



How Should Arbitrators Address Potential For Settlement With the Parties? Opportunities, Limits, and Ethics

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Arbitrator Involvement in Settlement: Potential Tools

Will discuss some tools for arbitrator involvement, but bearing in mind:

- The Arbitrator's duty to protect enforceability of the Award.
- The Arbitrator's duty of neutrality/to decide the case on the merits.





When to Mediate—the Parties' Choice

1. The parties may agree to mediate at any time
2. The panel can suggest mediation at any time
3. Suggestions on timing (and benefits and disadvantages):
 - During the organizational meeting
 - After discovery cutoff
 - After submission of expert reports
 - After submission of summary judgment motions but before final hearing
 - After partial decision of targeted issues agreed upon by the parties
 - Even after the hearing or the Award





Potential Tools: “Mediation Window” in the Arbitration

1. ADR provisions may require mediation before arbitration.
2. Provided by some arbitral organizations as default (with the possibility to opt-out)(e.g., AAA).
3. May be raised at initial organizational meeting/ CMC/preliminary hearing.
4. What are the consequences? “Pause” or “stay” the proceedings.





Potential Tools: Asking the Parties; Addressing Specific Situations

1. Simply asking the parties early in the arbitration if they have discussed settlement is a pretty informal, light-touch, no pressure technique.
2. Might be asked early in the arbitration or at a later conference in connection with discussing whether to have a "mediation window."
3. Alternatively, asking when the case calls for it (e.g., when a party appears to assent to a demand or injunctive relief by the other party).
4. Arbitrators can ask parties questions on the merits that show the risks to each side.



Potential Tools: Bifurcation; Leaving Time Before Drafting Award Convert Settlement to Consent Award? *Functus Officio* Status?

1. Commonly used in insurance arbitration; bifurcation leaves room for settlement on damages amount after a liability ruling.
2. Setting aside time after the close of the liability/full hearing for parties to discuss settlement before the Award is drafted.
3. Conversion of Settlement Agreement into Consent Award.
(*Albtelecom S.H.A v. UNIFI Communs., Inc.*, 2017 U.S. Dist. LEXIS 82154 (S.D.N.Y. May 30, 2017))
4. When does a settlement render Arbitrator *functus officio*?
(*Martin Dawes v. Treasure & Son Ltd [2010] EWHC 3218 (TCC)*)





Potential Tools: “Arb/Med”

1. Written agreement a must—whether by written agreement or consent panel order.
2. After the final hearing is completed, then mediation is scheduled.
3. Mediation is scheduled after the final award is issued and sealed pending mediation session.
4. Advantage: Both parties have seen each other’s case and arguments.
5. Disadvantage: Expensive.





Potential Tools: “Med/ Arb”

1. Written agreement a must.
2. Mediation at the outset before arbitration proceeding.
3. Here, the mediator is generally also the arbitrator.
4. Advantage: Has the potential to reduce costs with settlement before arbitration.
5. Disadvantage: Has the potential problem of parties biasing arbitrator in *ex parte* communications.



Potential Tools: Other Party-Agreed Arbitrator Involvement

- Other Case Management Techniques, see ICC 2023 Report on Facilitating Settlement in International Arbitration
- Prague Rules, Article 2.4(e) (non-binding preliminary views), Article 9 (assistance in amicable settlement)
- Wing-arbitrators work with both sides
- Arbitrator(s) at a joint settlement conference
- Giving off-the-record preliminary, non-binding views
- Managing enforcement concerns



Thank you!

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