

The settlement deficit in arbitration

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While arbitral institutions have addressed many concerns about the arbitral process, the problem of how to reduce the settlement deficit in arbitration remains unsettled, argue **Justin Williams**, the London-based head of arbitration at Akin Gump, and counsel **James Glaysher**.

For users of international arbitration, things are looking up. There has recently been an encouraging amount of action from arbitral institutions directed to addressing some of their concerns – in particular, as to cost, time, availability of summary procedures and transparency. But there is one thing that users are often keenly interested in but which has attracted less attention, namely settlement. And those attempts that have been made from time to time to establish frameworks to encourage settlement of international disputes have all too often either not been adopted or are of limited effect.

The latest initiative is the Convention on the Enforcement of Mediation Settlements, which UNCITRAL resolved in June 2018 to recommend to the UN General Assembly. The convention is intended to facilitate the international

enforcement of mediated settlement agreements, but in practice there have been few examples of problems in relation to such enforcement (certainly compared to court judgments or arbitral awards). Rather the difficulty is in encouraging parties to settle in the first place.

Anecdotal evidence suggests that international arbitration is especially prone to a relatively low incidence of settlement, at least in common law jurisdictions. Most practitioners in the US and England will privately confirm that arbitration proceedings are on the whole much less likely to settle than litigation cases in their jurisdictions.

Therefore, what concrete evidence is there of a settlement deficit in international arbitration and what should be done about it?

Reliable statistics are hard to come by. It is frequently reported that less than 5% of litigation actions commenced in the US, England and other common law jurisdictions go to trial, but of course that does not mean that all of the others settle – cases can be resolved or discontinued for numerous reasons. Nevertheless, it can fairly be assumed that well over half of litigation cases do settle.

In contrast, statistics published by arbitral institutions suggest much lower settlement rates in arbitration. For example, ICSID Caseload statistics (Issue 2018-2) show that of all arbitral proceedings under the ICSID Convention and Additional Rules Facility that were disposed of by tribunal rulings, settlement and discontinuance, perhaps only around 25% were disposed of by settlement.

This breaks down as 5% being disposed of through a settlement agreement embodied in an award at the parties' request, and 16.8% disposed of at the request of both parties. That rate of settlement is broadly in line with statistics published by the Swiss Chambers' Arbitration Institution, showing that 27% of all arbitrations it administered between 2004 and 2015 settled.

In short, then, compared to litigation in many countries, the statistics do appear to support a settlement deficit in international arbitration.

It hardly needs to be said that, where possible, settlement is often preferable to taking an arbitration through to a final award. It is a cliché that users of arbitration want a cost-efficient, quick and reliable process, and that the lawyers' response is that at most they can have only two of those three things. But

users may be able to achieve all three objectives if they are can settle their dispute. And they may get the added bonus of maintaining commercial relationships. What's not to like?

Naturally good arbitration counsel will actively explore the opportunity for settlement in an appropriate case. But the prospects of a settlement being reached will be notably improved if the procedural framework and culture encourages that outcome. All too often in international arbitration, that is not the case.

Currently, the rules of most major arbitral institutions touch only very lightly on settlement. For example, among the case management techniques listed in Appendix IV of the ICC Arbitration Rules, paragraph (h) simply suggests that the tribunal “inform the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods ...” and “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”.

Likewise, many rules provide only that the terms of settlement may be recorded in the form of an arbitral award: see article 15(8) of the Swiss Rules, article 26.9 of the LCIA Rules, and article 36 of the UNCITRAL Arbitration Rules. This is hardly strong encouragement to settle, and most arbitration statutes are entirely silent on the subject.

In contrast, modern procedural rules in court litigation often do include measures to encourage settlement. For example, under the English Civil Procedure Rules, the court must “actively manage cases”, including “encouraging the parties to use an alternative dispute resolution procedure” and “helping the parties to settle the whole or part of the case”.

The imposition of a similar positive duty on arbitrators would assist them to be more proactive. For example, a practice commonly adopted in common law litigation is for a judge to give a preliminary view on the merits of the case at a suitable point prior to the trial. This is often highly effective in enabling parties to take a more realistic view of their respective cases and in encouraging them to compromise – as well as having the happy consequence that the judge is more likely to have read into the case at an earlier stage.

Indeed, it is an approach that is often taken in practice by Swiss and German arbitrators, whereas those in England and the US more often hold back from expressing any view prior to the final award, perhaps concerned by the prospect of procedural challenge.

This difference may partly explain why it is sometimes said that civil law arbitrations are more likely to settle than those under common law.

The CEDR Commission on Settlement in International Arbitration, co-chaired by **Gabrielle Kaufmann-Kohler** and **Lord Woolf**, identified precisely this issue. In 2009, they published final recommendations and a set of rules which provides that, unless otherwise agreed by the parties in writing, the tribunal may, if it considers it helpful to do so, “provide all parties with the [tribunal’s] preliminary views on the issues in dispute in the arbitration and what the [tribunal] considers will be necessary in terms of evidence from each party in order to prevail on those issues”, and (1.2) “provide all parties with preliminary non-binding findings on law or fact on key issues in the arbitration”.

The adoption of such a rule has the merit that in practice it is likely to mean that the tribunal will at least give thought to expressing preliminary views and it should reduce the risk of procedural challenge.

But in the nine years since the CEDR Rules were published, it is unfortunately our experience that they are in practice seldom adopted. It may well be that this is a function of those drafting arbitration agreements being unaware of them or preferring a simple clause incorporating a single set of institutional rules. We suggest that there may be merit in parties considering the adoption of aspects of the CEDR Rules in their arbitration agreements. But perhaps in practice the onus here is on the arbitral institutions to re-visit the ideas suggested by Lord Woolf and Professor Kaufmann-Kohler with a view to adaptation of institutional rules.

Court judges are motivated to encourage settlement because they are usually over-worked and have a strong personal incentive to reduce their case-load. But for arbitrators sometimes the opposite incentive can apply, which makes it even more appropriate that an express duty on them to encourage settlement be applied.

Another approach towards encouraging settlement that is sometimes adopted is “med-arb”, where the parties attempt mediation, and if no settlement is achieved

the mediator then becomes the arbitrator. A concern with this is that it may discourage open dialogue at the mediation stage and may create a risk of an arbitrator being influenced by information that is not on the arbitral record.

Those difficulties are avoided by the “Mediator-in-Reserve Policy” included within the JAMS International Arbitration Rules. The JAMS rules provide that within one week of the commencement of an international arbitration, a suggested list of mediators (distinct from members of the tribunal) should be sent to the parties, from which they are encouraged to select an individual who will be placed in reserve during the pendency of the arbitration. This mediator in reserve is to be made available to the parties in the event that at any time during the course of the arbitral proceedings, the parties all agree to enlist the mediator’s assistance, and the JAMS rules specifically provide that the arbitrators are to have no knowledge of the identity of the mediator-in-reserve at any time.

The fact that there is an appointed mediator-in-reserve should increase the likelihood of the parties attempting to resolve their dispute by mediation in parallel with the arbitration. That likelihood might be increased further if the arbitral tribunal had a positive duty to consider encouraging the parties to make such a reference.

There are of course many other possible innovations in addition to those suggested above. The arbitration community has recognised that changes are needed to meet the needs of users. It is time that recognition extended to the need to encourage settlement.