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Chapter 18

UNCONSCIOUS IMPEDIMENTS TO SETTLEMENT AND THE PROACTIVE ARBITRATOR[±]

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In his article *What Does it Mean to be 'Pro-Arbitration'?* my friend and esteemed colleague, George Bermann, reflected on the fact that "those who practice international arbitration—whether as counsel, arbitrator, or expert—characteristically take an exceptional degree of interest in the health and well-being of the arbitration enterprise…. How 'good' a particular policy or practice is for international arbitration has become a veritable professional preoccupation."

A recent program in which I participated, sponsored by CARTAL in India, was titled "Does Arbitration Still Hold the Crown?" This would not have been a question five years ago. But it is a question that was intriguingly posed in response to recent developments in related fields. The Singapore Convention completed in 2019 provides for the enforcement of cross-border mediated settlement agreements, an innovation that fills a significant gap in the utility of the mediation mechanism. Similarly, the Hague Conference on Private International Law recently achieved a long-sought goal by adopting a new multilateral Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matter. The Convention commits Contracting States to recognize and enforce civil and commercial judgments rendered by the courts of other Contracting States, and to do so without a substantive review of the merits of the underlying dispute.

Perhaps the question that should be asked in keeping with achieving what is good for arbitration is not what dispute resolution process "holds the crown" but rather how can users be best served. In George's words, what would be "good" for arbitration must be what is good for users.

[±] This chapter is adapted in part from *Arbitrator Techniques and Their (Direct or Potential) Effect on Settlement – Working Group 4*, N.Y. Disp. Res. Lawyer Vol 14 No. 1, 25-28 (2021).

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The world of dispute resolution has been changing. Users have increasingly stated preferences for uses of combined ADR processes. Surveys demonstrated tremendous support for a convention, like the Singapore Convention, that would make mediated settlement agreements enforceable across borders and thus enhance the utility of that dispute resolution mechanism. The 2018 Queen Mary White & Case Survey found an increase from 34% in 2015 to 49% in 2018 of respondents preferring arbitration in conjunction with ADR. Undoubtedly, that number would be even higher today.

Arbitration has always adapted to meet user preferences. Calls for reducing time and cost are met with a robust response from the arbitration community. This emerging user preference for a more flexible process that utilizes a mix of mechanisms to achieve resolution, which not coincidentally would also reduce time and cost, must be heeded. There are many ways this can be approached. These available procedures include step clauses in which a mediation precedes the arbitration, parallel tracks in which a mediator shadows the arbitration throughout the proceeding and works continuously with the parties throughout, mediation and last offer arbitration also known as MEDELOA, mock arbitrations, the appointment of a neutral to advise the parties as to how to structure their dispute resolution process and other modalities.

We focus on the issue here from the perspective of the arbitrator and consider whether these developments should cause the arbitration community to seize the moment and examine whether there are existing techniques that should be more frequently used and whether there are new techniques that can be developed that would be of assistance to the parties. Should the arbitrator consider the impact of arbitration process steps on settlement as one of the factors to guide how the arbitration is conducted?

This article considers the arbitrator's role in settlement, the arbitrator's authority, and the unconscious impediments to settlement that may be obviated by process steps employed by the arbitrator.

I. THE ROLE OF THE ARBITRATOR

Over the past decade, the arbitration community has debated the appropriate role for the arbitrator. Is the arbitrator simply appointed to manage the proceeding, receive the evidence and make a decision—thus, a role essentially limited solely to being a passive decision-maker—or is the arbitrator a service provider who should undertake a more active role and act as the dispute manager,[1]

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[1] Paolo Marzolini, *The Arbitrator as a Dispute Manager—The Exercise of the Arbitrator's Powers to Act as Settlement Facilitator*, *in* THE ARBITRATOR'S INITIATIVE: WHEN, WHY AND HOW SHOULD IT BE USED?, ASA SPECIAL SERIES, NO. 45 (2016).

the settlement facilitator,[2] the town elder,[3] the collaborative arbitrator,[4] the interactive or proactive arbitrator?[5] Is there a continuum along with a series of possible measures that should be considered for each case?[6] Should options be discussed with the parties at the start of the proceeding so that a bespoke process can be developed for the case with appropriate procedural steps which may directly or indirectly have an effect on settlement?

The Mixed Mode Task Force, a combined effort by the College of Commercial Arbitrators the International Mediation Institute and the Straus Institute for Dispute Resolution, Pepperdine School of Law has explored the subject. Interviews were conducted by members of Working Group 4 of the Task Force which is titled *Arbitrator Techniques and their (Direct or Potential) Effect on Settlement*.[7] Seventy-five arbitrators and arbitration practitioners from jurisdictions around the world were interviewed to seek their views as to the arbitrator's role in settlement. Given the number of respondents interviewed the responses can only be viewed as anecdotal, but the insights they offer are valuable.

In response to the question "Do you think an arbitrator has a role in fostering settlement?" 78.38% responded "yes" and 21.62% responded "no." Thus, a majority of respondents recognized that arbitrators have a part to play in facilitating settlement. The comments expanded on the positive responses by explaining that the tribunal: "Has an important role in helping the parties understand the procedural options to settlement, outside of the arbitral proceedings as well as within the arbitral proceedings;" "The arbitrator can have an active role provided this is in line with expectations/wishes of the parties;" "The arbitral proceedings can be framed in a manner favorable to possible settlements;" "An arbitrator plays a significant role in fostering settlement;" "It is the arbitrator's duty to encourage the parties to settle the dispute."

However, reactions were not uniform. Numerous responses were submitted with such comments as: "An arbitrator has no role in fostering settlement—his or her role is to decide;" "The arbitrator is a service provider. You should only

[2] Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT'L 187 (2009).

[3] David Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 ARB. INT'L 375 (2008).

[4] Catherine Kessedjian, *International Arbitration—More Efficiency for Greater Credibility*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014 (Rovine ed., 2015).

[5] Michael Schneider, *The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION (KLUWER LAW INTERNATIONAL (Brekoulakis et al. eds., 2016).

[6] Klaus Peter Berger and J. Ole Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, 40 FORDHAM INT'L L.J. 887 (2017).

[7] Working Group 4 of the Task Force is co-chaired by Edna Sussman and Klaus Peter Berger. A full list of members of this Working Group is *available at* https://imimediation.org/mmtf.

render a decision and not give advice;" "No active role unless the parties want it;" "There is a very limited role for an arbitrator to do things proactively."

The question we must now address is which approach should guide arbitrator conduct. Of course, that decision should be made with deference to the expectations and preferences of the particular parties appearing in a particular arbitration. However, recent developments favor the conclusion that arbitrators should become sensitive to how their actions might assist the parties in achieving an amicable resolution.

II. THE ARBITRATOR'S AUTHORITY

An evolution to greater acceptance of a more active role for the arbitrator has been reflected in guidelines, rules, and practice notes by multiple organizations. Perhaps the most telling evidence of this evolution with respect to the arbitrator's role in settlement is the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings from the 1996 version to the 2016 version. The 1996 version provided in article 12, paragraph 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.

The 2016 version provided in Article 12, paragraph 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 assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.

Many institutional rules and guidelines also refer to the arbitrator's role in settlement:

- ICC Rules Appendix IV, (h) (ii): "Where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate

settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law."

- IBA Guidelines on Conflict of Interest in International Arbitration General Standard 4(d): "An arbitrator may assist the parties in reaching the settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings" (with express agreement).
- Swiss Rules Article 15(8): "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 Article 26: "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."
- Prague Rules Article 9.1: "Unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration;" Articles 9.2. and 9.3. allow "any member" of the tribunal "upon written consent of all parties" to "act as a mediator to assist in the amicable settlement of the case."
- CIETAC Rules Article 47(1): "Where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings."
- Singapore International Arbitration Act Article 17(1): "If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator."

The specific recognition of the arbitrator's authority with respect to settlement in an increasing number of rules and guidelines should serve to satisfy any remaining concerns arbitrators may have about being more proactive in their case management. However, these rules do not address precisely how the arbitrator can engage in assisting the parties in reaching an amicable settlement. That is an area that requires further exploration as we expand our use of existing techniques and consider developing new tools for our toolkit while we continue to respect party expectations and legal and cultural traditions.

III. UNCONSCIOUS INFLUENCES ON PARTY CASE ASSESSMENTS

A great deal of attention has been devoted in recent years to the impact of unconscious influences on arbitrator decision-making,[8] and even more recently

[8] Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences, and What You Can do About Them*, 24 AM. REV. INT'L ARB. 487 (2013).

to the impact of the unconscious on the accuracy of witness testimony.[9] However, an area not often considered is the impact of measures taken by arbitrators on unconscious psychological impediments to settlement. As we consider the arbitrator's role and the various procedural steps an arbitrator can take, attention to the impact of these steps on such psychological impediments must be reviewed. There are numerous psychological biases, heuristics and illusions that negatively impact settlement postures.[10] A few of the most important are highlighted here.

Optimistic overconfidence: People are overconfident in their own abilities and in their predictions concerning the outcome of future events. People think that the chances of good things happening to them is greater than the reality and the chances of bad things happening to them worse than the reality. For example, subjects about to be married estimated their likelihood of later divorcing at 0%, college students think that their income on graduating will be higher than average, and that they will be more likely than average to have their work recognized with an award. This cognitive bias is equally applicable to litigated disputes. Study after study has demonstrated that litigants and their counsel do not accurately predict case outcomes. An extensive empirical study of settlement postures versus actual trial outcomes demonstrated significant errors in case prediction with defendant's/respondent's decision errors many orders of magnitudes larger than that of the plaintiff's/claimant's in all settings, judge, jury or arbitration.[11] The principal culprit that leads to this predictive failure is referred to as the "overconfidence bias."

Egocentric bias: People tend to rely too heavily on their own perspective and have a higher opinion of themselves than the reality. Thus, people tend to overvalue the accuracy of their assessments of case value and so overvalue its merits. In one study judges were asked to estimate their reversal rate on appeal by stating what quartile they would fall into as compared to other judges, with the top quartile being the one with the highest reversal rate. Fifty-six percent put themselves in the lowest quartile and 31 percent in the second lowest quartile. Thus, 87% of the judges thought at least half their peers had higher reversal records on appeal. In a similar fascinating study which demonstrates the egocentric bias, at the ICCA conference in 2012 arbitrators were asked a series of questions. In response to the question, "if the researchers were to rank all of the arbitrators currently in this room according to their skill at making accurate and impartial decisions, what would your rate be?," nearly 85% of responding arbitrators indicated that they were better than the median arbitrator at the

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[9] ICC Arbitration and ADR Commission Report on the Accuracy of Fact Witness Memory in International Arbitration (2020).

[10] RANDALL KISER, BEYOND RIGHT AND WRONG, 89–140 (Springer publ. 2010) (reviewing numerous psychological attributes of decision errors).

[11] *Id.*

conference. When asked, "if the researchers were to rate all of the arbitrators currently in this room according to their skill at efficiently resolving disputes in a timely manner, what would your rate be?," nearly 92% of the arbitrators rated themselves as superior to the median arbitrator in attendance.[12]

Confirmation bias: People interpret evidence so as to maintain their initial beliefs. In a well-known study those who favored capital punishment and those who opposed capital punishment were given details of two studies, one supporting its effectiveness as a deterrent, and the second providing evidence against its effectiveness as a deterrent. The study showed that participants rated the study that supported their view as logically superior to the study that contradicted their view and felt even more strongly about their previously held view than they had before.

Biased assimilation: Closely related to confirmation bias, people tend to seek evidence that will be consistent with their initial beliefs and to receive information in a way that is biased in favor of their own previous position. Opposing disputants who are provided the same objective information tend to interpret the facts differently. As they absorb the information they fill in context and content and draw inferences. Thus disputing parties on reviewing the same objective facts, evidence and history will draw different conclusions and become more polarized in their sentiments. In an interesting study subjects were given an identical set of facts about a lawsuit, but half were told they would play the role of the plaintiff and the other half that they would play the role of the defendant. Following the negotiation simulation, the subjects were asked to write down the facts in favor of their position and the facts that favored the opposing position. The subjects recalled significantly more facts that favored their own positions than facts that supported the other position.

Reactive devaluation: There is a tendency to evaluate proposals less favorably when they have been offered by one's opponent and to devalue positions and arguments made by one's adversary. In a well-known study an identical proposal regarding possible arms reductions by the United States and the Soviet Union were presented to participants in the United States. The plan was deemed as unfavorable if it was stated to have been suggested by the Soviets, moderately favorable when attributed to a neutral third-party and quite favorable when the proposal was attributed to the United States.

Loss aversion: This phenomenon has been confirmed in numerous studies which have showed that decision-makers tend to attach greater weight to prospective losses than to prospective gains of equivalent magnitude. For example, studies have shown that merely assigning subjects to assess settlement proposals from the perspective of either the plaintiff or the defendant causes them to view the proposals differently. In one experiment using law students

[12] S. D. Franck, et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1165-68 (2017).

as subjects it was found that 77% of plaintiffs choosing between gains and only 31% of defendants choosing between losses believed that an economically equivalent settlement offer should be accepted. Loss aversion causes decision-makers to take unwise risks rather than accept certain losses causing continued litigation. Defendants, facing potential losses tend to continue to litigate when they would have been better served by settling.

Sunk costs: Parties who have already spent considerable time and money often feel they already have so much invested in the process that they choose to take the adversarial process through to the end rather than settle. While considered a "fallacy" that has no rational economic justification, since decisions should be based solely on future costs and benefits not ones which have already occurred, the fallacy persists as a significant influence on decision-making. In one study, lawyers who were told that $420,000 in attorneys' fees had already been spent were significantly less likely to accept a settlement offer of the same economic value based on a given case description and likelihood of success than lawyers who had been told that only $90,000 in attorneys' fees had been spent.

Equity seeking: People feel that they deserve to get a fair and equitable resolution that is in keeping with their perception of the strength of their claims. Studies have shown that disputants are often more concerned with achieving what they consider to be a fair settlement of the case than maximizing their own expected value. In one experiment, the subjects were presented identical case materials; one subject was designated the defendant and the other the plaintiff with the defendant having a fixed fund from which any settlement would have to be paid. The subjects were then asked to negotiate a settlement. Absent a settlement the funds were to be distributed according to a pre-existing independent trial judgment with manipulated amounts being allocated for the cost of going to trial. The study concluded that the magnitude and distribution of costs of going to trial did not have the predicted effect on the probability of settlement or settlement values. Disputants seem more concerned about achieving a fair settlement than maximizing their own expected value.

IV. ARBITRATORS SETTING THE STAGE FOR SETTLEMENT

It is easy to match available existing arbitration procedural measures against these psychological influences to demonstrate the impact they can have. For example, in-depth mid-arbitration reviews of the case by the arbitrator and providing preliminary views, early on or after the taking of evidence, are some of the measures that would counter "optimistic overconfidence," "egocentricity bias," "confirmation bias" as well as "reactive devaluation." Imperfect information causes errors in the estimation of case value. Voluntary settlement is facilitated as parties gain additional information and become more realistic about their own prospects of winning.

Active case management with a robust first session to plan the proceeding, early disposition of material issues, bifurcation of liability from damages and focusing the parties on the critical issues could serve to counter "sunk costs" by reducing those costs.

More engagement with the parties through the various opportunities that present themselves in the course of the arbitration could satisfy the need for "equity seeking" as it could address the desire to obtain equity by satisfying that desire or forcing a recognition that the arbitrator may not perceive the equities the same way.

Providing for a mediation window or windows in the arbitration schedule would provide an avenue for the parties to work with a mediator skilled in helping the parties overcome the unconscious biases that impede settlement.

Arbitrators may also delve into the mediator's toolbox without stepping out of the role of the arbitrator. These too serve to counter unconscious biases. Some examples come to mind, none of which would seem to exceed the arbitrator's authority or jeopardize the award. What makes sense in a particular case will of course vary. Every case presents new facts, new law, new people and new psychology. Responses must always be tailor-made.

Arbitrators can ask probing questions. Mediators are often evaluative and some rely heavily on offering the mediator solution, but many highly effective mediators prefer to try to get the parties to resolution without getting to an evaluative stage in the mediation. A great deal can be accomplished in terms of assisting a party to more accurately assess the likelihood of success by just asking questions, a process eminently suitable for an arbitrator.

Arbitrators can engage in active listening by repeating and recapturing accurately what has been presented. This validation that one has been understood, particularly where those statements are made directly to the parties, can assist parties in coming to closure.

An arbitrator can endeavor to ensure that the party representatives who are actually in a position to foster settlement are present for critical sessions in the arbitration such as the first case management conference or the mid-case review. Mediators always devote considerable attention to making sure the right people are present or at least engaged in the process long distance.

An arbitrator at the hearing may see that the principals who have not seen each other since their dispute arose are present and arrange that they sit near each other forcing an interaction that may overcome their differences; or, failing that, simply say "you have not had an opportunity to speak with each other since the dispute arose perhaps you want to seize the opportunity to talk now." Mediators devote considerable attention to how they set the table for the mediation, not only who will be there but also where they will be seated.

As we look forward, consideration must be given to additional approaches. A renewed examination of med-arb, with the same individual serving as both

arbitrator and mediator, with appropriate safeguards and protocols and with due regard to any concerns with regard to the jurisdictions of enforcement, should be welcomed. Perhaps more radically, an examination of what kind of cooperation/coordination there can be between the arbitrator and the mediator may prove to be a fruitful avenue as we look to the development of new processes that assist the parties in achieving a settlement. The Mixed Mode Task Force is exploring these and other dispute resolution approaches.

V. CONCLUSION

Arbitration, a creature of party choice, must be responsive to the needs and preferences of its users. The clarion call for a reduction in time and cost in arbitration has been followed by the more recently expressed view that combinations of dispute resolution processes are favored. To meet this developing preference arbitration would be well served, and it would be "good," for arbitration, if arbitrators considered the impact that their process choices might have on the parties' ability to achieve an amicable resolution and considered approaching the arbitration having in mind how they can set the stage for such a resolution.