

The Mediation Window: An Arbitration Process Measure to Facilitate Settlement

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Eighty percent of users of arbitration at a conference held in 2014 with 150 delegates from over 20 countries that spanned the globe voiced their desire to have arbitration institutions and tribunals explore in the first meeting what other forms of dispute resolution may be appropriate to resolve the case.¹ Over two-thirds of the users at that conference desired a cooling off period during the arbitration proceeding to make a good faith attempt to settle using a mediator.²

While users have expressed their interest in early discussion of mediation, it has not yet become common or accepted practice. Only a small percentage of the 75 respondents from across the globe who responded to a survey organized by the author and conducted by experienced practitioners each in their own jurisdiction (the "Mixed Mode Survey") discussed the possibility of a mediation window at the first conference with the parties. However, quite a few from diverse jurisdictions thought it would be a good idea. As one respondent stated: "I believe it might be necessary and a good way to promote settlement."

This article is intended to assist those who would be interested in considering a mediation window in understanding what it is and how it can best be utilized.

What is a mediation window?

A mediation window can be structured as was suggested in the CEDR Rules for the Facilitation of Settlement in International Arbitration as "a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity."³ This structure would require a pause in the arbitration to allow the parties to focus on the mediation and the development of potential solutions without the conflicting simultaneous pursuit of their adversary positions. Because the CEDR Rules address a scenario in which the arbitrators themselves conduct the facilitation of the settlement, it would of course only make sense if there was a pause in other procedural activity. The pause, however, should be time-limited, so as not to unduly prolong the arbitration. A discussion of the actual conduct of the mediation during a mediation window by the arbitrators in the manner discussed in the CEDR Rules is beyond the scope of this article which is focused on in-

roducing the idea of the mediation window and providing for it the arbitration schedule.

Alternatively, assuming that a separate individual will be retained as the mediator as is usually the case, a mediation window can simply be a time set in the procedural schedule when the parties will discuss whether or not it would be useful to conduct a mediation. The mediation would proceed simultaneously with the arbitration and would create no delay in the schedule. If this process is used, the parties may, and, in this author's view should, be advised that the mediation window must be scheduled sufficiently in advance of the hearing that it will not interfere with the hearing dates set. The hearing date should not be adjourned for the parties' continuing discussions. This alternative will be preferable in many cases because it does not delay the arbitration at all and there is generally no compelling reason not to proceed on parallel tracks where the mediator is retained separately from the arbitration.

Why would a mediation window be helpful?

Ideally the mediation window will provide the opportunity for the parties to resolve the entire dispute. However, a mediation may also serve to resolve parts of the dispute, identify issues for early resolution, narrow the issues, maintain relationships, and streamline the proceeding.

The insertion of a mediation window in the schedule at the start of the arbitration which forces the conversation to take place at an appropriate time as the arbitration proceeds counters the continued expressed concern of parties that to suggest mediation or the commencement of settlement discussions is a show of weakness which will damage their negotiating position. Indeed, in a recent sur-

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vey of barriers to settlement over 60% of the respondents from both East and West geographies believed that “parties hesitating to make the first move toward settlement” is a “highly relevant/significant” barrier to achieving a resolution amicably.⁴ While to those who practice in jurisdictions where mediation is commonplace this may seem somewhat surprising, for jurisdictions where mediation is just beginning to emerge, as is the case in many countries, one can well imagine this to be a significant barrier. The mediation window resolves that obstacle.

When should the idea of a mediation window be raised?

The mediation window is ideally raised at the first conference with the parties. The discussion of the objectives for the mediation, a determination of the best timing for the mediation window and its structure will serve to develop a process most suitable and helpful for the particular dispute. The arbitrator may not be involved in the discussion, but it might be helpful to include the arbitrator as well in determining the correct timing for the mediation window.

The mediation window should be raised at the first conference with the parties because the point of the mediation window is to have it as an established step in the arbitration schedule so that the subject does not have to be raised by any party or even by the arbitrator. There may be points in time at which a party may wish to discuss mediation or settlement but feels constrained by its own perception that it would show weakness to raise it. And there may be points of time where a discussion of mediation would be propitious but is not a time that the arbitrator would feel comfortable making the suggestion because of the posture of the case at that time. The mediation window, although at a set time in the schedule, overcomes these impediments.

When should the mediation window be scheduled in the arbitration schedule?

When the mediation window should be set in the schedule should be determined based on the conversation with the parties. It will vary depending on the dispute. In cases where the facts and issues are known or can be easily identified it may occur early in the arbitration, even after the filing of the demand and the answer. In complex cases which require extensive investigation, the parties may feel they need more time before they are comfortable participating in a mediation.

There are advantages to an early mediation even in complex cases. A mediation set at an early stage will, of course, deliver greater cost savings and potentially find parties more flexible in their positions and not yet locked into their views of the case. Moreover, a good mediator can start the process at an early stage and if it proves to be too soon to achieve a settlement can continue to be

in touch with the parties as the arbitration progresses to achieve a resolution later.

Ultimately, a mediation is most likely to succeed at a time that the parties are able to realistically assess the relevant facts and legal principles, the likely outcome and what a reasonable compromise might be, and the likely expense in terms of legal costs and damage to reputation commercial relationships and other non-monetary factors. If it is concluded that conducting the mediation after the filing of the initial pleadings is too early, in a traditional international arbitration with two successive rounds of submissions, a mediation conducted after the first round of submissions may be optimal. In some cases, the parties may wish to wait until after the exchange of documents, but while they may then be better informed as to their position it will decrease the cost savings.

It is also possible to schedule several mediation windows as the parties can continually assess whether the moment is opportune for a mediation or settlement discussions.

Who should the mediator be?

Appointing the arbitrator with full knowledge of the issues in dispute as the mediator may be tempting as being most cost-effective and efficient. Whether this is a viable option depends on the jurisdiction of the seat, the likely jurisdictions of enforcement, and the applicable institutional rules. Such a process is accepted in some jurisdictions and not in others. In some jurisdictions, it may even be a basis for challenge or vacatur of an award. It is permissible in some jurisdictions if the parties enter into a comprehensive informed consent to such a procedure. It is permissible under some institutional rules and not others. But there are also significant practical concerns as to the efficacy and appropriateness of having the same individual serve in both capacities. Concerns relating to due process issues, the coercive effect of having the arbitrator serve as mediator, lack of candor in the mediation by the participants if they are addressing the arbitrator have been discussed. Accordingly, while it may be possible for the arbitrator to serve as the mediator depending on the jurisdiction governing the arbitration, the likely jurisdictions of enforcement and the applicable rules, the choice is generally to retain a different individual.

Does the arbitrator have authority to suggest consideration of a mediation window?

Arbitration is a creature of contract and the arbitration clause provides the scope of the arbitrator’s authority. While an arbitrator may not have the authority to require the parties to mediate, the inherent authority of the arbitrator to conduct the arbitration process and assist the parties in the resolution of their dispute encompasses the authority to make a suggestion to consider alternative dispute resolution mechanisms. Over half of the respon-

dents to the Mixed Mode Survey stated that they raised settlement as an option at the first conference with the parties and over half said they raised settlement as an option later in the arbitration process.

Indeed, institutional rules and guidelines expressly provide for such assistance to the parties. For example, Section 29 of the ICC Mediation Guidance Notes, specifically references a mediation window and states that “it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation.” The ICC Rules Appendix IV provides that the arbitrator may inform the parties “that they are free to settle all or any or part of the dispute... through any form of amicable dispute resolution methods... such as, for example, mediation...” Swiss Rules Article 15(8) provides: “With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it.” German DIS Rules Section 32 provides: “At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute, or of individual issues in dispute.” UNCITRAL 2016 Notes on Organizing Arbitral Proceedings “In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties.” ICDR Article 5 provides “The administrator may invite the parties to mediate.”

How would a mediation window be specified in the first procedural order: sample clause?

If the mediation window is established as a pause in the arbitration proceedings it will simply be reflected in the schedule for the arbitration. If the mediation is

window is established to create the opportunity for the parties to consider mediation, the following clause may be considered for the first procedural order:

On the date set in the annexed schedule, the parties will meet and confer with respect to whether they would like to engage in a mediation or other settlement discussions with respect to this arbitration. The [institution name] will be glad to assist in this process. The Tribunal will not be part of any mediation or settlement discussions between the parties. The parties will not communicate to the Tribunal with respect to such mediation or settlement discussions, other than advising of any settlement. If a mediation is agreed by the parties it will be scheduled for an early date, so as not to jeopardize the hearing dates. No adjournment of the hearing date will be granted on the grounds that a mediation or settlement efforts are ongoing.

Conclusion

The scheduling of a mediation window offers a way to introduce the subject of mediation and settlement into the arbitration at an early juncture in a manner and at a time of unquestioned neutrality and impartiality. It reflects no position, preliminary or otherwise, on the merits, by any party or the arbitrators. Building the mediation window into the arbitration schedule will require a discussion of mediation or settlement and thus lead to a conversation which might not otherwise take place. All parties, whether the case settles or not, would benefit from at least considering the possibility. Offering a mediation window option would meet users’ preference for exploration of alternative dispute resolution modalities and for opportunities to discuss settlement during the arbitration.

APPENDIX A

SURVEY RESPONSES

1. Do you set a mediation window at the first conference that requires parties to consider mediation at a set time in the schedule? YES: 24%; NO: 76%

2. Do you schedule a mediation window at the first conference that builds a pause into the arbitration to allow the parties to try to mediate? YES: 12%; NO: 88%

3. Do you raise settlement as an option at the first conference? YES: 56%; NO: 44%

Endnotes

1. International Mediation Institute and CEDR, *Shaping the Future of International Dispute Resolution* at p. 22 (reporting on preferences expressed at the 2014 conference), available at <https://www.imimediation.org/wp-content/uploads/2018/11/London-2014-Final-data.pdf>.
2. *Id.* at pp. 52-53
3. CEDR Rules for the Facilitation of Settlement in International Arbitration, Article 1(5).
4. Shahla Ali, *Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement Among Practitioners in East Asia and the West*, 19 Pac. Rim L. and Pol’y J. 243 (2010). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569302.