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Divergent Paths: Settlement In Us Litigation And International Arbitration

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DIVERGENT PATHS: SETTLEMENT IN US LITIGATION AND INTERNATIONAL ARBITRATION

*By Alexandre de Gramont, Michael D. Igyarto, and Tatiana Sainati**

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I. INTRODUCTION

There are many differences between international arbitration and US litigation.¹ One especially important, but often overlooked, difference is the rate of settlement. Litigation cases in the state and federal courts of the United States are very likely to end in settlement. International arbitration cases are not. Such cases are far more likely to proceed to trial (i.e., a full evidentiary hearing on the merits) than are cases in US litigation.²

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1. The term "US" litigation," as used in this article, refers to litigation in both the state and federal courts of the United States.

2. A separate reason why international arbitration cases tend to proceed to trial at a higher rate than US litigation cases is that US litigation cases are more often resolved by dispositive motions. Resolution of cases by dispositive motions in international arbitration remains comparatively infrequent. *See generally* Adam Raviv, *No More Excuses: Toward a*

The statistics, even if imperfect, are striking. Most analyses of US cases put the settlement rate in the range of seventy to ninety percent.³ Even when limited to contract/commercial cases, settlement rates in US litigation are typically estimated at well over sixty percent.⁴ International arbitration cases, on the other hand, settle at a far lower rate, with most studies estimating the settlement rate at thirty to forty percent.⁵

Cases in US litigation settle at a higher rate than cases in international arbitration for a variety of reasons. Litigation in the state and federal courts of the United States is notoriously expensive, time-consuming, and disruptive, with far-reaching and intrusive discovery. Moreover, the uneven quality of lay juries (and sometimes judges) contributes to unpredictable results. Many litigants thus prefer to settle their disputes rather than face the time, expense, and uncertainty inherent in litigating a case through trial in US courts.

Another reason for the higher settlement rate in US litigation is the fact that many US judges actively promote settlement. Many judges no doubt promote settlement because they genuinely believe that parties are usually better off resolving their disputes through amicable resolution than protracted, costly, and unpredictable litigation. But judges may also promote settlement as a means to manage their increasingly large dockets, which in many judicial

Workable System of Dispositive Motions in International Arbitration, 28 *ARB. INT'L* 487 (2012).

3. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 *J. EMPIRICAL LEGAL STUD.* 111, 112 (2009). Given the numerous different court systems in the United States, and the fact that it is not always easy to determine whether a case has settled through a review of the case file, there has been debate and uncertainty concerning the settlement rate for US litigation. However, nearly all of the analyses conclude that the vast majority of US litigation cases end in settlement. *See id.*

4. *Id.* at 120.

5. *See, e.g.*, Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 *BROOK. J. INT'L L.* 827, 828-29 (2015); Loukas Mistelis, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: The Settlement-Enforcement Dynamic in International Arbitration*, 19 *AM. REV. INT'L ARB.* 377, 378 (2008). As with estimating the settlement rate in US litigation, estimating the settlement rate in international arbitration presents certain challenges. There are numerous different international arbitration institutions, which do not necessarily keep or make public records indicating settlement rates. There are also numerous *ad hoc* arbitrations that are not administered by any institution. Therefore, the analyses of settlement rates in international arbitration are generally based on surveys of the users of international arbitration services rather than institutional records.

districts have become overwhelming. Indeed, the culture of settlement promotion in much of the US judiciary is so pervasive that “settlement is the modal civil case outcome” in US litigation.⁶

By contrast, many international arbitrators are reluctant to promote or even mention settlement, lest they be perceived as biased or as prejudging the case.⁷ US and other common law lawyers who sit as arbitrators in particular see their role as limited to adjudicating the dispute.⁸ In their view, the promotion of settlement is a role limited to mediators.⁹

Some commentators have observed that arbitrators who come from legal traditions where part of the court’s mission is to seek settlement (such as the Romano-Germanic tradition) are far more open to discussing and even facilitating settlement in arbitration cases.¹⁰ Yet despite the now prevalent efforts by US judges to promote settlement, US lawyers who sit as arbitrators in international arbitration remain largely reluctant or unwilling to intervene to encourage settlement.¹¹

The differences in settlement rates between US litigation and international arbitration have real and practical consequences for parties who have a choice of how to resolve their disputes; so too, does the difference between how US judges and international arbitrators approach the issue of settlement. There are certainly sound reasons why users of international arbitration may not want arbitrators to be as proactive (or, some might say, aggressive) as US judges in

6. Eisenberg & Lanvers, *supra* note 3, at 112.

7. Kun Fan, *The Risks of Apparent Bias When an Arbitrator Acts as a Mediator: Remarks on Hong Kong Court’s Decision in Gao Haiyan*, 13 Y.B. PRIV. INT’L L. 535, 538 (2011).

8. See, e.g., Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT’L 187, 190 (2009).

9. See Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN. ST. Y.B. ARB. MEDIATION 1, 1 (2014) (“It is generally understood that arbitrators adjudicate disputes and mediators help settle them through negotiated agreement.”) (citing John W. Cooley, *Arbitration v. Mediation – Explaining the Differences*, 69 JUDICATURE 263 (1986)).

10. Gabrielle Kaufmann-Kohler & Victor Bonnin, *Arbitrators as Conciliators: A Statistical Study of the Relationship between an Arbitrator’s Role and Legal Background*, 18(2) INT’L CHAMBER COM. BULL. 1, 5-6 (2008), available at <http://www.arbitration-icca.org/media/4/92368195274054/media01231914460597000950003.pdf>.

11. *Id.* (“Practitioners know from experience that German arbitrators and arbitrators from German-speaking Switzerland will be more likely to intervene to encourage a settlement than their English or American counterparts.”).

urging settlement. Arbitrators are paid to devote their attention to adjudicating the dispute in a manner that results in a thorough and reasoned outcome that is fair (if not necessarily favorable) to both parties. One reason parties choose arbitration is to have greater control over the proceedings, which in turn may lead many arbitrators to take a “hands-off” approach when it comes to promoting settlement. Many arbitrators may rightly believe that the parties, having chosen arbitration, are perfectly capable of engaging in settlement discussions without the arbitrator’s encouragement or intervention.

On the other hand, as has been widely observed, many users of international arbitration are concerned and dissatisfied with its rising costs, increased delays, and perceived inefficiencies.¹² The role of arbitrators in promoting settlement is therefore “intertwined with concerns regarding efficiency and economy in arbitration, which in recent years has been the subject of continuing attention and discussion.”¹³ If international arbitration is seen to be as costly and time-consuming as litigation—with less likelihood of settlement because arbitrators are unwilling to encourage it—that may well result in fewer parties choosing international arbitration to resolve their disputes.¹⁴ Many users of international arbitration may in fact want arbitrators to play a role in encouraging the parties to settle.

This Article first reviews the rise in settlement efforts among US judges over the past few decades and considers some of the methods deployed by US judges to promote settlement.¹⁵ The Article then considers why international arbitration cases tend to settle less often than US litigation cases, including the reasons why many arbitrators are reluctant to promote settlement. While recognizing the reasons that arbitrators cannot become as proactive in promoting settlement as many US judges, the Article suggests steps that arbitrators might take to encourage settlement without departing from their obligation to

12. Kaufmann-Kohler, *supra* note 8, at 191.

13. Stipanowich & Ulrich, *supra* note 9, at 5.

14. Of course, some parties may not have any choice other than to agree to international arbitration or face litigation in the foreign courts of their counterparty. But many parties are able to negotiate forum resolution clauses in their cross-border contracts that provide for US litigation and have no reason to be concerned about enforcing a US judgment against their foreign counter-party.

15. *See infra* Section II.

remain neutral and impartial, and to provide parties with the dispute resolution services that they want.¹⁶ The Article concludes that while it is neither feasible nor desirable for international arbitrators to engage in settlement activities to the same extent as US judges, there are steps that international arbitrators can and should take to promote settlement in international arbitration cases.¹⁷

II. THE PROMOTION OF SETTLEMENT IN AMERICAN COURTS

The role of US judges in facilitating and promoting settlement has received much attention over the past few decades.¹⁸ The use of alternative dispute resolution (“ADR”) techniques currently employed in US courts varies widely, even within the same courthouse. Prior to 1983, there was no explicit authority for US judges to participate in settlement of their cases. Since then, Congress has enacted several laws that explicitly authorize settlement participation by the judiciary. Indeed, not only are US judges encouraged (and sometimes required) to take a more active role in promoting settlement, there are remarkably few limitations on their authority to do so. As a result, US judges now employ a wide variety of ADR techniques, which the courts have almost always approved when challenged. This section will discuss first the current legislative framework regarding the participation of US judges in settlement, and will then describe several of the various techniques used in US courts to promote and facilitate settlement.

A. *The Evolution of US Judicial Involvement in Settlement of Disputes*

Common law courts, like those in the United States, have traditionally “been entrusted with adjudicating, not settling, disputes.”¹⁹ The original version of Federal Rule of Civil Procedure

16. *See infra* Section III.

17. *See infra* Section IV.

18. Although our focus in this section is primarily on federal rules and practice, many state courts throughout the United States have adopted similar rules and practices. “[E]very state now has some type of court-connected ADR at some level.” *Comparing State Courts*, NAT’L CTR. ST. CTS., <http://www.ncsc.org/Information-and-Resources/Comparing-state-courts.aspx> (last visited Jan. 11, 2017).

19. Kaufmann-Kohler, *supra* note 8, at 190.

16, for example, “which provided that a court could hold a discretionary pretrial conference, said nothing about settlement in its list of subjects for consideration.”²⁰

In the early 1980s, however, influential commentators like Professor Judith Resnik “helped launch a debate in the United States about judicial management and managerial judges that stemmed primarily from frustrations over the costs, delays and formalism of adjudication.”²¹ As a result, Federal Rule of Civil Procedure 16 was amended in 1983 specifically to permit some judicial involvement in the settlement process:

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . facilitating the settlement of the case.²²

The Advisory Committee observed that the reasons for promoting and facilitating settlement include saving costs for litigants and the judicial system and reducing crowded court dockets:

[The 1983 amendment] recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.²³

In the 1990s, Congress continued its support for the expansion of ADR in the federal judiciary through the passage of the Civil Justice Reform Act, which “requires the courts to utilize ADR programs to reduce litigation costs and to alleviate congestion and delay in the court system.”²⁴ As the late US District Judge Harold Baer, Jr. observed, “[a] direct result of the [Civil Justice Reform Act] was the adoption of some form of ADR in almost all of the ninety-four federal district courts.”²⁵ Then in 1998, Congress passed the Alternative

20. Edward Brunet, *Judicial Mediation and Signaling*, 3 *NEV. L.J.* 232, 242-43 (2002-2003).

21. Kaufmann-Kohler, *supra* note 8, at 191.

22. *FED. R. CIV. P.* 16(a)(5).

23. *Id.* (advisory committee’s note to 1983 amendments).

24. Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 *N.Y.U. ANN. SURV. AM. L.* 131, 133-34 (2001).

25. *Id.*

Dispute Resolution Act,²⁶ “which mandates that all federal courts implement ADR programs, make improvements to existing programs, and appoint judicial officers to supervise ADR procedures in the courts.”²⁷

B. ADR Techniques Used in US Courts

Despite the consistent encouragement for courts to develop and utilize ADR techniques, there is little guidance regarding the permissible extent of a judge’s involvement in settlement. The current Model Code of Judicial Conduct contains only one provision addressing the limits of a judge’s authority in settlement, which states (in its entirety) that, “[a] judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.”²⁸ However, as at least one commentator has noted that the provision, “even as elaborated in the comments to Rule 2.6(B), is so elastic and general that it leaves individual judges free to conclude that any one of a number of extremely different approaches to settlement work is ethically permissible.”²⁹

US courts currently deploy a myriad of ADR procedures to promote settlement of disputes. Many of these procedures involve persons other than the judge to help the parties reach settlement. As described in one publication, the procedures include:

Mediation – “Mediation is a relatively informal, non-binding process in which a neutral third party attempts to help litigants reach a consensual solution to their dispute Because of its amorphous and flexible nature, mediation is considered appropriate for most types of civil cases.”³⁰

Arbitration – “Arbitration differs from mediation in its use of an arbitrator to reach a decision as opposed to a consensual judgment among the parties Arbitration is typically useful in contract and

26. Alternative Dispute Resolution Act of 1988, 28 U.S.C. §§ 651-658 (1998).

27. Baer, *supra* note 24, at 134 (citing 28 U.S.C. § 651(b)-(d)).

28. MODEL CODE JUDICIAL CONDUCT, r. 2.6(B).

29. John C. Cratsley, *Judges and Settlement: So Little Regulation with So Much at Stake*, 16 DISP. RESOL. MAG. 4 (2010).

30. Peter Lantka, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judge’s Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 UWLA L. REV. 71, 79 (2005) (internal citations omitted).

tort cases involving moderate amounts of money for which litigation costs are disproportionate to the amount at stake.”³¹

Hybrid Mediation-Arbitration (“Med-Arb”) – “Med-Arb is a rarely utilized process in which parties first attempt to settle their case through mediation and go directly to arbitration if the process is unsuccessful . . . however, [Med-Arb] is usually tempered by the fact that litigants are tempted to hold back information during mediation for fear that it will be used against them at a later date.”³²

Early Neutral Evaluation (“ENE”) – “Early Neutral Evaluation allows parties to present their preliminary case to a neutral evaluator. The process involves an initial exchange of briefs followed by an ENE session in which each party presents its case to the evaluator, calling witnesses and presenting evidence if necessary. The session is concluded with a non-binding written evaluation from the evaluator assessing the merits of each party’s case and estimating possible awards.”³³

Summary Trial – “The summary trial, as its name implies, is a truncated version of an actual trial. The process includes attorney presentations to the judge, magistrate, or jury and an eventual non-binding decision.”³⁴

Mini-trial – Although rarely used, “[t]he mini-trial is a specialized form of ADR designed to handle large, commercial litigation cases. Generally, the mini-trial consists of high-level, high-profile executives meeting with a neutral third party. Unlike a summary trial, the neutral party does not make a decision. Rather, the ‘trial’ consists of information being presented to the respective executives who retire afterwards and attempt to reach a mutual settlement.”³⁵

Another report notes the use of a “practice jury,” where the judge seeks volunteers from the jury pool (those in the courthouse for jury duty that were not selected for an actual case) and then allows counsel to make a presentation about the issues of the case and the

31. *Id.* at 79-80.

32. *Id.* at 80.

33. *Id.* at 80-81.

34. *Id.* at 81.

35. *Id.* at 82.

evidence likely to be introduced. Once both sides have presented, the attorneys can then ask questions of the practice jury.³⁶

The extent to which US judges will themselves become involved in an ADR procedure—and then remain to adjudicate the case if it does not settle—varies considerably. Some judges, for example, will not adjudicate a case on the merits if they have previously participated in an unsuccessful form of ADR. Some judges routinely have Magistrate Judges³⁷ handle settlement conferences and ADR processes to avoid any appearance of bias should the settlement efforts fail. Other judges, however, will participate in the ADR process and also adjudicate the dispute if settlement efforts fail.³⁸ Beyond those differences, some judges will meet separately with the parties (while others will only address all parties together), while others will separate clients from attorneys for individual discussions.³⁹

Judge John C. Crastley served on the Massachusetts Superior Court for nearly a quarter of a century and served as Chair of the Superior Court Committee on Alternative Dispute Resolution. In an illuminating article, Judge Crastley interviewed three of his colleagues on the Massachusetts Superior Court “who are well known for their work as settlement judges” and then recounted their various approaches to settlement.⁴⁰

As the article describes, “Judge A” routinely has an introductory conference with all counsel and parties, and then asks everyone to leave except for the defendant and the defendant’s counsel.⁴¹ Judge A then asks the defense team how much money is available to settle.⁴² Judge A then meets with the plaintiff and the plaintiff’s counsel to ask

36. Crastley, *supra* note 29, at 6.

37. 28 U.S.C. §§ 631(a) (2010) (providing authorization for US federal magistrate judges as judicial officers in the district court system). A US magistrate judge exercises jurisdiction over matters assigned by statute, as well as those delegated by the district judges, although duties assigned to magistrate judges by district court judges may vary considerably from court to court. Unlike District Court judges (who enjoy tenure for life), a full-time magistrate judge is appointed by majority vote of the active district judges of the court and serves a term of eight years. *Id.*

38. Crastley, *supra* note 29, at 4-6.

39. *Id.*

40. *Id.* at 4.

41. *Id.* at 5.

42. *Id.*

what amount they need to settle.⁴³ Once he has a feeling for the plaintiff's position, Judge A asks only the plaintiff's counsel whether the case would settle if he could get a number near what he got from the defense side, although counsel is directed not to share that number with the plaintiff.⁴⁴ Judge A then goes back to the defense side and asks if they could settle for an amount higher than they initially indicated if it would terminate the case.⁴⁵ If the defense side agrees to a higher (and usually final) number, he then meets privately with the plaintiff's counsel, instructs counsel that this is the best offer he can get and asks counsel to recommend the number to the plaintiff and explain how it was reached.⁴⁶ Even if the plaintiff comes back with a higher number, Judge A does not engage in further back-and-forth at that point.⁴⁷

"Judge B" takes a substantially different approach and never separates the parties from either their counsel or the other parties.⁴⁸ Instead, he inquires about the current state of settlement discussions and offers or demands.⁴⁹ He then comments on the realism of the offers and demands, the prospects of the plaintiff prevailing and the strengths of the pleaded defenses.⁵⁰ If Judge B determines that the lawyers are comfortable with achievable settlement terms but there is a client hold-out, he then discusses with all parties the risks of trial, the uncertainty of a jury decision, his views on the strength of available evidence, and jury awards in similar trials.⁵¹

"Judge C" uses a more standard form of judicial mediation, in which he meets with all parties and counsel, then engages in so-called "shuttle diplomacy," meeting with one side (and its counsel), then the other side, trying to close the gap between the parties.⁵² Over the course of several iterations, Judge C may suggest that the parties "split the difference"; that the party with greater assets or exposure should come up by more than half the difference; that the parties

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 5-6.

52. *Id.* at 6.

agree to some form of non-monetary settlement; or that the parties accept what Judge C believes to be the “best” possible settlement.⁵³ If Judge C is ultimately unsuccessful in resolving the case though, he will then inform the parties that he will not be the trial judge.⁵⁴

Some American courts even set up special systems to help facilitate settlements. As retired US Magistrate Judge Morton Denlow describes, some federal courts in Illinois have had their “Magistrate Judges create[] and maintain a settlement database of cases that appeared with frequency, such as employment discrimination, civil rights, personal injury, and consumer credit.”⁵⁵ Judge Denlow explains:

By tracking the major characteristics of a settlement, including the settlement terms, the plaintiff’s initial demand, the defendant’s initial offer, the plaintiff’s itemization of damages, the stage of the litigation, and brief comments from the judge, we were able to help parties determine whether the settlement proposals being made were consistent with other similar cases. Because of the large volume of cases, we were able to provide useful guidance to the parties on the appropriate settlement range.⁵⁶

The same court “also developed a settlement assistance program, in which volunteer lawyers were appointed to represent *pro se* litigants for the sole purpose of representing them in a settlement conference.” Judge Denlow reports that the program “has further reduced the amount of motions and trials in *pro se* cases.”⁵⁷

Finally, some US judges use “signaling” as means to encourage settlement. Signaling can occur orally (for example, commenting at a pre-trial conference that a claim or defense may appear unsubstantiated) or in writing while denying dispositive motions (e.g., “while I cannot say I think highly of plaintiff’s case, there may be some issue of fact that precludes summary judgment”).⁵⁸ Signaling

53. *Id.*

54. *Id.*

55. Morton Denlow, *Magistrate Judges’ Important Role in Settling Cases*, 2014 FED. LAW. 101, 103 (2014).

56. *Id.*

57. *Id.* at 102.

58. Brunet, *supra* note 20, at 232-33.

often encourages the parties (or at least one party) to consider settlement seriously.⁵⁹

III. THE PROMOTION OF SETTLEMENT IN INTERNATIONAL ARBITRATION

There are good and legitimate reasons why the settlement rate in international arbitration is lower than that in US litigation. As explained above, parties to US litigation often decide to settle in order to avoid the uncertainty of jury verdicts. That may be especially true in complex or highly technical cases. By contrast, parties typically choose international arbitrators who, by virtue of their background and expertise, are particularly competent to decide the dispute at hand. As also explained above, US judges often promote settlement as a means to manage and reduce their heavy caseloads. By contrast, parties (at least in theory) choose international arbitrators who can dedicate themselves to the dispute presented without the competing demands of a heavy court docket. In addition, parties to US litigation may settle early to avoid having their confidential business information (or other secrets) revealed in public proceedings. Because parties can typically agree to maintain the confidentiality of arbitration proceedings, such publicity concerns are less likely to lead the parties to settle in international arbitration. In short, the reasons why parties often prefer international arbitration to litigation also explain, in part, why the settlement rate is lower in international arbitration than in litigation. Overall, parties generally have more confidence and fewer concerns in proceeding to a trial by arbitrators than a trial by jury to resolve their dispute.

At the same time, the lower settlement rate in international arbitration may also result from entrenched habits and antiquated expectations—and perhaps even misconceptions as to what is permissible on the part of the arbitrators. Again, given the oft-stated concerns about increasingly expensive and protracted international arbitration proceedings, there is every reason to consider whether international arbitrators should become more active in promoting settlement—and if so, how—within the parameters of their ethical obligations and their mandate. Indeed, some commentators have

59. *Id.* at 250.

questioned whether an arbitrator's "ethical obligations extend to helping promote an early resolution of a dispute by means of settlement, which is very often the best way of achieving cost-savings and efficiency as well as a satisfactory result."⁶⁰

There is no question that many parties to international arbitration, as well as many international arbitral institutions, take steps to promote the early settlement of disputes before undertaking full-blown arbitration proceedings. For example, parties may include tiered dispute resolution clauses in their contracts.⁶¹ Such clauses may require that prior to commencing arbitration, a party must provide the counterparty with a notice of the dispute. The parties must then undertake efforts to resolve the dispute amicably (perhaps through a meeting of their CEOs or other senior officers). If such efforts are unsuccessful, the dispute resolution clause might then permit the parties to proceed to arbitration—or might require another step such as mediation. Often, these clauses require the parties to devote a certain amount of time to such efforts before formally commencing the arbitration.⁶²

Similarly, many prominent arbitral institutions provide ADR services designed to assist the parties in settling their disputes without arbitration—such as mediation and expert determinations.⁶³ The Singapore International Arbitration Centre ("SIAC") launched an "Arb-Med-Arb" protocol in 2015 in collaboration with the recently

60. Stipanowich & Ulrich, *supra* note 9, at 2.

61. See, e.g., PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 121 (2d ed. 2007).

62. See *id.* at 121-23.

63. For example, the ICC administers both arbitrations and mediations. The institution's Mediation Rules and Arbitration Rules are "designed to facilitate the combination of ICC Mediation and ICC Arbitration." *Combination of Arbitration and Mediation Under the ICC Rules of Arbitration and ICC Rules of Mediation*, INT'L CHAMBER COM., <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Combination-of-arbitration-and-mediation-under-the-ICC-Rules-of-Arbitration-and-ICC-Rules-of-Mediation/> (last visited Jan. 11, 2017). Similarly, the Stockholm Chamber of Commerce offers both arbitration and mediation services. *Dispute Resolution Services*, ARB. INST. STOCKHOLM CHAMBER COM., <http://sccinstitute.com/dispute-resolution/> (last visited Jan. 11, 2017). The International Institute for Conflict Prevention and Resolution likewise offers mediation and arbitration services. *Services Offered*, INT'L INST. CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/dispute-resolution-services/services-offered> (last visited Jan. 11, 2017).

established Singapore International Mediation Centre.⁶⁴ If the parties elect to participate in the protocol, then, after the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, the SIAC tribunal refers the dispute to the Mediation Centre and stays arbitral proceedings while mediation is attempted. If, within eight weeks, mediation proves unsuccessful, arbitral proceedings resume.⁶⁵

The harder issue is whether and to what extent international arbitrators themselves should promote settlement discussions among the parties appearing before them. Arbitration rules and institutions provide that arbitrators can at least raise the issue of settlement with the parties. For example, the United Nations Commission on International Trade Law (“UNCITRAL”) Notes on Organizing Arbitral Proceedings of 2016 provide that “[i]n appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties.”⁶⁶

In addition, there are a number of steps that arbitrators might take to promote settlement that do not include directly engaging in settlement discussions with the parties. For example, Neil Kaplan, a well-known arbitrator and former High Court Judge in Hong Kong, has proposed a mechanism—the eponymous Kaplan Opening—that uses the inherent flexibility in arbitral proceedings to clarify key issues and facts in dispute before the main hearing.⁶⁷ Mr. Kaplan

64. Gary B. Born, *Drafting International Arbitration Agreements*, in *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 29-114, ¶ 24 (5th ed. 2016).

65. *SIAC-SIMC Arb-Med-Arb Protocol*, SINGAPORE INT’L MEDIATION CTR., <http://simc.com.sg/siac-simc-arb-med-arb-protocol> (last visited Jan. 11, 2017).

66. UNCITRAL, UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS ¶ 72 (2016), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf>. This provision reflects a changed attitude in favor of settlement. The 1996 Notes recommended that tribunals “only suggest settlement negotiations with caution.” UNCITRAL, UNCITRAL NOTES ON ARBITRAL PROCEEDINGS ¶ 46 (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>. The Working Group’s decision to adopt a more favorable stance on settlement “reflect[s] more positively the possibility of amicable settlements during arbitral proceedings.” Esme Shirlow, *UNCITRAL’s 2016 Notes on Organizing Arbitral Proceedings: Evolutions and Fragmentations in International Arbitration*, KLUWER ARB. BLOG (Sept. 7, 2016), <http://kluwerarbitrationblog.com/2016/09/07/uncitrals-2016-notes-on-organizing-arbitral-proceedings-evolutions-and-fragmentations-in-international-arbitration/>. Perspectives on settlement “had evolved to such an extent that—in some circumstances—it may even be appropriate for arbitrators to be involved in mediating such settlements themselves.” *Id.*

67. Neil Kaplan, *If It Ain’t Broke, Don’t Change It*, 80 *ARB.* 172, 172 (2014).

invites tribunals to fix a hearing after the first round of written submissions and before the hearing on the merits at which both counsel open their respective cases before the tribunal.⁶⁸ One advantage of this Kaplan Opening is that by “[b]ringing the parties together, with their trial counsel, well in advance of the hearing . . . there is a chance that at least part of the case may be settled, or points of disagreement minimized.”⁶⁹

Arbitrators have other tools to focus the parties on reasons for settling, including weaknesses or vulnerabilities of their case. Article 2 of the IBA Rules on the Taking of Evidence in International Arbitration provides that the tribunal “is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate.”⁷⁰ The American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes clarifies that arbitrators “may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration.”⁷¹ Together with institutional rules designed to help identify key issues early in the proceedings,⁷² these provisions ensure that arbitrators can discuss the case with the parties. In so doing, the Tribunal can work to ensure “the mutual recognition of each party’s position,” and to facilitate “new analysis and new risk assessment by each party, which may well be the beginning of new efforts to have the case settled.”⁷³

But should arbitrators go further? Should they become involved in facilitating or even participating in settlement discussions, as many US judges do? Hybrid procedures—such as Med-Arb, in which

68. *Id.* at 174.

69. *Id.*

70. IBA RULES ON THE TAKING OF EVIDENCE IN INT’L ARB. art. 2(3) (INT’L BAR ASS’N 2010).

71. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 4 (AM. ARBITRATION ASS’N & AM. BAR ASS’N 2004), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (quoting Canon I to Rule 15).

72. For example, the 2010 revision of the UNCITRAL rules was intended to ensure clarification of the core issues in dispute at an earlier stage in the proceedings. DAVID CARON & LEE CAPLAN, THE UNCITRAL ARBITRATION RULES, A COMMENTARY 371 (2d ed. 2013).

73. Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 ARB. INT’L 523, 531 (2005).

parties commence mediation with the understanding that, if the procedure fails, the dispute will go to arbitration, and arbitration-mediation (“Arb-Med”), in which parties begin arbitral proceedings and then elect to attempt mediation—both anticipate the same person acting as both arbitrator and mediator.⁷⁴ This dual role raises concerns about the ability of the arbitrator-mediator to remain impartial throughout the processes.⁷⁵ The bias problem arises because “the role of mediator and arbitrator can be at odds with each other.”⁷⁶ The mediator can, and must, caucus with the parties separately, creating the risk of bias if the mediator learns confidential information in the course of these ex-parte conversations⁷⁷ or expresses provisional perspectives on the case.⁷⁸ The ICC Mediation Rules address this concern, stating that “[u]nless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute.”⁷⁹

Despite the advent of such procedures, many arbitrators remain reluctant to actively engage in settlement proceedings. As discussed above, the issue is sometimes one of culture. As Professor Gabrielle Kaufmann-Kohler writes, arbitrators from legal cultures where courts play a prominent role in promoting settlement—such as Germany, Switzerland, and China—tend to engage in settling disputes among the parties before them.⁸⁰ Yet, as also noted above, US (and other common law) lawyers who serve as arbitrators rarely promote settlement among the parties appearing before them, notwithstanding the increased role played by US courts in doing precisely that over the past three decades.⁸¹

74. Jacob Rosoff, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings*, 26 J. INT’L ARB. 89, 89 (2009).

75. *Id.*

76. *Id.* at 89-90.

77. *Id.* at 91.

78. Alexis Mourre, *The Proper Use of Med-Arb in the Resolution of International Disputes*, 2016 ASIAN DISP. REV. 94, 94 (2016).

79. MEDIATION RULES art. 10(3) (INT’L CHAMBER COM. 2014).

80. See Kaufmann-Kohler, *supra* note 8, at 195-97. See generally Kaufman-Kohler Bonnin, *supra* note 10.

81. W. Whitaker Rayner, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 172 (1985); see also Klaus Peter Berger, *The International Arbitrator’s Dilemma: Transnational Procedure versus Home Jurisdiction—A German Perspective*, 25 ARB. INT’L 217, 225 (2009) (“[C]ommon law arbitrators and counsel have

More broadly, proactive efforts by international arbitrators to facilitate settlement remain exceptional.⁸² That is unfortunate, as there are significant advantages to having the arbitrator involved in settlement discussions with the parties, as opposed to a mediator or other third person who is not involved in adjudicating the dispute. According to Professor Kaufmann-Kohler:

First, the arbitrator already knows the case. A third party mediator or conciliator who acts before or in parallel to arbitration must acquire such knowledge, with the unavoidable duplication of work, additional expenses and delays. Second and foremost, the arbitrator is the master of the timing the proceedings, and is in the best position to choose the appropriate moment to offer the tribunal's services for settlement purposes. This may often be after the exchange of written briefs and before the hearing. It may also be after a partial award. It should not be too early in the proceedings, when the arbitrators (and sometimes the parties as well) do not have a sufficient understanding of the issues. It should not be too late either; it should not be at a time when the parties have already spent too much time on the arbitration and may no longer be willing to settle. Identifying the right moment is a question of judgment, and experienced arbitrators will generally know when the time is ripe.⁸³

There are also significant risks or concerns when an arbitrator becomes involved in promoting settlement. The first is the risk posed to the consensual nature of arbitration. Neither party should feel coerced into settling the case or even into entering settlement discussions (with or without the arbitrator). Another risk is that a party may reveal facts to the arbitrator-mediator that are unknown to the other party during private caucuses, raising due process concerns.⁸⁴ Still another risk is the threat to impartiality. The fear is that, if the settlement fails and the arbitration continues, the arbitrator

always looked with skepticism and even some dismay at this pragmatic approach to settlement in arbitration.”).

82. Karl-Heinz Böckstiegel, *Arbitrator's Case Management: Experiences and Suggestions*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE, AND DISPUTE SETTLEMENT—LIBER AMICORUM IN HONOUR OF ROBERT BRINER 115, 124 (Gerald Aksen & Robert Briner eds., 2005).

83. Kaufman-Kohler, *supra* note 8, at 197.

84. *Id.*

will lose her impartiality and/or objectivity because of information learned during the course of settlement discussions.⁸⁵

There are rules and guidelines to help diminish, if not eliminate, these valid concerns. First, an arbitrator may only get involved in settlement discussions with the informed consent and express agreement of the parties. General Standard 4(d) of the IBA Guidelines on Conflict of Interest in International Arbitration provides:

An arbitrator may assist the parties in reaching a settlement of the dispute . . . at any stage of the proceedings. However, before doing so, the 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 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.⁸⁶

Second, arbitrators are discouraged from meeting with the parties separately. The IBA Rules of Ethics for International Arbitrators provide that arbitrators may make settlement proposals "to both parties simultaneously, preferably in the presence of each other."⁸⁷ The IBA Rules state that it is "undesirable that any arbitrator discuss settlement terms with a party in the absence of the other," since this could result in the disqualification of the arbitrator.⁸⁸ Third, although the IBA Guidelines on Conflicts of Interest make clear that an arbitrator's impartiality does not necessarily become impaired if she engages in settlement discussions with the parties, the arbitrator

85. *Id.*

86. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARB. § 4(d) (INT'L BAR ASS'N 2014).

87. IBA RULES OF ETHICS FOR INT'L ARBITRATORS § 8 (INT'L BAR ASS'N 1987); *see also* Kaufman-Kohler, *supra* note 8, at 199.

88. IBA RULES OF ETHICS FOR INT'L ARBITRATORS, *supra* note 87, § 8. The concept of Med-Arb and Arb-Med, where the arbitrator also plays the role of mediator, may run into conflict with this Rule, given that mediators typically meet with the parties separately. *See* Rosoff, *supra* note 74, at 91.

should nonetheless resign if she considers that she cannot perform her duties as a result of her involvement in the settlement process.⁸⁹

The London-based Centre for Efficient Dispute Resolution (“CEDR”) launched its Rules for the Facilitation of Settlement in International Arbitration in 2009. In adopting these rules, parties agree that the arbitral tribunal’s facilitation of settlement will not be used as grounds to disqualify the tribunal or any member thereof, or to challenge any award rendered.⁹⁰ The tribunal is prohibited from taking into account “any substantive matters discussed in settlement meetings or communications” or assessing the credibility of any witness based on the witness’ participation in settlement discussions when rendering an award.⁹¹ The tribunal is likewise prevented from *ex parte* meetings, or from acquiring information from one party which is not shared with the other.⁹² To facilitate settlement, the tribunal is vested with the authority to provide the parties with “preliminary views on the issues in dispute,” as well as “preliminary non-binding findings.”⁹³ The tribunal “shall insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties,” and must also “adjourn the arbitral proceedings for a specified period of time so as to enable mediation.”⁹⁴

In sum, in appropriate cases, arbitrators can and should encourage and facilitate settlement as an important tool in making international arbitration less expensive and more efficient. Arbitral institutions increasingly recognize the need to promote settlement in international arbitration. With the consent of the parties, arbitrators also have a role to play in promoting and facilitating settlement, but must be mindful of valid due process and impartiality concerns in playing this part. The task may not be easy, as arbitrators who have been involved in the parties’ settlement discussions should not take the matters discussed in settlement meetings or other communications into account if the case proceeds to the merits. But many US judges

89. See generally IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB., *supra* note 86.

90. CEDR RULES FOR THE FACILITATION OF SETTLEMENT IN INT’L ARB. art. 3(3) (CTR. EFFECTIVE DISP. RESOL. 2009).

91. *Id.* art. 3(5).

92. *Id.* art. 5(2).

93. *Id.* art. 5(1).

94. *Id.* art. 5(3).

are able to accomplish this task. Moreover, arbitrators must often put aside evidence and other information they have heard, but which they later determine to be irrelevant, in deciding the merits of a case. By following appropriate steps, such as ensuring the written agreement of parties and avoiding *ex parte* communications, arbitrators can fairly promote settlement and help improve the efficiency and efficacy so vital to international arbitration.

IV. CONCLUSION

Despite a growing awareness that promoting settlement may help reduce costs and inefficiencies in international arbitral proceedings, arbitrations settle at much lower rates than proceedings in US courts. In part, this disparity may be attributed to the assertive case management approach embraced by US judges, who actively encourage settlement as a mechanism to address ever-growing dockets. In contrast, many arbitrators remain timid about promoting settlement—and are unlikely to be involved in settlement or mediation efforts. Such reluctance stems, in part, from fears that participation in settlement risks the arbitrator's neutrality or raises due process concerns. But these concerns can be addressed by following guidelines and rules designed to preserve arbitral neutrality and procedural fairness while helping parties reach an amicable settlement. With the consent of the parties, arbitrators should use these tools in order to achieve fair, efficient, and cost-effective resolution of disputes. There are good and understandable reasons why the settlement rate in international arbitration is and will almost certainly remain lower than that of US litigation. But the notion that international arbitrators should never promote or involve themselves in settlement discussions among the parties is neither sound nor sustainable.