MEALEY'S®
International Arbitration Report

Rethinking Dispute Resolution In The Pandemic-Era: Is Double-Hatting The Answer?

by
Peter Halprin

Pasich LLP
New York, NY

Stephen Wah

Pasich LLP
New York, NY

and

Nika Gigashvilli

A commentary article reprinted from the December 2020 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

Rethinking Dispute Resolution In The Pandemic-Era: Is Double-Hatting The Answer?

By
Peter Halprin,
Stephen Wah
and
Nika Gigashvilli

[Editor's Note: Peter A. Halprin, FCIArb, FAiADR is a partner with the law firm of Pasich LLP with offices in New York, Los Angeles, and Manhattan Beach. In addition to his work as counsel to commercial policyholders in complex insurance coverage matters, he teaches international commercial arbitration, and acts as arbitrator. Stephen Wah is an associate in Pasich LLP's New York office. Nika Gigashvili has a JD from Penn State Law. Any commentary or opinions do not reflect the opinions of Pasich LLP or LexisNexis® Mealey Publications™. *Responses are welcome.]*

Introduction

For the most part, 2020 started as any other year would, with many businesses looking forward to continued success. In the United States, the country was in the midst of the longest economic expansion in U.S. history and the nation faced near record-low unemployment.[1]

Unfortunately, 2020 was not like any other year. The global pandemic wrought havoc on the world economy, and pushed many well-established businesses into bankruptcy.[2] Writing about this in April, the Brookings Institute forecasted the following:

> The current crisis could bring a much greater surge in business bankruptcy filings than either of the two most recent recessions. Prior to the current crisis, businesses took on an extraordinary amount of debt—$15.5 trillion, according to one estimate, a 52% increase since its high point during the 2008 crisis. This debt, coupled with the nearly complete shutdown of the economy and the fact that the revenues of many businesses will be slow to recover, even after economic activity resumes, suggests there will be a surge of business bankruptcies. Businesses also may be less hesitant to file for bankruptcy than they otherwise would have, given that some debt is now guaranteed by the government and the distress has been triggered by a crisis outside their control. At the very least, regulators need to assume that a bankruptcy wave is coming.[3]

A June report from the Organisation for Economic Co-operation and Development ("OECD") estimated that, absent government intervention, 12% of small and medium sized-enterprises were expected to fail due to the pandemic.[4] This number represented up to 5% of employment in 17 countries. Industries expected to be particularly impacted include wholesale and retail, accommodations and food, manufacturing, and construction.[5] In a subsequent report, issued in September, it was estimated that the failure rate of small and medium sized-enterprises would increase by nearly 9% without government supports.[6]

In the United States, as of mid-October, more than 1,300 cases were filed in relation to insurance coverage for pandemic business income losses.[7] In the United Kingdom, an appeal will be heard by the Supreme Court on the "test case" regarding pandemic insurance coverage.[8] At the outset, the UK's Financial Conduct Authority estimated that 370,000 policyholders could potentially be affected by the test case.[9] The bottom line is that businesses need help and they need it right away.

While traditional litigation and alternative dispute resolution alike can assist businesses in recovering monies to which they are entitled, the pace of such resolutions are inadequate in the status quo.

Given the current challenges, new thinking is required. As such, this paper suggests that arbitrators, counsel, institutions, mediators, and parties from the common law tradition consider looking at the issue of "double-hatting" – arbitrators acting as mediators and vice versa in the same case - anew. In other words, this paper suggests that a bold approach is required to rapidly resolve pending disputes and to assist businesses with a return to business. With the proper procedural safeguards, the time may be ripe for rejecting conventional wisdom and embracing forms of double-hatting.[10]

The risks and rewards are well known. Per Axel Reeg, referencing something short of double-hatting:

> Engaging in settlement facilitation, for an international arbitral tribunal, may be a tricky issue. It may result in disaster if overly active arbitrators are pushing hard for a settlement are successfully challenged and the tribunal falls apart. It may also earn praise by and lead to satisfaction of the parties with the performance in cases where it facilitates a solution both parties can live with rather than rendering an award which produces a full victory for one side and a full defeat for the other.[11]

Despite the obvious upside, there has traditionally been great hostility to double-hatting by those trained in the common law tradition. This paper explores the differences between arbitration and mediation, the pluses and minuses of the double-hatting approach, and the embrace of combined approaches in civil law jurisdictions such as Austria, China, and Germany. Following this, the paper will offer best practices for double-hatting and whether conventional concerns about double-hatting can be addressed through steps short of arbitration and mediation such as settlement facilitation.

Overview of Dispute Resolution Mechanisms

Litigation

Litigation has long been regarded as a primary venue to administer justice.[12] While the purpose of litigation is universal across all jurisdictions, the manner of administration of justice differs in common law and civil law countries.[13] Although the differences are plentiful, the contrast in the roles judges assume is most relevant to the discussion in this paper.

In common law countries, like the United States, a judge is "an independent umpire" between the parties.[14] In the "umpireal" system, "[t]he ignorance and unpreparedness of the judge are intended axioms."[15] Hence, the duty to gather and present evidence falls on the parties and the judge makes no substantive contribution to fact-gathering.[16] The judge is usually passive and does not evaluate relative strengths and weaknesses of each party's position outside of his or her ruling in the case.[17] Then, it is not a surprise that the role of "judge-conciliator" is relatively unknown in common law litigation.[18]

For that reason, the adversarial nature of the proceedings and the role of counsel are paramount in common law litigation.[19] To negotiate before or during the pendency of the case and to enter into settlement agreements are prerogatives of counsel both in England and the United States.[20] Any non-adversarial attempt to resolve the case usually takes place outside the courtroom without the judge's involvement.[21]

In contrast, the judge's role in civil law jurisdictions is more managerial than umpireal.[22] For civil law judge, the "Olympian ignorance" of its common law counterpart is largely an unfamiliar concept.[23] While judges still have to decide the controversy based on a party's presentation of its case, their role is best described as a "case managers."[24] In Germany, for instance, the judge has a significant role in assisting and advising the parties, which would be unheard in Anglo-American

adversarial system.[25] Consequently, the judge may become an "informal collaborator" with a duty to promote settlement between the parties.[26] Unlike litigants in common law jurisdictions, parties to the dispute in civil law countries usually welcome judges' recommendations to settle as well as their assistance in reaching an agreement.[27] Nevertheless, in the continental legal system, too, the latitude of the judge's discretion is limited by the parties' autonomy and their needs.[28] But unlike the Anglo-American system, active promotion of settlement does not impair a court's impartiality in the eyes of the parties.[29]

It should be noted that, in practice, the "pure" form of either function of the judge does not exist.[30] And, as discussed below, even US judges are starting to embrace a more active role in settlement facilitation. While this may be true, the general distinction between approaches greatly influences the role of an arbitrator in these jurisdictions.

Arbitration

Arbitration has developed as an alternative to national judicial system (litigation).[31] Arbitration is a legal process in which the parties refer their dispute to one or more arbitrators for the final determination of the case.[32] Unlike judges, arbitrators derive their power to adjudicate from a private agreement between the parties.[33] The agreement to arbitrate permanently removes the dispute from the jurisdiction of national courts and vests adjudicatory powers into arbitrators who are selected in compliance with the said agreement.[34] The private nature of arbitration allows the parties to agree on more lenient and suitable procedures to resolve controversies with a final and binding award.[35] Once an award has been issued, it can be easily enforced in almost all jurisdictions.[36]

Although arbitration is usually less formal than litigation, the role of the arbitrator is mostly similar to that of the judge.[37] Specifically, an arbitrator, like a judge, resolves the controversy based on the evidence presented by the parties and issues legally enforceable decisions (awards).[38] Nevertheless, arbitration maintains key advantages over litigation that can make arbitration a more attractive dispute resolution mechanism. Neutrality, party autonomy, ease of enforcement, confidentiality, and finality of the award are among the most appealing characteristics of arbitration.[39]

The most distinctive benefit of arbitration is the parties' ability to select an arbitrator—not any arbitrator, but an arbitrator with specific skills, knowledge and expertise.[40] In particularly complex disputes that involve highly technical and complicated issues, an arbitrator's expert knowledge may increase the parties' confidence in the process at large.[41] Despite this contrast, the relationship between the parties and the tribunal are generally similar to litigation systems in the relevant jurisdictions.[42]

With the lack of universal international arbitration rules, the proper role of the arbitrator has been subject to debate.[43] On the one hand, arbitrators are viewed as "impartial referee[s]" who ensure that the conduct of proceedings are fair and that awards are rendered in compliance with the parties' agreement and applicable laws.[44] On the other hand, arbitrators are deemed to be "proactive dispute resolver[s]" whether by issuing an award or encouraging parties to negotiate.[45]

An Anglo-American arbitrator, like a judge, maintains independence and impartiality by being neutral arbiters of the dispute.[46] Therefore, the task of finding a resolution generally falls completely on the parties and arbitration is as adversarial in nature as litigation.[47] In short, the role of arbitrator in the common law legal system can be simply described as a "private judge."[48] Thus, the mandate of arbitrator is limited to deciding the dispute by means of a final award, and any encouragement from the tribunal to amicably settle the case may be grounds for challenge by either party.[49]

An arbitrator's role in civil law jurisdiction is less adversarial and primarily focuses on *resolving* the dispute rather than *deciding* it.[50] Countries like Germany, Switzerland, and Austria have adopted more proactive approaches that allow arbitrators to facilitate settlement—expanding an arbitrator's power beyond the mere adjudication of a case.[51] Similar to civil law judges, arbitrators in these jurisdictions fulfill managerial functions to encourage more favorable outcomes for both parties.[52] Civil law practitioners even expect the arbitrator to present the possibility of settlement to the parties and work with them to amicably resolve the dispute before the final award is rendered:

> An arbitrator, is an arbitrator, is an arbitrator, whose function it is, not merely to

> adjudicate the dispute but also to help resolve it amicably with the co-operation of the parties. . . . 'Arbitration' must never be considered as excluding from its purview the settlement of a dispute before the arbitrator: because it is the essence of the spirit of arbitration.[53]

The debate on the proper role of the arbitrator, as further explored below, changes the course of discussion on how and in what manner an arbitrator can act as a mediator once the dispute arises.

Mediation

Mediation or conciliation serves as another alternative to litigation and arbitration."[54] While some may attach slightly different meanings to the terms "mediation" and "conciliation," they are usually used interchangeably.[55] The UNCITRAL Model Law on International Commercial Conciliation explains that:

> "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.[56]

Unlike arbitration and litigation, mediation is not an adjudicative process.[57] Mediation is a negotiation method whereby an independent party (the mediator) assists the parties in reaching a favorable agreement.[58] Nevertheless, mediation can provide the parties with advantages that are commonly associated with arbitration—"procedural efficiency," "case management," and "proactivity."[59] With regard to efficiency, mediation can be less costly in terms of money and time.[60]

Like arbitration, a mediator's authority derives from a contractual agreement between the parties.[61] But the question becomes whether party autonomy allows the same person to act as a mediator and an arbitrator in the same dispute. The answer to this question largely hangs on the contrast of the roles that arbitrators and mediators take in dispute resolution.

Arbitrators and Mediators

Both arbitrator and mediator are neutral third parties appointed by the parties to come up with the solution to their problem—the dispute.[62] Albeit their functions diverge significantly.

First, arbitrators and mediators use different tools to achieve their goals. An arbitrator, as explained, adjudicates and resolves the dispute, which means that the final award is ultimately in favor of one party and against another.[63] A mediator, in contrast, "assists the parties to negotiate a settlement."[64] A mediator does so by holding caucuses or joint sessions with the parties, where the mediator discusses the relative strengths and weaknesses of the parties' positions.[65] Arbitrators possess no such powers.[66] Even in jurisdictions like Germany, where arbitrators are expected to promote amicable resolution of the dispute, an arbitrator would not be allowed to hold caucus or discuss possible outcomes of the dispute with the parties.[67]

Second, within the applicable legal framework, arbitrators have the authority to make decisions on questions of fact and law in order to render a binding award.[68] Once the arbitration starts, apart from settling the dispute, parties are unable to stop the proceedings even if one of the parties refuses to present its case.[69] Mediation, however, completely depends on participation of the parties.[70] Any party can refuse to continue negotiations without providing justification for its decision, which will end the mediation. Then, the party is free to pursue any course of action it may deem more appropriate to resolve the dispute.

Third, considering its adjudicatory power, the power of the arbitrator is limited by the parties' agreement, applicable procedural or institutional rules, and applicable law.[71] Mediation is subject to fewer mandatory regulations mostly because it is not designed to result in a binding decision.[72]

Comparing Views on Double-Hatting

The power of any tribunal is subject to applicable procedural laws—*lex arbitri*.[73] *Lex arbitri* may on its own

regulate the conduct of an arbitrator—from a complete prohibition of double-hatting to a minimal control. In any case, the arbitration laws of specific jurisdictions can be decisive on the authority of double-hatting.[74]

The UNCITRAL Notes on Organizing Arbitral Proceedings, for example, provides that, "[t]he arbitral tribunal may raise the possibility of a settlement between the parties."[75] It notes, however, that:

> In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations.[76]

Common Law's Traditional Hostility

Although, as the authors note from experience, common law jurisdictions are starting to embrace a more active role for judges in dispute resolution, the common law bias against double-hatting is well-documented.

As discussed above, the common law world is rooted in the "adversarial system," where judges "direct the evidence; moderate length, repetition or impertinency of speech; recapitulate, select and collate the material points of that which hath been said; and... give[s] the rule or sentence."[77] These traditional maxims that are expected to be upheld by judges have permeated the realm of the arbitration, and have influenced the expectations of parties and arbitrators alike.[78] Common law practitioners tend to view a tribunal's active promotion of settlement as inappropriate because an arbitrator's active role in settlement could prematurely provide insight into an arbitrator's legal views on the dispute at hand.[79] Such insight would make the arbitrator susceptible to challenge by the parties.[80] Arbitrators in turn, avoid facilitation of settlements even where they acknowledge the rising importance of settlement.[81]

Common Law Practitioners Are Traditionally Hostile to Double-Hatting

Common law practitioners are "reluctant to consider the idea of the tribunal engaging in settlement facilitation."[82] This reluctance stems from the traditional Western outlook that the arbitrator and mediator have distinct roles.[83] Paul Eric Mason lays out the four reasons for the Western distinction between arbitrator and mediator:

> First, in the Western mind there is a certain level of discomfort in not knowing precisely what the neutral's role will be: mediate or arbitrate? Second, knowing the mediator may also arbitrate their dispute, parties (especially their attorneys) may be less willing to disclose certain information during the mediation, in turn making the mediation less likely to succeed. Third, if they do disclose, then they run the risk of having an arbitrator with actual or apparent bias by having heard information disclosed confidentially by one party in the mediation's private caucus, without the other having an opportunity to be heard on it. And fourth, the parties may have a tendency to misuse the mediation as a forum to make arguments to the mediator-arbitrator in an effort to anticipate the arbitration phase, rather than earnestly try to settle their case during the mediation phase.[84]

Another concern is that "arbitrators may abdicate their mandate to decide the parties' case by using settlement between the parties as a short cut."[85] These concerns are why common law lawyers uphold the "umpireal system" and step in only to decide questions and disputes put forward by the advocates."[86]

Likewise, Common Law Arbitrators See Themselves as Decision-Makers and Impartial Referees

As noted above, the role of the arbitrator in common law jurisdictions is often limited to that of the "decision-maker."[87] As Berger states, in common law jurisdictions,

> the arbitrator's role is confined to ensuring that the proceedings between the disputing parties is conducted fairly

> from start to finish and that the dispute is decided within a reasonable timeframe by means of a final award. For the proponents of this view, the role of the arbitrator is limited to that of an impartial referee and decision-maker.[88]

While the parties may choose to engage in settlement discussions, the arbitrator's role is not to promote the amicable resolution of the dispute – "it is neither the duty nor the task of the arbitral tribunal to become involved in these negotiations between the parties, let alone to initiate such discussions."[89] Instead, a common law trained arbitrator sees "his paramount duty in the rendering of a judgment or an arbitral award, following, of course, a series of proceedings during which the arbitrator's principal duty is safeguarding the procedural rights of the parties with little intervention in the action as possible."[90]

An empirical study conducted by the College of Commercial Arbitration and the Straus Institute for Dispute Resolution reinforces the notion that common law arbitrators refrain from promoting settlement.[91] The study sent questionnaires to 225 of the leading arbitrators in the United States.[92] Of the 134 individuals who replied, more than 50% were not concerned with settlement options despite acknowledgement of the importance of settlement.[93]

But, is Change Upon Us?

That said, in the United States, judges have increasingly been encouraged to facilitate settlement between parties.[94] While U.S. federal district judges are encouraged to facilitate settlement, many state courts also frequently encourage settlement, going as far as conducting caucuses.[95] In 2019, the New York State Unified Court System announced a presumptive ADR program in which "[a] broad range of civil cases, from personal injury and matrimonial cases to estate matters and commercial disputes, will, at the onset of the case, be directed to ADR ? which comprises a variety of resolution approaches with a focus on court-sponsored mediation."[96]

With a similar goal in mind, the International Commercial Arbitration Act of British Columbia states:

> It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement.[97]

Likewise, the Arbitration Act of Ontario allow arbitrators to commence mediation or conciliation, unless it would compromise the tribunal's impartiality.[98]

Civil Law Openness to Double Hatting

Unlike common law jurisdictions, civil law jurisdictions have embraced the use of double-hatting to manage disputes.[99] China and several other European nations have found ways to integrate arbitration and mediation to benefit parties.

Double Hatting in China

Modern double-hatting in China stems from China's earliest and largest arbitration institution, the China International Economic and Trade Arbitration Commission ("CIETAC"). In the CIETAC Rules of 1989, mediation was provided for, and "if an amicable settlement was reached by the parties through mediation, the arbitral tribunal should render an arbitral award in accordance with the contents of the settlement agreement."[100]

CIETAC's initiative influenced the Arbitration Law, 1995 which permits and actively encourages, the combination of mediation and arbitration.[101] Under Chinese Arbitration Law, the arbitral tribunal may carry out mediation prior to rendering an arbitral award, and if the parties request mediation, the tribunal must carry out the mediation proceedings.[102] In early 2007, Gabrielle Kaufmann-Kohler and Fan Kun conducted a series of interviews with Chinese arbitrators acting within the CIETAC framework, as well as those with the Beijing Arbitration Commission and the Wuhan Arbitration Commission.[103] These interviews support the notion that while mediation remains important, party autonomy remains at the forefront of everyone's concerns.[104]

Chinese arbitrators tend to take initiative and ask the parties if they wish for the tribunal to facilitate a mediation.[105] Although the arbitrators report that they receive positive responses to such requests more than

fifty percent of the time, the percentage of positive responses is higher when dealing with domestic cases.[106] This is because Chinese parties are accustomed to the practice while foreign parties "fully prepared to argue their case probably are not immediately receptive to such a suggestion from the arbitrators."[107]

The timing to propose mediation is done on a case-by-case basis, but Chinese arbitrators generally make the first mediation proposal after hearing the parties' oral statement of facts, "when [the parties] begin to realize the weaknesses of their positions and the strengths in the other side's position through the process of pleading and the exchange of documentary evidence and witness statements."[108] As mediation is an ongoing process in China, if the first mediation proposal is unsuccessful, the tribunal may raise the mediation proposal several times at any stage of the proceedings before an award is rendered.[109]

The *Keeneye* case, discussed below, demonstrates that Chinese arbitrators are not opposed to meeting with the parties privately or "caucusing" with the parties, as long as both parties give their consent. In fact "[m]eeting parties separately also allows the arbitrators to conduct a so-called 'reality check' that can encourage a party with an overly optimistic view of its chances of success to reconsider its case on its merits, and thereby increase the possibility that the parties reach a settlement."[110] It is important to note that Chinese arbitrators do take caution to ensure that they do not "express their opinions on the merits to the parties." Their analyses are "limited to a party's 'possible' deficiencies and will not pronounce on the outcome of the arbitration."[111]

Parties may withdraw from arbitration at any time, and the mediator is expected to shift from their role back to being an arbitrator and to render an arbitral award.[112] Although the Arbitration Law does not expressly prohibit the use of confidential information obtained during the mediation in subsequent arbitration proceedings, most Chinese arbitration institutions have prohibitions against this. For example, the CIETAC Rules 2005 provide:

> Where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings or any other proceedings.[113]

Although the Beijing Arbitration Commission contains a similar rule, the practice is different in Hong Kong (a traditionally common law jurisdiction), where the mediator-turned arbitrator is expected to disclose confidential information as they consider material to the arbitration proceedings before resuming the arbitration proceedings.[114]

Goo Haiyan v. Keeneye Holdings Ltd & New Purple Golden Resources Development Ltd.

The case of *Goo Haiyan v. Keeneye Holdings Ltd & New Purple Golden Resources Development Ltd.*, provides valuable insight into double-hatting in China. In *Keeneye,* the underlying dispute involved the validity of a share-transfer agreement. The case was submitted to the Xian Arbitration Commission ("XAC"), where after the first hearing, the tribunal asked the parties if they would agree to mediate their dispute. The parties agreed.

Under the applicable arbitration rules, the tribunal was empowered to "conduct mediation at any time before the rendering of an award."[115] The rules also provided that the "mediation may be proceeded simultaneously between both parties or with one party separately" and that the "mediator may put forward a mediation resolution plan for the parties."[116]

As empowered under the rules, the Arbitral Tribunal prepared a settlement proposal to the parties and left the seller's party-appointed arbitrator and the Secretary General of the XAC to submit the proposal to the parties.[117] Under the Tribunal's proposal the share transfer agreement would be found to be valid and the buyer would pay 250 million renminbi.[118] While the office of the Secretary General sent the proposal to the seller, there was a different approach in transmitting the proposal to the buyer.[119] The seller's party appointed arbitrator, and the Secretary General met with a third-party close to the buyer for dinner and transmitted the proposal, asking that the third party "work on" making the buyer agree to the settlement.[120] Both parties rejected the proposal and a second hearing was held. In its subsequent award, the tribunal found that the share transfer was invalid but added a

non-binding recommendation that the seller pay an economic compensation of 50 million renminbi to the buyer, a result different from what was recommended in the initial proposal.[121]

The buyer challenged the award at the Xian Intermediate Court in China on the grounds that there were procedural mistakes and "favouritisim and malpractice" on the part of the Tribunal. The Intermediate court refused to set the award aside, holding that the Secretary General complied with the rules. The buyer then challenged the enforcement of the award at the Hong Kong High Court. The Hong Kong High Court found that there was nothing wrong with med-arb itself, it "raised several objections to the kind of process utilized by the XAC from the way the mediators were appointed to the way that the mediation itself was conducted."[122] The Hong Kong High Court refused to enforce the award for several reasons, including the apparent bias and the *ex parte* communications that took place.[123]

The Hong Kong Court of Appeal disagreed, overturning the decision and enforcing the award set out by the tribunal. The Court of Appeal assessed "whether there existed actual bias on the part of the arbitrators as a result of the failed mediation process" and "insisted on recognizing the culture of parties and the practice that was normally accepted at the seat of the arbitration, which was the People's Republic of China."[124] Another reason for its decision was because "the party resisting enforcement had not objected to the mediation process in due time, which constituted implicit waiver."[125]

Double Hatting in Europe

Germany and Austria have also embraced a hybrid approach of double-hatting. In Germany, arbitrators are "empowered to seek settlement opportunities during the arbitration process,"[126] and in both Germany and Austria, it is not uncommon for tribunals to "express their preliminary indications of their views on the merits of the case during their mediation, something which is not viewed as bias by those familiar with the procedure."[127]

The Arbitration Rules of the German Arbitration Institute (DIS) grants the tribunal the authority "to encourage an amicable settlement of the dispute" unless any party objects.[128] The DIS rule mirrors Section 278(1) of the German Code of Civil Procedure, which establishes the court's obligation to seek "amicable settlement" of the dispute. Similarly, tribunals are allowed to participate in settlement negotiation with the parties.[129] As a matter of German law, such participation cannot be a sole ground to challenge the arbitrator, because "facilitating a settlement of the dispute during the arbitration do[es] not constitute a premature legal assessment."[130]

Germany's Managerial System

Commercial arbitration practitioners in Western Germany are of the belief that there is no need "for separate mediation proceedings to resolve international business disputes."[131] Instead, "the promotion of settlement should be put in the hands of arbitrators, who have the power to pronounce a binding decision when conciliation efforts fail."[132] While mediation rules are virtually non-existent in internal German law, "the idea of mediation is inherent in the German concept of arbitration. The arbitrators' duty to make conciliation efforts during arbitration is laid down in most arbitration rules proposed by German institutions."[133] This duty stems from Germany's "managerial" system, which is to be distinguished from the American "umpireal" system.[134] The most distinguishing feature of the German "managerial" system is that the judge's role is as a case manager.[135] Germany's legal system developed with judges acting as adjudicator and mediator, so unlike parties in the "umpireal" system," German parties do not "question the judge's immunity from party influence, the promotion of a settlement and even assistance in drafting an agreement, [as these actions] are not considered a threat to impartiality and are generally welcomed by the parties."[136]

Austria and the Mediation Act

While Germany has not regulated mediation, Austria is among the first to have explicitly regulated the field of mediation, providing clear rules for who can act as a mediator.[137] Although the Austrian legislature provides that the same person cannot act as arbitrator and mediator in the same dispute, party autonomy prevails as parties are not prohibited from using their free choice to decide on who to use as a neutral in their dispute resolution process.[138] In fact, the Austrian Mediation Act states "with the consent of the parties concerned the mediator may engage in the implementation of the outcome of the mediation," demonstrating the relevance of party autonomy in Austria.

Challenges with Double-Hatting

Although the common and civil law systems have different approaches to double-hatting, it can be said that the concerns that come with double-hatting are consistent amongst all jurisdictions. The disadvantages to double-hatting can generally be distilled into four categories: (1) settlement may take the parties by surprise; (2) impartiality; (3) access to privileged and confidential Documents; and (4) lack of party equality.

Surprise

A risk of double-hatting is that "settlement negotiations may come as a surprise to the parties."[139] This is a risk where the parties are from different cultural backgrounds or the arbitrator comes from a jurisdiction where involvement in settlement negotiations is normal practice, but the parties are not used to this approach.[140]

Privileged or Confidential Documents

Another risk involved with double-hatting stems from "access during the mediation to documents that are privileged or otherwise confidential."[141] The tribunal's access to confidential information during private caucusing risks inequality.[142] Arbitration prohibits *ex parte* communications with the parties, but as evidenced by the *Keeneye* case, this rule is not always adhered to when the neutral is double-hatting.[143]

"Once an arbitrator in his/her dual role as arbitrator and mediator has seen these privileged documents, it will be very difficult to erase them from his/her mind."[144] A mediator-turned-arbitrator's access to privileged and confidential documents may give rise to a challenge as the tribunal may be perceived to have lost its impartiality.[145]

On the other side, there may be cases where "improperly submitted documents or arguments are rejected or discarded after the arbitrator has taken cognizance of them."[146] These challenges stemming from acting as both mediator and arbitrator may be why many prefer to "have different persons perform the tasks of mediator and arbitrator."[147]

Impartiality

As previously above, "the impartiality of the mediator-turned-arbitrator may come into question because of the confidential information he or she may have obtained during the mediation phase."[148]

The confidential information obtained during a private caucus may bring an arbitrator's impartiality into question, thus leading to a challenge by one of the parties.[149] Christian Buhrung-Uhle reflected on the challenge that private caucusing presents:

> What causes lawyers most concern is the idea of the mediator privately caucusing with each side. The right to know and be able to answer an opponent's case is fundamental to most notions of justice. But what if one side has no way of knowing what the other side might have said, and what influence that might have on the mediator turned arbitrator?[150]

Common law practitioners against double-hatting would likely argue that the combination of roles would endanger the arbitrator's impartiality and the arbitrator "might lose the parties' confidence if settlement negotiations fail."[151] On the other hand, the arbitrator in the "managerial" model "has the unenviable task of finding his way long the ill-defined borderline between giving too much or not enough advice and assistance."[152] It can be stated that because the arbitrator "plays an active part in presenting the case, he may sometimes be close to the point where the integrity of the process is in jeopardy."[153]

The Conceptual Objection

The fear of party inequality may be why parties conceptually object to double-hatting.

> The main conceptual objection to a combination of roles in one person is that parties will be reluctant to speak freely in private to mediators who will then decide the case if the mediation fails and, the other side of the same coin, that will be difficult or impossible for arbitrators in deciding the case to forget or ignore what they have been told by the parties privately and confidentially.[154]

The risks involved with double-hatting may go to the core differences between arbitrators and mediators.

> [I]n the eyes of many, the roles of the arbitrator and mediator are incompatible,

> and in the vast majority of cases the settlement activities performed by arbitrators present a rather low intensity of third-party intervention in the negotiation process. The reason behind this restrain is a fundamental *dilemma* between the effectiveness of mediation and the procedural integrity of arbitration.[155]

Advantages of Double-Hatting

Although double-hatting poses many risks, there are advantages to undertaking the process. Advantages include "the saving of costs, gains in efficiency and the maintaining of a friendly cooperative relationship between the disputing parties."

One advantage of double-hatting is that the arbitrator "already knows the case, and the parties do not need to educate another neutral party, which would include duplication of work, additional expenses, and delays."[156] This allows for more efficient organization of the proceedings as the arbitrator can make preliminary decisions on some legal issues so that the parties can have a "better risk assessment regarding the validity of their claims or counterclaims, which in turn may lead to an early settlement between them."[157] An arbitrator who previously served as mediator may also be in a better position to manage witnesses to promote agreement on factual issues as well as promote efficiency by narrowing the documents being submitted.[158]

Another advantage to double-hatting is that the arbitral tribunal is in the position to choose the appropriate time to offer its services for settlement.[159] "[A]rbitrators can create an amicable and rational climate aimed at indirectly facilitating a settlement between the parties through efficient case management and control."[160] Arbitrators are in the position to ask "appropriate questions on key points, by telling the parties what critical issues really matter or by asking senior-decision makers to appear at the hearings."[161]

Overall, "parties who see their arbitrators play an active role in helping them to reach an amicable settlement may leave the proceeding with a higher degree of satisfaction and a greater desire to resort to arbitration for future disputes, and this is likely to be the case with both parties."[162] Conversely, "if no settlement is reached, the ultimate arbitral award often is more acceptable."[163]

Finally, and certainly in the pre-Singapore Convention-era, parties can feel secure in their settlements as, "settlement agreement[s] entered into in the course of a pending arbitration may form a part of a consent award and become enforceable under the New York Convention.[164]

Best Practices: Double-Hatting While Minimizing Risk

A key principle of international arbitration, and the underlying theme uniting the above concerns, is that of due process. In contrasting arbitration with litigation, Gary Born notes that "it is also incorrect to say that due process, rules of evidence, or rules of substantive law are disregarded in contemporary international arbitration: on the contrary, there is often greater attention to such matters in international arbitration than in many national courts."[165] He explains that this "is in part because international arbitration conventions, arbitration legislation and institutional rules guarantee the parties' rights to due process and procedural regularity, and in part because arbitral tribunals normally take these guarantees seriously."[166]

Indeed, one need look no further than the UNCITRAL Model Law to find reference both to equal treatment of the parties and the tribunal's discretion, absent agreement of the parties, to "conduct the arbitration in such manner as it considers appropriate."[167] In the commentary to these provisions, the Secretariat identifies examples from other Model Law provisions which illustrate how this is to be undertaken. In one such example regarding equal treatment, the commentary notes that Article 24(3) requires that "all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party. . ."[168] As to the discretion of the tribunal, the commentary notes that "it allows the tribunal to tailor the conduct of the proceedings to specific features of the case without being hindered by any restraint from traditional local law" and "provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law."[169]

For any arbitrator or tribunal considering some form of arbitration and mediation to resolve a dispute, due process is a central consideration. In this section, we address the means by which such issues, and those referenced above, could be addressed including whether some combination of format and sequencing might account for the four concerns raised above.

Ensuring Due Process

Klaus Peter Berger states it clearly, and best, that an essential prerequisite of a proactive approach to settlement by the tribunal "is that it is always based on the informed and uncoerced consent of the parties, i.e. an agreement by the parties during (not before) the arbitration."[170] As Berger further notes, "[t]he informed consent of the parties also serves to protect the arbitrator from subsequent challenges, should the arbitration continue because an amicable settlement of the dispute is not reached."[171]

The IBA Guidelines on Conflicts of Interest in International Arbitration, likewise note:

> [T]he 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 potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver.[172]

In addition to obtaining the informed consent of the parties to avoid surprise, as discussed above, due process requires addressing the following: (1) concerns regarding the partiality of the arbitrator; (2) concerns regarding the arbitrator's access to privileged or confidential documents; (3) concerns about private caucusing and its impact on party equality, and; (4) concerns about a reluctance to speak freely to the mediator.[173]

To help address these concerns, there are a number of ways to structure a hybrid approach. These various alternatives, in concert with due consideration for the timing of arbitration and mediation within a dispute, may be drawn upon by arbitrators and parties in considering how to proceed. It may be that a combination or escalation of these options best suits a given dispute.

Settlement Facilitation and the CEDR Approach

Although arbitrators commonly let the parties know that they are free to settle the dispute during the case and such encouragement does not run afoul of any due process concerns, it is rarely enough to motivate the parties to seek settlement.

The "lightest" approach which follows mere encouragement would be for the tribunal, with the parties' consent, to provide its preliminary views on the issues in dispute in the arbitration. Pursuant to Article 5(1) of the CEDR Rules for the Facilitation of Settlement in International Arbitration, this can also include what the tribunal considers will be necessary in terms of evidence from each party in order to prevail on those issues.

The advantage of this approach is clear – due process concerns are satisfied as there is no separate caucusing, separate submissions, or anything that might create the appearance of inappropriate partiality. In fact, Article 5(2) of the CEDR Rules requires such. And, to be clear, this is settlement facilitation not mediation.[174] But, knowing the tribunal's preliminary views and what might be required to prevail on outstanding issues, may lead the parties to reach settlement on their own accord. In many early failed mediations, frustrated claimants hear from respondents that it is too early to settle. This is particularly the case where a respondent feels they can prevail on a dispositive issue early on and avoid significant legal costs (or that they may receive an award of such costs). Getting a preliminary view from the tribunal may provide the parties with a better risk assessment regarding their claims, and perhaps enough to push to early settlement.[175]

As a further step, and within a similar result, the tribunal can issue preliminary non-binding findings on law or fact on key issues.[176] As previously noted, this can help the parties better assess their positions and perhaps lead them to settle.[177] One issue with this approach is that it may be difficult for the tribunal to reverse course on a preliminary finding and, if it does so, this may create issues as a party who thought themselves to be

"prevailing" on an issue may not present arguments on the issue that it would have otherwise done so.[178]

Following CEDR, if requested by the parties in writing, the next step would be for the tribunal to offer the parties suggested terms of settlement as a basis for further negotiations.[179]

The challenge with this step is that without a true mediator, the tribunal's analysis of settlement would be limited to legal rather than economic concerns.[180] As such, it may be difficult to facilitate settlement in the absence of such considerations. Like Stefan Kroll, the authors' experience is that economic considerations often drive settlement. To wit, for claimants, money now is generally better than money later ("a bird in the hand is worth two in the bush") and accounting concerns and reporting deadlines (such as the end of fiscal year) may be of paramount importance.

And, as a final step in the CEDR escalation ladder if requested in writing by the parties, the tribunal may chair one or more settlement meetings attended by the representatives of the parties at which possible terms of settlement may be negotiated.[181]

Stefan Kroll notes that there is risk here as a party could challenge an arbitrator if it views the meetings as unfair or a party feels coerced into settling when the proposal comes from the very person who may later decide the dispute if settlement fails.[182]

Accordingly, "indispensable" preconditions associated with settlement facilitation include: (1) not proceeding if any party is opposed; (2) not caucusing; (3) the arbitrators acting as proactive case managers[183]; (4) settlement discussions involving the tribunal can only start after a full statement of claim and a full statement of defense have been submitted; (5) any attempt at settlement facilitation can be ended as soon as any party requests, and (6) if settlement is reached, the tribunal should offer to issue a consent award to ensure enforceability under the New York Convention.[184]

Item 3 in the list of preconditions requires an active tribunal that stays abreast of all filings while item 4 wisely necessitates no discussion of settlement too early in a dispute. Stefan Kroll notes something practical about such a step given the growing practice in international arbitration to front-load the proceedings. To wit:

> Nowadays, they are often hundreds of pages long and set out all details of the case. The relevant documents are attached to such submissions and the witnesses have described in their written statements in detail what they are going to say. Such submissions, including the documents attached should have been read by the arbitrator before any evidentiary hearing.[185]

As he continues, "[i]t is normal that an arbitrator after reading through the submissions, documents and witness statements has formed an at least primary view about questions he or she considers relevant for the decision of the case and which of the offered witnesses or experts should be heard or which documents have to be discussed. Informing the parties about these preliminary views is therefore not prejudging the case."[186]

Authors of this article have had similar experiences in commercial courts in United States.[187] Judges there have held settlement conferences where they have provided parties with preliminary views on pending motions and encouraged settlement. Once extensive briefing has been provided to a Judge or tribunal, the parties will have already been heard by the adjudicator. Thus, their views on the merits of a party's legal position, unlike the non-binding views of a mediator, are likely to be far more persuasive and inducing of settlement.

Integrated Approaches

Beyond settlement facilitation, there are a number of combinations of mediation and arbitration available to parties and arbitrators. The options include: (1) Pre-Arbitral Mediation; (2) Post-Arbitration Mediation; (3) Mediation Windows and Shadow Mediation; and; (4) MEDALOA.[188]

Pre-Arbitral Mediation

Pre-Arbitral Mediation refers to mediation occurring before arbitration is demanded. This can come in the form of a last attempt to settle before arbitration is

demanded or as part of a multistep clause which requires mediation prior to arbitration.[189]

The advantage to this approach is that the parties may be able to settle without initiating arbitration. The biggest challenge here is that the parties are on the brink of arbitration because they cannot reconcile their conflict and may not be open to negotiation. A related challenge is that a party may want to go further down the path of arbitration before considering settlement. For example, the party may want to get a sense of the tribunal and the issues before the tribunal before being amenable to settlement.

To combine this form of mediation with arbitration, there are two approaches. Under the first approach, the mediator serves as arbitrator if the mediation fails.[190] Under the second approach, separate neutrals serve as mediator and arbitrator.[191]

Assuming the mediator and arbitrator are the same person, this approach could promote efficiency given the mediator's knowledge of the dispute if mediation fails.[192] On the other hand, all of the issues discussed in Part III above, are unresolved. In particular, the parties may not be candid with the mediator or decide not to offer economic (i.e., non-legal) considerations for fear that they might be used against the party in the arbitration.

Post-Arbitration Mediation

Post-Arbitration Mediation refers to mediation at any point after arbitration is commenced. It could be after the final hearing has been completed or early in the dispute.

The most recent iteration of the ARIAS-US Panel Rules for the Resolution of Insurance and Contract Disputes contemplates this form of mediation per the following Rule:

> If at any point during the arbitration proceedings, the parties intend to mediate their dispute, the parties shall jointly inform the Panel in writing of their intentions (the "Intent to Mediate Letter") and the arbitration shall be stayed from the date of the Intent to Mediate Letter until 30 days after the mediation is held. The mediation should take place before a Qualified Mediator, who is not a member of the Panel and shall be held within 60 days of the submission of the Intent to Mediate Letter. Should the parties require additional time to negotiate their differences with regard to mediation, they must jointly request an extension of the automatic stay.[193]

This Rule is aimed at facilitating mediation while avoiding attempts to delay arbitration.[194] If mediation is unsuccessful, under this model the parties can quickly return to the arbitration proceeding.[195]

One way of approaching Post-Arbitration Mediation is to have the case completed and then an award drafted by the arbitrator.[196] The arbitrator would then act as mediator after the arbitration session but before the final and binding award is made known to the parties.[197] The advantage of this approach is that an outcome is guaranteed and the parties have the opportunity to alter it by reaching a negotiated resolution.[198]

Assuming the arbitrator and mediator are the same person, the issues discussed in Part III above are likely to remain unresolved. They may be mitigated somewhat by the approach of completing arbitration and having an award drafted so that the arbitrator's decision will have been made. As such, concerns about sharing confidential materials or sharing economic issues with the arbitrator-now-mediator will not create grounds for challenge or imperil the award. The obvious practical downside, of course, is that the costs associated with a full-blown arbitration will be incurred and then additional costs for mediation will also be incurred.

Mediation Windows and Shadow Mediators

Mediation Windows refer to the concept of having set aside periods to insert a mediation procedure. Thus, unlike the previous approach which halts an active arbitration, this approach seeks to build mediation periods into the schedule of the arbitration. The idea is that the arbitration is not disrupted and there may be an incentive to settle in advance of a hearing or other critical juncture in the arbitration.[199]

This process could be conducted in various ways including having a different person than the arbitrator

handle the mediation, or it could be the same person, or a separate mediator could be brought in for a later mediation window if the case doesn't settle within the first mediation window with the arbitrator.[200]

A related approach would be to have a mediator shadow the arbitration proceedings and to act as a stand-by if the parties decide to mediate.[201]

Assuming the arbitrator and mediator are the same person, this approach could be workable if there are clear delineations of roles within the windows.[202] If the mediator acts only as a mediator during the mediation windows, perhaps the forthrightness of the parties would not be an issue. On the other hand, such delineations will not actually create a barrier in the neutral's mind between what is heard as arbitrator and mediator. It will be impossible to wall-off knowledge for different phases. Thus, the issues discussed in Part III above would generally remain unresolved.

As to shadow mediation, one concern is the cost of employing a second neutral who may not even be called upon.[203] On the other hand, an early settlement might offset any such costs and it would be less expensive to have an arbitrator and a shadow mediator than a three arbitrator panel.[204]

MEDALOA

MEDALOA refers to a combination of mediation followed by Last-Offer or Baseball Arbitration.[205] Baseball arbitration is a form of arbitration wherein each party makes a single offer (or chooses a single number) and the arbitrator may select one of the two offers as the award.[206] The benefit of this approach is that last-offer arbitration limits the decision-making power of the neutral insofar as it limits the choice between the two offers.[207] Thus while a variant of Pre-Arbitration Mediation, it helps to mitigate some of the concerns raised in Part III above because of the limitation on the arbitrator's discretion. It would also have the benefit of reducing costs.

Conclusion

The brilliance of alternative dispute resolution is that it allows the parties to tailor a bespoke process to meet their needs and wants in a particular dispute. Given the great economic challenges and uncertainties facing the world and the consequential pressure on businesses, counsel, parties, and neutrals should be creative in finding ways to resolve disputes. As such, counsel, parties, and neutrals should give serious consideration to the approaches set forth above – settlement facilitation, pre-arbitration mediation, post-arbitration mediation, mediation windows and shadow mediation, and MEDALOA – to help businesses get back to business.

Endnotes

1. Kate Davidson, Recession in U.S. Began in February, Official Arbiter Says, The Wall Street Journal (June 8, 2020), https://www.wsj.com/articles/recession-in-u-s-began-in-february-nber-panel-says-11591636626?mod=hp_major_pos1#cxrecs_s.

2. Hank Tucker, Coronavirus Bankruptcy Tracker: These Major Companies Are Failing Amid The Shutdown, Forbes (May 3, 2020), https://www.forbes.com/sites/hanktucker/2020/05/03/coronavirus-bankruptcy-tracker-these-major-companies-are-failing-amid-the-shutdown/?sh=3b541b073425.

3. David Skeel, Bankruptcy and the coronavirus, Economic Studies at Brookings (April 2020).

4. Pierre-Olivier Gourichas, Sebnem Kalemli-Ozcan, Verinika Penaciakova, Nick Sander, Covid-19 and Business failures, Global Forum on Productivity, OECD (June 5, 2020), https://www.oecd.org/global-forum-productivity/webinars/Gourinchas-Kalemli-Ozcan-covid-19-and-business-failures.pdf.

5. *Id.* at Figure 5.

6. Pierre-Olivier Gourichas, Sebnem Kalemli-Ozcan, Verinika Penaciakova, Nick Sander, COVID-19 and SME failures, IMF Working Papers (September 25, 2020), https://www.imf.org/en/Publications/WP/Issues/2020/09/25/COVID-19-and-SME-Failures-49753.

7. Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu/.

8. *See generally*, Business interruption insurance, Final Conduct Authority (Nov., 26, 2020), https://www.fca.org.uk/firms/business-interruption-insurance.

9. The Financial Conduct Authority v. Arch Insurance (UK) Limited, et al., [2020] EWHC 2448 (Comm) at

para. 7, (Sept., 15, 2020), https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf.

10. Or as articulated by Alexis Mourre:
Given the general consensus that more efficiency and cost-effectiveness is desirable in international arbitration, the use of Med-Arb techniques is a flexible solution that can, in the right circumstances, assist the parties to resolve their disputes more quickly and cheapy, with the added potential benefit of maintaining long-term business relationships.
Alexis Mourre, "The Proper Use of Med-Arb in the Resolution of International Disputes," ASIAN DISPUTE REVIEW (Hong Kong International Arbitration Centre, 2016, Volume 18, Issue 2), pp. 94-99, at 98-99. While true four years ago, this is even more critical in the midst of the current crisis.

11. Axel Reeg, "Chapter 27: Should an International Arbitral Tribunal Engage in Settlement Facilitation?," in Patricia Louise Shaugnessy and Sherlin Tung (eds), THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER (Kluwer Law International; Kluwer Law International 2017), at 269.

12. *See* HENRY JULIAN ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 2-3 (Henry Julian ed. 7th ed. 1998).

13. *See* Vincent Fischer-Zernin & Abbo Junker, *Arbitration and Mediation:Synthesis or Antithesis?*, 5 J. Int'l. Arb. 21, at 22, 34 (1988).

14. *Id.* at 22.

15. Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1042 (1975).

16. *Id.*; *see also*, Fischer-Zernin, *supra* note 13 at 23-24.

17. Fischer-Zernin, *supra* note 13 at 24.

18. *Id.*

19. Fischer-Zernin, *supra* note 13 at 24.

20. *Id.*

21. *Id.*

22. *See* Frankel, *supra* note 15 at 1042; see also Fischer-Zernin, *supra* note 13 at 30.

23. Frankel, *supra* note 15 at 1042.

24. Fischer-Zernin, *supra* note 13 at 31.

25. *Id.* at 32.

26. *Id.*; *see e.g.* German Code of Civ. Pro. Sec. 139, 279 (establishing judge's duty to discuss relative strength of their respective cases with the parties and to attempt an amicable settlement at any stage of legal proceedings).

27. Fischer-Zernin, *supra* note 13 at 32.

28. *Id.* at 34.

29. *Id.*

30. *Id.*

31. JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 4 (2003).

32. *Id.* at 2.

33. *Id.*

34. *Id.*; PATRICIA LOUISE SHAUGHNESSY & SHERLIN TUNG, THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 209 (2017).

35. LEW, MISTELIS & KRÖLL, *supra* note 32 at 5-6.

36. *Id.* at 7; *see also* The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (7 June 1959) 4739 U.N.T.S. 330 [New York Convention], Arts. I, II, V.

37. Fischer-Zernin, *supra* note 13 at 24.

38. *Id.*; *see also* LEW, MISTELIS & KRÖLL, *supra* note 31 at 7.

39. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 74-76 (Gary B. Born ed., 2nd ed. 2003); LEW, MISTELIS & KRÖLL, *supra* note 32 at pp. 5-7.

40. LEW, MISTELIS & KRÖLL, *supra* note 31 at 8; BORN *supra* note 39 at p. 73.

41. LEW, MISTELIS & KRÖLL, *supra* note 31 at 8; Paul Eric Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J Int'l Arb. 541, 543 (2011).

42. Fischer-Zernin, *supra* note 13 at 24.

43. Klaus Peter Berger, *The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute*

Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, 35 J. Int'l Arb. 501, 503 (2018); Klaus Peter Berger & J. Ole Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, 40 Fordham Int'l L. Rev. 887, 887 (2017).

44. Berger, *supra* note 43 at 503.

45. *Id.* at 503-04.

46. *Id.* at 24-25.

47. *Id.* at 23.

48. Berger & Jensen, *supra* note 43.

49. Berger, *supra* note 43, at 503.

50. Berger & Ole, *supra* note 43. at 889; Fischer-Zernin, *supra* note 13 at 30;

51. Berger, *supra* note 43, at 504-05.

52. Fischer-Zernin, *supra* note 13, at 30-31.

53. CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 247 (2nd ed. 2006).

54. See Fischer-Zernin, *supra* note 13, at 25.

55. *Id.*

56. UNCITRAL Model Law on International Commercial Conciliation, Art. 1(3); *see also* Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. Fla. L. Rev. 19, 24 (1985).

57. Mason, *supra* note 41, at 541.

58. *Id.*

59. Berger & Jensen, *supra* note 43, at 58.

60. Nikolaus Pitkowitz & Marie-Therese Richter, *May a Neutral Third Person Serve as Arbitrator and Mediator in the same Dispute?*, 7 Ger. Arb. J. 225, 225 (2009).

61. *Id.* at 226.

62. *Id.*

63. *Id.*; see also LEW, MISTELIS & KRÖLL, *supra* note 31, at 4.

64. Pitkowitz & Richter, *supra* note 61, at 226.

65. *Id.*

66. See Berger, *supra* note 43, at 502; Pitkowitz & Richter, *supra* note 60, at 227.

67. Pitkowitz & Richter, *supra* note 60, at 227; *see also* Jeremy Lack & Renate Dendorfer, *The Interaction Between Arbitration and Medation: Vision vs. Reality*, 5 Ger. Arb. J. 195, 199 (2007).

68. Lack & Dendorfer, *supra* note 67, at 197.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Berger, *supra* note 43, at 514-15.

74. See for example New York Convention, Arts. V.1.(e) that subjects enforceability of arbitral award to the laws of the seat of the arbitration.

75. Settlement of Commercial Disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, U.N Doc. A/CN.9/879 (2016), Art. 12.

76. *Id.*

77. Stephen Michael Kröll, "*Chapter 22: Promoting Settlements in Arbitration: The Role of the Arbitrator*," in Patricia Louise Shaugnessy and Sherlin Tung (eds), THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER (Kluwer Law International; Kluwer Law International 2017), at 210.

78. *See id.* at 211; *see also* Fischer-Zernin, *supra* note 13, at 23.

79. *See* Berger, *supra* note 43, at 503

80. *Id.*

81. Kröll, *supra* note 77, at 211.

82. Reeg, *supra* note 11, at 269.

83. *See* Mason, *supra* note 41, at 545.

84. *Id.*

85. Berger & Jensen, *supra* note 43, at 68.

86. *Id.*

87. Berger, *supra* note 43, at 503.

88. Berger, *supra* note 43, at 502.

89. Berger, *supra* note 43, at 503.

90. Reeg, *supra* note 11, at 270.

91. Kröll, *supra* note 77, at 211.

92. *Id.*

93. *Id.*

94. Berger & Jensen, *supra* note 43, at 68.

95. *Id.*

96. Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases, dated May 14, 2019, https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

97. International Commercial Arbitration Act, R.S.B.C. 1996, part 30(1) (Can.).

98. Kröll, *supra* note 77, at 216-17.

99. Article 9.1 of the Prague Rules, for example, tasks arbitrators to "assist the parties in reaching an amicable settlement of the dispute" unless one of the parties objects.

100. Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why it Works in China*, 25 J. Int'l Arb. 479, 485 (2008).

101. *Id.* at 486.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 487.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 488.

111. *Id.*

112. *Id.* at 490.

113. *Id.*

114. *Id.*

115. Kröll, *supra* note 77, at 211.

116. *Id.* at 212.

117. *See id.* at 212.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Mason, *supra* note 41, at 549.

123. *Id.*

124. Mourre, *supra* note 10, at 96.

125. *Id.*

126. Mason, *supra* note 41 at 545.

127. *Id.* at 545-546.

128. DIS Arbitration Rules 2018, Art. 26.

129. Berger, *supra* note 43, at 505.

130. Berger, *supra* note 43, at 505.

131. Fischer-Zernin, *supra* note 13, at 30.

132. *Id.*

133. *Id.*

134. *See Id.*

135. *Id.*

136. *Id.* at 31.

137. Pitkowitz & Richter, *supra* note 60, at 228.

138. *See id.*

139. Mourre, *supra* note 10, at 96.

140. *See id.*

141. Mourre, *supra* note 10, at 97.

142. Mourre, *supra* note 10, at 98.

143. *Id.*

144. Mourre, *supra* note 10, at 98.

145. *See id.* at 98.

146. Kohler & Kun, *supra* note 100, at 491.

147. Bühring-Uhle, *supra* note 53, at 250.

148. Kohler & Kun, *supra* note 100, at 491.

149. *Mourre, supra note 10 at 98.*

150. Bühring-Uhle, *supra* note 53 at 250.

151. Fischer-Zernin, *supra* note 13, at 35.

152. *Id.* at 36.

153. *Id.*

154. Arthur L. Marriott, in "Arbitrators and Settlement," Albert Jan Van den Berg (ed), NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA Congress Series, Volume 12, at 541.

155. Bühring-Uhle, *supra* note 53, at 248.

156. Kohler & Kun, *supra* note 100, at 490.

157. Ugo Draetta, "*Leveraging the Arbitral Process to Encourage Settlement: Some Practical and Legal Issues*," in Miguel Angel Fernandez-Ballester and Davis Arias (eds), LIBER AMICORUM BERNARDO CREMADES (Wolters Kluwer Espana; La Ley 2010), at 370.

158. *Id.*

159. Kohler & Kun, *supra* note 100, at 490.

160. Draetta, *supra* note 157, at 369.

161. *Id.*

162. Id. at 368.

163. Kohler & Kun, *supra* note 100, at 491.

164. *Id.* at 490-491; *see infra* note 184, regarding the Singapore Convention.

165. Born, *supra* note 39, at 2129-30.

166. *Id.* at 2130.

167. UNCITRAL Model Law on International Commercial Arbitration (1985, with 2006 Amendments), Arts. 18, 19.

168. Explanatory Note by the UNCITRAL Secretariat on the UNCITRAL Model Law on International Commercial Arbitration, paras. 32-33.

169. *Id.* at para. 35.

170. Berger, *supra* note 43, at 513-14; Reeg, *supra* note 11, at 275 ("First and most fundamentally: The arbitrators must not engage in settlement facilitation insofar as any of the parties is opposed to it.").

171. *Id.* at 514; Mourre, *supra* note 10, at 96 (noting the risk of taking parties by surprise); Draetta, *supra* note 157, at 372.

172. IBA Guidelines on Conflicts of Interest in International Arbitration, Standard 4(d).

173. *See supra* Part III.

174. Berger, *supra* note 43 at 512.

175. Draetta, *supra* note 157, at 370.

176. Berger, *supra* note 43, at 510 (citing CEDR Article 5(1.2).

177. Draetta, *supra* note 157, at 370.

178. *See* Kröll, *supra* note 77, at 221.

179. Berger, *supra* note 43, at 510 (citing CEDR Article 5(1.3).

180. *See* Kröll, *supra* note 77, at 222.

181. Berger, *supra* note 43, at 510 (citing CEDR Article 5(1.4)

182. *See* Kröll, *supra* note 77, at 223.

183. This particular precondition dovetails with the very concept of the "enlightened," "muscular" or "proactive" arbitrator discussed in Peter A. Halprin, "Resisting Guerrilla Tactics in International Arbitration," (2019) 85 Arbitration 87, 89.

184. Reeg, *supra* note 11, at 275-76. As to precondition (6), the cited article predated the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). The Singapore Convention established a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. The Convention entered into force on September 12, 2020 and, as of September 1, 2020 had 53 signatories. Singapore Convention on Mediation, "Singapore Convention on Mediation Enters into Force," (September 12, 2020), https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force.

185. Kröll, *supra* note 77, at 219.

186. *Id.*

187. *See, e.g.,* Klaus Peter Berger and Ole Jensen, "The Arbitrator's Mandate to Facilitate Settlement," International Commercial Arbitration Review (Association of Researchers in International Private and Comparative Law 2017, Volume 2017 Issue 1), at 68 ("Thus, the argument that settlement facilitation is incompatible with the arbitrator's *judicial* role does not reflect judicial reality in many jurisdictions.") (emphasis in original).

188. *See* Bühring-Uhle, *supra* note 53; Lack and Dendorfer, *supra* note 67.

189. Bühring-Uhle, *supra* note 53, at 251.

190. *Id.* at 252-53.

191. *Id.*

192. Lack and Dendorfer, *supra* note 67, at 200-01 (discussing the advantages associated with Med-Arb).

193. ARIAS-US Panel Rules for the Resolution of Insurance and Contract Disputes (Effective September 16, 2019), Rule 15.1. The Rules are available at the following link: https://www.arias-us.org/wp-content/uploads/2019/09/FINAL-ARIASU.S.-PANEL-RULES-FOR-THE-RESOLUTION-OF-INSURANCE-AND-CONTRACT-DISPUTES-9-16-19.pdf.

194. Halprin, *supra* note 183.

195. *Id.*

196. Lack and Dendorfer, *supra* note 67, at 202.

197. *Id.*

198. *Id.*

199. *See* Christian Bühring-Uhle, *supra* note 53, at 259-60.

200. *Id.* at 260-61.

201. *Id.*

202. See id. at 262.

203. Lack and Dendorfer, *supra* note 67, at 203.

204. *Id.*

205. *Id.; see also* Erin Gleason and Edna Sussman, Final Offer/Baseball Arbitration: The History, The Practice, and Future Design, Alternatives to the High Cost of Litigation, Vol. 37 No.1, January 2019. Note that in *Ryan N. Bowers v. Raymond J. Lucia Cos., Inc.*, No. D059333 (Cal. Ct. App. May 30, 2012), the court upheld a settlement agreement providing for mediation and binding baseball arbitration.

206. JAMS, Arbitration Defined: What is Arbitration? https://www.jamsadr.com/arbitration-defined/.

207. Lack and Dendorfer, *supra* note 67, at 203. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

LexisNexis®

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397