settlement is favored and provides the most efficient resolution and the most effective - IF enforced
- ▶ Mediation growing in popularity
- ▶ Singapore Convention - entered into force in 6 countries
- ▶ Hybrid processes: Med-Arb, Arb-Med-Arb

Arbitrators as Settlement Facilitators

- ▶ **CEDR Rules for the Facilitation of Settlement in International Arbitration (2009)**
 - ▶ Subject to Article 3(1), the Arbitral Tribunal will take proactive steps in accordance with these CEDR Settlement Rules to assist the Parties to achieve a negotiated settlement of part or all of their dispute.
- ▶ **DIS Rules (2018):**
- ▶ **Article 26 Encouraging Amicable Settlements**

Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.
- ▶ **Article 27.4 - At the CMC the tribunal shall discuss with the parties:**
 - (iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.

Prague Rules (2018)

Article 9. Assistance in Amicable Settlement

- ▶ 9.1. Unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration.
- ▶ 9.2. Upon the prior written consent of all parties, any member of the arbitral tribunal **may also act as a mediator** to assist in the amicable settlement of the case.
- ▶ 9.3. If the mediation does not result in a settlement within an agreed period of time, the member of the arbitral tribunal who has acted as mediator:
 - ▶ a. may continue to act as an arbitrator in the arbitration proceedings after obtaining written consent from all parties at the end of the mediation;
 - ▶ or b. shall terminate his/her mandate in accordance with the applicable arbitration rules if such written consent is not obtained.

ICC Rules (2021) Appendix IV

Case Management Techniques

- ▶ **(h) Settlement of disputes:**
- ▶ (i) encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;
- ▶ (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

UNCITRAL MODEL LAW on INTERNATIONAL COMMERCIAL ARBITRATION

- ▶ Article 30. Settlement
- ▶ (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- ▶ (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

UNCITRAL Rules (2010) Article 36:

Settlement or other grounds for termination

- ▶ 1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.
- ▶ 2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so. 3.
- ▶ Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5, shall apply.

The Interchangeability of the Role of Mediator, Settlement Facilitator, and Arbitrator

- ▶ Different mandates, tasks, roles, skills, and tools
- ▶ Differing legal and cultural approaches
- ▶ Concerns about ensuring the integrity of the process
- ▶ Concerns about impartiality and equal access to information
- ▶ Concerns about enforceability of outcome

When is an Arbitrator an Arbitrator?



- ▶ Frog
- ▶ Prince
- ▶ Mediator
- ▶ Settlement Facilitator
- ▶ Arbitrator

Does an Arbitrator Need a Dispute to Adjudicate?

- ▶ Can a mediated settlement be converted to a consent award?
- ▶ Does an actual dispute need to exist at the time of commencing arbitration?
- ▶ Can arbitrators be appointed, and the tribunal constituted if a settlement has already been agreed?
- ▶ Can arbitrators render a consent award if a dispute has not been referred to them to actually adjudicate it?
- ▶ Does the judicial role of arbitrators in the administration of justice impose an obligation to ensure the integrity of the consent award that may be enforced?

- ▶ (1) Each Contracting State shall recognize an arbitration agreement in writing, under which the parties undertake to **submit to arbitration all or any differences which have arisen or which may arise between them** in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

New York Convention, Article II (1)

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ICC Rules (2021) Article 33: Award by Consent

- ▶ If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

Consent Awards

Parties jointly request the Tribunal to render a Consent Award

The Tribunal has discretion to grant the request

Consent Awards are subject to the same conditions as other Awards, except that reasoning may not be required

Consent Awards enjoy the same status as other Awards

- Can be corrected and interpreted
- Can be challenged
- Can be enforced
- Res judicata



Potential Considerations

- ▶ How should the Tribunal's discretion be exercised?
- ▶ Is there a presumption that the request should be granted?
- ▶ Should the Tribunal require that it may view the actual settlement?
- ▶ To what extent, if any, should the Tribunal monitor the settlement?
- ▶ To what extent should the Tribunal record its assessment in deciding to render the consent award?
- ▶ What relief may be granted?
- ▶ To what extent should an arbitral institute review?

Potential Issues

- ▶ Settlements that go beyond the scope of the arbitration agreement or the matters submitted to arbitration
- ▶ Parties or lawyers that lack capacity or authority to settle
- ▶ Illegality, bribery, corruption, money-laundering
- ▶ Arbitrability and public-policy
- ▶ Effects on third-parties

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Thank you!

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