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by Harold I. Abramson

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PROTOCOLS FOR INTERNATIONAL ARBITRATORS WHO DARE TO SETTLE CASES

*Harold I. Abramson**

I. INTRODUCTION

The best time to settle an international business dispute can be after the international arbitration proceeding has been commenced. Just like in court litigation, parties may be ready to settle only after the adjudicatory process has begun and even has progressed. In court, judges commonly open the door to settlement; they hold settlement conferences and even actively participate in settlement negotiations. But arbitrators rarely open the door to settlement; when they do, they risk losing their jobs.¹ So, what can international arbitrators safely do? What dare they do?²

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¹ Because I only consider settlement efforts attempted after the formal arbitration has been commenced, I do not use the more common term “med-arb” which usually envisions a mediation process followed by an arbitration process. Instead, I consider a different sequencing of processes which might be called “arb-settlement-arb.” For a background article on “med-arb” see Barry C. Bartel, Comment, *Med-Arb As A Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLIAMETTE L. REV. 661 (1991); James T Peter, *Med-Arb in International Arbitration*, 8 AM REV. INT’L ARB. 83 (1997).

² This paper does not consider whether domestic arbitrators should try to settle cases. Different considerations apply to domestic arbitrations, considerations that were not examined in this paper. For instance, the justifications for domestic arbitrators settling cases may be weaker because it can be easier to bring in a separate neutral in domestic arbitrations where the participants do not typically face significant cross-cultural and vast geographical obstacles to convening a meeting. Nevertheless, I encourage the testing of these ideas and proposals in domestic arbitrations.

International arbitrators can safely encourage parties to settle. They can suggest that parties consider settling or trying mediation with another neutral of their choice. When taking these initiatives, arbitrators stay out of direct participation in settlement negotiations.

Arbitrators also might dare to participate directly in settlement efforts.³ This initiative is controversial and fraught with risks. This initiative should not be tolerated as an occasional move done on the sly. Instead, when and how arbitrators participate in settlement efforts should be openly studied and debated.⁴

Ideally, I think international arbitrators should stay out of the direct settlement business. I favor the optimal arrangement in which the neutral who tries settling a case is different from the neutral who decides the case.⁵ This arrangement preserves the impartiality of the neutral as decisionmaker while giving the neutral as settler the maximum flexibility to do her job well.

But as a pragmatist, I worry about lost opportunities for settlement in international arbitrations. In many international disputes, it can be extremely cumbersome to convene all the parties and attorneys. The first opportunity for the participants to meet face-to-face may not arrive until the first day of the arbitration hearings (or the night before in a foreign city while recovering from jet-lag.) This first opportunity to meet may be the first real opportunity for participants to discuss settling the case. In this paper, I consider whether these settlement discussions can be facilitated by the arbitrators. This may be feasible when done under strict safeguards. When participants agree to follow carefully crafted protocols, this suboptimal arrangement may be capable of preserving the impartiality of arbitrators while offering limited opportunities for efficient, cost-effective, and fair settlement of disputes.

³ In this paper, the terms “settlement efforts” and “settlement initiatives” are used to cover a broad range of options, including mediation.

⁴ There are remarkably few articles on how international arbitrators should go about trying to settle cases. See, e.g., David Plant, *Mediation in International Commercial Arbitration—Some Practical Aspects*, 4 ILSA J. INT’L & COMP. L. 329 (1998) and Kenji Tashiro, *Conciliation or Mediation during the Arbitral Process—A Japanese View*, 12(2) J. INT’L ARB. 119 (1995). Instead, most authors consider only the threshold question of whether arbitrators should settle cases and then point out that it is done in other countries in Western Europe and Asia. See next section on “Can One Neutral Serve Two Processes?”

⁵ In international arbitrations, parties may engage a “shadow mediator” who attends the arbitration hearings and confers with parties and attorneys at promising moments during the proceeding such as at the beginning or end of each hearing day. See James J. Myers, *10 Techniques for Managing Arbitration Hearings*, DISP. RESOL., Jan. /Mar. 1996, AT 28. Rule 17 of the CPR Non-Administered Arbitration Rules (1994) explicitly authorizes the arbitration panel “to permit the mediator to attend conferences and hearings held in connection with the arbitration.”

Selecting a mediator at the beginning of the arbitration proceeding may eliminate any temptations for arbitrators to settle. But, parties must invest foresight, time and effort to mutually select a mediator and to invest the additional expense of retaining a fourth neutral. Parties can find it difficult to make these investments when they are occupied with preparing for and participating in an arbitration proceeding.

In this paper, I explore the dilemma presented when one neutral tries to both arbitrate and settle a case, consider the range of settlement initiatives available for arbitrators who try to settle, and then recommend protocols that arbitrators should adopt if they dare to try to settle cases.

II. CAN ONE NEUTRAL SERVE TWO PROCESSES?

Practitioners and scholars have debated extensively whether one neutral can serve as both arbitrator and settler in the same case.⁶ The benefits are self-evident. Arbitrators who settle cases can save parties time and money. Savings accrue because the case settles rather than continue in the arbitration proceeding. Furthermore, the case settles without adjourning the arbitration to select a mediator who must then be educated about the dispute at a rescheduled session. These savings are magnified in international arbitrations where communications and scheduling of sessions are more difficult among neutrals, parties and attorneys who are from different countries. It is for these reasons that when everybody is already convened in one location for the arbitration proceeding, parties can find the option of the arbitrator settling a case to be extremely attractive.

The primary risk is that one neutral may not be able to perform effectively the two distinctively different roles of arbitrator and settler in the same case.⁷ In order to preserve the integrity of each process, the neutral must simultaneously maintain her *impartiality* as arbitrator and her *flexibility* as settler.⁸

⁶ For articles that consider pros and cons of the same neutral serving as arbitrator and mediator, see, for example, Barry C. Bartel, Comment, *Med-Arb As A Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLIAMETTE L. REV. 661 (1991); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997); Nels E. Nelson & A.N.M. Meshquat Uddin, *Arbitrators as Mediators*, LAB. L.J. APRIL 1995, at 205; Kenji Tashiro, *Conciliation or Mediation During the Arbitral Process—A Japanese View*, 12(2) J. INT'L ARB. 119 (1995); V. Fischer-Zernin & A. Junker, *Arbitration and Mediation: Synthesis or Antithesis?*, 5(1) J. INT'L ARB. 21, 24-25, 35-37, 39-40 (1988); Stephen J. Burton, *Combining Conciliation with Arbitration of International Commerce Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 652-57 (1995); Michael F. Hoellering, *Mediation & Arbitration: A Growing Interaction*, 52 DISP. RESOL. J. 23 (1997) (reaffirms "conventional wisdom that arbitration and mediation operate best when employed as separate processes"); M. Scott Donahey, *Seeking Harmony; Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?* 50 DISP. RESOL. J. 74 (April 1995); Lon Fuller, *Collective Bargaining and the Arbitrator*, WIS. L.R. 3, 23-24 (1963) and Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1962 PROC. OF THE 15TH ANN. MTG. OF THE NAT'L ACAD. OF ARB. 8, 29-30, 33 (1962) (Classic objections to one neutral serving two roles).

⁷ See, Lon L. Fuller, 1962 Proc. *supra* note 6, at 8, 29-30, 33. (Fuller made his now widely-cited observations that a neutral may confuse the two distinctive roles of mediator and arbitrator each of which call for different purposes and moralities, with mediation focused on settlement and arbitration focused on decisions according to the law.)

⁸ See CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 203, 204 (1996). The author distinguishes *impartiality*, which "refers to the absence of pre-disposition with respect to the merits of the dispute" from *independence*, which refers to being "capable of making their own judgment without being impaired by some type of dependence or obligation to a

The neutral must figure out how to preserve her impartiality when trying to settle a case. Settlers, for instance, may solicit confidential information for purposes of settlement, hold *ex parte* meetings (caucuses), engage in “reality testing,” and even assess merits of claims (evaluations). These initiatives may benefit the settlement process but may expose the arbitration process to legal attack. A party may challenge the arbitrator or the award on the grounds that the arbitrator was influenced by information learned during settlement efforts. A party also may claim that the arbitrator prejudged the case during settlement efforts when she offered an evaluation of the merits of the case. A party might even complain that the arbitrator retaliated against the party in the arbitration proceeding for not heeding her advice during settlement discussions. Therefore, arbitrators face the daunting risk of engaging in settlement initiatives that may disqualify them as arbitrators. In trying to reduce this risk, arbitrators may feel compelled to limit their use of some basic techniques that might otherwise make settlement efforts effective.⁹

Other problems arise when the same neutral serves two processes. For settlement efforts to be successful, parties must talk candidly with the neutral. Parties may be reluctant to talk candidly for strategic reasons when they realize that the neutral may later serve as the arbitrator. Moreover, when the arbitrator tries to convert an on-going arbitration into a formal mediation, the arbitrator-turned-mediator may short-circuit the mediation process. This alternative pathway into mediation may require the neutral to omit some valuable steps in the mediation process that are designed to orient parties toward settlement such as the preparation of a mediation briefing paper and opening statements of mediator, attorneys and clients.

In the area of international dispute resolution, this familiar debate follows different cultural paths to practices that can vary among different

party.”

⁹ Christian Bühring-Uhle succinctly elaborated on this point:

In mediation, the quest for an efficient solution that creates value for the parties makes it necessary to explore the real interest underlying the parties’ legal positions. Hence, the neutral may have to obtain confidential information from the parties regarding points on which, as an arbitrator, he is not supposed to base his decision. Another important element of effective mediation is “reality-testing”—the mediator has to confront and question the parties’ positions on the merits in order to narrow the difference between them and to deflate exaggerated demands. Both reality-testing and the exploration of the parties’ real interests work best when the mediator meets the parties separately, and generally in order for mediation to be effective the neutral has to build an intensely personal relationship with the parties.

By contrast, the task of adjudicating a dispute requires a high level of detachment and emotional distance from the parties and their interests and positions. The integrity of the adjudicative process is imperiled when the arbitrator obtains information that he must disregard when deciding the dispute; and his impartiality is threatened when he expresses his views on the merits before having seen all the evidence and legal arguments.

As a consequence, the arbitrator will tend to be rather cautious in expressing his views and eliciting sensitive information. This, in turn, reduces the effectiveness of his mediation attempts.

regions of the world. In many Asian countries¹⁰ and in several Western European countries,¹¹ arbitrators and parties are more receptive than U.S. participants to arbitrators settling cases. For instance, “the most complete integration of the role of the arbitrator and conciliator is in the Chinese model, where the arbitrator may become a conciliator, then become an arbitrator again at any stage of the proceedings.”¹² In a survey of U.S. and German practitioners,¹³ German respondents reported that they “often” encountered arbitrators participating in settlement negotiations while U.S. participants reported that they “very rarely” saw arbitrators do this.¹⁴ When asked about the propriety of arbitrators participating in negotiations, 92% of German respondents thought it was appropriate, while 71% of U.S. respondents rejected this role for arbitrators.¹⁵ Thus, different cultural experiences may shape participants’ attitudes toward one neutral serving two processes.¹⁶

III. RANGE OF SETTLEMENT INITIATIVES: FROM QUASI-MEDIATIONS TO REAL MEDIATIONS

Arbitrators may engage in a range of settlement initiatives,¹⁷ such as (1) suggesting that parties try to negotiate a settlement of the case; (2) actively participating in settlement negotiations (at parties’ request); (3) proposing a settlement formula (at parties’ request); (4) meeting with parties separately to discuss settlement options (with parties’ consent); (5) hinting at the possible outcome of the arbitration; and (6) rendering a

¹⁰ See M. Scott Donahey, *supra* note 6, at 74, 76; Tashiro, *supra* note 6, at 119; and Huang Yanming, *Mediation in the Settlement of Business Disputes: Two Typical Examples of Cases Settled by Mediation at the CIETAC’s Shenzhen Commission*, 8(4) J. INT’L ARB. 23 (1991).

¹¹ See e.g., V. Fischer-Zernin & A. Junker, *supra* note 6, at 30, 34-35 (1988) (“The prevailing opinion [in most continental Western European countries] is that a separation between arbitration and mediation is unnecessarily duplicative” In Austria, Germany, the Netherlands and Sweden, arbitrators attempt to settle their cases).

¹² M. Scott Donahey, *supra* note 6, at 74, 76.

When CIETAC (China) recently updated its arbitration rules, it tried to govern the long standing practice of Chinese arbitrators conciliating disputes during the arbitration proceeding. Among the changes, arbitrators can only conciliate with the consent of both parties, and any information learned during conciliation cannot be used in the arbitration proceeding. See Michael J. Moser, *China’s New International Arbitration Rules*, 11 (3) J. INT’L ARB. 5, 11-12 (1994).

¹³ BÜHRING-UHLE, *supra* note 8, at 189-96.

¹⁴ *Id.* at 191.

¹⁵ *Id.* at 193-94.

¹⁶ These different attitudes may be converging as parties are exposed to different cultural practices, leading to U.S. lawyers becoming more acquainted with Asian practices of conciliation and Asian lawyers becoming familiar with the more adversarial U.S. model of arbitration. See, e.g., Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT’L L. J. 89, 105-109 (1995). In a survey, attorneys appeared more receptive to settlement initiatives by arbitrators than the actual practice of international arbitrators. See BÜHRING-UHLE, *supra* note 8, at 188-92, 193-96, 211.

¹⁷ BÜHRING-UHLE, *supra* note 8, at 189. (The author surveyed practitioners about the use of these six settlement techniques.)

“case evaluation” (at parties’ request). Arbitrators are more likely to resort to mild interventions such as suggesting to parties that they try to settle the case than more intensive interventions such as “case evaluations.”¹⁸ The more intensive the intervention, the more controversial its use.

Because some of these techniques are commonly used by mediators, these settlement efforts may appear to be a mediation process. Participants may think that they are experiencing mediation. But, usually, they are not experiencing the real thing.

Real mediation¹⁹ for the type of disputes that arise in international arbitrations is a structured negotiation conducted by a specially trained expert, a mediator. The mediation process is a separate and self-contained process that has a beginning, middle and end. The mediator guides parties and their attorneys through each distinct stage of the process.

Each stage and each step by the mediator has a purpose, starting with the mediator’s usual request for each party to prepare a mediation briefing paper. Preparing the briefing paper orients parties toward the goals of the mediation, goals that typically involve resolving any relationship or substantive problems.²⁰ At the mediation session, the mediator normally starts with an opening statement that reinforces the goals of the mediation. The mediator then manages a structured discussion in which the mediator employs various techniques that are designed to encourage client involvement, explore clients’ interests, and create a collaborative environment for settling the dispute.

The mediator guides the participants by employing a mix of highly refined techniques. The mediator poses open-ended and focused questions, re-frames issues, conducts brainstorming sessions, and uses strategies to defuse tensions and overcome impasses. The mediator may use private caucuses to gain confidential information and use various methods for helping participants to evaluate the strengths and weaknesses of the case. If the case does not settle, the mediator may help the participants design alternative pathways out of the conflict.

This real mediation is not typically done by arbitrators. Typical settlement efforts by arbitrators should be more accurately described as something other than mediation. The process may be more akin to a judicial settlement conference in which the trial judge or a different

¹⁸ BÜHRING-UHLE, *supra* note 8, at 188-92.

¹⁹ See generally, DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES - EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS*, CHS. 2 & 3 (1996); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS - PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 63-68 (2D ED., 1996); JAY FOLGER & ALLISON TAYLOR, *MEDIATION - A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 7(1984); and Fischer-Zernin & A. Junker, *supra* note 6, at 25-26.

²⁰ Compare these goals with the goals in “transformative mediation” in which mediators focus on the goals of “empowerment” and “recognition.” See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION - RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

settlement judge may employ various techniques to promote settlement.²¹ Because some of the settlement techniques may be used by mediators, the process might be called quasi-mediation.²²

Labeling typical settlement efforts as quasi-mediation should flag the fact that the settlement initiatives are not real mediation. A separate label also makes clear that arbitrators may take two different pathways toward settlement: arbitrators can mediate or quasi-mediate. This division also alerts us to the reality that settlement initiatives are not monolithic but instead consist of a collection of techniques, some of which may be acceptable and some inappropriate for arbitrators who try to settle cases.

IV. PROTOCOLS FOR ARBITRATORS SETTLING CASES

Parties and neutral(s) should adopt protocols that will reduce the inherent risks that arise when one neutral serves two processes.²³ Any protocols must manage the tension between the need to preserve the impartiality of the arbitrator and the need to give the neutral sufficient flexibility to conduct effective mediations or quasi-mediations. This tension erupts when the neutral as mediator contemplates caucusing with one party or providing an evaluation of the case. Does the use of these two settlement techniques by a neutral inherently compromise the appearance of impartiality of the neutral when she resumes arbitrating? The tension also surfaces when the neutral as mediator learns information during settlement efforts that should be disregarded by the neutral in the arbitration proceeding. Is it possible for the neutral to erect a mental wall that strictly separates information, insights, and views developed during settlement efforts from the record of evidence developed in the arbitration proceeding?

The antagonism against the same neutral serving as both mediator and arbitrator in the same case is reflected in the clear prohibition found in most arbitration and mediation rules.²⁴ But most rules authorize an

²¹ There is a vast literature on the role of judges in the settlement of cases. Many of the authors evaluated specific settlement techniques of judges. In a recently published *JUDGES' GUIDE*, the authors analyzed a large number of techniques, deeming which are "acceptable" and which are "inappropriate" for judges to use in settlement conferences. For example, they concluded that it is acceptable for judges who will not decide the case to "evaluate a litigant's case with the litigant in a separate caucus "but that judges who will decide the case should be "more circumspect." In contrast, they concluded, it is inappropriate for a judge to "require the litigant to explain to the judge why the litigant won't accept the settlement." See, Jona Goldschmidt & Lisa Milord, *Judicial Settlement Ethics*, *JUDGES' GUIDE 42* (American Judicature Society and State Justice Institute, 1996). This same study offers an excellent bibliography. (See *Annotated Bibliography of Judicial Settlement Literature*, in *id.* at 92-104).

²² See BÜHRING-UHLE, *supra* note 8, at 201 (referring to "low-intensity" forms of mediation).

²³ See *e.g.*, Plant, *supra* note 4, at 329 and Tashiro, *supra* note 6, at 129-32.

²⁴ See *e.g.*, ICC Pre-Arbitral Referee Procedure prohibits a referee from serving as an arbitrator in the same case, unless the parties agree otherwise. ICC PRE-ARBITRAL REFEREE PROCEDURE, Rule 2.3 (effective January 1, 1990). The ICC RULES OF OPTIONAL CONCILIATION bar a conciliator from serving in any related judicial or arbitration proceeding unless the parties agree otherwise. ICC

exception: they permit parties to waive this prohibition. For this waiver to be meaningful, the consent must be informed and uncoerced. Informed consent can be achieved through a discussion of the protocols described below. The protocols elaborate on a number of issues that participants should consider before giving consent. Uncoerced consent is more likely when a party first suggests that the participants try settling than when an arbitrator makes the suggestion. An arbitrator's suggestion may be interpreted as an order that if not followed will alienate the arbitrator. Nevertheless, arbitrators can try to broach the topic tactfully and creatively.²⁵ For example, they might sincerely advise the parties that they routinely and non-judgmentally ask whether any parties are interested in trying to settle the case.

The following protocols may work best when settlement initiatives are restricted to quasi-mediations. In some limited situations, adopting these protocols may make it feasible for arbitrators to engage in real mediations.

(1) *Neutral is Trained in Both Processes*

The neutral who serves as both settler and arbitrator should be trained in the ethics, norms, and techniques of each process. The neutral must strive to maintain the integrity of each separate process, and this is no easy task. Only an exceptionally qualified neutral is likely to succeed.

RULES OF OPTIONAL CONCILIATION, Art. 10 (effective January 1, 1988). The Mediation Rules of the World Intellectual Property Organization (WIPO) also prohibit mediators from acting in any other capacity in any pending or future proceedings unless authorized by the parties. WIPO MEDIATION RULES, Art. 20 (effective October 1, 1995). The widely used Arbitration Rules of the China International Economic and Trade Arbitration Commission explicitly authorize the arbitration tribunal to conciliate cases during the arbitration proceeding if the parties consent. The rules maintain a separation between the two processes by barring the use of information developed in the mediation from use in subsequent arbitration or judicial proceedings. CIETAC Arbitration Rules, Arts. 46-51 (effective March 17, 1994). The UNCITRAL Conciliation Rules and the Non-Administered International Arbitration Rules of the CPR Institute for Dispute Resolution also specifically prohibit a mediator from serving as an arbitrator in the same case unless the parties agree to modify the rules. UNCITRAL CONCILIATION RULES, Arts. 1, 19 (1980) and CPR INSTITUTE FOR DISPUTE RESOLUTION NON-ADMINISTERED INTERNATIONAL ARBITRATION RULES 1.1, 18.2 (1995). Surprisingly, the AAA International Arbitration Rules and AAA Mediation Rules do not consider the med-arb issue. The AAA Domestic Arbitration Rules, however, specifically prohibit an arbitrator from serving as a mediator, unless the parties agree otherwise. AAA COMMERCIAL ARBITRATION RULES, Rule 10 (effective on July 1, 1996).

²⁵ In a recent domestic arbitration, while walking with the attorneys from the waiting room to the hearing room for a pre-arbitration conference, I casually asked the attorneys whether they had settled the case while waiting for me. They both responded that they could settle the case, but the clients could not. I responded glibly that this sounded like a case for mediation. Both attorneys greeted this off-the-cuff remark enthusiastically, drilled me about how mediation works, and agreed to use mediation. Incidentally, I advised them that if the mediation failed, I would not serve as the arbitrator! I did not think that this domestic case with local parties and attorneys justified the use of this suboptimal arrangement.

(2) *Neutral Consents to Serve Both Roles*

The neutral should carefully consider whether to assume both process roles. The neutral should first assess whether she has the expertise to perform both roles (Protocol 1). The neutral also should ascertain whether the mandate to preserve her impartiality as an arbitrator prevents her from serving effectively as a settler. Finally, the neutral should make an independent assessment as to whether the particular case is ripe for settlement.

(3) *Neutral as Settler Will Respect Principle of Party Self-Determination*

When trying to settle a case, the neutral should respect the right of each party to enter into a voluntary, uncoerced agreement. Each party should be free to determine whether or not to settle. This principle of party self-determination is adopted in the mediator's code of conduct.²⁶ This principle can be easily violated in an arrangement in which the settler also has the power to decide the case. This arrangement may create a coercive atmosphere for settlement.²⁷ As a result, the neutral as settler must be especially careful to avoid any initiatives that may be viewed as coercive in order to preserve the principle of party self-determination.

(4) *Clients With Settlement Authority Will Be Present*²⁸

Settlement efforts are usually more successful when the settlement process includes active participation by not only attorneys but also their clients—the people with the personal knowledge of the dispute, personal interest in the outcome, and settlement authority. Real mediations in the United States succeed in part because of the unique opportunity for attorneys and clients to meet with their counterparts in a non-adversarial and confidential setting.²⁹ However, the familiar division of roles between attorneys and clients in the U.S. is not necessarily followed in civil-law jurisdictions. In other countries, clients may perform less active roles and their attorneys may possess greater settlement authority and personal knowledge of the clients' situation, especially in business matters.

²⁶ See, STANDARDS OF CONDUCT FOR MEDIATORS, Articles I and VI (adopted by American Arbitration Association, Society for Professionals in Dispute Resolution, and American Bar Association Section on Dispute Resolution, 1994).

²⁷ In a detailed study of settlement techniques by judges, the authors drew a sharp distinction between initiatives by trial judges, the judges who will decide the case, and settlement judges, the judges who will only try to settle the case. They concluded that trial judges should be "more circumspect" when using certain more aggressive techniques. "This is because the judge's authority over the trial makes it more likely that his or her actions will be perceived as coercive, as demonstrating a premature judgment on the case, or as bias toward or against a litigant." Goldschmidt & Milford, *supra* note 21, at 7.

²⁸ In federal court, a judge has the authority to order a party or its representative to attend a settlement conference with the judge. See FED. R. CIV. P. 16(c).

²⁹ See GOLANN, *supra* note 19, at Sec. 5.1.3.

Therefore, this protocol may need to be modified to accommodate different cultural practices while ensuring that the people with broad settlement authority and personal knowledge participate in settlement efforts.

(5) *Documents and Statements in Settlement Process are Confidential*

Parties and neutral(s) should execute a confidentiality agreement that prohibits introducing in the arbitration proceeding any information disclosed or developed in the settlement process and that is otherwise not independently discoverable. Executing confidentiality agreements has become standard practice in mediations because of the belief that confidentiality promotes candor and risk-taking in settlement discussions.³⁰ It is obviously impossible to secure complete confidentiality when the settler will also serve as arbitrator. Nevertheless, this protocol should contribute to erecting a wall between settlement and arbitration.

(6) *Neutral as Settler Will Not Evaluate Merits, Evidence or Reasonableness of Positions*³¹

Any evaluation by the neutral as settler poses a significant risk of compromising the neutral's impartiality if she resumes the role of arbitrator. The arbitrator who offers an evaluation during the settlement process may appear to have prejudged the case when the arbitration proceeding resumes. When the neutral returns to arbitrating, the neutral also may discover that her evaluation may have contaminated her view of the record in the arbitration proceeding. This protocol barring evaluations directs the neutral as settler to resist slipping prematurely into an adjudicatory mindset. This prohibition should reinforce the wall that separates the settlement process from the arbitration process.

This restriction should not be interpreted to bar a mediator or quasi-mediator from helping the parties evaluate their case. The settler can still ask even-handed questions about the quality of evidence, credibility of witnesses, clarity of law, and likelihood of success in the arbitration proceeding. The settler can introduce the use of decision tree analysis to

³⁰ See GOLANN, *supra* note 19 at Secs. 13.0, 13.1 (1996) and NANCY H. ROGERS & Craig A. McEWEN, *MEDIATION - LAW, POLICY, PRACTICE*, Secs. 9.01, 9.02, 9.23 (1994, Supp. 1995).

³¹ In an extensive but somewhat dated survey of lawyers, the lawyers strongly preferred judges to evaluate cases but preferred that the evaluations be done by judges who would not ultimately decide the case. See, WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT-A HANDBOOK FOR LAWYERS AND JUDGES* 391, 392, 403-407, 418-24 (1988). (Almost 1900 lawyers were surveyed in 1983-1984 for an ABA study.)

The IBA Ethics for International Arbitrators, Section 8, "Involvement in Settlement Proposals," provides that where parties have consented, "the arbitral panel may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other." This provision should be narrowly construed to cover proposals that are future-oriented or suggestions for compromises that do not reflect views on who has the stronger case. This narrow construction would reduce the risk that any proposals by an arbitrator might undermine the impartiality of the panel.

help the parties assess alternatives to settlement.³² The settler can even encourage the parties to bring in a jointly-selected expert to evaluate decisive aspects of the case, such as conflicting evidence or conflicting interpretations of law.

This protocol, followed by mediators who subscribe to a facilitative style of mediation,³³ eliminates a tool for settlers who use their personal evaluations as a technique to break impasses and prod settlements. Even though I strongly recommend against the use of evaluations, I realize that some participants may still want to take the risk and seek evaluations from arbitrators-turned-settlers. In these circumstances, participants should limit evaluations to matters not likely to be adjudicated in the arbitration, such as future-oriented issues or compromised-based solutions that do not clearly reflect who has the stronger case.

(7) *Neutral Will Not Caucus, Unless Parties Agree to Exception*

When to use caucuses and how best to use them are debated among mediators. Some mediators even advocate avoiding caucuses altogether because the private meetings between the neutral and one side may interfere with the opportunity for parties to work with each other to resolve their own problems.³⁴

Arbitrators turned settlers increase the risk of compromising their appearance of impartiality when they hold private meetings.³⁵ The excluded party may become concerned that the neutral played one party against the other during settlement efforts. The excluded party also may become suspicious that the other party corrupted the neutral's view of the case under circumstances where the excluded party could not challenge the information. Presumably for these reasons, international practitioners have judged caucuses as the least appropriate technique for the arbitrator-turned-mediator.³⁶

Barring caucuses means eliminating a tool that many quasi-mediators and mediators consider vital for settlement efforts to be successful. Many settlers believe that private meetings create a unique and safe opportunity

³² See, e.g., Marjorie Corman Aaron & David P. Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, in *MEDIATING LEGAL DISPUTES*, ch. 11 (Dwight Golann ed., 1996) (In decision tree analysis, parties identify adjudicatory paths for resolution, estimate probability of success along each branch of the path, and approximates the likely substantive outcome, if a party makes it to the end of the adjudicatory path).

³³ For an explanation of different styles of mediation, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996).

³⁴ See, GOLANN, *supra* note 19, at Sec. 3.2 (detailed discussion of goals, techniques, and common mistakes in caucuses).

³⁵ See IBA Ethics for International Arbitrators, Section 8, Involvement in Settlement Proposals ("... the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration").

³⁶ BÜHRING-UHLE, *supra* note 8, at 206, 207.

for neutrals to help parties vent and release anger, clarify positions and interests, and assess the acceptability of alternative settlement options.³⁷ In private confidential sessions, parties may be more inclined to engage in reality testing with the settler and openly recognize weaknesses of their own case as well as strengths of the other side. The private meetings also can create an environment in which parties may feel secure to reveal their real interests to the neutral, who can then use this information to help parties explore mutually acceptable solutions.

After weighing the risks and benefits of using caucuses, parties might still want the settler to use caucuses. Parties may decide to permit the use of caucuses generally or restrict their use to less risky settings. Caucuses are less risky when the settlement effort is focused on forward-looking solutions such as a continuing business relationship instead of backward-looking issues of the type that typically arise in the arbitration.

The reasons for the foregoing distinction are relatively straightforward. If the settlement discussions can be separated in time or subject matter from the issues in the arbitration, the arbitrator is much less likely to be infected from the settlement discussions with off-the-record information or impressions that may affect the arbitrator's view of the merits of the issues being arbitrated on the record. Concomitantly, the larger the overlap between the subject of the settlement discussions and the issues being arbitrated, the greater the likelihood of the arbitrator's being affected by what the arbitrator sees or hears in the settlement discussions.³⁸

Caucuses also are less risky when parties re-configure three-person panels to accommodate the settlement process. These options are considered in Protocol 8.

(8) *Parties Agree to Reconfigure Arbitration Panel to Suit Settlement Process*

Arbitrators can take many different pathways toward helping parties settle a case.³⁹ Each pathway offers different ways for preserving the impartiality of the neutral as arbitrator while opening opportunities for settlement. Many of these pathways are built around the flexibility offered by the usual international tribunal of three arbitrators. Five configurations are considered here, although other permutations can be imagined.

First, when a typical panel of a neutral chair with two party-appointed arbitrators is constituted, the two party-appointed arbitrators could work together as a settlement team without the participation of the chair. This arrangement would preserve the neutrality of the chair who would not be tarnished by settlement efforts.

³⁷ *Id.* at 206–208 and GOLANN, *supra* note 19, at Sec. 3.2 (detailed discussion of goals, techniques, and common mistakes in caucuses).

³⁸ Plant, *supra* note 4 at 331.

³⁹ See, BÜHRING-UHLE, *supra* note 8, at 196–201.

The settlement team could serve as quasi-mediators or even full-fledged mediators. They might function like a panel in a minitrial, hearing the parties' claims and helping them settle the dispute. The settlement team of party-appointed arbitrators may even be permitted by the parties to use caucuses because the third arbitrator, the chair, remains in reserve, insulated from the settlement process (Protocol 7). The settlement team should caucus only as a team which means each party-appointed arbitrator should avoid any *ex parte* contacts with the appointing party.⁴⁰

If settlement efforts are unsuccessful, the chair could serve as a sole arbitrator. This option, however, may be resisted by many international attorneys, who prefer their party-appointed arbitrators to participate in the deliberations.⁴¹ In the alternative, all three arbitrators could hear the case. The impartiality of the panel may survive because any partiality by the party-appointed arbitrators would offset each other, leaving the chair with the neutral and decisive role in the deliberations.

Second, the typical panel of a neutral chair with two party-appointed arbitrators could be reconfigured so that the chair serves as the settler,⁴² preserving the relative impartiality of the party-appointed arbitrators. The neutral chair may serve as a quasi-mediator or full-fledged mediator. The neutral chair should still be prohibited from using caucuses and evaluations in order to protect the impartiality of the chair who performs such a vital role on the arbitration panel. If the case does not settle, the three-person panel would hear the case but only the two party-appointed arbitrators would issue an award. With this arrangement, there is a significant risk of a tie between the two party-appointed arbitrators. Any tie could be broken by the chair, although the chair's neutrality may be suspect despite the prohibition on her use of caucuses and evaluations. When deciding whether to adopt this configuration, parties should consider whether this procedure for breaking a tie is adequate.

Third, when three neutral arbitrators are selected, one could serve as a settler while the other two function only as arbitrators. This arrangement

⁴⁰ In contrast, it is not uncommon for party-appointed arbitrators in China (CIETAC) to conciliate through *ex parte* meetings with the appointing party. See BÜHRING-UHLE, *supra* note 8, at 198-200.

⁴¹ See, e.g., Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INTL. L.J. 59, 65 (1995) and James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 AM. REV. INT'L ARB. 153 (1992).

⁴² In the Commentary for CPR Non-Administered Arbitration Rules, it is suggested that a non-party-appointed arbitrator may be a candidate to serve as a mediator even though this is not as a rule a preferable option.

The members of the tribunal will be thoroughly familiar with the case, and an arbitrator not appointed by either party may well be able to serve as mediator. However, the parties may hesitate to confide in an arbitrator, and an arbitrator would be inhibited in making settlement proposals or giving advice to the parties.

CPR Non-Administered Arbitration Rules & Commentary Rule 17. Settlement and Mediation 28-29 (1994).

would preserve the impartiality of two arbitrators. The arbitrator-turned-settler could serve as a quasi-mediator or even as a full-fledged mediator, employing a wide range of mediation techniques including using caucuses. But the neutral should avoid any evaluations, because she might still serve on the arbitration panel (Protocol 6). If the case does not settle, the remaining two arbitrators would issue the award. If the two arbitrators reach an impasse, then the third arbitrator-turned-settler would be available to break the tie. Again, parties will want to consider whether this tie-breaking procedure is adequate.

Fourth, three arbitrators, whether all neutral or with two party-appointed ones, could serve as a settlement team. This arrangement poses a significant risk of the impartiality of the arbitrators being compromised as settlement efforts are tried. Under these circumstances, the arbitrators should limit themselves to serving as quasi-mediators who employ relatively safe initiatives such as encouraging the participants to try settling the case on their own, requesting parties with settlement authority to be present, helping participants define legal and factual issues in dispute, or suggesting at a propitious moment that the parties “split the difference.” If the issues in the settlement process are limited to forward-looking ones, the settlement team might try a broader range of settlement initiatives.

A fifth pathway may be possible in the rare case when a single international arbitrator is selected. This pathway should be a narrow one. A sole arbitrator should be limited to the role of a quasi-mediator who employs only a few selected and safe initiatives. This restriction is necessary because of the inherent difficulty in preserving the appearance of impartiality of a single arbitrator who tries to settle a case.

(9) *Arbitrator Will Not Be Influenced by Information Revealed in Settlement Process*

The neutral must erect a mental wall to guard against information learned in the settlement process from contaminating her understanding of the record in the arbitration proceeding. The neutral as arbitrator should not be influenced by off-the-record information and insights gleaned from settlement efforts.⁴³ This fundamental tenet can be too easily violated when a neutral is in the throes of an actual case. The neutral as arbitrator must tenaciously strive to make any decisions based on the arbitration record in order to preserve the integrity of the arbitration process.⁴⁴

⁴³For example, neutrals need to guard against any personal reactions to contacts with witnesses or a decision of a party not to settle.

⁴⁴A Hong Kong ordinance establishes an unusual procedure for reducing this risk by requiring the arbitrator to disclose confidential information learned while conciliating that “he considers is material to the arbitration proceedings.” Hong Kong Arbitration Ordinance, Ch. 341, 2B (3) (1996).

(10) *Parties Agree Not to Challenge Arbitrator or Award Based on Combined Roles*

When an arbitrator has tried to settle a case, his impartiality as an arbitrator and the fairness of the arbitration process can be easily challenged by a dissatisfied party. A party who is willing to consent to the combined roles should waive any later objections related solely to the arbitrator trying to settle the case.⁴⁵ Any challenges should be restricted to cases in which a party can make a clear showing that the arbitrator prejudged the case or improperly considered information learned in the settlement process.

(11) *Settlement Initiatives Will Not Unduly Delay the Arbitration Proceeding*

Parties who are anxious to conclude a dispute frequently resist settlement efforts out of concern that the efforts might delay the arbitration proceeding. They are concerned that settlement efforts might extend the arbitration proceeding due to time lost trying to settle or worse yet time lost due to repeating the arbitration selection process because disqualified arbitrators must be replaced. To guard against unduly prolonging the arbitration proceeding, parties could agree to continue the arbitration proceeding in parallel with settlement efforts, or parties could negotiate a short timetable for suspending the arbitration proceeding. To guard against disqualification of the settling arbitrators, parties and neutrals should strictly follow the other protocols.

(12) *Parties Consent to Combined Processes*⁴⁶

The parties serve as the ultimate safeguard of the arbitration process. No settlement initiatives by arbitrators should be tried unless the parties consent. This is a vital and indispensable requirement. In order to increase the likelihood of parties making an informed decision, parties should be given a copy of these protocols and a disclosure statement on the advantages and risks of the neutral serving two processes. Parties and neutral(s) may even develop their own set of protocols and then sign an agreement to abide by them.

⁴⁵ See BÜHRING-UHLE, *supra* note 8, at 208-211; Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L.J.* 578, 620-22 (1990/1991) (describes procedures in British Columbia and Hong Kong that restrict objections to a conciliator resuming the role of arbitrator); see also, JAMS/ENDISPUTE COMPREHENSIVE ARBITRATION RULES AND PROCEDURES, Rule 27(b) (January, 1997) (Parties must confirm in writing that they will not try to disqualify arbitrator(s) who assist in settlement efforts).

⁴⁶ See e.g., CODE OF ETHICS FOR ARBITRATIONS IN COMMERCIAL DISPUTES, Canon IV.H. (1977) (Code states that arbitrators can suggest that parties try to settle a case but arbitrators should not participate in settlement discussions unless requested by all the parties.). See *supra* note 24 (selection of international rules on requiring parties consent).

V. ADOPTING THE PROTOCOLS

The protocols can be regrouped into two basic categories: The first group of three consists of typical practices followed in real mediations. The remaining nine protocols relate to issues that arise from combining two processes with one neutral.

The first group of three protocols should be easy for participants to adopt because the protocols incorporate sound and widely accepted practices that are followed in most mediations: Settlers should respect the principle of party self-determination (Protocol 3). Clients with settlement authority should participate in any settlement process (Protocol 4).⁴⁷ And, participants should agree to maintain the confidentiality of documents and statements generated in the settlement process (Protocol 5).

The remaining protocols deal with distinctive issues that arise when arbitrators try to settle cases. Six of these protocols should be *relatively* noncontroversial and *relatively* straightforward to discuss and adopt. The neutral should be trained in both processes (Protocol 1). The neutral should consent to serving both roles (Protocol 2). The arbitrator should not be influenced by information revealed in the settlement process (Protocol 9). Parties should agree not to challenge the arbitrator or the award based on the arbitrator trying to settle the case (Protocol 10). Parties should guard against unduly delaying the arbitration proceeding (Protocol 11). And, parties should consent to participate in the combined processes (Protocol 12).

Three of these protocols will require considerable attention and negotiations. Two of them are bound to be particularly controversial: the prohibitions on evaluations (Protocol 6) and caucusing (Protocol 7). These prohibitions will be controversial because many participants want the insights gained from credible evaluations and desire the settlement opportunities created in private caucuses. But these benefits must be weighed against the risks that arise when the settler also decides the case. It is safer to prohibit the use of these techniques by arbitrators. If participants still prefer that the techniques be used, the participants should consent only after they have been made fully aware of the risks.

Finally, the protocol for reconfiguring the arbitration panel needs to be thought through. It serves as the centerpiece of the settlement process (Protocol 8). Each possible configuration should be carefully assessed by the participants who should consider which configuration is most likely to preserve the impartiality of the arbitration tribunal while opening the door to the type of settlement initiatives that they want used.

These protocols can be customized to suit the particular preferences of the participants. For instance, they may want to modify the protocols to accommodate different and even competing cultural practices. The

⁴⁷ As noted in the earlier discussion of this protocol, this protocol may need to be modified to accommodate different cultural practices.

protocols include several choices for participants. Participants need to select an optimal configuration for the arbitration panel (Protocol 8). They need to resolve whether to permit caucuses (Protocol 7). They also may decide to modify the protocols by permitting evaluations (Protocol 6) or settlement efforts in the absence of clients (Protocol 4). At a minimum, a discussion of the protocols should generate a focused and illuminating exchange in which the participants can design protocols that are suitable to their circumstances.

VI. CONCLUSION

A colleague recently commented that he had served on an international arbitration panel that violated almost every one of these protocols and the panel still successfully settled the case! This possibility does not surprise me. Arbitrators can surely breach these protocols and still successfully settle cases. But my colleague also speculated what would have happened if the case had not settled; he suspected that parties would have objected to the panel resuming the arbitration.

These protocols provide a road map for navigating around the risks posed by arbitrators trying to settle cases. Settlement efforts inherently pose the risk that either the arbitrators will be disqualified or will act so cautiously as to undermine the effectiveness of settlement efforts. The protocols cannot guarantee the safety of the trip. But, they should provide arbitrators and parties a safer route for settling cases. These protocols should not be adopted wholesale as rigid rules. Instead, they should be the starting point for negotiating the details of protocols that will safeguard the arbitration process and create a narrow settlement opening.