



# CEDR Commission on Settlement in International Arbitration

**CEDR Rules and Recommendations  
-the final report**

November 2009



# CEDR Commission on Settlement in International Arbitration

## Final Report of the Commission

Contents:	Page
1. Introduction	1
2. Objectives, Principles and Summary	2
3. CEDR Rules for the Facilitation of Settlement in International Arbitration	4
4. Recommendations of the CEDR Commission	4
a. Arbitrators	4
b. Arbitral Institutions	6
c. Parties and their counsel	7
5. New Developments	8
Appendix 1 CEDR Rules for the Facilitation of Settlement in International Arbitration	9
Appendix 2 Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement	14
Appendix 3 The effect of offers to settle in arbitration	17
Appendix 4 Table of existing provisions on settlement in arbitration	19
Appendix 5 Members of the CEDR Commission	28

## 1. Introduction

- 1.1 International arbitration is the default choice of dispute resolution forum for cross-border commercial contracts, largely because it offers neutrality and awards that are enforceable around the world.
- 1.2 The international arbitration community is continuously working to improve its product for the benefit of business users. Papers such as the UNCITRAL Notes on Organising Arbitral Proceedings, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration, and the ICC Commission's Techniques on Controlling Time and Cost in Arbitration are all documents aimed at making international arbitration work better.
- 1.3 Although some of these papers refer to the role of the arbitral tribunal in encouraging settlement, at present, it is only in certain jurisdictions that tribunals are pro-active in this regard. It is certainly very rare for tribunals to recommend that the parties try using mediation during the course of the arbitral proceedings. Indeed, whilst courts in Europe now generally enforce multi-tier dispute resolution clauses and decline jurisdiction where these are not observed, arbitral tribunals tend to accept jurisdiction and proceed with the arbitration, even where one party has clearly breached an obligation to mediate before commencing arbitral proceedings.
- 1.4 Some research<sup>1</sup> suggests that settlement rates in arbitration are significantly lower than they are in many national courts, particularly those courts where judges systematically promote early settlement and the use of ADR techniques such as mediation.
- 1.5 The CEDR Commission for Settlement in International Arbitration (the Commission) was formed to review the current practice regarding the promotion of settlement by international arbitral tribunals and to come up with recommendations to improve this aspect of the process for end-users. A key premise of the Commission's work, which is supported by studies of the attitudes of international business to dispute resolution<sup>2</sup> is that parties generally want their problems solved cost effectively and efficiently and that this will often be best achieved through negotiated settlement.
- 1.6 Attached to this Report<sup>3</sup> are the following documents:
  - 1.6.1 CEDR Rules for the Facilitation of Settlement in International Arbitration (Appendix 1).
  - 1.6.2 An appendix outlining safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement (Appendix 2).

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<sup>1</sup> *Bucher*, ASA Bulletin 1995, p. 568 estimates the settlement rate at approximately 50%; many authors agree with this assessment. The second survey conducted by *Bühning-Uhle/Kirchhoff/Scherer in Arbitration and Mediation in International Business (2<sup>nd</sup> edition 2006)* (p. 112) delivered a settlement rate of 43% on average.

<sup>2</sup> See for example the PriceWaterhouseCoopers survey, *International arbitration: Corporate Attitudes and Practice 2006*

<sup>3</sup> Please note that the contents of this report do not necessarily reflect the personal views of individual members of the Commission

- 1.6.3 An appendix on the Effect of Offers to Settle in Arbitration (Appendix 3).
- 1.6.4 A table showing provisions from legislation and the rules of arbitral institutions around the world concerning the arbitrators' role in the encouragement of settlement within arbitration proceedings. This provides an indication of the current approach adopted by the different arbitral institutions. (Appendix 4)
- 1.6.5 A list of the members of the CEDR Commission (Appendix 5).

## 2. Objectives, Principles and Summary

- 2.1 The purpose of the Recommendations set out in this Report is to provide tools which can be used by all of the different participants in international arbitration proceedings. These tools are all designed to increase the prospects of parties to the proceedings being able to settle their disputes without the need to proceed through to the conclusion of arbitral proceedings.
- 2.2 The CEDR Commission has considered the different approaches currently adopted for the encouragement of settlement within arbitration proceedings. These include the use by arbitrators in China and in Hong Kong of mediation techniques. They also include the approach prevalent in Germany and Switzerland where arbitrators are generally willing at an early stage in the proceedings to provide the parties with an indication of their preliminary views on the issues in the case. This can encourage settlement discussions between the parties and provide focus for those discussions.
- 2.3 By way of contrast, the typical common law approach is for arbitrators to refrain from engaging with the parties on the substantive issues for fear that this may suggest that they have prejudged the case before hearing all of the evidence and argument. However, the common law jurisdictions do make use of other techniques to promote settlement such as "offers to settle" which are described in more detail below and in Appendix 3. The Commission has identified the techniques and approaches that it considers being of most value and has included these within its Recommendations.
- 2.4 The Commission considers that the following three principles should apply to international arbitration proceedings and these three principles underpin the 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 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.*

- 2.5 The Commission recognises that by applying the third of these principles, an arbitrator will be discouraged from engaging in a med-arb process, which involves meeting privately with each party as part of the mediation phase. The Commission has concluded that whilst this form of med-arb has been used successfully by some arbitrators, it carries significant risks to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase. In addition, this form of med-arb may result in a mediation phase which is less effective than would be the case if the mediation were to be conducted by a third party mediator. Whilst currently the Commission does not therefore specifically recommend a med-arb process, which involves private meetings with the parties, it has considered safeguards that can be used in order to minimise the risks involved with such an approach. These are set out at Appendix 2 entitled "*Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement*".
- 2.6 The participants in the arbitral process to whom the Recommendations are addressed are arbitrators, arbitral institutions and parties and their counsel. The Recommendations are organised by reference to each of these categories.
- 2.7 In summary, the Recommendations are intended to achieve the following purposes:
- 2.7.1 Remind all participants that arbitration proceedings may be used in conjunction with other processes to achieve efficient and cost-effective outcomes.
  - 2.7.2 Encourage arbitrators to use appropriate techniques in the course of their conduct of the arbitration to promote and encourage settlement. An "appropriate" technique is one that will assist the parties, will not lead to successful challenges to their role as arbitrators and will not jeopardise the enforceability of any award that the tribunal may ultimately make.
  - 2.7.3 Offer suggestions to arbitral institutions on how to design processes which are intended to facilitate settlement and ways to allow them to be more readily accessible to parties to arbitral proceedings.
  - 2.7.4 Produce a list of principles which will give guidance when arbitral institutions, tribunals or parties are considering the use of combined adjudication and settlement processes such as Med-Arb, Arb-Med etc.
  - 2.7.5 Offer guidance on the drafting of arbitration clauses which record the agreement of the parties regarding the approach that the arbitral tribunal is to take to facilitate settlement.

### 3. CEDR Rules for the Facilitation of Settlement in International Arbitration Proceedings

- 3.1 In addition to its Recommendations, the Commission has prepared CEDR Rules [See Appendix 1]. *These Rules apply the Recommendations.* They are designed to be incorporated by agreement into the procedure to be adopted in an arbitration.<sup>4</sup> This can be done either in a contractual agreement to arbitrate embodied in a contract, or by inclusion by arbitral institutions in their rules of arbitration, or by way of a procedural agreement made by the parties, possibly recorded in an order made by consent by an arbitral tribunal early in the proceedings.
- 3.2 By adopting the CEDR Rules, Parties will ensure that their arbitral tribunal will facilitate settlement of their dispute and will also know how that facilitation will be undertaken.
- 3.3 The Recommendations in this Report are intended to be of use to arbitrators, arbitral institutions and Parties whether or not the Parties choose to adopt the CEDR Rules.

### 4. Recommendations

- 4.1 These Recommendations are not prescriptive. Many of the Recommendations are already being implemented in some parts of the world both by arbitral institutions and some arbitrators. One of the aims of the Recommendations is to identify techniques that have been used successfully so that they can be adopted more widely.

#### Arbitrators

- 4.2 Steps that arbitrators can take within the context of most existing arbitral rules include the following:
- 4.2.1 *Enforce multi-tier dispute resolution clauses in accordance with the applicable law if pre-arbitration phases have not been completed in accordance with the clause.* If the parties have agreed that they will, for example, conduct a mediation before embarking on arbitration proceedings, then this agreement should be enforced if the applicable law so provides. Not only does this respect the will of the parties (assuming that they have not varied the agreement set out in the multi-tier clause), but it also provides the parties with an opportunity to engage in a settlement process before incurring significant costs in the arbitration proceedings. In general terms, enforcement of such clauses will usually involve either staying the arbitral proceedings or declining jurisdiction.
- 4.2.2 *Remind the parties' counsel that it is best practice for internal party representatives to be present at the first procedural conference. Arbitrators can remind the parties at that conference that they can settle their dispute at any time.* Direct communication between the arbitral tribunal and the parties will ensure that the parties themselves understand the options available to them. This may be of particular benefit where the lawyers representing the parties come from different legal traditions and

<sup>4</sup> CEDR would like to thank the International Bar Association for permission to adopt in these Rules some of the terminology from the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.

may have different expectations of the tribunal's role regarding settlement.

- 4.2.3 *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.
- 4.2.4 *Question the parties' counsel and the parties themselves at appropriate junctures in the arbitral process regarding the status of settlement discussions and the potential use of other forms of ADR to assist.* The use of mediation or other ADR processes may be appropriate at different stages of the arbitral process, and it can be helpful for the parties' counsel to be reminded of this as the process progresses.
- 4.2.5 *If both parties agree, provide an indication as to the tribunal's preliminary view on the merits of the case.* This can be done in different ways. One approach is for the tribunal to set out the issues in the case that it has identified and what the tribunal considers will be required in terms of evidence from each party in order to prevail on the key issues.
- 4.2.6 *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.
- 4.2.7 *Propose that the parties be at liberty to make offers to settle during the arbitral proceedings with a view to settling the case and protecting their position on legal costs.* Where the Party to whom such an offer has been made has not accepted it and that party has not achieved a better result in the award, the arbitral tribunal shall be at liberty to take this fact into account when considering the allocation of the costs of the arbitration between the Parties. A more detailed description of how offers to settle can operate is set out at Appendix 3.

- 4.3 If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign.

#### Arbitral institutions

- 4.4 Institutions administering arbitration proceedings can take various steps to assist. Some of these can be taken within the context of existing rules and procedures. Others would require a change to those rules and/or the introduction of new services.
- 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.
- 4.6 Operating within their existing rules, institutions could take the following steps<sup>5</sup>:
- 4.6.1 *Instruct case managers to initiate a discussion regarding settlement with counsel representing the parties when the proceedings are commenced.* This is likely to involve asking whether the parties have already used ADR techniques and discussing with them whether it would be helpful to use such techniques immediately or at some later stage in the arbitral proceedings.
  - 4.6.2 *Provide information to counsel and the parties about ways of facilitating settlement negotiations.* This is likely to be of particular value and importance for parties and lawyers from jurisdictions where ADR techniques are less commonly used.
  - 4.6.3 *Where the institution either offers ADR services (such as mediation), or is able to recommend an ADR institution that provides such services, this can be drawn to the attention of the parties.*
  - 4.6.4 *Encourage arbitrators appointed by the institution to take the steps identified above at paragraph [4.2] and select sole arbitrators and chairmen for appointment who are likely to be pro-active in this regard.*
  - 4.6.5 *Support arbitrators who take such steps if queries are raised by the parties.*
  - 4.6.6 *Provide training to arbitrators in how to give an early view on the merits in order to encourage settlement, without making themselves or their award vulnerable to a successful challenge.*
  - 4.6.7 *Provide training to all participants in the arbitration process on alternative dispute resolution techniques.*
- 4.7 Additional steps which are likely to require changes to existing rules or the introduction of new rules include the following:

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<sup>5</sup> It is acknowledged that a number of institutions already take some of these steps.















































