11 July 2025

DIS Rules Clinic Report on Settlement Facilitation

Practices in applying Article 26 (and related provisions) of the 2018 DIS Arbitration Rules

1. Arbitration is a dispute resolution mechanism intended to result in a final and binding decision imposed on the parties, in accordance with their arbitration agreement.[1] Arbitrators are primarily appointed to achieve this objective and to resolve disputes in a final and binding manner.[2] However, an amicable settlement offers advantages, particularly when preserving a cooperative business relationship is important. It can save time and costs and conserve the parties' resources so that they may focus on their businesses.[3] In some situations, a settlement, rather than an award, may be in the parties' best interests as it may be more aligned with their commercial objectives. Settlement facilitation seeks to assist parties in achieving all of the benefits usually attributed to settled rather than decided cases.[4]

2. Article 26 of the 2018 DIS Arbitration Rules ("**Article 26**" and the "**DIS Rules**", respectively)[5] empowers tribunals to promote settlement between the parties. This power may be exercised to facilitate the settlement of disputes in whole or in part, unless any party objects.

3. Article 26 echoes Section 278 (1) of the German Code of Civil Procedure ("**ZPO**").[6] For comparison, Article 26 and Section 278 (1) ZPO read as follows:

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1 *B. Ehle*, The Arbitrator as a Settlement Facilitator, Professional journal (3 September 2010), p. 79; *A. Reeg,* Vergleichsbemühungen des Schiedsgerichts, in: Salger / Trittmann (eds.), Praxishandbuch Internationale Schiedsverfahren (2019), § 18, para. 1.

2 *S. Elsing*, Section 32 – Settlement, in: Böckstiegel / Kröll / Nacimiento (eds.), Arbitration in Germany, The Model Law in Practice, 2nd ed. (2015), p. 690, para. 2.

3 *A. Reeg*, Chapter 27: Should an International Arbitral Tribunal Engage in Settlement Facilitation?, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), p. 272; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 413.

4 *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, p. 197.

5 The role of the tribunal in the context of amicable settlement was previously regulated by Article 32.1 of the DIS Arbitration Rules 1998.

6 *S. Elsing*, Section 32 – Settlement, in: Böckstiegel / Kröll / Nacimiento (eds.), Arbitration in Germany, The Model Law in Practice, 2nd ed. (2015), p. 690, para. 2; *K. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, p. 505; *I. Welser*, Chapter II: The Arbitrator and the Arbitration Procedure, Early Dispute Settlement through Arbitral Tribunals – A Common Feature in the "DACH Region" Austria, Germany and Switzerland? Including Additional Thoughts and Sixteen Golden Rules on the Way to a Successful Settlement, in: Klausegger / Klein et al. (eds.), Austrian Yearbook on International Arbitration (2023), p. 103.

Section 278 (1) ZPO (Unofficial English translation): "In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue."

Article 26 DIS Rules: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues."

4. In German state courts, judges act under Section 278 (1) ZPO by, *inter alia*, identifying key facts and legal issues and presenting a preliminary, non-binding assessment to the parties. This approach facilitates constructive dialogue and encourages settlements. The German Constitutional Court has emphasized that it is generally preferable to resolve an initially contentious issue by mutual agreement rather than by judicial decision, even in a state governed by the rule of law.[7]

5. Reflecting this "Germanic" approach, Article 26 may be understood broadly to authorize tribunals to take specific steps to facilitate amicable settlement beyond merely informing parties of their right to settle and outlining available settlement mechanisms. However, in contrast to Section 278 (1) ZPO, the parties' consent to settlement facilitation by a tribunal is crucial in arbitration. It is for the parties to decide whether and when negotiations should take place, and what role the tribunal should play in them.[8]

6. Article 26 has an additional protective function. Arbitrators engaging in settlement facilitation under its framework are generally shielded from challenges and allegations of partiality.[9]

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7 German Federal Constitutional Court, Judgment of 14 February 2007, 1 BvR 1351/01, NJW-RR 2007, 1073, para. 35; for a discussion of the German approach see *J.K. Schäfer*, Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method, b-Arbitra (2013), Issue 2, p. 333 et seq.

8 *K. Berger*, Integration of Mediation Elements into Arbitration, 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators, Arbitration International (2003), Vol. 19, Issue 3, p. 402; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 416, para. 10.

9 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 414, para. 4; see also *S. Elsing*, Section 32 – Settlement, in: Böckstiegel / Kröll / Nacimiento (eds.), Arbitration in Germany, The Model Law in Practice, 2nd ed. (2015), pp. 690 et seq., para. 3; *D. Plant*, The Arbitrator as Settlement Facilitator, Journal of International Arbitration (2000), Vol. 17, Issue 1, p. 146; *H. Raeschke-Kessler*, The Arbitrator as Settlement Facilitator, Arbitration International (2005), Vol. 21, Issue 4, p. 530.

A. Key features of settlement facilitation pursuant to Article 26 of the DIS Rules

I. Parties' consent

7. The words "unless any party objects" in Article 26 of the DIS Rules could be read as suggesting that it is up to a party that does not want the tribunal to take any steps to encourage settlement of the dispute to raise an objection, otherwise the tribunal may proceed with settlement facilitation. The better view is that a tribunal must respect the principle of party autonomy and therefore needs to ensure that all parties agree on settlement facilitation before engaging in any settlement activities.[10] De facto, the tribunal needs to obtain the consent of the parties. To do so the parties must understand what steps would be involved and they must not be pressured to agree to them. The parties' agreement is usually recorded in writing to minimize the chances of potential challenges. The informed consent of the parties should imply a waiver of any right to challenge an arbitrator and/or an award if settlement discussions are not successful.[11]

8. The parties' agreement may be evidenced, for example, in the arbitration clause, a separate agreement or waiver, or be recorded in a hearing transcript.[12] The record of such an agreement should expressly state (i) what role the tribunal will play in settlement facilitation,[13] and (ii) that an arbitrator's participation in settlement facilitation initiatives should not constitute a ground for challenging the arbitrator or the award in the event that the parties fail to settle their dispute.[14] The tribunal may also expressly reserve its right to reconsider its position after having provided any preliminary assessment of the case (or specific issues) and state that it remains open to considering follow-up arguments and the parties' submissions.[15]

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10 *S. Elsing*, Section 32 – Settlement, in: Böckstiegel / Kröll / Nacimiento (eds.), Arbitration in Germany, The Model Law in Practice, 2nd ed. (2015), p. 690, para. 3; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 416; *G. Horvath*, Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?, SchiedsVZ (2005), Vol. 3, Issue 6, p. 300.

11 *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, p. 204.

12 *G. Horvath*, Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?, SchiedsVZ (2005), Vol. 3, Issue 6, p. 300; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 417, para. 11.

13 *D. Plant*, The Arbitrator as Settlement Facilitator, Journal of International Arbitration (2000), Vol 17, Issue 1, p. 146.

14 *D. Plant*, The Arbitrator as Settlement Facilitator, Journal of International Arbitration (2000), Vol. 17, Issue 1, p. 146; *G. Horvath*, Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?, SchiedsVZ (2005), Vol. 3, Issue 6, p. 301.

15 *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 909.

II. The tribunal's role

9. Article 26 of the DIS Rules mandates a tribunal to "seek to encourage" an amicable settlement of the parties' dispute or of individual disputed issues unless a party to the arbitration objects. Article 26 allows the tribunal to explore whether the parties wish to go beyond the tribunal's main mandate of "decision-maker", rendering the final award, by taking steps to facilitate a settlement in the interests of achieving an efficient and comprehensive resolution of the dispute.[16] Such an initiative on the part of the tribunal may have at least two benefits. First, it may motivate the parties to contemplate a less litigious approach to resolving their differences and consider the possibility of settlement.[17] Secondly, the tribunal's initiative may encourage a party to voice its interest in exploring settlement options without concerns about appearing to be weak.[18]

10. If the parties wish to explore settlement opportunities, the tribunal may discuss the available options with them. The DIS Rules do not define the scope of permissible promotion or "encouragement" of amicable settlement. As indicated above, Article 26 may be understood broadly to authorize tribunals to take specific steps to facilitate amicable settlement. Such steps may include the provision of the tribunal's preliminary views on issues in dispute and evidence needed, a preliminary non-binding assessment of factual or legal issues, a proposal for an agenda for settlement discussions between the parties and, on the other end of the spectrum, the direct participation in and moderation of settlement discussions, a proposal of a specific settlement formula,[19] as well as proposing settlement terms.[20] Attention should be paid to any mandatory rules and laws at the place of arbitration, and in jurisdictions where an award may be executed, which may restrict the options available to the tribunal.

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16 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 416.

17 *G. Horvath*, Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?, SchiedsVZ (2005), Vol. 3, Issue 6, p. 296.

18 Ibid; see also *E. Bucher*, Die Rolle des Schiedsrichters bei vergleichsweiser Beilegung des Streites, ASA Bulletin (1995), Vol. 13, Issue 3, p. 574.

19 *S. Kröll*, Chapter 22: Promoting Settlements in Arbitration: The Role of the Arbitrator, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), pp. 217 et seq.; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 416; in a recent decision of 7 November 2024, the Higher Regional Court of Bavaria (BayObLG) confirmed that, generally, preliminary expressions of opinion and assessments made in the context of conducting arbitration proceedings are not a valid ground for challenging an arbitrator if the limit of arbitrariness is not exceeded, see Higher Regional Court of Bavaria, Decision of 7 November 2024, 102 SchH 135/24 e, BeckRS 2024, 30225.

20 Higher Regional Court of Munich, Judgment of 1 January 2008, 34 SchH 3/07, SchiedsVZ 2008, 104; see also Higher Regional Court of Frankfurt am Main, Judgment of 27 April 2006, 26 SchH 1/06, SchiedsVZ 2006, 329, 331; Higher Regional Court of Berlin, Decision of 12 February 2018, 13 SchH 2/17, MDR 2018, 885, 886; Higher Regional Court of Munich, Decision of 24 November 2015, 34 SchH 5/15, NJW 2016, 881, 882.

11. Settlement facilitation by arbitrators is often confused with mediation and "hat changing" by those who are unfamiliar with this concept.[21] It is important to distinguish settlement facilitation from hybrid procedures, such as mediation-arbitration (Med-Arb) or arbitration-mediation (Arb-Med), which are used in some jurisdictions, such as China, and may involve caucusing with the parties.[22] As tribunals are advised to avoid *ex parte* discussions with the parties, changing roles from arbitrator to mediator (or vice versa) during arbitration proceedings raises a number of difficult issues.[23] While settlement terms may be discussed, no unilateral communications with a party should take place in the context of settlement facilitation by members of a tribunal.

12. Since the DIS Rules are silent on the parameters to be respected by tribunals in promoting settlement, supplementary rules may be helpful. One helpful source is Article 5 of the CEDR Rules for the Facilitation of Settlement in International Arbitration (the "**CEDR Rules**"), which provides guidelines for settlement facilitation that are aligned with the objectives of Article 26 of the DIS Rules and consistent with current practice in Germany:

> *"1. […] the Arbitral Tribunal may […] take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute:*
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> *1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of*

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21 *H. Abramson*, Protocols for International Arbitrators Who Dare to Settle Cases, The American Review of International Arbitration (1999), Vol. 10, Issue 1, p. 7; *K. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, p. 512; *A. Reeg*, Vergleichsbemühungen des Schiedsgerichts, in Salger/Trittmann (eds.), Praxishandbuch Internationale Schiedsverfahren (2019), § 18, paras. 10-15 and footnote 9 with a reference to a prominent defender of the "changing-hat-theory".

22 See for example CIETAC Arbitration Rules 2024, Article 47; *G. Kaufmann-Kohler / F. Kun*, Integrating Mediation into Arbitration: Why it Works in China, Journal of International Arbitration (2008), Vol. 25, Issue 4, pp. 479-492; *K. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, p. 512.

23 *K. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, p. 513; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 419, para. 16; Article 8 of the IBA Rules of Ethics for International Arbitrators (1987); The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), Cannon IV F; *A. Reeg*, Chapter 27: Should an International Arbitral Tribunal Engage in Settlement Facilitation?, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), pp. 274 et seq.; *U. Draetta*, in: Fernández-Ballesteros / Lozano (eds.), Liber Amicorum Bernardo Cremades (2010), p. 373.

evidence from each Party in order to prevail on those issues;

1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;

1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;

1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.

2. The Arbitral Tribunal shall not:

2.1. meet with any Party without all other Parties being present; or

2.2. obtain information from any Party which is not shared with the other Parties.

3. The Arbitral Tribunal shall:

3.1. insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place;

3.2. adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment)".[24]

13. Should efforts to settle the dispute be unsuccessful and the arbitral proceedings are continued through to an award, Article 3, paragraphs (4) and (5) of the CEDR Rules provide the following guidance for tribunals:

4. Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that

[24] The CEDR Rules were appended to the Final Report (2009) of the CEDR Commission on Settlement in International Arbitration, chaired by Lord Woolf and Gabrielle Kaufmann-Kohler (available at: https://www.cedr.com/wp-content/uploads/2021/04/Arbitration-Commission-Document-April-2021.pdf); for a discussion of the settlement tools set out in the CEDR Rules see *S. Kröll*, Chapter 22: Promoting Settlements in Arbitration: The Role of the Arbitrator, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), p. 217 et seq, §22.05.

> *the arbitration resumes (save as regards the allocation of costs in accordance with Article 6 of these Rules).*
>
> *5. The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.*

14. In accordance with Article 7 of the CEDR Rules:

> *"If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator shall resign."*

15. This principle is consistent with General Standard 2(a) of the IBA Guidelines on Conflicts of Interest (2024). Further information on the CEDR Rules and other institutional reports and guidelines that address direct settlement facilitation techniques in international arbitration is set out in Annex 1 (A) to this Report.

16. Importantly, the parties are free to decide whether they wish to receive assistance from the tribunal in settling their disputes and, if so, the steps towards amicable settlement they would like to undertake. Under Article 26, no settlement facilitation initiatives may be imposed on the parties without their agreement or upon agreement of only one party.

17. The tribunal's role in facilitating a settlement is only one aspect of an arbitrator's broader mandate under the DIS Rules. While Article 26 underscores the importance of promoting efficient dispute resolution, not all arbitrators are familiar with the various techniques that can be used to facilitate settlement, nor do they have the requisite experience or skill set to chair a settlement conference effectively. This may be the case where an arbitrator comes from a jurisdiction where settlement facilitation is not practised. In Annex 1(B) the Working Group has provided a proposed set of guidelines on best practices for arbitrators who undertake settlement facilitation.

III. Timing

18. Under Article 26 of the DIS Rules, the tribunal has a duty to seek to encourage an amicable settlement at every stage of the proceedings unless a party objects. The reference to "*every stage of the arbitration*" requires the tribunal to evaluate a case

continuously and propose settlement whenever it considers the moment to be right.[25] Article 26 gives tribunals broad discretion to decide when to raise the issue with the parties.

19. Article 27.4 of the DIS Rules requires the tribunal to discuss the procedural rules and timetable with the parties during the initial case management conference ("**CMC**"), which must be held, in principle, within 21 days of its constitution (Article 27.2). It is thus appropriate to inform the parties at that juncture of the possibility of the tribunal assisting them in settlement efforts, if they wish.[26] Pursuant to Articles 27.4 (i) and (iii), the tribunal must in any event discuss with the parties during the CMC, *inter alia*, the possibility of providing them with a preliminary assessment of questions of fact or law and of using mediation or other ADR methods, in combination with arbitration, to resolve their dispute. Depending on the parties' respective positions, the tribunal may revisit the topic later during the proceedings. Identification of the appropriate stage to revisit the possibility of the tribunal assisting the parties in seeking a settlement may usefully be discussed by the parties and the tribunal at the outset.

20. The time for settlement facilitation steps should be carefully selected, considering the specifics of the case and the applicable laws.[27] As a manager of the proceedings, the tribunal is best positioned to choose the appropriate moment to offer its assistance in facilitating a settlement.[28] The tribunal's approach should be balanced and case specific.[29] Early settlement facilitation has the advantage of saving time and costs. However, it raises the risk that the case has not been fully developed at that stage. Further, the tribunal's assessment of the case (or specific issues) may change during the course of the arbitration.[30] It is also important that the parties have gained sufficient confidence in the tribunal, as well as an understanding of their respective cases, before settlement facilitation is attempted.[31] If settlement facilitation is conducted at a later stage in the proceedings, the case will probably be well developed. However, the likelihood of a settlement being reached may diminish as the case progresses due to

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25 *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 910.

26 Ibid, p. 907.

27 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), pp. 420-421, para. 19.

28 *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, p. 197.

29 *A. Reeg*, Vergleichsbemühungen des Schiedsgerichts, in Salger/Trittmann (eds.), Praxishandbuch Internationale Schiedsverfahren (2019), § 18, para 14.

30 *R. Schardt*, Neue Regelungen der DIS-Schiedsgerichtsordnung zur Steigerung der Verfahrenseffizienz, SchiedsVZ (2019), Vol. 17, Issue 1, p. 33; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 421, para. 19.

31 *G. Horvath*, Schiedsgerichtsbarkeit und Mediation – Ein glückliches Paar?, SchiedsVZ (2005), Vol. 3, Issue 6, p. 300.

the elimination of elements of uncertainty and the fact that the potential savings in arbitration costs will be reduced.[32]

21. Depending on the case and applicable laws, it may be sensible to facilitate settlement after the first round of comprehensive written submissions, before or after the oral hearing,[33] or after a partial award.[34] Importantly, the tribunal should wait until it has gained a sufficient understanding of a dispute, or a relevant issue, prior to attempting settlement facilitation.[35]

IV. Steps that may be involved in settlement facilitation

22. The parties may decide whether they wish to seek the tribunal's assistance in attempting an amicable settlement of their dispute in its entirety or in settling specific issues. For example, the parties may wish to receive a preliminary assessment of one specific issue which is the core of their dispute. Based on the results of this assessment, the parties may wish to explore further settlement options independently or with additional facilitation on the part of the tribunal. Some settlement steps, such as suggesting terms of settlement, would be more appropriate in the context of an attempt to settle the entire dispute.

23. By encouraging settlement, Article 26 aligns arbitration with principles of efficiency and party autonomy. It reflects a proactive approach to dispute resolution while respecting the boundaries of arbitrators' impartiality and the parties' right to object.

B. Efficiency measures provided for in the 2018 DIS Arbitration Rules and ADR mechanisms which complement Article 26

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32 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 421, para. 19.

33 *R. Schardt*, Neue Regelungen der DIS-Schiedsgerichtsordnung zur Steigerung der Verfahrenseffizienz, SchiedsVZ (2019), Vol. 17, Issue 1, p. 33; *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 421, para. 19; see also *H. Raeschke-Kessler*, The Arbitrator as Settlement Facilitator, Arbitration International (2005), Vol. 21, Issue 4, pp. 528 et seq.; *A. Marriott*, in: van den Berg, New Horizons in International Commercial Arbitration (2005), p. 542; *A. Reeg*, Chapter 27: Should an International Arbitral Tribunal Engage in Settlement Facilitation?, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), p. 275; others suggest that witnesses be examined first.

34 *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, p. 197.

35 Ibid, p. 197.

24. One of the reasons to promote amicable settlement in pending cases is efficiency of dispute resolution.[36] Steps used to facilitate settlement are often listed as measures for efficient dispute resolution.[37] Therefore, the Article 27 and Annex 3 Measures for Increasing Procedural Efficiency in the DIS Rules ("**Article 27**" and "**Annex 3**" respectively) are often considered in relation to Article 26. For example, it has been noted that providing parties with a preliminary non-binding assessment of factual or legal issues, subject to parties' agreement (Lit. F of Annex 3), can contribute significantly to the success of a tribunal's efforts in promoting amicable settlement pursuant to Article 26.[38]

25. Pursuant to Article 27.4 the tribunal must specifically discuss with the parties during the initial CMC the following:

> *"i) each of the measures set forth in Annex 3 (Measures for Increasing Procedural Efficiency) in order to determine whether any of them should be applied;*
>
> *[…]*
>
> *(iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues."*

26. Annex 3 sets out several measures that may directly or indirectly lead to the settlement of a dispute. Such measures include: (i) dividing the proceedings into multiple phases; (ii) rendering one or more partial awards or procedural orders on specific issues; and (iii) providing the parties with a preliminary non-binding assessment of factual or legal issues in arbitration (subject to their consent). It is noteworthy that the express requirement of party consent to a tribunal providing such a non-binding assessment constitutes an exception to the general power of a tribunal (set out in the concluding paragraph of Annex 3) to decide, in its discretion, whether to apply the other procedural efficiency measures listed therein.[39]

27. In addition, the DIS provides other tools and ADR rules that parties may consider in the context of Article 27.4 (iii). These include the DIS Conciliation Rules, DIS Mediation

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36 Ibid, p. 188; *K. Sachs*, Chapter 19: Do We Deliver: How to Make International Arbitration More Efficient, in: N. Kaplan / M. Pryles et al. (eds.), International Arbitration: When East Meets West – Liber Amicorum Michael Moser, p. 232-233.

37 See for example ICC Arbitration Rules 2021, Appendix IV; IBA Rules on the Taking of Evidence in International Arbitration (2020), Articles 2(1) and (3); Prague Rules (2018), Article 2.

38 *R. Schardt*, Neue Regelungen der DIS-Schiedsgerichtsordnung zur Steigerung der Verfahrenseffizienz, SchiedsVZ (2019), Vol. 17, Issue 1, p. 33.

39 Ibid, p. 33.

Rules, DIS Rules on Expert Determination, DIS Rules on Expertise and DIS Rules on Adjudication.

28. Statistics for 2022 and 2023 (white column for 2022 and turquoise for 2023) show that mediation has been the most popular ADR tool after arbitration:

Conciliation		*6*	*3*
Mediation		*7*	*7*
Adjudication		*0*	*0*
Expert Determination		*1*	*1*
Subtotal ADR proceedings		**14**	**11**

Source: the DIS, German Arbitration Institute (DIS): Our work in numbers.

29. Pursuant to Article 2.2 of the DIS Rules a party or parties may jointly appoint a Dispute Manager prior to the filing of a request for arbitration or at any time during the arbitration. This is a service provided by the DIS which is not offered by most other arbitral institutions.[40] Dispute Managers advise and assist the parties in selecting the dispute resolution mechanism best suited for resolving their dispute.

30. Upon the parties' request, the tribunal may record a settlement in an award by consent (Article 41 DIS Rules). The same is true for the settlement agreement or a decision arising out of proceedings under the DIS Mediation Rules, the DIS Conciliation Rules, the DIS Rules on Adjudication, the DIS Rules on Expertise and the DIS Rules on Expert Determination.

31. Terminating an arbitration prior to a final award or pursuant to an award by consent may result in significant savings in costs for the parties. In accordance with Article 34.4 of the DIS Rules, the Arbitration Council will fix the tribunal's fees taking into consideration criteria such as the stage of the proceedings, the diligence and efficiency of the tribunal and the complexity and economic importance of the dispute. It is noted that, at present, Article 34.4 does not contain any specific reference to the tribunal's efforts to facilitate a settlement of the dispute pursuant to Article 26.

[40] At the time of writing, CPR Dispute Resolution in the United States has a pilot programme providing for dispute resolution planning through a neutral acting as a facilitator. For further information see: https://drs.cpradr.org/services/dispute-resolution-planning.

C. Direct approaches to settlement facilitation by arbitrators and practitioners in Germany

32. German parties and counsel are accustomed to settlement facilitation by arbitral tribunals, but parties and practitioners from other jurisdictions may be less comfortable with it. Tribunals should consider the legal and cultural background of the parties and their counsel when seeking to encourage the amicable settlement of a dispute.[41] As indicated, settlement facilitation must not be imposed on the parties. The consent of all parties is essential.[42]

33. The Report discusses below the more commonly used direct approaches to settlement facilitation that are employed by arbitrators in Germany: (i) preliminary non-binding assessment of factual or legal issues, and (ii) facilitation of settlement discussions by arbitrators (chairing settlement conferences). This will be followed by a brief discussion of caucusing (iii).

I. Preliminary assessment

34. As mentioned above, pursuant to Article 27.4 and lit. F of Annex 3, during the first CMC, the tribunal must ask the parties whether they wish to receive from the tribunal a preliminary non-binding assessment of factual or legal issues raised in the arbitration. If the parties agree, the tribunal may conduct a separate hearing for the non-binding assessment, during which it will address, on a preliminary basis, factual and legal issues raised in the case as presented by the parties.

35. During this process, the tribunal remains neutral in its assessment. It outlines the legal and factual issues in a way that will allow the parties to develop their own settlement terms.[43] During the hearing to discuss preliminary views, it is important for the tribunal to highlight the strengths and weaknesses of each party's position in a balanced manner. It is also essential to stress that the assessment is preliminary and non-binding, and that the tribunal reserves the right to change its assessment should the arbitration proceed.

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41 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 418, para. 13.

42 *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 908.

43 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 418, para. 14.

36. During the preliminary assessment hearing, the tribunal may use tools such as a presentation outlining issues and key arguments or other demonstrative materials. However, tribunals do not share any written assessment with the parties. Equally there will be no transcript made of the hearing.[44]

37. The preliminary assessment, and any documents shared with the parties by the tribunal in the context of giving that assessment, do not constitute indicative rulings (within the meaning of *Hinweisbeschluss* issued by a state court) or orders to submit evidence (*Beweisbeschluss* or *Beweisauflagenbeschluss*). However, the preliminary assessment may serve as an indication of what the tribunal considers, at that stage, to be relevant. This step may be used as a stand-alone technique, or it may be followed by a discussion of specific settlement terms with the parties.

II. Facilitation of settlement discussions

38. A tribunal may participate directly in and moderate settlement discussions.[45] This may involve the proposal of specific settlement terms by the tribunal.[46] A settlement conference may be combined with a preliminary assessment of the case, or specific issues, or be conducted on a stand-alone basis.

39. The tribunal's role should be discussed with and decided upon by the parties in advance. The approach is flexible and should be adapted to accommodate the parties' preferences. For example, the parties may request the tribunal to provide a specific settlement amount, a settlement formula or a monetary range for the settlement. To arrive at a range of figures, the tribunal and the parties may calculate "best" and "worst" case scenarios based on their own understanding of the case, using a decision tree or other tools. Settlement conferences are conducted in an interactive manner, involving exchange between the tribunal and the parties.[47] Should the tribunal propose settlement terms to the parties, it is always important for the tribunal to emphasize that its proposal is based on a preliminary non-binding assessment of the case.[48]

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44 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 39.

45 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 416, para. 9.

46 Higher Regional Court of Frankfurt am Main, 26 SchH 1/06, Decision of 27 April 2006, SchiedsVZ 2006, 329; Higher Regional Court of Munich, Judgment of 1 January 2008, 34 SchH 3/07, SchiedsVZ 2008, 104.

47 *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 910.

48 *D. Busse*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 26: Encouraging Amicable Settlements, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), p. 419, para. 14.

40. When assessing the conduct of arbitrators, German state courts tend to take an approach which is favourable to settlement facilitation. The tribunal's involvement in direct settlement facilitation initiatives agreed to by the parties will not be viewed by a court as casting doubt on an arbitrator's impartiality, as arbitrators act in the interests of all parties.[49] It is also not improper for the tribunal to make its own proposals during settlement negotiations.[50] Communicating a legal assessment which is unfavourable to one of the parties, or proposing possible settlement terms, is not considered to be an indication of bias on the part of an arbitrator.[51] Even though German courts have repeatedly denied challenges of arbitrators because of involvement in settlement facilitation initiatives, it is still recommended that tribunals obtain consent of all parties, ideally recorded in writing, before conducting a settlement conference. Express prior consent and a waiver of the right to challenge an arbitrator or an award on the ground that the tribunal engaged in settlement facilitation will serve to prevent such challenges.[52]

III. Caucusing

41. Parties may wish to use some mediation techniques during arbitration, such as caucusing with individual parties. The use of caucusing during settlement facilitation is, however, very controversial.[53] First, it may pose due process issues such as the risk of a violation of the right to be heard.[54] Secondly, caucusing raises valid concerns regarding an arbitrators' impartiality. In the event that settlement discussions are not successful, there is a non-negligible risk that an arbitrator will not be able to exclude entirely from consideration in the decision-making process all information obtained during unilateral communications with a party.[55] For these reasons, tribunals are advised to avoid caucusing.[56] As indicated above, if the arbitration proceedings

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49 Higher Regional Court of Frankfurt am Main, 26 SchH 1/06, Decision of 27 April 2006, SchiedsVZ 2006, 329.

50 Higher Regional Court of Munich, Judgment of 1 January 2008, 34 SchH 3/07, SchiedsVZ 2008, 104.

51 Higher Regional Court of Berlin, Decision of 12 February 2018, 13 SchH 2/17, A contribution by the ITA Board of Reporters, para. 23.

52 IBA Guidelines on Conflict of Interest in International Arbitration 2024, General Standard 4(d); *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 912; *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, p. 198; *M. Hwang*, The Role of Arbitrators as Settlement Facilitators – Commentary, in Albert Jan Van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, Vol. 12 p.571

53 *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, p. 913.

54 Ibid, pp. 913-914.

55 Ibid, p. 914.

56 CEDR Rules, Article 5.2; IBA Rules of Ethics for International Arbitrators (1987), Article 8; CIArb Practice Guideline on the Use of Mediation in Arbitration 2021, section 8; *K. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, p. 513*; A. Reeg*, Vergleichsbemühungen des Schiedsgerichts, in Salger/Trittmann (eds.), Praxishandbuch Internationale Schiedsverfahren (2019), § 18, para. 48 no. 2 taking a clear stand against caucusing in this context.

resume after unsuccessful settlement negotiations, an arbitrator who has developed doubts as to his or her ability to remain impartial or independent must resign.

D. Indirect approaches to settlement facilitation by arbitrators that may be relevant to Article 26 of the DIS Rules

42. Party expectations are a key element to be taken into consideration by a tribunal in selecting an appropriate settlement facilitation technique. This basic notion is implicit in the requirement of party consent contained in Article 26 of the DIS Rules.

43. Arbitrators, counsel, and parties coming from Germany and more generally from the "DACH" region are likely to be familiar with the concept of settlement facilitation and may be more open to such initiatives in any arbitration proceedings that they are involved in. German arbitrators tend to view themselves as dispute resolvers rather than dispute adjudicators. Similarly, in the German speaking part of Switzerland, settlement facilitation is viewed as being part of the tribunal's role. Where an arbitrator's role is restricted to that of a dispute adjudicator, direct settlement facilitation techniques will not be viewed as being part of the arbitrator's toolkit.[57]

44. A Working Group of the IMI Mixed Modes Task Force on Arbitrator Techniques and their (Direct or Potential) Effect on Settlement conducted a Survey among 75 practitioners from jurisdictions around the world to understand the role of arbitrators in settlement facilitation. The results were published in a Report issued in 2021.[58] In response to the question "Do you think an arbitrator has a role in fostering settlement?", 78.38% of participants responded positively and 21.62% responded "no".[59] However, almost 80% of the respondents to the Survey stated that they did not offer preliminary views to the parties in arbitration proceedings[60] and only 31% of respondents stated that they discussed settlement options with the parties.[61]

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57 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 36; *J.K. Schäfer*, Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method, b-Arbitra (2013), Issue 2, pp. 333-344; *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, pp. 188-192; *P. Marzolini*, The Arbitrator as a Dispute Manager – the Exercise of the Arbitrator's Powers to Act as Settlement Facilitator, in: Baizeau / Spoorenberg (eds.), ASA Special Series No 45, The Arbitrators' Initiative: When Why and How Should It Be Used? (2016), pp. 99 and 102-104; *H. Stutzer*, Settlement Facilitation: Does the Arbitrator have a Role? The 'Referentenaudienz' – the 'Zurich-Way' of settling the Case, ASA Bulletin (2017), Vol. 35, Issue 3, pp. 589-608, §5 and 6.

58 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 7.

59 Ibid.

60 Ibid, p. 37.

61 Ibid, p. 36.

45. This Working Group has also conducted a survey. Respondents from various countries and regions were asked, *inter alia*, to describe perceptions of the "German approach" to settlement facilitation in their jurisdiction. The "German approach" was defined as an approach whereby arbitrators are viewed as dispute resolvers who are expected to encourage the settlement of disputes throughout arbitration proceedings. It was further explained to survey participants that the approach usually involves (subject to party consent) direct settlement techniques, such as the giving of preliminary views and the holding of settlement conferences during which preliminary views of the merits and, in some cases, possible settlement terms are discussed with the parties.

46. The results of the Working Group's survey are set out in Annex 3 to this Report. In summary, the study confirmed that the direct settlement facilitation techniques which characterize the "German approach" are not commonly applied in most parts of the world and there is no uniform approach to this issue or transnational practice. Facilitating a settlement in many jurisdictions is an activity reserved for mediators and conciliators. Exceptions can be found in parts of Asia such as China, Taiwan and Japan, where arbitrators do engage in settlement facilitation. However, in other jurisdictions with legislation that provides expressly for the possibility of an arbitrator acting as mediator, in practice arbitral tribunals do not tend to employ direct settlement facilitation techniques. This is the case in Hong Kong, Singapore and Australia.[62] Within Europe, direct settlement techniques are generally not employed by tribunals outside the DACH region and are viewed as being inappropriate in many countries such as France, Denmark, Norway, Sweden and Finland. Although the Working Group did not find that there was any clear civil law – common law divide in attitudes towards settlement facilitation by arbitrators, it is noted that in two prominent common law jurisdictions, England and Wales and the United States, an arbitral tribunal's role is generally viewed as that of a dispute adjudicator. The results of our survey underscore the need for tribunals in international cases conducted under the DIS Rules to take into account the potential differences in attitudes towards settlement facilitation in any jurisdictions that are relevant to a case when determining how to fulfill the tribunal's duties under Article 26.

47. In 2023, the ICC Commission on Arbitration and ADR published a Report on the Facilitation of Settlement in International Arbitration (the "**ICC Report**"). The ICC Report made the following observations regarding attitudes towards an arbitrator's role in encouraging settlements:

62 See Hong Kong Arbitration Ordinance (Cap. 609) 2011, as amended, Section 33; Singapore International Arbitration Act 1994, as amended, Section 17; New South Wales Commercial Arbitration Act 2010 No 61, as amended, Section 27D (the Commercial Arbitration Acts of Queensland, Western Australian Territory, Tasmania, Australian Capital Territory and Northern Territory contain equivalent provisions). All of these pieces of legislation permit an arbitrator to act as mediator, subject to certain conditions.

> *"The role of the arbitral tribunal in facilitating settlement of the parties' dispute has evolved in recent years. While arbitrators in some jurisdictions are accustomed to being proactive in this respect, the traditional viewpoint in most jurisdictions has been that the role of the arbitral tribunal is to decide the case in an enforceable award. Consistent with this view, the parties remained free to negotiate and settle their dispute should they wish to do so, but that was not something the arbitral tribunal should seek to encourage, facilitate or, least of all, become directly involved with. This view was motivated by concerns that taking on such a role would negatively impact the tribunal's neutrality vis-à-vis the merits of the dispute or the parties' perception of it."*[63]

The ICC Report goes on to observe that this traditional view has evolved.[64] It suggests that the current debate has "*moved from whether arbitrators (and arbitral institutions) should take steps to facilitate settlement, to how that should be done*."[65]

48. This evolution in attitudes towards settlement facilitation, at least in some parts of the world, is reflected in the most recent version of the UNCITRAL Notes on Organizing Arbitral Proceedings (the "**UNCITRAL Notes**"). Section 12 of the 2016 UNCITRAL Notes summarises the current position as follows:

> *"72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. 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*

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63 ICC Commission on ADR and Arbitration, Report on Facilitating Settlement in International Arbitration (2023), p. 4, para. 1. The ICC Commission on ADR and Arbitration published a second report at the same time entitled "Guide to Effective Conflict Management". The Guide is intended to provide guidance for business managers, decision makers and in-house counsel on proactive conflict management, as well as approaches to assisted conflict management through the use of various ADR techniques before and during arbitration proceedings.

64 ICC Commission on ADR and Arbitration, Report on Facilitating Settlement in International Arbitration (2023), p. 4, para. 2; see, for example, IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 7. Support for the proposition that settlement facilitation by arbitrators is gaining acceptance can also be found in revisions to guidelines and arbitral institution rules. See for example, ICC Arbitration Rules 2021, Appendix IV, para. (h); Swiss Rules 2021, Article 19(5); Arbitration Rules of the Australian Centre for International Commercial Arbitration 2021, Articles 25.3 and 55; NAI Arbitration Rules 2024, Articles 26 and 30; CIETAC Arbitration Rules 2024, Article 47; IBA Guidelines on Conflicts of Interest 2024, General Standard, 4(d); Prague Rules (2018), Articles 9.1 to 9.3; CIArb Professional Practice Guideline on the Use of Mediation in Arbitration 2021, section 5 "Settlement techniques short of mediation during the course of arbitral proceedings", which discusses both facilitative and evaluative assistance from the arbitrator.

65 ICC Commission on ADR and Arbitration, Report on Facilitating Settlement in International Arbitration (2023), p. 4, para. 2.

assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal."

49. The 2016 text can be contrasted to the 1996 version of the UNCITRAL Notes, which set out a far more circumspect approach:

"47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral Tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations."

50. The previous version of the UNCITRAL Notes is more in line with the traditional view of the arbitrator's role, yet it does recognize that case management can be carried out in a way that favours settlement negotiations in parallel to the arbitration.[66]

51. While the regional studies undertaken by this Working Group have confirmed that the traditional view still prevails in many jurisdictions, it does appear that views as to what constitutes settlement facilitation may be changing. This is illustrated by the Report produced in 2021 by Working Group IV of the IMI Mixed Modes Task Force entitled Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (hereinafter, the "**IMI Arbitrator Techniques Report**").[67] The IMI Arbitrator Techniques Report examines seven techniques, most of which comprise case management tools that are accepted and used in international arbitration by arbitrators who stay within their traditional role. Through effective case management, a tribunal may facilitate a

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66 See *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, pp. 887-917: The authors observe at pp. 892-894 that the role of arbitrators in settlement facilitation may be viewed as a continuum, ranging from no involvement at one extreme to active involvement including caucusing with individual parties at the other extreme, with different degrees of involvement in between. The authors argue at p. 890 that arbitrators should be guided by what the parties and the intricacies of the case require rather than their own legal up bringing and cultural convictions; see also *K. Berger*, The Direct Involvement of the Arbitrator in Amicable Settlement of the dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, pp. 501-516; for a common law perspective on settlement facilitation by arbitrators see: *J. Gill*, The Arbitrator's Role in Bringing About a Settlement – An English View, in: Wirth (ed.), ASA Special Series No. 25, Best Practices in International Arbitration (2006), pp. 155-165; *C. Harris*, Arbitrators and Settlement – A Common Law Perspective, in: Baizeau / Spoorenberg (eds.), ASA Special Series No. 45, The Arbitrators' Initiative: When Why and How Should It Be Used? (2016), pp. 89-98.

67 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021): Working Group 4 was one of seven working groups within the Mixed Modes Task Force, which is a combined effort of the College of Commercial Arbitrators, the International Mediation Institute ("IMI") and the Straus Institute for Dispute Resolution, Pepperdine School of Law. For a summary of the work of the seven groups see: New York Dispute Resolution Lawyer – Vol 14 No 1 – New York State Bar Association (nysba.org).

settlement indirectly by fashioning a procedure that assists parties in identifying the key issues and gaining a sufficient understanding of their respective cases so as to enable them to engage more effectively in settlement discussions in the background of the arbitration. This implies that there would be no direct involvement of the tribunal in that settlement process.

52. The techniques identified by the IMI Arbitrator Techniques Report include the following: (i) the holding of a substantial initial case management conference, preferably with party representatives present; (ii) discussing the possibility of providing for a mediation window in the procedural calendar; (iii) bifurcation; (iv) summary dispositions; (v) mid-arbitration review (mid-stream case management conferences or Kaplan openings); (vi) discussing the possibility of providing preliminary views on the issues in dispute and the evidence necessary to prevail, or preliminary non-binding findings on law or fact regarding key issues in the arbitration; and (vii) sealed offers. Apart from summary disposition and sealed offers, most of these techniques are already encouraged, in the interests of procedural efficiency, by Article 27 and Annex 3 DIS Rules. With the exception of giving preliminary views, the techniques reviewed by the IMI Arbitrator Techniques Report have broad acceptance in international arbitration and can be seen as compatible with the traditional view of the role of an arbitral tribunal.

53. Where parties or members of an arbitral tribunal do not consider it to be desirable to use any of the direct settlement techniques referred to above, through proactive case management the tribunal may still assist the parties in settling a case on their own, in whole or in part. In particular, where tribunals manage cases in a way that leads parties to gain a better understanding of the strengths and weaknesses of their respective cases and the key issues in dispute, this may place them in a better position to engage in meaningful settlement negotiations. In Annex 2 to this Report the Working Group has examined the case management techniques referred to above in the context of the DIS Rules, with the exception of preliminary views which are addressed in Annex 1 (direct settlement techniques). These case management techniques may be deployed by arbitrators in a manner that is aligned with the spirit of Article 26 of the DIS Rules and meets the parties' expectations.

E. Conclusions and recommendations for DIS regarding the implementation of Article 26 of the DIS Rules

54. Settlement facilitation by arbitral tribunals can be of significant assistance to parties in resolving their dispute in a cost-effective and efficient manner. The current wording of Article 26 of the DIS Rules should be maintained as it encourages the taking of concrete steps on the part of tribunals. Equally, Article 26 requires parties to consider the options for obtaining tribunal assistance in settling their dispute, while at the same time acknowledging their autonomy to decide whether to accept such assistance. Possible risks can be mitigated by careful consideration of requirements of laws which

are relevant to the arbitration, notably, the laws of the seat and of any place where an award will be executed. However, a tribunal should only engage in settlement facilitation initiatives if its members have the requisite knowledge and skills, and the parties' consent has been given in an appropriate manner both as to its scope and form.

55. On the basis of our study, the Working Group would like to make the following recommendations to the DIS in relation to the application Article 26 and the fostering of settlements in international arbitration.

a) Users of the DIS Rules could benefit from a model form of consent statement that could be used by arbitrators to mitigate the risks of challenges to an arbitrator or an award on grounds that they engaged in settlement facilitation. It is recommended that the DIS prepare both a template document that could be used for recording the parties' consent to settlement facilitation and a checklist on steps to be taken in obtaining that consent.

b) In the context of the next revision of the DIS Rules, consideration should be given to two amendments: (i) adding to the list of matters that must be discussed at the first CMC (listed in Article 27.4 DIS Rules) a requirement to discuss with the parties the possibility of the tribunal facilitating a settlement and, if the parties agree, the steps to be taken by the tribunal in that regard; (ii) an acknowledgement in the DIS Rules that, by agreeing to settlement facilitation on the part of the tribunal, the parties waive their right to challenge an arbitrator's impartiality based upon his or her participation in such initiatives as well any knowledge acquired in that context. An example of such a waiver can be found in Article 19(5) of the Swiss Rules (2021).

c) It would be of benefit for the DIS to develop either guidelines or a practice note on a tribunal's duties pursuant to Article 26 of the DIS Rules. Such a document could include a statement of best practices in implementing Article 26 but, more importantly, should set out the parameters that must be respected. In this regard, the CEDR Final Report (2009) and CEDR Rules could serve as very useful reference documents. Workshops on the Application of Article 26 may also be of benefit.

d) Arbitrators who come from jurisdictions where settlement facilitation is uncommon or not permitted may have difficulties with the application of Article 26. The DIS may wish to develop a non-exhaustive list of case management techniques that may indirectly promote a settlement which are available to arbitrators and parties that do not wish to use direct techniques such as preliminary case assessments or

settlement conferences. In this regard, the IMI Arbitrator Techniques Report would serve as a useful reference document.

e) Settlement facilitation requires prior review of the record by all members of the tribunal to an extent that is sufficient for them to engage in meaningful discussions about the case at hand and, as appropriate, arrive at a non-binding preliminary assessment of the case. As a prerequisite for such discussions, arbitrators must have a good grasp of legal and factual issues, as well as any other background relevant for the settlement. Preparation for a preliminary assessment or suggesting terms of the settlement requires deep study of the case file and is, therefore, time consuming. It is recommended that, when fixing the arbitrators' fees pursuant to Article 34.4 DIS Rules, the Arbitration Council takes into consideration the extent to which a tribunal has sought to facilitate a settlement and the kind of settlement facilitation initiatives that it has undertaken. To encourage arbitrators to engage in settlement facilitation, tribunal's fees should reflect the time commitment that is involved in such settlement facilitation work.

f) It is recommended that the DIS put in place a mechanism for the use of sealed offers, where parties agree to their use.[68] Where sealed offers are made, such a mechanism would enable tribunals when allocating the costs of an arbitration to take into account the refusal by a party to accept a settlement offer where the refusing party has not done better in the tribunal's award. Implementation of this recommendation could involve a procedure similar to that used by the ICC whereby the Secretariat may hold sealed offers on behalf of (a) party(ies) until such time as the tribunal is ready to rule on costs.[69] Should such a mechanism be established, it is important to add a requirement that the decision to apply it or not be discussed by the tribunal with the parties during the initial CMC, so that it is clear what the potential implications of rejecting a settlement offer will be at the time that it is received from an opponent.

g) It is recommended that the DIS include statistics on settlement of arbitrations in its annual statistics. For example, it would be of interest to know how many cases have been terminated per year pursuant to Article 42.4(i) DIS Rules and how many ended with an award by consent (Article 41 DIS Rules). Although settlements may not always result from settlement facilitation on the part of the tribunal, such

68 For a discussion of sealed offers, see Annex 3 of this Report, section (vi) "Sealed Offers". It is noted that Article 6 of the CEDR Rules provides for the possibility of a tribunal taking the refusal of settlement offers into account in assessing costs where a party has not done better in an arbitral award. Sealed offers are also discussed in: IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), pp. 41 et seq.

69 See ICC, Note to Parties and Tribunals on the Conduct of the Arbitration (2021), paras. 267-270. See also Appendix 3 to the CEDR Report, which sets out a procedure for sealed offers which can be incorporated into procedural rules in an arbitration.

statistics would still be indicative of trends in relation to the settlement of cases under the DIS Rules. This would be of particular interest to users of DIS arbitration.

h) The application Article 26 could usefully be further explored through a survey of stakeholders in DIS arbitration. The survey could examine matters such as the following: (i) how often the parties have requested or agreed to settlement facilitation by the tribunal during arbitration; (ii) whether parties have had recourse to ADR mechanisms, such as mediation, during the arbitration; (iii) whether settlement facilitation on the part of a tribunal resulted in (immediate or eventual) settlement of the dispute; and (iv) if the dispute was not settled entirely, whether any individual issues resolved or claims withdrawn.

Annex 1

Institutional Guidelines and Suggested Best Practices for Settlement Facilitation in International Arbitration

1. In this section of the Report, we consider direct settlement facilitation techniques, in contrast to the indirect settlement facilitation techniques discussed in Annex 2. These include, principally, the giving of preliminary views and the holding of settlement conferences.[70] There have been initiatives over the years on the part of mediation and arbitral institutions to develop guidelines for settlement facilitation by arbitrators. This Report will refer in section A to three of them below, in addition to relevant provisions of the IBA Guidelines on Conflicts of Interest (2024).[71] In section B, we set out guidelines which outline best practices in fulfilling a tribunal's duties under Article 26 of the DIS Rules and for direct settlement facilitation in general.

A. Reports and guidelines that address direct settlement facilitation techniques

I. The CEDR Rules on the Facilitation of Settlement in International Arbitration

2. An early but very significant initiative to develop transnational guidelines on settlement facilitation was undertaken by the Centre for Effective Dispute Resolution ("**CEDR**").

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70 These techniques have been commented on fairly extensively by practitioners and academics. See for example *K. Berger / J. Jensen*, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal (2017), Vol. 40, Issue 3, pp. 887-917; *K. Berger*, The Direct Involvement of the Arbitrator in Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, Journal of International Arbitration (2018), Vol. 35, Issue 5, pp. 501-516; *S. Kröll*, Chapter 22: Promoting Settlements in Arbitration: The Role of the Arbitrator, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer (2017), pp. 209-224; *A. Reeg*, Chapter 27: Should an International Arbitral Tribunal Engage in Settlement Facilitation?, in: Shaughnessy / Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017), pp. 269-278; *P. Marzolini*, The Arbitrator as a Dispute Manager – the Exercise of the Arbitrator's Powers to Act as Settlement Facilitator, in: Baizeau / Spoorenberg (eds.), ASA Special Series No 45, The Arbitrators' Initiative: When Why and How Should It Be Used? (2016), pp. 89-98; *H. Stutzer*, Settlement Facilitation: Does the Arbitrator have a Role? The 'Referentenaudienz' – the 'Zurich-Way' of settling the Case, ASA Bulletin (2017), Vol. 35, Issue 3, pp. 589-608; *B. Ehle*, The Arbitrator as a Settlement Facilitator, in: CEPANI, Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do (2010), pp. 79-95; *G. Kaufmann-Kohler*, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Arbitration International (2009), Vol. 25, Issue 2, pp. 187-205; *I. Welser*, Chapter II: The Arbitrator and the Arbitration Procedure, Early Dispute Settlement through Arbitral Tribunals – A common Feature in the 'DACH Region' Austria, Germany and Switzerland? Including Additional Thoughts and Sixteen Golden Rules on the Way to a Successful Settlement, in: Klausegger / Klein et al. (eds.), Austrian Yearbook on International Arbitration (2023), pp. 97-122.

71 For an overview of existing guidelines and institutional rules on settlement facilitation by arbitrators see: *R. Davidson / P. Peterson*, Chapter 3: Settlement Facilitation and the Use of ADR in International Arbitration, in: Newman / Hanessian (eds.), Leading Arbitrators' Guide to International Arbitration, 4th ed. (2025), section IV.

In 2009, a Commission on Settlement in International Arbitration established by CEDR (chaired by Lord Woolf and Gabrielle Kaufmann-Kohler) issued a report (the "**CEDR Report**"), accompanied by the CEDR Rules for the Facilitation of Settlement in International Arbitration (the "**CEDR Rules**").[72] The CEDR Report and CEDR Rules are particularly helpful in the context of a discussion of Article 26 of the DIS Rules, as they propose certain ground rules for the direct settlement facilitation techniques that are used in Germany and parts of Switzerland.

3. The CEDR Report contains recommendations for arbitrators, arbitral institutions, as well as parties and their counsel. It starts from the premise that an arbitral tribunal "has a primary responsibility to produce an award, which is binding and enforceable."[73] However, this premise is accompanied by two additional fundamental principles:

> *"2.4.2 Unless otherwise agreed by the parties, the arbitral tribunal, assisted by the arbitral institution where applicable, should also take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute.*
>
> *2.4.3 In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the Parties separately, or obtain information from any Party which is not shared with the other Parties, unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award or unless the Parties explicitly consent to this approach and its consequences."*[74]

4. The CEDR Report recognises that the second of these principles discourages arbitrators from engaging in a med-arb or arb-med process. Although such processes are used successfully in some jurisdictions, such as China, they carry risks with regard to the enforcement on an award, if the mediation phase does not result in a settlement. Therefore, the report suggests that a mediation conducted by an independent mediator, who can caucus with the parties, may be more effective.[75]

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72 The CEDR Rules are set out in in Appendix 1 to the Report. The CEDR Final Report (November 2009) is available at: https://www.cedr.com/wp-content/uploads/2021/04/Arbitration-Commission-Document-April-2021.pdf.

73 CEDR Report, Section 2.4.1.

74 Ibid, paras. 2.4.2 and 2.4.3; CEDR Rules Article 5.

75 CEDR Report, para. 2.5. Nevertheless, Appendix 2 to the CEDR Report, entitled "Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement", makes recommendations where caucusing with parties is practised which seek to minimise the inherent risks.

5. Among the steps that arbitrators can take to assist parties in achieving settlements, the CEDR Report recommends the following:

a) the enforcement of multi-tier dispute resolution clauses in accordance with applicable law if those steps have not been completed;

b) encouraging the attendance of internal party representatives at the initial case management conference, during which the arbitrators should ensure that the parties are aware of all of the options for the resolution of their dispute, including ADR processes that may be accommodated in the arbitral process, such as mediation windows;

c) at appropriate junctures during the proceedings the arbitrators should enquire as to the status of settlement discussions and the potential use of forms of ADR to assist;

d) if all parties agree, the tribunal may provide its preliminary view on the merits of the case, which can be done in different ways. The Report notes that one approach is for the tribunal to set out the issues in the case and specify what would be required in terms of evidence for a party to prevail on the key issues. Another approach is to provide the parties with preliminary non-binding findings on key issues of fact or law.

e) if all parties agree (in writing), chair one or more settlement conferences, attended by the parties' internal representatives (or other persons with authority to settle the dispute) during which possible terms of settlement are discussed;

f) propose that the parties be at liberty to make settlement offers during the proceedings with a view to protecting the offering party's position on legal costs. This is in essence a proposal to provide for "without prejudice settlement offers save as to costs" (discussed in section 2 above).[76]

6. On the topic of settlement conferences, the CEDR Report suggests that the involvement of one or more tribunal members can improve the chances of settlement discussions being successful. Further, at the request of the parties (in writing), the tribunal (or chairperson) may propose possible settlement terms to the parties. The process should be subject to three ground rules. First, the arbitrators should not meet with the parties separately nor "obtain any information from one Party which is not shared with the other Parties". Second, the arbitrators must not exert pressure on the

[76] Ibid, para. 4.2.

parties to settle.[77] Third, if as a result of an arbitrator's involvement in settlement facilitation, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the context of the continuation of the arbitration, the arbitrator should resign.[78]

7. These steps and principles are all incorporated in CEDR Rules. The following additional guidance contained in Article 3 of the CEDR Rules is worthy of note:

> *"4. Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that the arbitration resumes (save as regards the allocation of costs in accordance with Article [6] of these Rules)".*

> *5. The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions."*

8. These principles are consistent with an arbitrator's duty to treat the parties fairly, respect principles of due process, as well as the tribunal's primary responsibility to render an enforceable award.

II. The Chartered Institute of Arbitrators Professional Practice Guideline on the Use of Mediation in Arbitration

9. The Chartered Institute of Arbitrators ("**CIArb**") Professional Practice Guideline on the Use of Mediation in Arbitration (the "**CIArb Guideline**") addresses a range of options for combining mediation or mediation techniques with arbitration. Of particular interest for the purpose of this Report, is the section of the CIArb Guideline which discusses "Settlement techniques short of mediation during the course of arbitral proceedings".[79]

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77 Ibid, para. 4.2.7, CEDR Rules, Article 5(2).

78 CEDR Report, para. 4.3; CEDR Rules, Article 7.

79 CIArb Guideline, section 5. It is noted that the CIArb Guideline also addresses situations where an arbitration and a mediation of a dispute are conducted by the same person, a subject that remains controversial. The issues associated with an arbitrator acting as mediator are discussed in sections 8 and 10 of the CIArb Guideline.

10. The CIArb Guideline recognises that Arbitrators are entitled to promote amicable settlement of disputes and should be encouraged to do so, subject to the "*overriding principle of 'party autonomy*'". The Guideline suggests that arbitrators have a degree of flexibility in using techniques which may overlap with mediation techniques. Like the CEDR Report, the CIArb Guideline emphasises that, as long as parties freely consent to steps taken by a tribunal to facilitate a settlement, a tribunal should be free to implement them, *"… so far as that is consistent with the law and procedural rules governing the arbitration, and mindful of the importance of ensuring that any award is considered valid in each territory where it is to be enforced*."[80]

11. The Guideline distinguishes between facilitative assistance from arbitrators and evaluative assistance. The holding of a settlement conference, at which all parties are present, is addressed under the heading of facilitative assistance. Such a settlement conference may be structured to enable parties to settle specific issues or the entire dispute. Where parties are negotiating a settlement themselves, the Guideline suggests that arbitrators may be able to help them settle outstanding issues or "*bridge the gap*". In this context, arbitrators may use mediation-like techniques, which may include "*appealing to the interests of the parties in reaching a non-adversarial outcome, avoiding expenditure of further time and costs, or preserving what remains of the commercial relationship*."[81] As the Guideline observes, this may involve a discussion of matters that are not central to the issues in the arbitration, but which could lead to a settlement.

12. Under the heading of evaluative assistance from arbitrators, the Guideline refers to the giving of preliminary views on the merits of the dispute or on particular issues. This may be done at the request of one or both parties or at the initiative of the tribunal. According to the Guideline, the key safeguards to be observed in such situations are:

a) as a general matter, an arbitrator should only provide an evaluation of the merits of a dispute or an issue if all parties expressly agree in writing; and

b) an arbitrator should ensure that all parties understand that the view given is only of a provisional nature. It is recommended that the arbitrator indicate that his or her mind remains open and that he or she is "ready and able to continue with the case", should the parties not settle the matter; however, if a party or parties have concerns, another arbitrator should be appointed to decide the dispute if there is no settlement.[82]

80 CIArb Guideline, paras. 3.6-3.8.
81 Ibid, para. 5.1.
82 Ibid, para. 5.2.

III. The ICC Report on Facilitating Settlement in International Arbitration

13. Like the CEDR Report and CIArb Guideline, the ICC Report emphasises that any steps taken by an arbitral tribunal to facilitate a settlement should not expose the arbitrators to a challenge or place the enforcement of an award in jeopardy. The Report also recommends that a tribunal should carefully select the most appropriate technique considering the circumstances of the case and the experience of the arbitrators in implementing each technique.[83]

14. In addition to guidance on case management techniques that may assist parties in reaching a settlement and mediation windows, the ICC Report discusses both the giving of preliminary views and settlement conferences. The Report recognises that preliminary views may provide a tool to help parties settle a case by gaining a better understanding of their chances of succeeding on key issues. Further, in the absence of a settlement, preliminary views may increase the efficiency of the proceedings by focusing the parties on the critical issues in dispute.[84] Nevertheless in proposing preliminary views to parties, a tribunal must take into account that parties from different cultural backgrounds may not be comfortable and should not be pressured to agree to the process.

15. The ICC Report provides the following guidance on the giving of preliminary views:

> *"The way in which an arbitral tribunal goes about giving preliminary views will vary from case to case, influenced significantly by the experience and preferences of the arbitrators on the tribunal. There are nonetheless a few common approaches that would appear to be widely adopted:*
>
> *a) Preliminary views are only given once the arbitral tribunal has an adequate understanding of the issues on which it is expressing its view.*
>
> *b) The parties' express agreement should be obtained, with care taken not to pressure the parties into giving consent.*
>
> *c) The arbitral tribunal should make it clear that the views expressed are preliminary and are only applicable at the time they are given and on the basis of the materials presented to*

83 ICC Commission on ADR and Arbitration, Report on Facilitating Settlement in International Arbitration (2023), pp. 6 and 17, paras. 11 and 68.

84 Ibid, para. 60.

date; accordingly, the arbitral tribunal retains the right to change its views as the arbitration proceeds.

d) The arbitral tribunal should give its views orally, with no transcript made. This emphasises the preliminary and non-binding nature of the views expressed.

e) The views expressed by the tribunal and any comments made by the parties at the session where those views are expressed should be 'off the record' and subject to 'settlement privilege'.

f) The arbitral tribunal may use a decision tree analysis or other means of visualisation to support the views it sets out."[85]

16. Regarding settlement conferences, the ICC Report refers to the guidelines established in the CEDR Report and Rules, stressing both the importance of obtaining the parties' express consent before proceeding and the need to make the conference subject to 'settlement privilege'. This means that, if a settlement is not reached and arbitration proceedings continue, the parties may not refer to and the tribunal may not rely upon positions that were taken by the parties, or any disclosures that were made during the settlement conference, that are not part of the record.[86]

17. Like the CEDR Report, the ICC Report also highlights the distinction between the role of an arbitrator conducting a settlement conference and the role of a mediator. Where an arbitrator meets with parties individually during an arbitration and receives information that is not shared with the other party (caucusing), the risk of a challenge to enforcement of an award on the basis of due process arises if the dispute is not settled. Accordingly, the ICC Report concludes that any med-arb process must be undertaken with great caution.[87]

IV. The IBA Guidelines on Conflicts of Interest

18. General Standard 4(d) of the 2024 IBA Guidelines on Conflicts of Interest (the "**IBA Guidelines**") acknowledges that an arbitrator may engage in settlement facilitation. This provision establishes a requirement of party consent which may serve as a waiver of conflicts of interest. The waiver operates in the following way:

85 Ibid, para. 59.
86 Ibid, para. 64.
87 Ibid, paras. 63-67; the ICC Report does not address med-arb processes and states that they are beyond the scope of the report.

> *"An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation, or otherwise, 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 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. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of the arbitrator's involvement in the settlement process, the arbitrator develops doubts as to the arbitrator's ability to remain impartial or independent in the future course of the arbitration."*

The IBA Guidelines provision is consistent with the approach taken in the CEDR Report. Article 7 of the CEDR Rules also provides that an arbitrator who, as a result of engaging in settlement facilitation, has doubts about his or her ability to remain impartial or independent in the future course of arbitration proceedings should resign.[88]

B. Best practices for settlement facilitation by arbitrators under the DIS Rules

19. The guidelines which follow seek to set out best practices for settlement facilitation by arbitrators pursuant to Article 26 of the DIS Rules. The guidelines also include recommendations for counsel which are intended to ensure that parties to arbitrations under the DIS Rules understand the process and the potential benefits of having a tribunal assist them in reaching an amicable settlement.

I. Indispensable prerequisites for settlement facilitation by tribunals

20. First, and most importantly, arbitrators[89] must not engage in settlement facilitation insofar any of the parties to the arbitration objects to it.

21. Before discussing settlement facilitation initiatives, the tribunal must hold an initial case management conference ("**CMC**") pursuant to Article 27.4 DIS Rules involving a

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88 A different approach to the issue of settlement facilitation by arbitrators has been taken in The Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules 2018). Article 9.1 of the Prague Rules also recognises that arbitrators may assist parties in settling their dispute. Article 9.2 specifies that, with prior written consent of the parties, any member of the tribunal may also act as mediator. If a settlement is not achieved through mediation, Article 9.3 of the Prague Rules requires an additional written consent from the parties for an arbitrator who acts as mediator to continue with the case. In the absence of this additional written consent, the arbitrator must resign.

89 The terms arbitrator, arbitrators and the tribunal are used synonymously in this practice note.

discussion of the measures to be adopted to promote procedural efficiency set out in that provision as well as those in Annex 3 of the Rules.

22. Arbitrators should always discuss with the parties and their counsel the scope and the kind of settlement facilitation they wish to engage in before undertaking any of those steps. This approach is especially important in cases involving parties and/or counsel who are unfamiliar with settlement facilitation by arbitrators. Full transparency regarding the settlement facilitation steps to be taken should be a guiding principle throughout the process.

23. Arbitrators should not have separate discussions on the merits of the case with one party or its counsel and without all parties being present (*caucusing*). To do otherwise, would be to turn settlement facilitation into a mediation, whereas the two are by their nature different processes. Tribunals are advised to avoid caucusing. Caucusing implies the risk of the arbitrators no longer being impartial and/or being challenged. An arbitrator who has developed doubts as to his or her ability to remain impartial or independent must resign.

24. Before engaging in settlement facilitation, the arbitrators must have read, understood and reflected on the parties' submissions. In the case of a three-arbitrator-panel, the arbitrators must have deliberated after their review of the file in order to arrive at a preliminary non-binding assessment of the merits.

25. Settlement facilitation activities of arbitrators should not start before a full statement of claim and a full statement of defence have been submitted by the parties.

26. Any settlement facilitation initiatives on the part of the arbitrator(s) must be stopped as soon as any party so requests.

27. Before starting concrete settlement facilitation activities with the consent of the parties, the tribunal should request that the parties provide an express waiver of any challenge of the arbitrators based on the settlement facilitation activities, ideally in writing. If the waiver is only articulated orally, it should be documented in the minutes of the corresponding meeting or recorded in a hearing transcript.

II. Further recommended steps in the context of settlement facilitation by tribunals

28. Early in the proceedings, ideally during the first CMC, the arbitrators should explain to the parties that Article 26 of the DIS Rules gives them a mandate to engage in

settlement facilitation provided that no party objects to such facilitation activities. The arbitrators should emphasize that, while their primary duty is to decide the dispute and render an award, they are prepared and open to assisting the parties in reaching a settlement.

29. Following this explanation, the parties and their counsel should be asked whether they have any interest in receiving assistance from the tribunal in relation to a possible settlement of their dispute.

30. As suggested by Article 27.3 of the DIS Rules, the arbitrators should strongly encourage parties' internal representatives to attend the initial CMC with their external counsel, thus ensuring that the parties themselves become aware of the settlement facilitation options offered by the tribunal.

31. Unless the parties have already submitted statements of claim and defense, during the first CMC, the arbitrators should encourage the parties to agree to submit full statements of their respective cases, including factual allegations and legal arguments, in the next round of submissions. Such front-loading of the proceedings will enable the parties to gain a better understanding their opponent's case and permit the arbitrators to engage in settlement facilitation on the basis of well-informed tribunal discussions and preliminary deliberations.

32. The tribunal should always endeavour to identify and respect any cultural sensitivities, different business mentalities and expectations of the parties, as well as codes of professional conduct to which counsel may be subject, particularly when lawyers acting in the case are not regularly involved in international arbitration.

III. Settlement facilitation methods and preferred conduct of arbitrators

33. First and foremost, arbitrators should view themselves as service providers in the context of settlement facilitation.

34. Any settlement facilitation on the part of arbitrators should always be based on a non-binding preliminary assessment of the merits of the claimant's case and the respondent's defence. This requires a prior in-depth assessment of the submissions.

35. Apart from the substantive merits of the case, procedural aspects, such as issues regarding the taking of evidence, may also be a relevant consideration in settlement

facilitation. For example, the time and related cost of preparing complicated expert reports may be a factor to take into account.

36. All relevant open issues and the corresponding legal consequences should be identified by the tribunal and openly discussed with the parties on a without prejudice and preliminary basis. It may be helpful to take a decision-tree-approach. In this exercise, the arbitrators should act in a constructive and balanced manner, avoiding any appearance of being overbearing.

37. In the first CMC, the parties can agree on a procedural timetable which includes a second or even a third case management conference to be scheduled after the next round of submissions for the purpose of discussing a potential settlement.

38. To provide a basis for such settlement discussions, it may be helpful for the tribunal to prepare a spreadsheet summary of facts and corresponding legal issues in which the parties can insert their comments followed by a discussion on the merits.

39. Subject to the parties' preferences, and upon agreement of the tribunal and the parties, the arbitrators may either highlight open issues that the tribunal has identified or, alternatively, provide a more concrete non-binding preliminary opinion on the prospects for success of all or of individual claims. The Tribunal should not hesitate to inform parties if it is not yet convinced by an argument put forward by any party. To the extent that any preliminary views are given to the parties, it should be made clear to them that the tribunal has based those views on the arbitration record at the relevant time and it is not bound by them. The Tribunal should reserve the right to change its views at a later stage.

40. The arbitrators should always endeavour to ensure that they will be able to provide, to the extent necessary, valid and convincing reasons for their non-binding preliminary assessments of the merits and for any settlement proposal they make.

41. Depending on the degree of probability of the assumed outcome of a dispute, the arbitrators may formulate either a range for the potential monetary amounts to be paid in a settlement or, if appropriate, a concrete figure. Before doing so, they should ask the parties what they would like the tribunal to provide.

42. In this context, the tribunal needs to be very cautious and prudent, but it may, in appropriate cases, be more forthcoming with its views. However, a tribunal should

never attempt to dictate the terms of a settlement. It should always be careful to avoid losing the respect of all parties.

43. Based on an agreement and a discussion with the parties, the tribunal may either propose the draft wording for a settlement agreement or leave the negotiation of the details of a settlement to the parties. The tribunal should always offer its assistance in this exercise.

44. In the event that the parties are unable to settle their dispute and the arbitration proceedings resume after settlement facilitation by the tribunal, the arbitrators must give careful consideration to any further submissions made by the parties (whether oral or written) and/or evidence that is produced, bearing in mind that any preliminary views that might have been given to the parties are not binding on the tribunal. Any statements made by the parties off the record in the context of settlement facilitation discussions should not be taken into account by the tribunal in a subsequent award.

IV. Recommendations for counsel with respect to settlement facilitation by arbitrators

45. Soon after accepting a mandate to prepare a statement of claim or a statement of defence but at least ahead of the first CMC, counsel should provide information to the party they represent regarding Article 26 of the DIS Rules and the option of having arbitrators facilitate a settlement.

46. Counsel should also discuss with the party they represent whether it is interested in a settlement and, if so, whether it is open to the involvement of the tribunal in this respect. This internal discussion should be held repeatedly; i.e., at the beginning of the proceedings, after each round of submissions, before the oral hearing and after the taking of evidence.

47. If one party is interested or potentially interested in settlement facilitation, its counsel should openly articulate the expectation of that party regarding any settlement facilitation by the arbitrators. Before doing so, counsel should explore whether counsel for the opponent is at all open to any tribunal initiatives towards a settlement and if so, whether he or she has any clear ideas regarding the nature of the settlement facilitation process that is desired. Ideally, this would be done in the context of preparation for the first CMC and the explanation of Article 26 of the DIS Rules that will be given by the tribunal.

48. In the event that, contrary to the approaches suggested above, a tribunal is engaging in settlement facilitation by making proposals for settlements without giving any reasons for these proposals, counsel should always insist on the tribunal explaining the reasons and the rationale behind such a proposal.

49. The language of any settlement agreement should be drafted with care considering the potential need for enforcement of the settlement. It should properly identify due dates for payment, interest rates in case of default on payment(s), as well as the apportionment of costs generated by the arbitration.

50. After reaching a settlement and depending on its terms, counsel should consider whether the parties should request the tribunal to issue an award by consent containing the settlement terms and allowing for recognition and enforcement of the award by consent based on the rules of the 1958 United Nations New York Convention on the Reciprocal Enforcement of Foreign Arbitral Awards.

Annex 2

Case Management Techniques That May Have an Indirect Effect on the Settlement of Disputes Which are of Relevance to Article 26 of the DIS Rules

1. In this section of the Report, we review six case management techniques which may have the effect of assisting parties to arbitration proceedings in settling a dispute in whole or in part. None of the techniques discussed below requires an arbitrator to step out of the traditional role. These techniques are (A) the holding of a substantive initial case management conference; (B) the use of mediation/settlement windows or other forms of ADR in combination with arbitration; (C) bifurcation; (D) summary disposition; (E) mid-arbitration review; and (F) sealed offers.

A. The initial case management conference

2. The IMI Arbitrator Techniques Report submits that the holding of an initial case management conference ("**CMC**"), preferably with in-house party representatives, is an "essential first step to an engaged Tribunal that can helpfully promote a settlement".[90] The initial CMC provides the tribunal with an opportunity to ascertain the priorities of the parties, the approach taken by their respective counsel, how the parties work together and their expectations regarding the dispute resolution process. It not only provides an opportunity to discuss the contents of Procedural Order No 1, but, importantly, an opportunity to depart from standard orders and tailor the procedure to the needs of the parties with respect to the dispute concerned. It is at the initial CMC that the tribunal can discuss (i) the possibility of combining ADR techniques with arbitration, such as mediation, including how this can be integrated into the procedural timetable, (ii) the value of a mid-arbitration review and what might be accomplished in that context, (iii) whether there are any dispositive motions to consider, (iv) whether bifurcation would be desirable, and (v) the possible use of sealed offers. Equally, the CMC is the appropriate time to ascertain whether the parties would be interested in receiving some form of preliminary views at a later stage in the proceedings.

3. Generally, any procedural features of an arbitration which place the parties in a position where they have a better understanding of their respective cases can indirectly assist parties who are engaged in parallel settlement negotiations. Examples would include "front-loading" proceedings so that the first substantive submissions set out each parties' case and evidence, or requiring the parties to prepare a joint list of issues so that the key issues in a case are identified well before any merits hearing.

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90 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 14.

4. Like many institutional rules, the DIS Rules require an initial case management conference. The value of having an in-house party representative present at the first CMC is recognized expressly in Article 27.3 of the DIS Rules. Article 27 of the DIS Rules also requires tribunals to discuss with the parties many of the arbitrator techniques covered in the IMI Arbitrator Techniques Report. For example, Article 27.4 requires the tribunal to discuss "*the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issue*s". This provision further requires the tribunal to discuss with the parties during the CMC each of the Measures for Increasing Procedural Efficiency set out in Annex 3 of the DIS Rules. These measures include dividing the proceedings into multiple phases (paragraph C), rendering one or more partial awards or procedural orders on specific issues (paragraph D), and "*[p]roviding the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto*" (paragraph F).[91] Nevertheless, this list of possible measures leaves room for discussion as to how these techniques may be deployed in a given case.

5. The Appendices to the IMI Arbitrator Technique Report are helpful in setting out some of the options in relation to the various techniques covered by the Report. We set out comments below on each of these techniques, apart from the giving of preliminary views, which remains controversial in some jurisdictions. The giving of preliminary views (Appendix VI to the IMI Arbitrator Technique Report) is addressed in Annex 1, under the heading of direct settlement facilitation techniques, as well as in the main Report.

B. Mediation, settlement windows or the use of other forms of ADR

6. The concept of combining ADR techniques with arbitration has received increased attention over the last decade. The 2021 White & Case Queen Mary International Arbitration Survey reported *"... a noticeable increase over recent years in the overall popularity of arbitration used in conjunction with ADR: 59% of respondents expressed their preference for this combination, as opposed to 49% in 2018 and only 34% in 2015*".[92] The 2025 edition of the Survey reported a slight decline in the preference for

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91 For a commentary on Article 27 of the DIS Rules and Annex 3 see: R. *Trittmann / R. Schardt*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 27: Efficient conduct of the proceedings, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article - by-Article Commentary (2020), pp. 424-450.

92 White & Case / Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world, available at: https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/; see also Singapore Management University, Section 8 Mixed Mode (Hybrid) Dispute Resolution, SIDRA International Dispute Resolution Survey: 2022 Final Report, pp. 57-63, available at: https://sidra.smu.edu.sg/research-program/appropriate-dispute-resolution-empirical-research/sidra-survey-2022; Singapore Management University, Section 8 Mixed Mode (Hybrid) Dispute Resolution, SIDRA International Dispute Resolution Survey: 2024 Final Report, pp. 62-63, available at:

arbitration combined with ADR compared to the previous survey (48% of respondents). Nevertheless, the percentage of respondents who favoured the combination of arbitration and ADR, over arbitration as a standalone method of dispute resolution, remained significant.[93]

7. Mediation is the form of ADR that is most frequently used in combination with arbitration. However, other forms of ADR can also be combined with arbitration, such as expert determination (binding or non-binding), early neutral evaluation or mini-trials. As mentioned, under Article 27.4 (iii) tribunals constituted under the DIS Rules have a duty to discuss with the parties the possibility of using mediation or any other ADR techniques to resolve their dispute amicably. This duty is related to the Tribunal's broader duty under Article 26 to encourage amicable settlement of disputes.[94]

8. Mediation is often scheduled prior to arbitration as part of a tiered dispute resolution clause. However, in some cases a mediation prior to arbitration takes place too early and at a time when the parties do not have sufficient knowledge of their respective cases to engage in meaningful settlement discussions or the mediation is too close to failed commercial negotiations. Scheduling one or more windows for mediation or settlement discussions during arbitration proceedings can provide parties with an opportunity to resolve their dispute in whole or in part. If the dispute is not settled amicably, in the interests of ensuring the enforceability of any arbitral award that may be rendered, it is recommended that the mediation be conducted by an independent mediator rather than by one or more members of the tribunal.[95] This permits the

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https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2024/SIDRA_Final_Report_2024.pdf.

93 White & Case / Queen Mary University of London, 2025 International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration, available at https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf.

94 For a discussion of Article 27.4(iii) see: *R. Trittmann / R. Schardt*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 27 of the DIS Arbitration Rules: Efficient conduct of the proceedings, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article-by-Article Commentary (2020), pp. 424-450, paras. 76-81.

95 It is noted that some institutions have adopted this concept in the form of an institutional mediation window that parties may agree to. The best-known example is the SIAC-SIMC Arb-Med Arb Protocol ("**AMA Protocol**") that was introduced in 2014. Where parties agree to apply the AMA Protocol, they commit to submitting their dispute to mediation by a mediator appointed under the SIMC Rules for a period of up to eight weeks (subject to extensions following the exchange of the Notice of Arbitration and the Response to the Notice of Arbitration). The arbitration is suspended during this period. If the matter is settled, the parties may request a consent award. If it is not settled, the arbitration proceedings resume. Rule 32.4(a) of the 2025 SIAC Arbitration Rules seeks to encourage use of the AMA Protocol by providing that, at the first case management conference, the tribunal may consult the parties on the potential for settlement including through the adoption of ADR methods such as mediation under the AMA Protocol. A similar Arb-Med Arb Protocol was adopted in 2021 by the Vietnam International Arbitration Center and the Vietnam Mediation Center. A different approach has been taken by the Vienna International Arbitration Centre ("**VIAC**"), which has proposed an optional Arb-Med-Arb model clause, available on the VIAC website. The VIAC clause commits the parties "to jointly consider, after due initiation of the arbitration, to conduct proceedings" in accordance with the Vienna Mediation Rules. The clause then specifies that settlements reached in that context shall be

tribunal members to stay within their traditional role yet help foster a settlement through case management.

9. In discussing with parties at the initial CMC whether they wish to provide for a mediation or negotiation window in the procedural timetable, a tribunal will need to consider with the parties how that window should be structured. Apart from the selection of the mediator, the main issues that arise will be the appropriate timing of the mediation or negotiation window, whether there should be more than one such window and whether the arbitration should be paused while the mediation or negotiations take place. This depends on the case and the parties' preferences.

10. Pausing the proceedings during a mediation window can result in a saving of costs and allows the parties to focus on achieving a settlement.[96] On the other hand, pausing the proceedings will necessarily lengthen the proceedings overall if the parties are not successful in settling the dispute in its entirety. If the proceedings are paused during a mediation window that period of suspension should be limited in time. It should also be scheduled well in advance of any merits hearing so that a possible extension of the time period to be devoted to mediation will not interfere with hearing dates. An appropriate time to schedule a mediation window is often considered to be between two rounds of memorials, or substantive proceedings before or after document production. At this point parties should have a good understanding of their opponent's case and would benefit from considerable cost savings if the dispute were to be settled amicably. This may not, however, be appropriate for every case.

11. The window scheduled for amicable settlement negotiations does not need to involve a commitment on the part of the parties to submit all or part of their dispute to mediation. Parties may prefer simply to identify one or more points in the procedural timetable when they will discuss settlement, which may or may not include consideration of resorting to mediation. In some cases, it may be appropriate during the initial CMC for the tribunal to discuss with the parties the possibility of submitting specific issues to mediation.[97] Resolving part of a dispute through mediation could result in savings in time and costs in the context of the arbitration proceedings.

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referred to the tribunal, which may render an award on agreed terms; see also *A. Reeg,* The New Arb-Med-Arb Protocol of the Singapore International Arbitration Centre, IWRZ 2015, 15-18.

96 The Swiss Rules 2021, Article 19(6) provide for the possibility of a mediation window during arbitration proceedings. This provision states that "(u)nless the parties agree otherwise, the arbitration proceedings shall be stayed during that period". Therefore, suspension of the proceedings is the default position under those Rules.

97 See CIArb Professional Practice Guideline on the Use of Mediation in Arbitration, paras. 6.8 to 6.10. The CIArb Guideline suggests that, during the arbitration after full evidentiary disclosure, parties and/or the tribunal may identify issues that have a high likelihood of settlement and agree to submit discrete issues to mediation by an independent mediator. If such issues are settled, this will have the effect of narrowing the issues to be resolved in the arbitration or remove blockages that may lead to settlement of the entire dispute. Discussions between the mediator and the arbitral tribunal (if any) should be restricted to procedural matters.

12. The IMI Arbitrator Techniques Report questions the notion that a mediation conducted in parallel to arbitration proceedings should be limited to a window.[98] An "ongoing parallel" or "concurrent" mediation is another option that parties could consider. This option would involve the appointment of a mediator early in the proceedings, who would remain in that role. The mediation would run in parallel to the arbitration proceedings, with steps in the mediation to be scheduled at appropriate junctures, and continue until the parties settle the dispute, the tribunal renders an award, or one or more parties withdraws from the mediation. Concurrent mediation and arbitration have been provided for in the rules of some arbitral institutions in the United States, but at present there appears to be limited experience with this concept.[99] Among the advantages of concurrent mediation is the separation of the mediation from the arbitration so that matters discussed in the mediation can be kept confidential. Further, there is potential for the parties to resolve parts of their dispute, which would have the effect of narrowing issues in the arbitration. Potential drawbacks include the cost of running parallel proceedings and potential difficulties for the parties to remain focused on the mediation over a prolonged period of time, particularly during periods of intense activity in the arbitration proceedings.

13. Article 41 of the DIS Rules provides that a "*tribunal may record a settlement in an award by consent, unless it considers that there are serious grounds not to do so*". The Rules specifically mention in Article 41.2 the possibility of an award by consent being rendered, subject to the right of the tribunal to decline on the basis of serious grounds, in the case of a settlement agreement arising from proceedings under the DIS Mediation Rules, the DIS Conciliation Rules or the DIS Adjudication Rules. Awards by consent and the precautions for a tribunal to take when requested to issue such an award are a separate topic. It suffices for these purposes to note that where a dispute is settled in part, a partial award by consent could be rendered and the tribunal would be obliged to decide the remaining issues.

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98 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 18.

99 See for example the Model Clause and Protocol for Concurrent Mediation – Arbitration introduced by CPR in 2020. Concurrent mediation has also been provided for on an opt-out basis in the 2021 ICDR International Arbitration Rules, Article 6. That provision states as follows: "Subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration". Another interesting model is the JAMS International "Mediator-in-Reserve Policy for International Arbitrations". Pursuant to this policy parties may request that JAMS assist in selecting a "Mediator-in-Reserve", who will be available to the parties to assist in settlement negotiations at any time during the course of the arbitration proceedings if all parties agree to enlist the mediator's assistance.

C. Bifurcation

14. Bifurcation is a technique that is frequently used in international arbitration proceedings to separate jurisdictional issues from the merits of a case or liability from quantum. Decisions on whether proceedings should be bifurcated are generally driven by the consideration of factors related to procedural efficiency and time and costs. Accordingly, Annex 3 of the DIS Rules includes both the structuring of proceedings in multiple phases and the rendering of one or more partial awards or procedural orders on specific issues in the list of measures to be considered for increasing procedural efficiency (measures C and D). Annex 3 also provides that, to the extent parties disagree on the application of measures listed therein, the tribunal shall decide in its discretion whether to apply them. Therefore, the decision of a tribunal in relation to a contested application for bifurcation of arbitration proceedings would fall under the heading of case management.[100]

15. Much has been written about the factors that a tribunal should take into consideration in deciding whether to bifurcate a dispute or divide proceedings into more than one phase. A full discussion of these factors is beyond the scope of this paper.[101] It suffices for present purposes to note that, in exercising their discretion, tribunals often take into consideration factors such as the evidence required in relation to each issue, the extent to which the issues sought to be bifurcated are so intertwined that evidence will have to be heard more than once and, importantly, the impact on time and costs. The question as to whether bifurcation is appropriate and will achieve procedural efficiency depends on the circumstances of a given case.

16. The Arbitrator Techniques Report highlights that, while efficiency of proceedings is an important goal that may be achieved through bifurcation, it is also a case management technique which may have the effect of encouraging the settlement of disputes.[102] For example, bifurcation of liability and damages can assist parties in narrowing the range of damages to be considered, thus providing a basis for settlement discussions. The Report observes that cases where liability and damages are bifurcated often settle after a partial award on liability is rendered. The prospect of settlement following a partial award on liability may also be enhanced by a mediation that could be scheduled in the procedural timetable for the arbitration after the partial award is rendered.

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100 This provision of Annex 3 on Measures for Increasing Procedural Efficiency can be distinguished from Article 26 of the DIS Rules which provides that a tribunal has a duty to encourage amicable settlement of a dispute unless a party objects. Accordingly, settlement facilitation is not to be undertaken over the objections of a party.

101 See *R. Trittmann / R. Schardt*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 27: Efficient conduct of the proceedings, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article -by-Article Commentary (2020), pp. 424-450, paras. 48-51, 54; *L. Greenwood*, Does Bifurcation Really Promote Efficiency?, Journal of International Arbitration (2011), Vol. 28, Issue 2, p. 10.

102 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 23.

Accordingly, it is suggested that the extent to which bifurcation may narrow the issues and possibly lead to settlement are relevant factors to consider in the context of case management decisions on bifurcation, along with the usual factors that are focused on procedural efficiency, time and costs.

17. Dividing proceedings into multiple phases can also have the effect of narrowing the scope of the dispute. Equally, isolating specific issues in dispute for sequential determination can also provide openings for parties to settle a dispute.[103] An early decision from a tribunal on a pivotal or strategic issue in a dispute can in some instances assist parties in their settlement negotiations. The identification of such issues and the sequencing of them generally requires drawing up an issues list at the outset and is also assisted by the preparation of a decision tree.[104] Hence the importance of a substantive first case management conference during which the tribunal discusses with the parties the issues in dispute and whether dividing the proceedings into multiple phases and rendering one or more partial awards or procedural orders on specific issues makes sense in the context of a given case.

D. Summary disposition

18. The Arbitrator Techniques Report identifies decisions on summary disposition applications as a case management tool which may potentially assist parties in settling a dispute.[105] The ICSID Arbitration Rules introduced the notion in 2006, providing in Rule 41 that a party could "*file an objection that the claim is manifestly without legal merit*." In recent years, the revisions of the rules of several arbitral institutions have included specific provisions authorizing tribunals to decide some form of dispositive motion. The terminology used to describe these applications varies. Some rules refer

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103 This approach is supported by the IBA Rules on the Taking of Evidence in International Arbitration, Article 2(3): "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate".

104 In his Town Elder Rules, D. Rivkin has proposed a decision tree or roadmap approach to structuring arbitration proceedings. This approach requires developed submissions at the outset of a case and a well-prepared tribunal which engages actively with the parties at the first case management conference. See: *D. Rivkin*, Technology and arbitration: revising the paradigms of case management, in: Cremades / Peterson (eds.), Rethinking the Paradigms of International Arbitration, ICC Institute Dossier XX (2023), pp. 36-51.

105 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), pp. 26-30.

to early determination or dismissal[106], while others refer to the disposition of issues,[107] or deciding issues by way of summary procedure.[108] Where dispositive motions are provided for in institutional rules, they raise issues as to appropriate timing, whether leave from the tribunal to have the application considered is necessary, the standard that should be applied to determine the outcome of the application and whether evidence of any facts alleged is necessary.

19. Dispositive motions are not specifically provided for under the 2018 DIS Rules. However, dividing the proceedings into multiple phases and rendering one or more partial awards or procedural orders on specific issues, as provided for in Annex 3 of the DIS Rules, can achieve a similar result in terms of encouraging settlement of a dispute.

E. Mid-arbitration review

20. The possibility of holding additional case management conferences as needed is provided for in Article 27.6 of the DIS Rules. Tribunals are also specifically empowered under this provision to modify the first procedural order and the timetable if considered to be desirable in the interests of efficient case management. There is no limit on the number of case management conferences that can be scheduled. At various stages of an arbitration a case management conference may be useful, such as after the initial exchange of submissions, in the context of document production and prior to a merits hearing.[109]

21. Mid-arbitration case management conferences have been proposed by a few prominent arbitration practitioners. One well-known proposal is the Kaplan Opening, which may be summarized as follows:

> *"At a convenient time in the arbitration, probably after the first round of written submissions and witness statements but well before the main hearing, the Tribunal should fix a hearing at which both counsel will*

106 LCIA Arbitration Rules, Article 22.1(viii) on early determination; SIAC 2016 Arbitration Rules, Rule 29; carried forward in SIAC 2025 Arbitration Rules, Rule 47 on early dismissal of claims and defences; the 2024 HKIAC Administered Arbitration Rules, Article 43.1 on early determination. These arbitral rules use a standard of a claim being manifestly without merit or a defence being manifestly outside the jurisdiction of the tribunal. It is noted that both the LCIA and the SIAC Arbitration Rules also provide for preliminary determinations of specific issues in dispute (LCIA Arbitration Rules, Article 22.1(vii) and SIAC 2025 Arbitration Rules, Rule 46).

107 ICDR 2021 Arbitration Rules, Article 23.

108 SCC 2023 Arbitration Rules, Article 39(1).

109 See *R. Trittmann / R. Schardt*, § 2.05: The Proceedings Before the Arbitral Tribunal, Article 27: Efficient conduct of the proceedings, in: Flecke-Giammarco / Boog et al. (eds.), The DIS Arbitration Rules – An Article -by-Article Commentary (2020), paras. 85-89.

> *open their respective cases before the Tribunal. They may be required to serve skeleton arguments in advance. After the openings any expert witness should make a presentation of his or her evidence and explain the areas of difference from the expert of like discipline on the other side."*[110]

22. The Kaplan Opening is intended to encourage earlier interaction between tribunals and parties, thereby enabling tribunals to understand a case well before the merits hearing. This serves to inform the arbitrators' case preparation and subsequent directions for the parties, including the identification of evidentiary gaps and areas where evidence is unnecessary. A dialogue of this kind can also assist parties in gaining a better understanding of the case against them as well as provide a window on the tribunal's thinking which stops short of the tribunal giving preliminary views. As Neil Kaplan has observed, an early opening can also provide an opportunity for a case to be settled at least in part or for the issues in the case to be narrowed.[111]

23. Another proposal focused more on case management is the case review conference or "arbitration in two acts" that was put forward by Constantine Partasides and Scott Vesel.[112] This proposal highlights the fact that, at the outset of an arbitration, the tribunal may not have sufficient knowledge of a dispute to reach appropriate decisions regarding the most efficient procedure and timetable for the entire arbitration. A case management review held mid-stream, following the first exchange of substantive submissions, would enable the tribunal to issue directions for the next phase of the proceedings that could address matters such as document production and further written submissions, as well as identify any discrete points that may be appropriate for accelerated determination. This would also provide an opportunity for the tribunal to ensure that experts of like disciplines are being asked the same questions, reviewing the same data sets and commenting on the same methodologies. The proposal contemplates a tribunal-led discussion of the issues and evidence necessary to determine the parties' claims. The authors argue that, as long as the tribunal members remain open to changing their views in light of the parties' arguments and evidence to follow, such a process would serve to enhance due process and ensure a more tailored and efficient procedure.[113]

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110 *N. Kaplan*, If it Ain't Broke, Don't Change It, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (2014), Vol. 80, Issue 2, p. 174.

111 Ibid, p. 175.

112 *C. Partasides / S. Vesel*, A case Review Conference, or Arbitration in Two Acts, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (2015), Vol. 81, Issue 2, pp. 167-168.

113 Ibid, p. 168.

24. The use of a mid-stream conference to identify the key issues in a case has support in Article 2.3 of the IBA Rules on the Taking of Evidence in International Arbitration.[114] This provision states as follows:

> *"The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate."*

25. Such a discussion can be preceded by directions to the parties following the first round of submissions to seek to agree a joint list of issues which the Tribunal can review with the parties during the mid-stream conference. As the Arbitrator Techniques Report suggests, a process which focuses the tribunal and the parties on the relevant legal and factual issues in dispute may have an indirect effect on settlement by leading parties to take a critical look at their respective cases, which may trigger settlement discussions.[115]

26. Although these proposals have been around for some time, it can be observed that, in international arbitrations not involving parties and arbitrators who are familiar with such mechanisms in their national court procedure, mid-stream conferences and Kapan Openings have not been widely used.[116] One of the arguments against holding such conferences has been the cost associated with in-person meetings. However, since the pandemic, the availability of video conferencing platforms for case management conferences and hearings has neutralized the cost argument to a large extent.[117] The use of video conferencing for this purpose would be consistent with the DIS Rules, given that one of the measures for increasing procedural efficiency listed in Annex 3 is making use of information technology (measure G).

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114 See also ICSID 2022 Arbitration Rules, Rule 31 and Articles 26 and 30 of the 2024 NAI Arbitration Rules, which provide examples of how a mid-stream conference or additional case management conference may be used.

115 IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 31.

116 *K. Sachs*, Chapter 19: Do We Deliver: How to Make International Arbitration More efficient, in: Kaplan / Pryles / Bao (eds.), International Arbitration: When East Meets West – Liber Amicorum Michael Moser (2002), pp. 226-231. It is noted that, under the 2024 Arbitration Rules of the Netherlands Arbitration Institute, mid-stream conferences have become mandatory. In accordance with Article 26 of the 2024 NAI Arbitration Rules, one of the topics for discussion at the initial case management conference is the preferences of the parties regarding the mid-stream conference provided for in Article 30. Article 30 then states that the mid-stream conference may take place at any stage of the proceedings, electronically or otherwise, but in any case, after the submission of the statement of defence, "for the purpose of providing information, consultation on the further course of the arbitration or for exploring the possibility of a settlement".

117 See *D. Rivkin*, Technology and arbitration: revising the paradigms of case management, in: Cremades / Peterson (eds.), Rethinking the Paradigms of International Arbitration, ICC Institute Dossier XX (2023), pp. 41-42.

F. Sealed offers

27. Sealed offers are a mechanism that is well-known in some common law jurisdictions, such as England.[118] A sealed offer refers to a written settlement offer that is made by one party to arbitral proceedings to another party on a "without prejudice save as to costs" basis. The offer may not be brought to the attention of the tribunal until it has made a decision on liability and quantum and is ready to rule on costs. If the "without prejudice save as to costs" settlement offer is not accepted by the receiving party, it is deposited with a third party, such as an arbitral institution. The tribunal may then, in its discretion, take the settlement offer into consideration in allocating the costs of the arbitration. Although the settlement offer is not binding on the tribunal, if the party that has rejected the offer has received a less favourable award, the arbitrators may consider that the relevant party's conduct was unreasonable. In such circumstances, the tribunal may, in its discretion, decide to order the party that rejected the offer to pay the other side's costs as from the date of the rejection. On the other hand, if the party rejecting an offer has obtained a more favourable award, the tribunal may consider that the relevant party's conduct was justified.

28. The DIS Rules do not currently provide for sealed offers. One arbitral institution that has implemented this concept is the ICC. While sealed offers are not provided for in the ICC Rules of Arbitration, a mechanism has been put in place whereby sealed offers may be submitted to the ICC Secretariat. The procedure is outlined in paragraph 270 a) to h) of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.[119] Under the ICC procedure, when the Secretariat advises a tribunal that a sealed offer has been made, the tribunal has discretion to decide whether or not it wishes to receive the sealed offer. If the tribunal decides to do so, it still retains the discretion to decide whether it wishes to take the offer into account in its assessment of costs. Where the sealed offer mechanism will be used, it is highly desirable for this to be agreed between the parties at the outset of the proceedings so that they know how to conduct themselves when receiving settlement offers from the other side. This is an issue that can usefully be raised by the tribunal with the parties at the initial case management conference.

29. The sealed offer mechanism fosters settlement by encouraging parties to make reasonable offers and to give serious consideration to such offers on the basis of a realistic assessment of the strengths of their case. The Arbitration Techniques Report suggests, on the basis of their survey of practitioners, that sealed offers can have a direct effect on a party's willingness to settle a case. In other words, running the risk

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118 In England, sealed offers are often referred to as "Calderbank offers", following the case of Calderbank v Calderbank [1975] 3 All ER 333 (EWCA), the ruling of which is now reflected in the English Civil Procedure Rules.

119 ICC, Note to Parties and Tribunals on the Conduct of the Arbitration (2021). See also ICC Commission on ADR and Arbitration, Guide on Effective Conflict Management (2023), paras. 118-124, where the ICC's sealed offer mechanism is discussed.

of paying the other side's costs adds an incentive to accept a settlement offer. Equally, the prospect of avoiding some portion of the costs of an arbitration can provide an incentive to make a reasonable settlement offer.[120]

[120] IMI Mixed Mode Taskforce, Report of the Working Group 4: Arbitrator Techniques and their (Direct or Potential) Effect on Settlement (2021), p. 42. The effectiveness of sealed offers as a means of encouraging settlement is also supported by the CEDR Report (para. 4.2.7) and the CEDR Rules, Article 6 (Costs). Appendix 3 of the CEDR Report sets out a procedure for sealed offers that can be incorporated into the procedural rules for an arbitration.

Annex 3

Results of the Working Group's Survey on Perceptions of the "German Approach" to Settlement Facilitation in other Jurisdictions[121]

1. We set out below an overview of the results of the Working Group's Survey, which seeks to group together jurisdictions with similar approaches (section A). This is followed by summaries of the responses to the Working Group's questionnaire by country or region, as the case may be, presented in in alphabetical order (section B).

A. Overview of the results of the Working Group's Survey

2. In the **African countries and jurisdictions in the Middle East** that were covered by the survey response, it was noted that arbitral tribunals seek to respect the principle of party autonomy. Subject to the agreement of all parties, the tribunal may make a settlement proposal. The legislative framework in some jurisdictions allows for such an approach. At the same time, proactive settlement facilitation is uncommon. The idea of promoting settlements is viewed positively. However, the introduction of a legal obligation, such as one providing that "*the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute*", was not considered to be desirable by the survey respondents.[122]

3. In the experience of **Argentinian** respondents, it is common to encourage the parties to settle and suggest settlement offers. Some rules, such as that BCBA (Bolsa de Comercio de Buenos Aires) Rules, provide an opportunity (albeit not an obligation) for the tribunal to invite the parties to find settlement formulas. On the other hand, giving preliminary views on the case is uncommon and would be considered inappropriate.

4. By contrast, respondents for countries such as **Brazil**, **Finland, France, Iran, Malaysia, Norway and Sweden** noted that, generally, a tribunal's role is either restricted to that of a dispute "adjudicator" or this is the role commonly taken by arbitrators in practice. There are no accepted practices for the use of direct settlement techniques. Rather, the "German

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121 The Working Group makes the following caveats: (i) the survey answers were prepared in period between 2023 and 2024, they do not take into consideration any developments after this period; (ii) the summaries have been prepared on the basis of more complete responses provided by arbitration experts from the various countries or regions where responses to the survey questionnaire were received and they are not a substitute for them; and (iii) the intention of the questionnaire answers was not to set out the law of the respective countries or regions in a comprehensive way, but rather to give an indication as to the approach and possible framework for settlement facilitation. In other words, specific research and legal advice may be needed to address a query as to a tribunal's powers to facilitate settlement in a given jurisdiction.

122 The answer to the question related to the "German approach" in the survey does not refer to separate countries, but rather to "*African countries and […] the Middle East*".

approach" is perceived with skepticism, is "*not adopted*", is "*questioned by arbitrators*", or is "*unthinkable*".

5. Similarly, in **Australia, Denmark, Costa Rica**, **Hong Kong**, **New Zealand, Poland** and **Thailand** settlement facilitation is not viewed as part of the tribunal's role. In Costa Rica, direct settlement facilitation is practiced in state courts, but it is uncommon in arbitration. In Denmark, tribunals do not conduct settlement conferences or share preliminary case assessments with the parties. These techniques are viewed by practitioners as constituting a "*premature step*". However, there is at least one example - Article 22 of the 2018 Building and Construction Arbitration Rules, – which empowers a tribunal to facilitate settlement talks. In Hong Kong, the use of direct settlement techniques is not prohibited but it is extremely rare, despite the fact that Section 33 of the Arbitration Ordinance permits an Arb-Med or Arb-Med-Arb process with the same individual, subject to the written consent of the parties. A suitable step may be taken if the parties agree. Australia also has legislation that permits an arbitrator to perform the role of mediator (Section 27D of the Commercial Arbitration Acts) if contained in the parties' arbitration agreement or consented to by both parties. However, there has apparently been little or no use of this provision and the role of the arbitrator is generally restricted to that of dispute adjudicator. The respondent for New Zealand noted that, although an arbitrator's role is generally limited to dispute adjudication, the parties may request increased arbitrator involvement in settlement facilitation. Polish arbitrators usually ask the parties if they have attempted to settle their dispute amicably. Some arbitrators may repeat the question at various stages. The giving of preliminary views is considered "risky" but may be done if all parties expressly agreed to it.

6. The respondent for **Singapore** explained that direct settlement techniques are permitted in arbitrations under the International Arbitration Act 1994 but not in arbitrations under the Arbitration Act 2001 for domestic arbitrations. Section 12(3) of the International Arbitration Act 1994 allows the tribunal to adopt inquisitorial processes unless otherwise agreed by the parties. Further, section 16 of the Act permits an arbitrator to act as conciliator with the written consent of the parties (for so long as consent is not withdrawn). Nevertheless, there are concerns in the arbitration community that assuming the role of conciliator would raise risks of a subsequent award being set aside or rendered unenforceable. The respondent for Singapore indicated that the principal understanding in the arbitration community remains that settlement facilitation is not one of the tasks of the tribunal.

7. In **Japan**, **China, Taiwan, Vietnam and Uruguay** arbitrators may act as dispute resolvers in ways that vary. In Japan, the tribunal's power to facilitate settlement is codified in Article 38 of the Japanese Arbitration Act. It has been noted that Japanese parties may be open to the "German" approach under Article 26, as similar a practice exists in Japanese litigation. In a mid-stream conference, the tribunal may indicate its preliminary views on the merits of the dispute upon parties' agreement. In China, arbitrators are also not confined to the role of adjudicator. The tribunal has discretion to engage in direct settlement facilitation; however, there is no obligation to encourage amicable settlement

similar to Article 26. Caucusing or *ex parte* talks with the parties is a "*more common practice*". In Taiwan, arbitrators may, *inter alia*, facilitate settlement sessions and the tribunal can help the parties to generate a range of possible settlement options. The respondent for Uruguay did not specifically comment on the "German approach" but noted that, under Section 490 of the Civil Procedure Code, the tribunal is required to hold a conciliation hearing during the proceedings. However, other techniques, such as the giving of preliminary views, are not practiced. In Vietnam, arbitral tribunals may conduct conciliation for the parties to reach agreement on the settlement of their dispute.

8. The "German approach" is "*not uncommon*" in Indonesia. The current practice of arbitration is significantly influenced by court procedures. In courts, judges are required to allow parties to seek an amicable settlement of civil disputes at every stage of the proceedings. Influenced by this practice, arbitrators may also encourage parties to reach an amicable settlement. It is notable that, under Article 45(1) of the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, an arbitral tribunal must facilitate a settlement discussion between the parties during the first hearing. Under the Rules of the Indonesian National Board of Arbitration (BANI Arbitration Center) the parties have additional opportunities to engage in amicable settlement discussions when presenting an oral opening statement and the Rules contain other provisions when empower arbitrators to engage in settlement facilitation.

9. The respondent for **England and Wales** noted that lawyers in the English tradition are instinctively wary of a tribunal becoming involved in a settlement attempt. The "German approach" is alien to procedural traditions in common law jurisdictions. However, the Working Group understands that depending on the applicable arbitration rules, arbitrators may use some direct settlement techniques. For instance, the respondent referred to Annex IV of the ICC Rules, which authorizes a tribunal to take steps to facilitate a settlement subject to agreement of the parties and tribunal. Likewise, in **the United States**, arbitrators typically do not play the role of a dispute resolver. They are usually tasked only with deciding the merits of the case. On the other hand, arbitrators are not prohibited from suggesting a settlement or the use of mediation.

10. In **India**, the role of the tribunal is generally restricted to adjudication. However, the tribunal may contribute to settlement facilitation at its own discretion and depending on the circumstances of the case.

11. The respondents for **Italy** described the "German approach" to be more settlement friendly than the Italian approach. However, they noted that the role of arbitrators is also not limited to adjudication. At the first hearing or any time thereafter, the tribunal may offer to the parties solicited or unsolicited settlement terms and request the parties' feedback within a reasonable timeframe.

12. The respondent for **Kazakhstan** noted that tribunals are free to suggest the use of direct settlement techniques to the parties. The local arbitration laws are silent on the issue. However, for example, the Arbitration Rules of the International Arbitration Centre of the Astana International Financial Centre expressly provide that amicable settlement is one of the objectives of arbitration. In practice, tribunals regularly propose settlement of disputes and take steps to accommodate the parties if they see potential for a settlement.

13. In **Korea**, the "German approach" is not widely known, however it might be perceived as taking a "*hands-on*" approach. The tendency is for arbitrators to act as dispute adjudicators. Although it is not done frequently, the parties may request the tribunal to provide its preliminary views on the facts or legal issues in a case.

14. The role of a tribunal in **Portugal** is that of a dispute adjudicator. However, in practice, tribunals tend to expressly encourage the parties to reach an amicable settlement. The respondent for Portugal observed that the encouragement of a settlement between parties by arbitrators plays an important role in proceedings. Practitioners may even expect facilitation of settlement by arbitrators.

15. The "German approach" to settlement facilitation is a topic of debate within the **Spanish** arbitral community. Admittedly, it has received a warm reception in some circles; however, there is also concern over the potential impact on perceived neutrality of the tribunal.

16. On the basis of our survey, the overall conclusion of the Working Group is that the "German approach" to settlement facilitation, involving the giving of non-binding preliminary views and the chairing settlement conferences, is not well understood in many jurisdictions and is often confused with mediation. There are at present no transnational standards or practices for settlement facilitation by arbitrators. In many jurisdictions, the involvement of tribunals in settlement facilitation remains restricted by the perception that the role of an arbitrator is that of a dispute adjudicator rather than a dispute resolver.

B. Summary of the results of the Working Group's Survey by country and regions

17. The following trends in settlement facilitation have been identified based on information received by the Working Group from 36 jurisdictions and regions around the world. The information has been taken from the survey questionnaire which was completed by lawyers in the following countries and regions, respectively: Africa and Middle East, Argentina, Australia, Brazil, China, Costa Rica, Denmark, England and Wales, Finland, France, Hong Kong, India, Indonesia, Italy, Iran, Japan, Kazakhstan, South Korea, Kyrgyzstan, Malaysia, New Zealand, Norway, Pakistan, Poland, Portugal, Scotland,

Singapore, Spain, Sweden, Switzerland, Taiwan, Thailand, Uruguay, Vietnam, USA and Uzbekistan.

18. **Africa and Middle East**: The regions referred to in this report as Africa and the Middle East comprise a large number of countries and arbitration institutes with different legal systems, different legal cultures and different arbitration rules. There are no uniform rules or legal cultures that cover both regions or even just one of the regions as a whole. The following summary is therefore not intended to provide an overview of the legal situation and legal cultures of these two regions as a whole, nor should it be understood as such. This report is based on information encompassing the Kigali International Arbitration Centre (KIAC), Cairo Regional Center for International Commercial Arbitration (CRCICA), Abu Dhabi Commercial Conciliation & Arbitration Center (ADCCAC), Dubai International Arbitration Centre (DIAC), the Organization for the Harmonization of Business Law in Africa (OHADA), Ghana and Nigeria. Based on information received regarding these institutions and countries, it can be observed that, in general, tribunals respect the parties' autonomy when it comes to settlement facilitation. If both parties request the tribunal to make a proposal for a settlement, the tribunal may make such a proposal. The legislative framework in the countries relevant for the purpose of this Report allows such an approach. However, it is not common for a tribunal to play an active role in facilitating the settlement of disputes. Even though the idea of promoting settlements is perceived as beneficial in principle, a legal obligation providing that the tribunal should, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute, was not viewed as desirable in Africa and the Middle East.

19. **Argentina:** Argentina has a long-standing tradition of supporting mediation and alternative dispute resolution (ADR). Since the adoption of the Federal Mediation Law in 1995, which mandated pre-trial mediation in the City of Buenos Aires, Argentina became a regional pioneer in using ADR. In particular, mediation is now a well-established part of the Argentine legal framework. Companies view ADR as an efficient way to resolve conflicts, benefiting both themselves and reducing the judiciary's caseload. The Bolsa de Comercio de Buenos Aires (BCBA) Arbitration Rules provide that a tribunal may invite the parties to formulate settlement proposals for their dispute. There is no public data on the role of arbitrators in the context of settlement facilitation; however, it can generally be stated that dispute adjudicators in Argentina, including judges and arbitrators, tend to support mediation and other consensual dispute resolution mechanisms. While there are no specific provisions in Argentine arbitration law regarding acceptable settlement techniques and public information on cases where such techniques have been used is limited, the use of indirect settlement techniques is reported to be common in Argentina. Likewise, it is common for Argentine arbitrators to encourage parties during hearings to settle or even to suggest settlement proposals. Nevertheless, giving preliminary views on a case is uncommon and may be considered inappropriate, as it could be perceived as prejudgment.

20. **Australia:** In Australia the tribunal's role is generally restricted to that of a dispute adjudicator rather than a dispute resolver. Direct settlement facilitation techniques are not used by arbitrators. Case management techniques that can be used for indirect settlement facilitation, such as bifurcation, are used in Australia but not with the objective of facilitating a settlement. However, 'Calderbank offers' (sealed offers), where a settlement offer is made 'without prejudice' and reserves the right to refer to the offer in relation to costs, are often used. Since 2010 all Australian states and territories have adopted the Commercial Arbitration Acts ("CAAs"), governing domestic commercial arbitration. Under CAA s 27D, there is capacity for the arbitrator to perform the role of a mediator ('arb-med') if contained in the parties' arbitration agreement or consented to by both parties. This provision states that the arbitrator acting as mediator may communicate with the parties collectively or separately and must treat information obtained from a party with whom the arbitrator has communicated separately as confidential, unless that party agrees otherwise, or the arbitration agreement provides otherwise. Nevertheless, there has been little or no use of this provision. This may be due to: (i) the fact that that it is fairly recent and Australian lawyers have little experience with it; (ii) the provision does not make it clear whether the parties may opt out after the mediation phase if they commit to both arbitration and mediation; and (iii) concerns of possible bias where an arbitrator is privy to confidential information revealed during caucusing in the mediation phase. It is noted that, under Article 55.1 of the 2021 Australian Centre for International Commercial Arbitration Rules ("**ACICA Rules**"), the Tribunal is to raise for discussion with the parties at the initial CMC the possibility of using mediation or other forms of ADR to facilitate the timely, cost effective and fair resolution of the dispute. Pursuant to Article 55.2 of the ACICA Rules, upon the application of a party, the tribunal may suspend the arbitration to allow for mediation or other form of ADR.

21. **Belgium:** The technique of giving a preliminary assessment is sometimes used in commercial mediation or in state court proceedings, depending on the personality of the judge. It is thus legally permitted but not at all part of the Belgian legal culture. Recently, there has been some development towards this practice insofar as the parties are starting to prefer active arbitrators who ask questions which, from the point of view of the parties, helps to understand how the tribunal sees the case. As regards mediation, the first mediation legislation was introduced in 2005. Since 2023, the judges must *ex officio* refer cases to the mediation chamber.[123]

22. **Brazil:** The role of the tribunal in Brazil is restricted to that of a dispute adjudicator. The arbitrator is considered to be a "judge in fact and in law" by the Brazilian Arbitration Act. While article 21, Paragraph 4, of the Brazilian Arbitration Act provides for a duty of the tribunal to suggest conciliation of the parties' dispute at the beginning of an arbitration, in practice tribunals tend to ask only whether the parties are interested in conciliation at an early meeting; e.g., the meeting for a discussion of the terms of reference, to discharge this legal obligation. Further, it is common practice to hold an initial hearing after the written

[123] The summary for Belgium was prepared based on the interview with a contributor. Full answers to the Survey may be provided upon request.

submissions in which the parties' counsel may present their case which may help the parties to understand better the interests involved and the shortcomings of their claims. Tribunals may use bifurcation which is, however, not seen as an indirect facilitation of settlements but as a means of effectively promoting the arbitration process. Direct settlement techniques, such as the giving of preliminary views or conducting settlement conferences, are not accepted. The issuing of preliminary views could be seen as prejudging the case.

23. **China**: In the law of the Peoples' Republic of China (PRC), it is mediation which is the predominant means for a tribunal to guide the parties towards a possible settlement. Under the current PRC Arbitration Law, tribunals are expressly allowed to mediate during arbitration proceedings. As such, arbitrators are not confined to the role of adjudicators but can also act as dispute resolvers. This practice of combining mediation with arbitration dates back to China International Economic and Trade Arbitration Commission's (CIETAC) practices in the 1950s and is regarded as a distinctive feature of PRC arbitration. During the "13th Five-Year Plan" (2015–2020), which is part of China's series of national economic and social development plans, mediation was integrated into the country's top-level governance strategy. The "14th Five-Year Plan" (2021–2025) places emphasis on the role of mediation in maintaining social harmony and stability. In addition, 270 arbitration institutions nationwide have actively promoted mediation during the arbitration process, achieving a high success rate through mediation conducted by arbitration panels and assisted by arbitration institutions. Tribunals are also flexible in employing indirect settlement facilitation measures. Accordingly, indirect settlement techniques used in other jurisdictions may also be adopted in Chinese practice, such as bifurcation, including the issuance of partial and interim awards. Direct settlement techniques, such as providing preliminary views or conducting settlement conferences, are also within the discretion of tribunals in the PRC. However, they are not commonly used in PRC practice. A more common practice in the PRC involves arbitrators assuming a role akin to that of a mediator. If either party has a settlement proposal that the tribunal considers reasonable, the tribunal can be engaged in unilateral discussions, communicating separately with each party to understand their needs and facilitate settlement. It is said that this caucusing approach could significantly reduce the influence of emotional elements that may otherwise hinder settlement, fostering a more objective and focused discussion. Where settlement discussions are not successful, arbitrators in China tend to consider that such discussions will not affect their impartiality if the arbitration must resume.

24. **Costa Rica**: In Costa Rica settlement facilitation is not typically considered or accepted as being part of the arbitral tribunal's role. The role of arbitrators is generally confined to their function as adjudicators. Settlement facilitation is the role of a conciliator or a mediator in a mediation or conciliation process. It is not expected that tribunals will actively encourage settlement. The contribution of tribunals to settlement negotiations and settlements is limited to: (i) reminding the parties that there is the possibility of a settlement; and (ii) where a settlement has been reached by the parties and the tribunal is requested to do so, recording the settlement. The primary role of tribunals is to resolve the dispute

through the issuance of an award. The “German approach” of settlement facilitation is widely used in state court litigation, but not common practice in arbitration proceedings.

25. **Denmark**: In Denmark, tribunals are generally considered to be dispute adjudicators rather than dispute resolvers. While in legal literature it is assumed that a tribunal may seek to facilitate a settlement between the parties at any point in the proceedings, most Danish arbitrators will adhere strictly to the principle of party autonomy and will be reluctant to engage actively in settlement facilitation. This is partly due to the potential risk of not being considered impartial. Therefore, Danish tribunals generally only engage in settlement facilitation if the parties jointly request the tribunal to do so. Consequently, proceedings are generally reserved for dispute adjudication, while other dispute mechanisms are available separately for the parties if they wish to receive settlement facilitation from a neutral. Although a Danish arbitrator can be expected to be reluctant to engage directly in settlement facilitation, there are still means to try to facilitate settlements indirectly. The tribunal may, for example, respond positively to the parties’ mutual request for a time extension or direct the parties to consider the implications of a possible disproportionality between claim size and costs in cases where there are many separate small claims. A tribunal might also raise a potential bifurcation of a discrete issue, which could potentially lead to a final settlement. Additionally, if the parties have engaged in settlement talks and one side has proposed specific settlement terms, tribunals may accept the submission of that offer as a “sealed offer”, which is disclosed to the tribunal after its decision on the merits of the case but before the rendering of its costs award. In such cases, the tribunal would have the possibility of taking the settlement offer into account when deciding on the allocation of costs. This mechanism is, however, neither codified in Danish arbitration legislation nor arbitration rules. Thus, it is dependent on the request of the parties and the decision of the tribunal. In general, Danish arbitrators do not use direct settlement techniques such as settlement conferences or preliminary views. The German approach to settlement facilitation is fundamentally different from the Danish approach. The German practice of providing an early preliminary assessment of the case (*vorläufige Einschätzung*) is generally viewed by Danish practitioners as a premature step, which could lead to challenges based on bias. However, there seem to be some newer trends which might be perceived as pointing in the direction of settlement facilitation. In 2022, the Danish Institute of Arbitration (DIA) adopted Rules for Express Arbitration. Article 18 of these Rules contains a notable settlement tool. According to Article 18 the parties may jointly request the resolution of their dispute in accordance with a procedure that includes the following: (a) each party submits to the arbitrator a brief reasoned proposal stating how the party considers that the dispute should be resolved; (b) the arbitrator, within 10 calendar days of the submission of the last of the proposals mentioned in (a) above, selects one of the submitted proposals that the arbitrator, after an overall assessment, deems to express the most reasonable determination of the parties’ dispute and confirms this in the form of an arbitral award by consent. Further, the Danish Building and Construction Arbitration Board has devised arbitration rules as well as rules concerning “hurtig afgørelse” (“expedited proceedings”) that encourage the tribunal to facilitate settlement. Article 22 of the 2018 Building and Construction Arbitration Rules stipulates that the tribunal may facilitate settlement talks at any point during the

proceedings. Moreover, the tribunal may request the Arbitration Board to appoint a mediator for the purpose of settling the dispute.

26. **England and Wales**: Generally, a tribunal in England and Wales is restricted to the role of deciding rather than resolving the dispute between the parties. Indirect settlement techniques in widespread use include sealed offers (there is a highly developed practice when it comes to making offers that are "without prejudice save as to costs"), bifurcation which, however, is not specifically aimed at settlement, although it can and frequently does encourage it, and security for costs. Although not specifically aimed at encouraging settlement, the consequence of a failure to put up security for costs can be the complete and permanent loss of a claim. This undoubtedly puts pressure on an impecunious claimant to settle (although the risk of an order of security stifling an otherwise meritorious claim will be a factor that weighs against the granting of the order in the first place). Likewise, midstream case management conferences are common but – other than in giving an opportunity to consider / encourage settlement – they are generally geared towards managing the dispute rather than settling it. Although the provisions in the ICC Arbitration Rules on case management techniques (in Appendix IV) as well as the IBA Rules on Conflicts of Interest regarding settlement facilitation are known, there is a great concern that an arbitrator might struggle – in the event of a failure to settle – to keep an open mind regarding the merits of the dispute. The "German approach" is alien to the law of England and Wales. A judge / arbitrator in the English tradition would, before the final hearing of a case, typically take the view that he or she has insufficient insight into the evidence supporting each side's case to enable meaningful participation in settlement discussions.

27. **Finland**: The tribunal's role in Finland is not restricted to that of an adjudicator but in practice, this is the role that most arbitrators take. Arbitrator facilitated settlements are not common. For example, Article 26.6 of the Finish Arbitration Institute's (FAI) Rules reads: "*With the agreement of all parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps*." However, there is no strong tradition of using direct settlement techniques in Finland in practice. All means would be allowed but are seldomly used in practice. The perception of the "German approach" is positive among counsel and parties but questioned by arbitrators mainly for fear of appearing biased, and experiencing adverse financial consequences.

28. **France**: While French arbitrators have traditionally been reluctant to actively promote amicable settlement during arbitration proceedings—viewing their role strictly as that of adjudicators rather than dispute resolvers—this approach is gradually evolving. This shift is part of a broader movement toward the development of alternative dispute resolution mechanisms in France, which have gained increasing importance in recent years. In certain judicial proceedings, engaging in an amicable resolution process is now mandatory, with failure to do so resulting in the inadmissibility of the claim. Combined with

the rise of a younger generation of arbitrators who are more internationally minded, this trend contributes to a growing interest in the topic of settlement facilitation.

29. **Hong Kong**: Settlement facilitation is not regarded as an integral part of the arbitration process but there remains the flexibility to adopt suitable measures if the parties so desire. Pursuant to Sections 46(2) and (3) of the Arbitration Ordinance (Chapter 609, the Laws of Hong Kong), a tribunal is, *inter alia*, required to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate. However, the role of a tribunal is primarily one of dispute adjudication and determination. While the tribunal may give procedural directions (e.g. adjusting the timetable and ordering a temporary stay of the arbitral proceedings) so as to afford an opportunity for the parties to negotiate a settlement or attempt mediation, those initiatives are usually adopted upon the parties' application and/or with the parties' consent. This includes any indirect settlement techniques or measures which would only be used upon the parties' initiative. The parties can make any proposal to adjust or revise timetabling and procedural steps at any time, or raise such requests at case management conferences, reflecting the principle of party-autonomy in arbitration. The tribunal, however, would not mandate or otherwise require the parties to mediate or negotiate a possible settlement as this is not within the primary function and role of the tribunal to do so. Direct settlement facilitation practice is not expressly prohibited but it would be extremely rare. This is because arbitrators fear giving the impression that they might have prejudged any issues before hearing all evidence and arguments from the parties. Nevertheless, pursuant to Section 33 of the Arbitration Ordinance, an Arb-Med or an Arb-Med-Arb process with the same individual is permissible if all parties consent in writing. If the mediation is unsuccessful and the arbitration must resume the arbitrator must disclose to all other parties as much of that information as the arbitrator considers to be material to the arbitration. As such 'hat-changing' is perceived as risky, it is extremely rare.

30. **India**: In India, an arbitral tribunal is considered to be a quasi-judicial body, and its role is generally restricted to that of a dispute adjudicator. Tribunals in India do not practice indirect settlement techniques (such as mediation windows); however, direct techniques (such as suggesting mediation or conciliation) may be used, depending on the facts and circumstances. If there is a possibility of direct settlement between the parties, the tribunal may, after seeking the agreement of the parties, refer them either to mediation or conciliation, even while proceedings are in progress. However, the arbitrator does not switch roles (e.g., from arbitrator to mediator and vice versa), and "hat-changing" is not a recognized practice in India. An arbitrator may appoint an independent mediator to facilitate settlement. Encouraging parties to settle the dispute at every stage of arbitration as provided for in Article 26 of the 2018 DIS Rules, even when consented to by the parties, could lead to a situation that might be viewed as a conflict of interest and may also prolong the agreed timelines to complete the proceedings. According to Section 30 of the Arbitration and Conciliation Act, 1996 it is not incompatible with an arbitration agreement for a tribunal to encourage settlement of the dispute and, with the agreement of the parties, the tribunal may use mediation, conciliation, or other procedures at any time during the

arbitral proceedings to encourage settlement. Further, Indian courts do not directly facilitate settlements during court proceedings or engage in combining alternative dispute resolution (ADR) with court proceedings. However, Section 89 of the Civil Procedure Code, 1908 reflects India's broader legislative support for ADR by allowing courts to refer disputes to arbitration, conciliation, judicial settlement, or mediation where appropriate. Furthermore, the Mediation Act, 2023, and pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 reflect India's broader policy encouragement toward mediation. Additionally, India does not recognise the concept of sealed offers or Calderbank offers or fee-based rewards for arbitrators for settlement facilitation.

31. **Indonesia**: Under the Indonesian statutory framework, settlement facilitation may be viewed as part of the role of a tribunal (or the sole arbitrator). This is demonstrated by Article 45 para. 1 of the Arbitration Law which mandates the tribunal during the first hearing to facilitate a settlement discussion between the parties to the dispute. As such, the role of the tribunal can be seen as both that of a dispute adjudicator and a dispute resolver. In line with the statutory provision, the most prominent arbitration institution in Indonesia, the Indonesian National Board of Arbitration (BANI), has provided in its arbitration rules, a requirement that the tribunal first endeavours to encourage the parties to settle their dispute either on their own or with the assistance of a mediator/conciliator or with the assistance of the tribunal. The 2025 BANI Rules even provide in Article 19 that the parties may settle with the assistance of independent third parties, the tribunal acting as mediator or team of mediators, if agreed by the parties. If no settlement can be reached the tribunal is to continue the arbitration process in accordance with the Rules. In general, arbitrators in domestic arbitration engage in direct settlement techniques by facilitating an exchange of views and settlement discussions during the first hearing. Where applicable, these discussions may also take place after the parties have submitted pleadings and before the evidentiary stage. In arbitration proceedings under the auspices of an institution such as BANI, a further opportunity to discuss a settlement typically arises when parties are required to present an oral opening statement after submission of pleadings. Upon agreement between the parties, indirect settlement techniques are usually used in the course of international arbitration when the applicable rules permit such methods, and the arbitrators, typically foreign arbitrators, are familiar with them. There is no specific case law where a challenge to the appointed arbitrator(s) has arisen from taking the initiative to facilitate settlements. A challenge is unlikely given that facilitating settlement is a requirement under the Arbitration Law. The "German approach" to facilitation of settlements is therefore not uncommon in Indonesian arbitration. This is because, in practice, judges in Indonesian courts should allow (and, to some extent, persuade) parties to reach an amicable settlement of civil disputes at every stage of the proceedings. Since the current practice of arbitration in Indonesia is significantly influenced by these court practices (the majority of arbitrators currently being practicing lawyers, retired judges, or law professors), settlement facilitation is not uncommon in arbitration proceedings.

32. **Italy**: The role of tribunals in Italy is not restricted to that of an adjudicator, as tribunals can effectively guide the parties to settlement. At the outset of the proceedings, Italian arbitrators usually remind the parties of the high costs of the arbitration and of the

possibility of significantly lowering these costs should the parties reach a settlement at an early stage of the proceedings and before the drafting and filing of the award. Further, at the first hearing or any time thereafter, the tribunal may submit to the parties solicited or unsolicited settlement proposals and may request the parties' feedback within a reasonable timeframe. Alternatively, the tribunal can grant one or more settlement windows to the parties, inviting the parties to make their own reasonable attempts to settle their dispute. Settlement facilitation is not mandatory for the tribunal but just optional, although encouraged by the main arbitral institutions in Italy.

33. Iran: As a general principle and main rule, Iranian arbitrators must not act as dispute resolvers unless they are authorized to do so by the parties. This principle is reflected in Article 483 of Civil Procedure Law of Iran which reads: "*If the arbitrators have the power of conciliation, they may end the dispute by conciliation, in which case the settlement agreement signed by the arbitrators shall be valid and enforceable*". No indirect settlement techniques exist as a rule or practice in Iran's legal system. However, if the parties agree to allocate such powers to the tribunal based on their arbitration agreement, arbitrators have such authority to act as an adjudicator or mediator before hearing parties' submissions.

34. Japan: Under Article 38 of the Japanese Arbitration Act, a tribunal – or any individual tribunal members so designated by the tribunal – may facilitate settlement if the parties provide their prior consent in writing. As an indirect settlement facilitation technique some arbitrators adopt mid-stream conferences. In a mid-stream conference, a tribunal may also indicate its preliminary views on the merits of the dispute if the parties agree thereto. In principle, many Japanese parties should be open to the "German approach" as envisaged in Article 26 of the DIS Rules, as they are familiar with a similar practice in Japanese litigation.

35. Kazakhstan: The applicable law in Kazakhstan does not specify promotion of settlement as a role of an arbitrator with the exception of the Arbitration Rules of the International Arbitration Centre of the Astana International Financial Centre (AIFC IAC). AIFC IAC Rules expressly provide that amicable settlement is one of the objectives of arbitration. In practice, tribunals regularly propose to settle a dispute and take steps to accommodate the parties if they see potential for a settlement. As to particular indirect or direct settlement techniques, the applicable law is silent. However, a tribunal is free to propose any of these to the parties.

36. South Korea: The role of the tribunal in settlement facilitation is not prescribed by law or arbitration rules of Korean Commercial Arbitration Board (KCAB). It depends on the background experience and approach of each tribunal. The general tendency, however, can be viewed as slightly closer to a dispute adjudicator. Tribunals are often said to render decisions on the strengths and weaknesses of each case as pleaded by each party, as opposed to coming up with settlement proposals that could be commercially acceptable to

both parties. Although it is not done frequently, there may be situations in which the parties request the tribunal to express its preliminary views on the facts or legal issues, which could lead to settlement discussions. The “German approach” is not widely known in Korea, but for those who are aware of it, the perception is that it is a more “hands-on” approach compared to that in common law jurisdictions.

37. **Kyrgyzstan**: In Kyrgyzstan the tribunal’s role is restricted to dispute adjudication. Kyrgyz legislation does not provide for the term “settlement facilitation”. Settlement facilitation is not practiced. Therefore, the option to submit a dispute to mediation at any stage of an arbitration can be seen as the only settlement facilitation option. The law on mediation allows the tribunal to send parties to an informational meeting with a mediator (not to manage the mediation procedure itself). This offer of the tribunal is mandatory and may not be neglected by the parties. Currently, there is no other settlement facilitation mechanism provided for.

38. **Malaysia**: Malaysian courts do facilitate settlement of litigation proceedings before them but are quite careful in seeking to protect the perceived impartiality of the judge(s) hearing the matter. Despite the approach of the courts, arbitrators in Malaysia are reluctant to step into the role of settlement facilitator. The fear is that settlement facilitation may give rise to challenges to their impartiality and jeopardise the enforceability of any award. Therefore, settlement facilitation is not generally viewed as part of the role of an arbitral tribunal. There is, however, a recent development. In 2023 the Asian International Arbitration Centre (AIAC), one of the leading arbitral institutions in Malaysia, introduced the new edition of its Arbitration Rules. The 2023 AIAC Rules allow tribunals to facilitate the settlement of disputes, provided there is agreement of the parties. Parties entering into such an agreement are deemed to waive their right to challenge an arbitrator's impartiality based on their involvement in the agreed settlement facilitation. A similar provision is provided in the AIAC’s Islamic Arbitration Rules which incorporates Shahriah principles. It is too early to assess the impact of these changes to the rules on the conduct of tribunals. Where case management conferences, including mid-stream conferences, and bifurcation of proceedings are directed, this is done with a view towards the efficient conduct of proceedings as opposed to facilitating settlement.

39. **New Zealand**: The role of the tribunal in New Zealand is generally restricted to adjudicating the relevant dispute. The role of arbitrators is governed by the powers set out in Section 12 of the Arbitration Act 1996 (New Zealand) (the Act), which empowers arbitrators to award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court. However, there is nothing preventing parties from agreeing, in their arbitration agreement or in the course of the arbitration, to request an arbitrator to engage in direct settlement techniques in resolving their dispute. Parties may choose to request increased arbitrator involvement in settlement facilitation, but this would be done in reliance on the parties’ arbitration agreements or arbitral institutional rules, not under the Act. Unless specifically agreed between the parties, arbitrators do not typically engage in the settlement facilitation

process. The Act does not provide for indirect settlement techniques either. However, sealed offers, sometimes known as 'Calderbank offers' or offers made without prejudice save as to costs, are standard and widely used as a matter of practice.

40. **Norway**: Settlement facilitation in arbitrations in Norway is uncommon and it is not seen as part of the role of a tribunal. The only exception seen in practice is the tribunal's encouragement of the parties to settle smaller claims in cases involving multiple claims, which are typically construction cases with many small claims. In such a case, an tribunal may advise the parties that they should try to settle those smaller claims to save time and costs; however, the tribunal will not usually indicate how to settle such claims. The "German approach" is currently "unthinkable" in Norwegian arbitration practice.

41. **Pakistan**: While the structure of the Pakistani Arbitration Act, 1940 envisages the tribunal's role to be that of a dispute adjudicator, in practice, tribunals may, in certain circumstances, expand their role to that of a dispute resolver due to long-standing cultural practices. More recent legislation related to trade, i.e. the Trade Dispute Resolution Act, 2022, demonstrates a more favorable approach to settlement facilitation. For example, the Trade Dispute Resolution Commission, a dispute resolution body under the Act, is expressly empowered to seek to resolve the trade disputes by assisting the parties in conducting negotiations to arrive at an amicable settlement.

42. **Poland**: In Poland, in principle, settlement facilitation is not viewed as being part of the role of an tribunal. Arbitrators are in general not accustomed to being proactive in respect of settlement facilitation and view themselves as dispute adjudicators. Therefore, settlement facilitation techniques, whether indirect or direct, are not commonly used. Polish arbitrators, however, usually ask the parties, sometimes repeatedly during the arbitration proceedings, if they have tried to reach an amicable solution. Some arbitrators also hint at the difficulties in a case in relation to the evidence and the legal positions of the parties, emphasizing that settlement could help them to maintain a good business relationship in future and save costs. Arbitrators may also, with the express consent of all parties, make parties aware that they may not be successful in the arbitration. Most Polish arbitrators would not provide a "preliminary view" to the parties, as they consider it to be a very risky technique. Polish arbitrators are, *inter alia*, concerned about arriving at a final decision which turns out to be very different from the preliminary view. The Polish Code of Civil Procedure (PCCP) provides that settlements concluded in proceedings before arbitral tribunals are enforceable (PCCP, Article 1212). PCCP explicitly also allows for a settlement in arbitration be recorded in a consent award (PCCP Article 1196).

43. **Portugal**: The Portuguese Voluntary Arbitration Law (PAL) does not include any express provision on amicable settlement. Formally, the role of tribunals in Portugal is that of a dispute adjudicator only. Pursuant to the PAL arbitrators are not under any formal duty to facilitate a settlement between the parties. Nevertheless, it is widely recognized among arbitration practitioners that arbitrators have the freedom to conduct arbitral proceedings

in their discretion so long as the principles of due process are complied with. In using their discretion, arbitrators are free to adopt an approach which facilitates a settlement between the parties, and they often do so. Tribunals usually expressly encourage the Parties to reach an amicable settlement. Even in the absence of specific rules, facilitation and encouragement of a settlement by arbitrators plays an important role in arbitration proceedings and is widely recommended and expected by practitioners involved in dispute resolution. Throughout the arbitration proceedings and pre-proceedings, arbitrators tend to assist the parties actively in reaching an amicable settlement. Practitioners in Portugal seek to "encourage" the parties to reach an agreement by motivating the parties to discuss the matters in dispute before the tribunal (typically at the beginning of hearings or meetings with the tribunal) and debate potential settlements.

44. **Scotland**: There is no provision on settlement facilitation in the Arbitration (Scotland) Act 2010. The Rules of the Scottish Arbitration Centre also do not provide for the encouragement of settlement. There are likewise no rules that provide for an explicit combination of arbitration and other ADR techniques. Settlement facilitation is not commonly used in arbitration. The Arbitration (Scotland) Act 2010 only provides for the opportunity to end arbitration with the parties' settlement and issue an award on agreed terms.

45. **Singapore**: There are two statutory regimes for arbitrations seated in Singapore, the Arbitration Act 2001 for domestic arbitrations and the International Arbitration Act 1994 for international arbitrations. Singapore's law is based on common law so that the principal understanding is that settlement facilitation is not one of the tasks of the tribunal. However, Singapore arbitration law does not preclude the tribunal from performing such a function under certain conditions. Unless the parties have agreed otherwise and statutory arbitration law contains no mandatory provisions, a tribunal shall determine the rules of procedure at its own discretion. This generally permits the use of indirect settlement techniques. Direct settlement techniques are permitted in arbitrations under the International Arbitration Act 1994, but not in arbitrations under the Arbitration Act 2001. The International Arbitration Act 1994 allows the tribunal to adopt inquisitorial processes unless otherwise agreed by the parties. Sections 16 and 17 of the 1994 Act and section 63 of the 2001 Act allow parties to appoint an arbitrator to act as a mediator or conciliator. All that is required is the parties' written consent that is not withdrawn. A mediator or conciliator so appointed may communicate with the parties jointly or separately and must, in principle, treat any information obtained from a party as confidential. There are, however, concerns in the arbitration community that if the tribunal conducts a conciliation there would be a risk that the award could later be set aside or that the enforceability of the award could be impaired. The Arbitration Act 2001 does not provide for an arbitrator to encourage settlement on his or her own initiative.

46. **Spain**: The general role of tribunals in Spain is restricted to adjudicating the dispute. The intention is not to risk the neutrality of the arbitrators. In practice, however, tribunals may also encourage or facilitate settlement discussions. The use of indirect settlement

techniques is not the norm in Spanish arbitrations. Nevertheless, some arbitrators do take the initiative by, for example, issuing a partial award on liability, thus encouraging the parties to settle the remaining issues on their own. Direct settlement techniques are normally not pursued in Spanish arbitrations. The so-called “German approach” to settlement facilitation is a topic of debate in the Spanish arbitral community and has been positively received in some circles. That said, as indicated, the approach is not expressly referred to in the legislative framework relating to arbitration or in the rules of arbitral institutions. This has limited its acceptance to date by Spanish arbitrators, with many raising concerns about the potential impact on the perceived neutrality of the tribunal.

47. **Sweden**: Generally, settlement facilitation is not viewed as being part of the role of a tribunal. An explanation often given by arbitration practitioners is that, if the parties want a neutral person for facilitate settlement negotiations, they will opt to retain a mediator. In order to conduct the proceedings as efficiently and effectively as possible, a Swedish tribunal would discuss (and establish) a timetable at the initial CMC, as well as consider the positive effects of bifurcation of the proceedings. The “German Approach” is seen as unusual and - when advising Swedish clients - as an argument not to agree to arbitration under the DIS Rules or to arbitration seated in Germany, Switzerland or Austria.

48. **Switzerland**: Settlement facilitation is viewed as being part of the role of a tribunal, primarily in the German-speaking part of Switzerland, whereas in other regions of the country, this is much less common. In disputes pending before commercial courts (only in the cantons of Aargau, Bern, St. Gallen and Zurich), the process pursued follows in many respects the giving of provisional views and conduct of settlement conferences (called "*Referentenaudienz*" in Zurich). These four commercial courts will, after the first exchange of submissions, hold a conference in which the judge(s) provides the parties, whose presence is obligatory, and their lawyers with the court's preliminary view on the case, both on factual and legal points. Usually, this is followed by a settlement discussion. In the majority of the cases before the commercial courts, the dispute is resolved at this stage of the proceedings (e.g. approx. 85% of cased that arrive to this state before the Zurich commercial court). In arbitrations seated in Switzerland, the parties often request, or the tribunals propose, to conduct a provisional views/settlement conference ("*Referentenaudienz*"-style) after the first round of submissions. Arbitrators in the French and Italian-speaking parts of Switzerland who are experienced in international arbitration tend to adopt the settlement facilitation approach of German-speaking Switzerland. However, lawyers from the French and Italian-speaking parts of Switzerland practicing before state courts may not view settlement facilitation by tribunals favorably. These practitioners are generally not acquainted with it, since the courts in Western and Southern Switzerland do not use the procedural device of the *Referentenaudienz* and usually do not actively guide parties to a settlement. Therefore, in domestic arbitration with counsel and arbitrators from the French and Italian-speaking parts of Switzerland, the tribunal’s role is not that of a dispute resolver. Article 19 of the Swiss Rules of International Arbitration (Swiss Rules) of June 2021 on the organization and conduct of the proceedings supports settlement facilitation as it provides in its paragraph 5 as follows: “*With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the*

dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps.".

49. Taiwan: The Taiwan Arbitration Law provides for the possibility of resolving disputes through settlement and mediation in the context of arbitration. Before an arbitration award is made, the parties involved in the arbitration case may settle. If a settlement is reached, the arbitrator is responsible for drafting a settlement document. To facilitate settlements tribunals may use a variety of techniques, including setting a cooperative tone from the outset of the arbitration process emphasizing the benefits of settlement and the shared goal of a fair resolution, managing the arbitration process efficiently thereby indirectly influencing the parties towards settlement and holding separate private meetings (caucuses) with each party to identify potential areas for compromise. Further, there may also be a direct encouragement of open and direct communication between the parties providing a safe and neutral environment for them in which to express their needs and concerns, a "reality testing" through asking questions that can lead the parties to evaluate the strengths and weaknesses of their case realistically, as well as facilitating brainstorming sessions to support the parties in finding possible settlement options which the parties might not have considered themselves.

50. Thailand: In Thailand, the role of tribunal does not generally involve facilitating settlements between disputing parties. Nevertheless, settlement facilitation is not prohibited or restricted if the parties agree. There is no explicit legal restriction regarding the use of indirect settlement techniques if both parties so request. However, it is not common for the tribunal to facilitate a settlement and indirect settlement facilitation techniques have not been adopted very often in practice. There is also no explicit legal restriction on direct settlement facilitation, if both parties so request. Some tribunals have used direct settlement facilitation techniques. However, if a preliminary view is given it will be based on a preliminary consideration of the facts, and not on the legal position.

51. Uruguay: In Uruguay, the tribunal's role is not restricted to that of a dispute adjudicator but may be that of a dispute resolver as well. The Civil Procedure Code requires tribunals to hold a conciliation hearing during the proceedings. Such a conciliation hearing is generally held at the beginning of the proceedings. Additionally, the Uruguayan National Constitution contains a provision establishing an obligation to promote conciliation and arbitration. The techniques used by arbitral tribunals tend to be indirect settlement techniques. Tribunals generally hold a specific hearing for conciliation purposes but leave it to the parties to reach a settlement on their own. Tribunals do encourage the parties to reach a settlement, but do not provide preliminary views on the merits of the case.

52. USA: In the United States, arbitrators typically do not play the role of a dispute resolver. Arbitrators are not prohibited from making suggestions of settlement or making suggestions for mediation, but they usually remain focused on resolving the dispute on the

merits. One of the primary concerns with an arbitrator playing a role in facilitating settlement is that this often includes the provision of confidential information on the part of the settling party. There is a concern that an arbitrator may not be impartial if they receive confidential information from a party that is not shared with the other party. As some judges may also do, arbitrators can signal their impression of an issue of significance to the case in a manner that can indirectly help facilitate settlement. For example, if an arbitrator expresses pessimism or favor, prior to hearing, on the strength of a particular claim, defense, or damage category, that view could be taken as a signal that settlement should be explored. Arbitrators may also use various case management techniques to facilitate settlement.

53. Uzbekistan: Arbitration is a recently developed means of dispute resolution in Uzbekistan. Uzbekistan has a dualistic system with separate laws on international and domestic arbitration. Neither law provides for tribunal's power to facilitate settlement. The law on domestic arbitration states that tribunals adjudicate disputes arising from civil legal relations, including economic disputes arising between business entities. The tribunal's role is not that of a dispute resolver. Facilitation of settlements would be done through mediation, not by tribunals. The law on domestic arbitration provides for the suspension of arbitration if parties agree to mediate. The Rules of Arbitration of the Tashkent International Arbitration Center do not contain provisions on settlement facilitation.

54. Vietnam: Settlement facilitation is considered to be part of the role of an arbitral tribunal. For example, under Article 58 of the Vietnam Law on Commercial Arbitration, at the request of the parties, the arbitral tribunal shall conduct conciliation to help the parties reach an agreement on the settlement of their dispute. If such an agreement is reached, the arbitral tribunal shall make a record of successful conciliation, which must be signed by the parties and certified by the arbitrators. The arbitral tribunal then issues a decision recognizing the parties' agreement. This decision is final and binding as an arbitral award.

Annex 4
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