Facilitating Settlements in International Arbitration in 2024 and Beyond

MCLE: 1.5 Hours

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Conference Reference Materials

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ICC YAAF: Facilitating Settlements in International Arbitration in 2024 & Beyond

California International Arbitration Week

California Arbitration

ICC YAAF

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“Arbitrators facilitating settlement is a common practice for some, but brand new territory for most. Increased interest in this developing role for arbitrators means that all practitioners should know how it can be done effectively and the pitfalls to avoid – reading the Report on Settlement Facilitation is a good place to start.”

--Christopher Newmark
Co-Chair of the ICC Task Force on ADR and Arbitration

In July 2023, the ICC released two reports in tandem

The Guide on Effective Conflict Management

Offers guidance in selecting the most appropriate ADR technique and explains how to efficiently use them to avoid escalation, resolve disputes, and reduce the cost of unavoidable disputes, before and after the commencement of arbitration proceedings. It describes the available ICC Dispute Resolution Services and gives examples of how they can be used either as standalone mechanisms or combined.

The Report on Facilitating Settlement in International Arbitration

Proposes ways allowing parties to settle disputes even once arbitration has begun, thereby preserving business relationships.

The role of arbitrators in facilitating settlements has evolved over the past 10-15 years.

The Report on Facilitating Settlement in International Arbitration identifies the growing appetite for adequate settlement facilitation tools and provides guidance on what those tools are and how practitioners can best use them.

Rather than the starting point being **whether** arbitrators should facilitate steps to settlement, the discussion is about **how** it can and **should** be achieved.

The Roadmap for Discussion

- What and Why?
- When and Where?
- Who?
- How?
- Conclusions
- Q&A
- Resources

What & Why

-Often times, a settlement can be much more favorable outcome than a mere win.
-Brief intro on ADR and “settlement” (arbitration, mediation, settlements)

Tools and instruments available based upon the Report:

1. CMC / mid-stream conferences / Kaplan Hearing
2. Preliminary views
3. Mediation and settlement windows

When & Where

Building a procedural timetable that is conducive to settlement takes initiative by either the parties or the arbitrator.

A. What is the right moment to have a settlement/mediation window within the arbitration?

i. After first memorials are filed?
ii. After document production?

B. Where to define the terms: in a clause? In a protocol?

i. Importance of flexibility vs. predictability
ii. Factors: level of knowledge of the Tribunal; ripeness of the case.

C. Other timing considerations

Who

The role of settlement facilitator can be taken up by choosing from among several actors, such as:

a. Specific mediator vs arbitral tribunal expressing preliminary view/settlement conference?
b. Neutral mediator (and who appoints him/her)
c. Process facilitator
d. DAB

-Should the arbitrator be “hands-on” – promote/encourage/lead and/or express preliminary views?

-including mediation windows and reticence from co-arbitrators? From the parties? Any legal cultural preferences?

Who Cont’d.

-The role of arbitral institutions?

-The role of counsel?

Considerations when parties take the lead:

i. In-house counsel experience – internal pressures and dynamics

ii. Missed messages - Real value of mediation/experience as former client/perceived risks vs. real risks associated with mediation vs. arbitration

-The role of other stakeholders?

How

Case Management Techniques

i. (CMC, and mid-stream conferences/Kaplan)

-Traditional bifurcation vs. creative/issue bifurcation

-Mediation/Settlement Windows.

I. Can the mediator be in contact with the Tribunal? For example, issues of scheduling, procedural aspects, etc. informed to facilitate settlement discussions?

ii. Procedural effects of the mediation or settlement instruments?

-Other ways to streamline procedure including dispositive motions

Conclusions & Questions

Resources

- ICC arbitration rules

-Facilitating Settlement Report

-Effective Conflict Management Report

- Effective Management of Arbitration

-Top 10 tips article

ICC Dispute Resolution Services

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International Court of Arbitration

Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process

15 November 2021, online

During the 2021 New York Arbitration Week (NYAW), members of the ICC International Court of Arbitration ('Court') provided ten practical tips on how to improve the quality and enforceability of arbitral awards. These tips were based on frequent issues that arise during the scrutiny of draft awards. The discussion demonstrated the value of the scrutiny process to parties and identified common pitfalls encountered by arbitrators when drafting awards.

The panelists included Maria Chedid (Partner, Arnold & Porter, San Francisco; Alternate Member, ICC Court); Ndanga Kamau (Founder, Ndanga Kamau Law, Kenya/Netherlands; Vice President, ICC Court); Ina C. Popova (Partner, Debevoise & Plimpton, New York; Member, ICC Court); and Todd Wetmore (Partner, Three Crowns, Paris; Vice President, ICC Court). The text below is a synopsis of the full event which can be viewed online.

What is scrutiny?

Scrutiny of draft awards, a distinctive feature of ICC arbitration, is designed to enhance the quality and enforceability of awards. Pursuant to Article 34 of the ICC Rules of Arbitration ('ICC Rules'),[1] no award shall be rendered by an arbitral tribunal until the award is approved by the Court. Scrutiny is a mandatory gateway through which an award must pass before it is notified to the parties. During the scrutiny process, the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, the Court also may draw the arbitral tribunal's attention to points of substance.

The scrutiny process involves multiple layers of review and may take up to three to four weeks.[2] As a first step, the Secretariat of the Court reviews the draft award and prepares suggested comments, setting out observations on various drafting and substantive points.

The Court then reviews the award with the assistance of the Secretariat's comments and identifies the points to be brought to the attention of the arbitral tribunal. The Court also decides whether to approve the award as drafted, approve the award subject to its comments being subsequently addressed by the arbitral tribunal, or not approve the award and invite the arbitral tribunal to provide a further revised draft.[3]

When the Court scrutinizes draft awards, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration (see Article 7 of Appendix II to the ICC Rules). The consideration of mandatory law aligns with the general rule that both the Court and the arbitral tribunal shall make every effort to ensure that the award is enforceable at law (Article 42 of the ICC Rules).

Below are ten practical tips for arbitrators to improve the quality and enforceability of their awards. These tips can also assist counsel in international arbitration craft their submissions.[4]

1. Consult the ICC Award Checklist

The ICC Award Checklist ('Checklist') is an invaluable resource that the Secretariat provides to arbitral tribunals at the beginning of the arbitral process.[5] Though not exhaustive, the Checklist highlights key elements of a draft award that are frequently missing. The Checklist provides guidance for newer arbitrators and helpful reminders for more experienced arbitrators.

1 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

2 See paras. 168-171 of the ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration, which address the timing of scrutiny.

3 'In 2020, the Court approved 564 awards (142 partial awards, 383 final awards and 39 awards by consent). The vast majority of draft awards were approved subject to certain points raised for the consideration of arbitral tribunals. Only four draft awards were approved without any comments. A further 47 draft awards (7% of the total awards scrutinized in 2020) were not approved when first scrutinized by the Court and were returned to the arbitral tribunal for further consideration', see ICC Dispute Resolution 2020 Statistics.

4 The provided tips do not bind the Court and do not represent or reflect an official position of the Court.

5 The ICC Award Checklist and other ICC practice notes are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/.

The Checklist includes reminders, for example, to:

- identify all parties and representatives in the arbitration;
- provide details about the relevant arbitration agreement(s);
- summarize the history of the proceedings;
- fully reason jurisdictional decisions and the tribunal's disposal of the parties' claims; and
- fix the final costs of the arbitration.

2. Support findings on jurisdiction and the merits by reference to specific contract provisions, provisions of law or case law; provide specific reasons for conclusions pertaining to the persuasiveness of evidence and on credibility

Because jurisdictional decisions are especially prone to challenge before domestic courts, it is crucial to have such decisions well-reasoned and substantiated. When a jurisdictional objection is raised, it is essential to make clear which parties are bound by the arbitration agreement(s), on what basis, and what law is applicable when analyzing this issue. In practical terms, as the ICC Award Checklist states, the award should quote the entire arbitration agreement(s), including any amendments, and address the issue of the (non) signatories to the relevant contractual documents.

When addressing jurisdictional objections, it is also important to identify the non-jurisdictional issues, such as those pertaining to admissibility. For instance, an issue may arise regarding whether a party has complied with mandatory pre-arbitration steps. As such, properly labeling these issues as they are addressed in the award is essential.

When addressing the merits of the case, and analyzing the parties' claims, arbitral tribunals should include specific references and citations to case law and evidence relied upon, just as parties are expected to do in their briefs. They should also cite to the parties' specific submissions and exhibits when referring to the parties' arguments, and avoid making conclusions based only on general references to 'parties' submissions' or 'evidence in the record'.

Furthermore, arbitral tribunals should identify the legal elements and evidentiary standard to be met for each claim or cause of action under the relevant applicable law. They should also explain why, for instance, a party has not met its burden of proof.

Similarly, general views to the effect that the arbitral tribunal found an expert or fact witness to be 'credible' should be accompanied by some explanation as to why the arbitral tribunal found the testimony persuasive. In the context of expert witness testimony, the arbitral tribunal should consider stating why it found the expert's conclusions to be well-founded or correct and specify the elements taken into account (e.g. calculation method applied, elements of comparison, the base amount(s) used, and the relevant period(s) of time).

When the arbitral tribunal has assessed expert/fact witness evidence based on general statements that it found the clarifications of a witness 'unconvincing' without further elaboration, the Court has requested that the arbitral tribunal include a summary of the testimony, the criteria applied in its evaluation and references to the relevant parts of the transcript.

3. Tread carefully with non-participating parties

When a case involves a non-participating party (i.e. a party fails to participate in the proceedings either from the outset or at a later stage, or the party comes in and out of the proceedings intermittently), the scrutiny process will focus in particular on the procedural history of the matter, decisions on jurisdiction, and the arbitral tribunal's reasoning on the merits.

To demonstrate that due process was consistently respected and that the non-participating party was given a fair opportunity to be heard, the Court expects to see a detailed procedural history in the award of all pertinent steps. The Court is therefore focused on whether the award contains references to the way notices were sent or attempted, when the attempts were made and notices received, how records of the notices were kept, and whether the non-participating party was informed of the consequences of its non-participation. Such detailed documentation can show that all means have been taken to inform the non-participating party of each step of the procedure.

In cases involving a non-participating party, arbitral tribunals also need to decide on their own jurisdiction per Article 6(3) of the ICC Rules. The award therefore should address the existence of a binding arbitration agreement and contain reasoning for this decision, and a determination on this point should be included in the dispositive section of the award.

Additionally, arbitral tribunals are expected to reflect in the award that they have even-handedly considered the evidence and neither automatically accepted the participant's arguments nor advocated for the non-participating party's case. In summary, the award should show how the arbitrators independently tested all claims and reached their conclusions.

4. Carefully approach *jura novit arbiter/curia*

When grappling with the possible application of *jura novit arbiter/curia,* arbitral tribunals are invited to proceed cautiously so they do not exceed their mandate, defy the parties' legitimate expectations, or override mandatory provisions of the *lex arbitri*, including any due process rules.

Arbitral tribunals should carefully consider the applicable legal framework, how it applies, and when and how the parties' comments should be solicited on legal arguments that the parties may have not raised. Inviting party comments can help prevent surprises down the line, show that the relevant law is properly applied, and support the enforceability of the award.

For example, during the scrutiny process, if the Court notices an authority cited that is not associated with a submission from the parties, it will usually enquire whether that authority or legal argument was raised by the parties, and if so, where it is in the record and how the opposing party responded. This omission can bring to light an issue of form (e.g. a missing exhibit) or point to a substantive concern (e.g. whether the tribunal raised a legal issue on which the parties did not have an adequate opportunity to comment).

In one instance, an arbitral tribunal applied the *jura novit curia* principle to raise a statute of limitations issue where neither party had raised or referred to the application of that principle in its submissions. The Court invited the arbitral tribunal to consider whether the parties would not be surprised by such decision as neither party had been given the opportunity to comment on that point. The Court also invited the arbitral tribunal to consider to what extent the *jura novit curia* principle under that governing law applied to issues concerning the statute of limitations. Following the scrutiny process, the arbitral tribunal confirmed that this principle of *jura novit curia* was applicable under the relevant law and included references to the principle in support of its conclusions in the award.

5. Treacherous waters of dissenting opinions — moderate your tone and address the points raised by the other side

While most awards are unanimous, in some instances, an arbitrator is unable to agree with the other members of the arbitral tribunal and will dissent from the majority decision. Dissents may be limited to only some issues and may be expressed with or without the filing of a separate dissenting opinion.[6]

If a dissenting opinion is filed, the arbitral tribunal should ensure that it meets the mandatory requirements of the applicable law/local law, which may have specific conditions or prohibitions on dissents. In addition, a dissent may be filed when a breakdown in relations between the members of the arbitral tribunal has occurred. In such case, arbitrators in the majority and the dissenter are invited to moderate their language and tone when referring to each other. Finally, the majority should consider whether it has adequately addressed, where appropriate, the points raised by the dissenting arbitrator.

6. Fraud/illegality allegations — don't avoid red flags

Tackling allegations of fraud can be tricky and the scrutiny process can help ensure that the award appropriately addresses such issues. Arbitral tribunals should not jump to conclusions that implicate fraud, but should pay appropriate attention to any red flags that give rise to legitimate questions of fraud that may require additional inquiry.

The Court may invite the arbitral tribunal to ensure that matters which could be red flags are properly addressed given that an award may be set aside for contravening public policy, failing to decide all issues, or if the arbitral tribunal goes too far, deciding something that the parties have not argued. Arbitral tribunals should be vigilant to deal with these sorts of issues, if they arise, in an appropriate level of detail in the award.

In one case, an arbitral tribunal initially concluded that, while one could see red flags, it did not have either the duty or the power to consider *sua sponte* whether the contract at issue had an illegal object or was tainted by illegality. During the scrutiny process, the Court drew the arbitral tribunal's attention to points of substance and whether additional steps had to be taken. The Court invited the arbitrators to consider diving deeper into the red flag issue, expanding on the standard of proof for these types of allegations under the applicable law, addressing best practices for red flags under the governing framework, and explaining how they applied the law and standards to the record before them. After several rounds of exchanges, the draft award was approved and notified to the parties.

6 'In 2020, of the 289 partial and final awards rendered by three-member tribunals, 46 awards (16%) were rendered by majority. All majority awards were accompanied by a dissenting opinion, incorporated in the award itself in 18 cases or made by way of a separate document in 28 cases', see **ICC Dispute Resolution 2020 Statistics**.

7. Beware of awards by consent and check whether they align with the applicable mandatory requirements

Although consent awards may appear to be straightforward, they require a degree of caution. When drafting consent awards, arbitrators must balance the need to respect the parties' agreement with ensuring that they are not unwittingly part of something nefarious. Appropriate precautions are required to ensure that awards by consent are not vehicles for money-laundering, corruption, fraud, or do not run against public policy by virtue of the agreements or settlement terms that they incorporate. If the Court has any doubts in this respect, it will invite the arbitral tribunal to make the appropriate inquiries.

The applicable law may also have an impact on the scope of agreements/settlement terms that can be ratified in awards by consent. In one instance, where the settlement agreement was drafted in very broad terms, the Court invited the arbitral tribunal to check whether the parties' settlement agreement needed to be in line with the scope of the parties' claims in dispute in the arbitration. The arbitral tribunal considered that, under the applicable law, settlement agreements could be drafted in broad terms, the parties' settlement agreement was in line with what was before the arbitral tribunal and did not contravene any mandatory requirements.

8. Write an enforceable dispositive section and don't rule *infra petita* or *ultra petita*

The dispositive section of an award should provide rulings on all requests for relief and reflect decisions made in the body of the award. It should avoid replicating the reasons or analysis from the body of the award, avoid declarations/orders that were not requested, and not include procedural directions. The dispositive section should instead respond directly to the relief sought by the parties (i.e. the orders/declarations the parties seek).

The crucial test at the scrutiny stage is whether the dispositive section addresses all of the claims – and nothing but the claims – that the parties have raised. The draft award contains a serious defect if an arbitral tribunal fails to address a claim/relief the parties have raised (*infra petita*) or if the arbitral tribunal grants relief that has not been claimed (thereby ruling *ultra petita*).

To ensure that all claims have been addressed in the draft award, arbitral tribunals should carefully track the relief sought by the parties from the inception of the case (and incorporated in the Terms of Reference) until the parties' final submissions and also pay attention to what may have been subsequently withdrawn.

9. Costs — be rigorous

Costs decisions are not always addressed thoroughly in draft awards. These decisions typically follow two basic approaches in ICC awards: either the loser pays the successful party's costs (often referred to as 'costs follow the event') or each party pays its own costs regardless of the outcome.[7] Frequently, the outcome of a case is not decisively in favor of one side or the other: there is mixed success, which can raise important questions as to how that scenario should be reflected in the allocation of costs.

The parties' conduct during the proceedings and considerations of reasonableness may also impact the allocation. The requirement that the costs be reasonable serves as an important check protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders.

While the allocation of costs is within the arbitral tribunal's discretion under Article 38 of the ICC Rules, the allocation may be subject to specific terms agreed upon by the parties in the arbitration agreement. The process for arriving at a decision on costs may also subsequently be agreed upon by the parties during the pendency of the arbitration. In one case, the parties had agreed that the arbitral tribunal should first render an award on the merits and then decide the costs. Because the tribunal also allocated costs in its draft award when deciding the merits of the matter, the Court alerted the arbitral tribunal during the scrutiny process that it needed to follow the sequence that had been agreed by the parties.

In short, when scrutinizing an award, the Court will consider whether the arbitral tribunal has clearly set out the parties' positions on costs in their draft awards, specified the total amounts claimed (by all sides), provided an assessment of the reasonableness of the parties' legal and other costs (e.g. time spent, number of lawyers, number of submissions and complexity of the matter), and included a decision on who should pay these costs, in what specific proportion, and why.

7 For more information and a study of ICC awards, see ICC Arbitration and ADR Commission Report on **Decisions on Costs in International Arbitration** (2015).

10. Interest — seek clarifications from the parties when appropriate

Parties often neglect to address in sufficient detail issues pertaining to interest, and instead make a general conclusory request for interest or rely upon a general statement at the end of their submissions requesting from the arbitral tribunal any relief that the arbitral tribunal may deem appropriate. Arbitral tribunals in draft awards also frequently give insufficient attention to requests for interest, especially in cases in which the parties have not provided fulsome submissions on the issue.

Issues regarding interest which may need further attention include: (i) whether the party seeks interest on all amounts awarded, including arbitration costs, or only on certain amounts; (ii) the start and end dates for the calculation of interest; (iii) the applicable rate; (iv) whether interest should be simple or compound; and (v) whether post-award interest should run on accumulated pre-award interest in addition to the principal claims, at the same rate, or at a different rate.

To avoid the need to seek supplemental submissions on interest at a late stage of the proceedings, arbitral tribunals should ensure that the parties have fully ventilated the issues in their submissions. When drafting the award, the arbitral tribunal can then fully state the reasons for its decision to grant or deny the request for interest, with reference to the parties' submissions, and if interest is awarded, its justifications for the type of interest awarded.

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