Kluwer Mediation Blog

Mediation and Facilitating Settlement in International Arbitration

Rafal Morek (CMS) · Tuesday, September 19th, 2023

The ICC Commission on Arbitration and ADR has published an interesting report on "Facilitating Settlement in International Arbitration" ("**Report**"), which provides guidance on the effective use of mediation within arbitration proceedings, as well as on other manners of facilitating settlement by arbitrators.

The ICC has been promoting mediation – within the framework of its mainstream arbitration services – at least since 2007 when it published the Report 'Controlling Time and Costs in Arbitration'. Its second edition was released in 2012, followed by the 'Mediation Guidance Notes' in 2014.

The evolving role of arbitral tribunals in facilitating settlement

The authors of the Report of June 2023 observe that the role of the arbitral tribunal in facilitating

settlement of the parties' dispute has evolved in the past 10-15 years. While arbitrators in some jurisdictions are accustomed to being proactive in this respect, the traditional viewpoint in most jurisdictions has been that the role of the arbitral tribunal is to decide the case in an enforceable arbitral award. The parties remained free to negotiate and settle their dispute if they wanted to do so, but that was not something the tribunal should seek to encourage, facilitate or become directly involved with. This view was motivated by concerns that taking on such a role would negatively impact the tribunal's neutrality or the parties' perception of it. This traditional view has, however, evolved. The debate has moved from whether arbitrators (and arbitral institutions) should take steps to facilitate settlement, to how this should be done.

While the report explores some methods that arbitrators may employ without the use of mediation – including preliminary views or chairing of 'settlement conferences' – mediation lies at the cornerstone of the facilitating settlement techniques. As observed in the report:

> To date, mediation has proven to be the most popular and successful ADR tool for commercial disputes. Securing effective access to mediation during arbitration proceedings is clearly an important initiative that parties, arbitral tribunals and arbitral institutions can take to facilitate settlement of disputes. Access to mediation during arbitration can be facilitated by the use of mediation windows.

A mediation window clause

Ideally once arbitration proceedings have been commenced, the parties would discuss and agree to mediate either immediately or at some later point in the arbitration proceedings. In practice, however, once a dispute has arisen, the parties to the dispute often find it hard to reach agreement on such issues. A mediation window clause enshrined in a contract would ensure that mediation does take place at a specified point in time during the arbitration. In such clause the parties could anticipate when their dispute may be ripe for settlement — e.g., after the first round of substantive submissions have been filed and the parties have had the opportunity to reasonably assess the merits of the case. The mediation window clause could also specify other matters such as whether the arbitration proceedings should be suspended while the mediation takes place, and in what circumstances the mediation should come to an end. Such elaborated clauses are rarely seen in practice though. The Report correctly observes that many lawyers subscribe to the view that when it comes to dispute resolution clauses, a simple clause is preferable.

How should the idea of a mediation window be raised?

The idea of a mediation window may be raised not only by a party (whether or not the contract included a mediation window clause), but also by a tribunal or by an arbitral institution. A survey reported by the IMI Mixed Mode Taskforce showed that in response to the question 'Do you think an arbitrator has a role in fostering settlement', 78.38% responded " 'Yes'. The rising expectation of arbitration users is increasingly reflected in arbitration rules. For example, the 2021 ICC Arbitration Rules include as a case management technique, with arbitrators encouraging the parties to consider settlement of their dispute. However, there is no obligation on an arbitral tribunal under the Arbitration Rules to raise the possibility of a mediation window with the parties and practice in this regard varies significantly.

A mediation window protocol and other settlement facilitation instruments provided by

arbitral institutions

Therefore, there is a clear trend among arbitral institutions to adopt specific rules or protocols to equip both the parties and the arbitral tribunal with settlement facilitation tools. The Report provides several instructive examples in this respect.

The International Institute for Conflict Prevention and Resolution (CPR) provides a Model Clause and Protocol for Concurrent Mediation-Arbitration. The CPR concurrent mediation regime is a form of ongoing parallel mediation.

The AAA/ICDR adopted rules that provide for concurrent mediation on an opt-out basis.

The SIAC-SIMC 'Arb-Med-Arb Clause' provides for the appointment of an independent mediator to conduct a mediation under the SIMC Mediation Rules during an institutionally supported mediation window. Pursuant to the SIAC-SIMC Arb-Med-Arb Protocol, the mediation window is scheduled during the arbitration proceedings after the exchange of the Notice of Arbitration and the Response to the Notice of Arbitration, at which point the proceedings are suspended for a maximum of eight weeks for the mediation to be conducted.

The Vietnam International Arbitration Center (VIAC) offers two different mechanisms with the Vietnam Mediation Center (VMC): (i) the VIAC Med-Arb Combo, which is a mediation window whereby a mediation is conducted after arbitration is initiated and the arbitration proceedings are suspended; and (ii) the VIAC Arb-Med-Arb Protocol, whereby the mediation will proceed in parallel to the initial phase of the arbitration during which a response to the request for arbitration will be filed and the arbitral tribunal is constituted. In both cases is the arbitration process administered by VIAC under its Rules of Arbitration and the mediation is conducted by independent mediators appointed under the VMC Rules of Mediation.

Many other institutions, such the Court of Arbitration at the Polish Chamber of Commerce, provide for discounts or refunds of the arbitration fees, should a dispute be settled amicably due to mediation conducted under the auspices of such institution.

Final remarks

The Report correctly identifies the growing appetite of arbitration users for adequate settlement facilitation tools. It will be interesting to see whether this trend is emboldened in further model mediation window clauses, protocols or 'arb-med' rules, proposed by arbitral institutions.

Last but not least, it is critical that arbitrators are able eloquently explain to the parties why and how mediation could assist them in reaching more satisfactory results. This role goes beyond the traditional arbitrator's 'toolbox' and may require additional training. Arbitral institutions should support arbitrators in developing such skills, and constantly provide them with opportunities to explore the world of mediation.

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