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Should Arbitrators Facilitate Settlement?

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The practice of recording settlement agreements in the form of arbitral awards dates back to Ancient Greece. The Greek philosopher Isocratus (436-338 BC) in a court speech on behalf of the respondent in *"Against Callimachus*," argued that the case was already settled in an arbitral award on agreed terms.[1] As shown by a 2008 study[2] by the School of International Arbitration in modern legal practice settlements in arbitration became very common as 34% of arbitration proceedings are resolved by settlement.[3] Also, in East Asia, 72% arbitral practitioners view settlement as a desirable outcome in arbitral proceedings.[4] It is reasonable to assume that this percentage is even higher today.

There may be many reasons why parties to a dispute would prefer to settle instead of resolving the dispute through continuing litigation, including arbitration. Desire to reduce costs, avoid time-consuming arbitral proceedings and to remain on friendly terms with the other party can serve as incentives to settle. Settlement serves also as a risk-management tool. A party may prefer the certainty of settlement to the uncertainty of a future arbitration award. Amicable settlement of disputes facilitates restoration of mutual trust, even after a difficult dispute.[5] Additionally, enables further cooperation.[6] Furthermore, parties may also want to avoid possible obstacles to the enforcement of their agreement by requesting an arbitral tribunal to record it as an arbitration award. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards a consent award is treated as an arbitration award by the enforcing courts.[7] Starting arbitration proceedings may also serve as a bargaining tool to motivate an opposing party to come to an agreement. A request to arbitrate a dispute may become a wake-up call for management to understand that the other party is serious about pursing legal remedies.[8] Although the legal effect of a settlement agreement may vary in different legal systems, it remains essentially a contract.[9]

The ability of arbitrators to facilitate settlement agreements depends on the absence of any obstacles in the arbitration agreement, since most institutional arbitration rules do not prohibit

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[1] Yaraslau Kryvoi, Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 2015, 830
[2] Andrey Panoy, Sherina Petit, *Amicable Settlement in International Arbitration*, The European, Middle Eastern and African Arbitration Review 2015
[3] Leyla Orak Celikboya, *Promoting Settlement in International Arbitration* 2016
[4] Shahla F. Ali, *Facilitating Settlement at the Arbitration Table*, 21
[5] Yaraslau Kryvoi, Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 2015, 833
[6] Christop Schreuer, *The ICSID Convention: A commentary*, 2009
[7] Yaraslau Kryvoi, Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 2015, 831
[8] Ibid. 834
[9] Buhler, Webster, *supra* note 2, at para. 26-12

such measures. In fact, most procedural rules encourage arbitrators to pursue the amicable settlement of disputes, by allowing the parties to discontinue their arbitration proceedings at any time by mutual consent. [10] Additionally, some arbitration rules explicitly support the possibility of fixing settlements in consent awards.[11] The Rules of the German Institution of Arbitration[12] (*Deutsche Institution fur Schiedsgerichtsbarkeit* "DIS") expressly regulates in Art. 2.1. that the arbitral tribunal should encourage amicable settlement of the dispute. Art. 26.9. of the London Court of International Arbitration Rules[13] provide that the arbitral tribunal may make an award recording the settlement upon the joint request of the parties; or that the tribunal will be discharged if parties confirm in writing that they have reached a final settlement. The Center for Effective Dispute Resolution ("CEDR") also encourage arbitrators to settle in international arbitration as of 2007.

UNCITRAL urged national courts to regard settlement as a desirable outcome of civil procedure. French law is silent as to consent awards and legislators likely believed that such power of the arbitrators is inherent even where national law is silent on this issue. This follows from the general principle *favor conciliationis* (*i.e.* in favor of conciliation) which applies in developed legal systems. This also follows from the principle of party autonomy. An arbitral tribunal conducts the arbitral proceedings, but the disputing parties may dispose of the dispute by their mutual agreement.[14] There is a general consensus that settlement facilitation is not only compatible with an arbitrator's role, but is as a "noble obligation".[15] In certain civil law countries the parties anticipate the arbitrators to encourage amicable – *ex officio* – after expressing their preliminary views on the case. This is referred to as the "German approach" since German judges and arbitrators proactively assist the parties reaching a settlement during the proceedings.[16] Under the Rules of German Institution of Arbitration "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."[17] The "German approach" to facilitating settlement is not

[10] Leyla Orak Celikboya, *Promoting Settlement in International Arbitration* 2016
[11] ICC Rules, LCIA Rules, UNCITRAL Arbitration rules,
[12] http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10 (accessed on 6 February 2020)
[13] https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx (accessed on 9 February 2020)
[14] Yaraslau Kryvoi, Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 2015, 839
[15] Daniele Favalli, Max Hasenclever, *The Role of Arbitrators in Settlement Proceedings*, 23
[16] Bernd Ehle, *The Arbitrator as a Settlement Facilitator*, 80
[17] http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10 (accessed on 6 February 2020)

mediation nor Arb-Med or Med-Arb, but a *sui generis* method of proactive "managerial judging".

Arbitration in Bosnia and Herzegovina (BiH) is mostly limited to arbitration-enthusiasts and academic arena, and is rarely used to settle disputes. In the complex legislative framework of BiH, arbitration is regulated as one of the "other" dispute resolution mechanisms. Foreign Trade Chamber of BiH and the Chamber of Commerce of Republika Srpska[18] have established Courts of Arbitration. While the Rulebook of Chamber of Commerce of Republika Srpska does not mention resolving disputes by settlement, Article 53. of the Rules on organization and operation of the Court of Arbitration within the Foreign Trade Chamber of BiH stipulates that "The parties are entitled to resolve their dispute by settlement at any time during the proceedings. The arbitral tribunal or the sole arbitrator may make a final decision on the completion of the proceedings or, if both parties request so and the arbitral tribunal or the sole arbitrator accepts, an award on the basis of settlement.[19] Therefore, settlement within arbitral proceedings is possible in BiH and it follows the "German approach" because it does not call for arbitrator's *ex parte* meeting with parties, but it does not encourage an arbitrator to facilitate settlement.

The main rationale for the arbitrator taking on a dual role is the increased efficiency of the dispute settlement process. An arbitrator is familiar with the facts of a dispute because he conducted the proceedings from their inception and studied the parties' submissions. Further, arbitrators have the flexibility of discontinuing proceedings for negotiations and resuming them if necessary at any time.[20] The arbitrator should define the appropriate procedure and their degree of involvement so as to meet the parties' expectations. Most importantly, the arbitrator may identify critical issues and make a non-binding preliminary assessment of the case, based on the parties' argument and the evidence on record.[21] However, an arbitrator should never force a settlement on the, or in the words of Gabrielle Kaufmann-Kohler there is "a fine line between a judge coercing settlement and a judge facilitating settlement."[22]

The tribunal must ensure that it renders an enforceable award, in particular by determining whether there was a genuine dispute within its jurisdiction. Otherwise the award may be

[18] Republika Srpska is an entity of Bosnia and Herzegovina established by the 1995 Dayton Peace Accords. It represents a territorial, political and administrative unit occupying 49,9% of the territory of Bosnia and Herzegovina

[19] Foreign Trade Chamber of Bosnia and Herzegovina: Rules on organization and operation of the Court of Arbitration (2003)

[20] Lord Woolf, *Mediation in Arbitration in the Pursuit of Justice*, 2009, 172

[21] Bernd Ehle, *The Arbitrator as a Settlement* Facilitator, 91

[22] Gabrielle Kaufmann-Kohler, *op.cit.*, 192

unenforceable or set aside.[23] Article 30. of the UNCITRAL Model Law expressly authorises the tribunal to object to recording a settlement in the form of award. If a settlement agreement provides for some conditions preceding its entry into force, an arbitral tribunal issues a consent award after the parties confirmation that such conditions have been satisfied and the settlement agreement has taken effect.[24]

The users of arbitration are concerned that arbitration is becoming an increasingly inefficient and expensive, which can be contered by adopting innovative procedural methods. An arbitrator should "Speak softly and carry a big stick."[25] – allow parties to mutually settle their differences through settlement, while remaining capable of bringing final decision based on merits.

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[23] Yaraslau Kryvoi, Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 2015, 831
[24] *AbitibiBowater Inc. v. The Government of Canada*, ICSID Case, No. UNCT/10/1, 2010
[25] Theodore Roosevelt

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10. Leyla Orak Celikboya, *Promoting Settlement in International Arbitration* 2016

11.London Court of International Arbitration Rules 2014

12. Christop Schreuer, *The ICSID Convention: A commentary*, 2009

13. Lord Woolf, *Mediation in Arbitration in the Pursuit of Justice*, 2009, 172

14. *AbitibiBowater Inc. v. The Government of Canada*, ICSID Case, No. UNCT/10/1, 2010