

Combining Arbitration with Conciliation

Michael E. Schneider, Lalive & Partners, Geneva.

I. Introduction

In conciliation or similar forms of dispute settlement, a person chosen by the parties to a dispute assists them in finding agreement on the solution for their dispute. In arbitration, the person whom the parties have chosen decides for them how the dispute must be resolved. Since, in many respects, the best solution to a dispute is the one which both parties accept voluntarily, (1) there are distinct advantages in conciliation: The difficulty is that the conciliator does not always succeed, so that only a binding decision by a third party can eventually resolve the dispute. A combination of the two methods appears to some as an ideal solution which merges the best of both of them and to others as heresy which, by confusing two fundamentally different methods, renders both of them ineffective.

The subject, as will be seen, is not new. Various combinations have long been practised in certain parts of the world. But the subject has taken a new turn in recent years when its importance was discovered by dispute settlement specialists in other parts of the world who have now begun proposing such combinations, primarily under the designation of "Med-arb".

In the preparation of the present Report the author's own initial research was assisted by comments and contributions from Members of the International Council for Commercial Arbitration (ICCA) and other specialists in international dispute settlement. The author gratefully acknowledges these contributions, mentioning in particular those of Fali Nariman, the Chairman of ICCA and of Arthur Marriott, the Chairman of the session at which this Report was discussed during the Seoul ICCA Conference. (2) The work continued at the Conference itself with the observations by the Commentators appointed for the subject and the debate with the participants.

In view of the division of work between the Rapporteurs for this subject, the law and practice in Asia and in particular in China, will be dealt with by Prof. Tang Houzhi; consequently, the present Report does not deal with this region, apart from some occasional references.

Before examining whether and how the two methods of dispute settlement may or should be combined, the concept of each of the two methods must be clarified and the role which the

arbitrator and the conciliator are expected to play. There are indeed substantial differences in the perception of these roles, reflecting different legal and social cultures; these differences explain to a large extent the differing views about the combination of the two methods.

II. Cultural Differences In the Perception of the Role of the Arbitrator and the Conciliator

The rules and practices of arbitration and conciliation differ widely not only from one country to another but also, and perhaps even more so, among various forms of arbitration and conciliation. Substantial differences also may exist between a practitioner engaged in international arbitration and his or her (3) domestic legal environment.(4) Conversely, there may be similarities in the practice of arbitration in countries otherwise far apart, geographically and by their cultural traditions. In the field of our subject, such similarities exist in particular between the practice in Germany, Switzerland and some of their neighbouring countries, on the one hand, and that in China on the other. Indeed a German arbitration practitioner explained that in some respects he finds himself more at ease with colleagues from China than for instance with those following the practice in England. (5)

Under these circumstances, generalizations are difficult and risky; but for a better understanding of the subject it appears necessary to make an attempt at identifying the principle lines of distinction.

1. The Arbitrator and the Arbitral Process

In western forms of dispute settlement in general, the third party which intervenes to bring about the settlement is expected to be a professional, unrelated to the parties and to the dispute. This applies in particular in arbitration where the requirement of *independence and impartiality* generally is unquestioned in so far as a sole arbitrator and the chairman of an arbitral tribunal. To an increasing extent it is applied, as a principle, also to arbitrators appointed by the parties, although the practice in this respect is still quite diverse.

This role model of the arbitrator and, for that matter, the conciliator probably can be found in other cultures, too. (6) However, it is not inherent in the function of third party dispute settlement. Different role models can be found and probably are prevailing in other parts of the world, especially in domestic disputes settlement patterns. Such different models have existed in the West, too, and traces of them can still be found there.

In societies with a dense social tissue, "high-context" cultures, conflict is perceived primarily as a disturbance to group harmony and often expressed in terms of violation of group norms rather than as conflict between individuals about their respective rights. The resolution of the dispute is often sought not by direct confrontation in a formalized procedure but through a triangular process in which the disputants do not necessarily meet. What determines the choice of the third party in this process is not, or not primarily, independence and impartiality but his *role in the group*, his familiarity with the context of the dispute, insight in the relationships, authority and respect in the group and a stake in the outcome of the dispute by restoration of harmony and group norms. (7)

In the West, traces of such models (8) can still be found in dispute settlement mechanism organised by closely structured groups such as some of the traders of certain commodities. The arbitration systems of some commodity exchanges rely heavily on group solidarity. The arbitrators are in close contact with their respective parties and first seek to reach agreement; they are part of the same community just as the umpire who intervenes if the party arbitrators do not reach a settlement. Outsiders, such as lawyers, are excluded from the process. The principal sanction for failure to comply with the decision is blacklisting, the exclusion from the group.

Outside such group oriented dispute settlement schemes, the neutral, independent and impartial professional is the prevailing role model in modern international commercial arbitration. Where parties from different cultural backgrounds are involved in the dispute, some difficulties with the group oriented perception of the arbitrators may arise but the role model as such rarely seems to be questioned. (9) Nevertheless, there are considerable cultural differences in international arbitration. They concern primarily the communication between the arbitrator and the parties and the process in which the arbitrator reaches his decision. The distinction may be described as that between the two-staged process and the interactive process.

There is a wide-spread view among international commercial arbitration practitioners which perceives arbitration essentially as a *two-staged process*: the parties present their case and bring the evidence and argument which, in their view, is needed to support it, the arbitral tribunal then decides the dispute.(10)

During the first stage of this process, the parties present before the arbitral tribunal the evidence and argument on the basis of which this case must be decided. While it may be

called upon to intervene in the procedure so as to ensure that the rules of a fair trial are respected, the arbitral tribunal should not interfere with the presentation of the case by the parties and should abstain from expressing any views with respect to the merits until the case has been fully argued and all the evidence has been presented.

The arbitral tribunal then decides the case in the next stage which consists of its deliberations in which the parties must not interfere. The deliberation stage may start before the presentation of the case is complete, but it is secluded from the parties. The views of the arbitrators and their deliberations should remain strictly confidential. The communication of the tribunal's view by one of the arbitrators to one of the parties, generally to the party having proposed or appointed him, is a subject of major concern and generally perceived as a serious violation of the process. The arbitral tribunal is expected to form its view *in camera* and, once this process is completed, it delivers its award to the parties.

This two-staged approach to the arbitration procedure can be contrasted by what may be called the *interactive approach*. (11) In this interactive approach, also described as dialectic, (12) the formation of the arbitral tribunal's position which culminates in the award does not take place in isolation from the parties. The parties are given indications about the direction which the views of the arbitral tribunal take and are given the opportunity to adapt their argument and complete the evidence so as to influence these views.

There are many forms and degrees of interaction between the arbitral tribunal and the parties. The rules and practices in this respect often are influenced by those followed in judicial proceedings but also by practices specific to arbitration, to certain arbitration institutions or rules, and by the personal style of the arbitrator. A few examples may indicate the wide spectrum of interactivity in arbitration.

In his procedural decisions *with respect to evidence*, the arbitrator often provides indications on the direction which his views on the case have taken. When deciding on the admissibility of certain evidence, when ordering the appearance of a witness or the production of a document or when deciding on the appointment of an expert, the arbitrator normally must take into consideration, among the criteria for his decision, the relevance of the evidence. He may not commit himself and may decide the issue merely by reference to a "possible relevance"; he nevertheless indicates to the parties a provisional view on an aspect of the case.

Some arbitrators go further and, after the initial exchange of pleadings, the production of written evidence and the offer of further evidence in the form of witness testimony, indicate

the subject matter on which they wish to hear such further evidence. They may do that in general terms or identify specific points of fact for which they believe that such evidence is or may be required. (13) Through this identification, they indicate the substance matters which appear relevant to them for the decision of the case and on which evidence is required.

Similarly, when the arbitrator appoints an expert, (14) he must define his terms of reference. In so doing, he gives indications about the technical matters which he considers relevant. Here, too, the arbitrator may define the questions in general terms but this may create the risk that the expert spends time and efforts on issues which are of no interest for the decision and thus requires resources far beyond those necessary. Some arbitrators, therefore, indicate quite specifically the questions to which he must reply. (15)

When the witnesses or experts appear at the hearing, the arbitrators often pose questions to them, thereby providing clues about the subject matters which they consider relevant. The questions may be limited to mere clarifications of matters dealt with in the examination by the parties' counsel; such questions may provide little, if any, information on the arbitrators' views on the case. However, when the witnesses and experts first are questioned by the arbitral tribunal much more revealing clues can be expected. (16)

Interactivity can be found also in the arbitral tribunal's decision making process *with respect to the law*. One may have serious doubts whether international arbitrators may or should apply strictly the principle *iura novit curia*, which leaves it to the courts in some countries to identify the rules of law applicable to the claims made before them and the facts established in their support. Nevertheless, arbitrators often do not consider themselves bound by the legal characterization given by the parties to their claims.

However, where they do so, they should observe the right of the parties to be heard not only on the facts relied upon but also on the legal rules applied by the arbitral tribunal. The French Code of Civil Procedure, in its Art. 16, specifically requires the court to invite the parties' comments if it intends to rely on a rule of law or a construction of the facts which they have not discussed before him. (17) The rule is applicable in international arbitration proceedings in France. (18) The *principe du contradictoire* (19) of French procedure can also be found in the procedural or arbitration laws of other countries. (20)

Some rules of civil procedure, occasionally applicable also in arbitration, require or at least authorize the judge or the arbitrator to intervene with the parties so that they present their case properly. Under these rules, *the judge or arbitrator, where necessary, must invite the*

parties to clarify their case. It is the objective of these rules to avoid that, due to incomplete or inadequate presentation, the tribunal would have to reject a case which would otherwise be well founded. While these rules require assistance to the parties for clarification of the case, they do not authorize the judge or arbitrator to make the case of the parties on their behalf or even to suggest modifications in the substance of their claims.

The rules of procedure of the Swiss Supreme Court, for instance, require that the Court draws the attention of the parties to omissions in their prayer for relief ("*conclusions*") and that it invites them to present completely the facts and evidence necessary for the establishment of the truth. (21) The Supreme Court found that the rule is applicable in international arbitration. (22) Similar rules are applicable in many of the Swiss cantons, (23) in Germany (24) and some other countries.

Perhaps the most far reaching form of interactivity is the open *discussion of the case between the court and the parties*. In countries following the German tradition of civil procedure, such discussions are normal practice and sometimes even prescribed by law. Sect. 139 of the German Code of Civil Procedure, dealing with the duty of the court to invite clarifications of the case, concludes by requiring the chairman of the court to discuss with the parties, to the extent necessary, the case in its factual and legal aspects and to ask the necessary questions. (25) The practice of such discussions prevails also in many of the Swiss Cantons (26) and in some other countries following the German procedural tradition. Before the Swiss Supreme Court, the discussion normally is conducted by a reporting judge (*juge délégué*). This judge is required by law, in the course of a "preparatory debate", to discuss with the parties themselves the subject of their dispute and, to the extent necessary, to invite them to clarify, correct, simplify or complete their case and the argument in support of it. It is only with the consent of the parties that the reporting judge can omit such a preparatory debate. (27)

Forms of this discussion between the court and the parties or their lawyers can be found in other jurisdictions, too, although rarely as developed as in the German tradition. In English courts, for instance, it is not infrequent that members of the court, address questions to the barristers appearing before them and comment their answers. In the United States the Pre-trial Conferences play an important role in this respect. Rule 16 of the Federal Rules of Civil Procedure lists among the subjects to be discussed at Pre-trial Conferences the following:

(1)

“the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2)

the necessity or desirability of amendments to the pleadings;

(3)

the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulation regarding the authenticity of documents....”

[\(28\)](#)

Such a discussion of the case with the parties is a frequent feature in international arbitration before arbitrators familiar with the German tradition. Those who practice it argue that it has great advantages. An experienced Swiss counsel and arbitrator has expressed the supporting view as follows:

“... such a discussion of the merits, if properly conducted, is likely to increase the chances of reaching a fair result in an efficient arbitration procedure. Such discussions give to the arbitrator the opportunity to test his views and conclusions against possible objections from the parties and he can ascertain that his reasoning contains no fallacies and that he has not overlooked any relevant facts. Furthermore, by questioning the parties on points which do not appear to be conclusive, he may either clarify valid positions which have been presented awkwardly or unmask untenable positions which have not been submitted in good faith.

For the parties, too, such discussion[s] have many advantages: Not the least of them is to enable the parties to satisfy themselves that the arbitrator is familiar with the case and with the briefs and exhibits they have submitted”.[\(29\)](#)

Additional advantages of such discussions result from the contribution which they make to a common understanding of the case by the parties and the arbitral tribunal. Especially in complex cases with voluminous evidence, it is of great assistance for the arbitrator to test his understanding in a discussion with the parties and for the parties to be able to address the points in the arbitrator's understanding where their case has not been understood as they feel it should be. Finally, the discussion of the case with the parties and the expression by the

arbitral tribunal of its preliminary views on the case may contribute to a settlement; this feature will be discussed in greater detail below. [\(30\)](#)

However, it must be pointed out that such a discussion is also a great challenge to the arbitrator since he must be thoroughly familiar with the case and have the skill of conducting the discussion with impartiality and without creating the impression of bias. For Hafter, the discussion is of such importance that he considers the willingness of a potential arbitrator to engage in it as an important criterion in the choice of the chairman. [\(31\)](#)

In the present author's experience such discussions generally are appreciated even by participants from legal cultures not familiar with them, provided the process is explained in advance. The experience has been confirmed in the course of the enquiry conducted in preparation of this Report, where some of the respondents explained that the principal obstacle to a wider application of the method is the practice of some arbitrators to study the file only at the end, before or even after the hearing for the purposes of the deliberations.

2. The Conciliator

In the present Report, the person whom the parties engage for assisting them in finding a settlement without conferring decision-making power on him is described as a conciliator. Often such a person is referred to as a mediator. The term mediator seems to be more frequently employed in American usage, while that of conciliator has some currency in British English, although both expressions are used in England. [\(32\)](#)

There have been attempts to differentiate the two terms; indeed in public international law a distinction is made at least in the classical doctrine. In modern dispute settlement terminology other differentiations have sometimes been proposed. Thus mediation has been described as the more pro-active and evaluative process. [\(33\)](#) But the reverse usage can also be found. [\(34\)](#) In the present study the two terms are used as synonyms.

Another distinction concerns the scope and objective of the conciliation. The starting point of a conciliation is a dispute. When the dispute has been submitted for decision by a third party, court or arbitrator, the parameters of the dispute are circumscribed, although the concepts and rules of such circumscription [\(35\)](#) vary from one legal system to another. [\(36\)](#) The distinction considered here concerns the extent to which the conciliation is limited to the scope of the dispute as it is pending.

In conciliation which takes place outside the context of a pending litigation or arbitration, the conciliator tends to look for elements beyond the dispute itself so as to enlarge the scope of a possible settlement and create the grounds for an arrangement in which all parties find their advantage. This approach, transcending the limits of the pending dispute, is indeed one of the principal advantages of conciliation and similar forms of dispute settlement.

When the conciliation is combined with arbitration, the scope of the dispute before the arbitrator places some constraints on the conciliator's efforts. These constraints may be severe, if the arbitrator/conciliator finds himself bound by the legal and factual situation presented in the arbitration, a view which is widely held in Germany. [\(37\)](#) However, this view is not shared by Swiss arbitrators who, in their conciliation efforts, do consider aspects which they would have to disregard when making their award [\(38\)](#) and settlements may be recorded in court and in arbitration as consent awards which include elements outside the case before the judge or arbitrator. In any event and even if he does not consider himself strictly bound by the limits of the case, an arbitrator acting as conciliator may be reluctant to stray too far from the subject matter before him and the parties may hesitate to discuss with him matters wholly unrelated to the dispute.

As a result, the settlement efforts by a court or an arbitral tribunal normally differ in scope from those of conciliators acting in a manner unrelated to pending court or arbitration proceedings. These differences have a significant bearing on the view on the admissibility and suitability of a combination of arbitration and conciliation. Those who conceive conciliation in a wider scope have greater difficulties in accepting its combination with arbitration than those who experienced it in a close link with pending procedures. This distinction is reflected in the results of the enquiry conducted by Bühring-Uhle. [\(39\)](#)

III. Possible Forms of Combining Arbitration and Conciliation

Most of the controversy about the combination of arbitration and conciliation concerns the situation where the arbitrator and the conciliator are one and the same person. We shall deal with this situation in the next section. Before doing so, some other forms of combination should be considered.

When examining such combinations one should bear in mind that the management of a dispute is a complex process in which formal proceedings in conciliation, arbitration or before the courts, normally are only part of a larger strategy of the parties. While these formal proceedings, to some extent, are mutually exclusive, their availability and their possible

interaction are factors in the overall settlement efforts. A typical sign of such interaction is the experience, made by many arbitrators, that the parties reach settlement shortly before a hearing or other event in the arbitration which requires major efforts or confrontation.

1. Conciliation Followed by Arbitration

When the parties agree on conciliation, they must and do count with the possibility that the efforts of the conciliator fail. Some of the rules for conciliation provide for this case.

The issues which arise in this context are (a) the availability of other proceedings during the conciliation, (b) the use which the parties may make of the conciliation effort in the subsequent arbitration and (c) the role of the conciliator in subsequent arbitration or other contentious proceedings.

a. Availability of other proceedings

It is generally understood that during the course of the conciliation *no other proceedings*, in court or in arbitration, may be initiated. The only exceptions which are generally admitted concern actions which are necessary for the preservation of the parties' rights, in particular those which may be required to prevent the claims from becoming time barred. The rule is expressed in Art. 16 of the UNCITRAL Conciliation Rules but can also be found in some but not all other conciliation rules [\(40\)](#) or statutory enactments. [\(41\)](#)

There is no doubt some wisdom in the rule; the conciliation efforts should not be disturbed by the contentious nature of other proceedings. However, the interaction between different proceedings may have a salutary effect on the settlement efforts. In particular, one should bear in mind that the formation of an arbitral tribunal often takes a long time. It would not appear irreconcilable with an ongoing conciliation if the parties in parallel were proceeding with the formation of the arbitral tribunal to which they will submit their case if the conciliation fails. Indeed the Centre for Dispute Resolution Model Mediation Procedure expressly provides that litigation or arbitration may be commenced notwithstanding the mediation, unless the parties agree otherwise. [\(42\)](#)

b. Subsequent use in arbitration

It is generally understood that, if the conciliation efforts are unsuccessful, they should *not be relied upon in other proceedings*. The UNCITRAL Rules express the principle in Art. 20 as follows:

“The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a)

Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b)

Admissions made by the other party in the course of the conciliation proceedings;

(c)

Proposals made by the conciliator;

(d)

The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.”

Almost identical provisions are contained in Art. 11 of the ICC Conciliation Rules and in some other rules [\(43\)](#) and some recent statutory enactments. [\(44\)](#)

If the settlement efforts fail, the parties will have to resort to other means of dispute resolution. In that case, the previous efforts often have been in vain. Nevertheless the conciliator can be of some help if he prepares the grounds for such other means. During his efforts, he has become familiar with the dispute. He can identify the critical issues and may recommend to the parties how best to resolve them. The WIPO Mediation Rules recognise this situation and provide the following:

“Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration

of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. In particular, the mediator may so propose:

(i)

an expert determination of one or more particular issues;

(ii)

arbitration;

(iii)

[last offer arbitration];

(iv)

[arbitration by the mediator]”.

[\(45\)](#) This provision in the WIPO Rules seems to be an innovation; but nothing should prevent conciliators proceeding under other rules which do not contain such a provision to make recommendations of the sort.

c. Subsequent role of conciliator

With respect to the *role of the conciliator in other proceedings*, the traditional wisdom seems to be that he should abstain from any activity and act neither as arbitrator, nor as counsel nor as witness. The UNCITRAL Rules state it clearly:

“The parties and the conciliator undertake that the conciliator will not act as an arbitrator or a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings”. In this respect, too, one finds similar clauses in other conciliation rules. [\(46\)](#) However, differing agreements by the parties are reserved specifically for this case [\(47\)](#) or by a general rule. [\(48\)](#)

The preclusion of the conciliator's subsequent action is not unquestioned in so far as his possible role as arbitrator is concerned. Traditionally, it was accepted that the role as conciliator was irreconcilable with that of arbitrator in the same proceedings. (49) In France, the *Cour d'appel* of Paris held that it was difficult to reconcile the role of a conciliator with the powers of deciding subsequently the outstanding issues in a judicial manner;(50) a learned French writer, commenting the decision, characterized as "deplorable" an agreement to this effect which combined what in his opinion should remain distinct. (51)

The question whether the role of arbitrator and conciliator are indeed irreconcilable or not shall be discussed below. In the context of the succession to the conciliator as examined here, it should be pointed out that practice and rules recently developed in the United States and exported from there as well as some recent enactments expressly provide for the possibility of the conciliator succeeding himself as an arbitrator. The procedure in the United States, as mentioned above, is called "Med-arb" and has found advocates both in that country and abroad. (52) It consists essentially in appointing a mediator who will, if and to the extent to which his mediation efforts fail, continue as arbitrator and will decide those issues on which the parties have failed to agree. (53) The process is used in the United States particularly in labour disputes (54) and in community mediation centres. (55) It found followers in Canada (56) and elsewhere (57) .

Among the recent legislative enactments which expressly authorize the conciliator to act as arbitrator in case the conciliation has failed, one may mention in particular statutory provisions in Australia, (58) the 1990 Hong Kong Arbitration Ordinance and the 1994 Singapore International Arbitration Act. Sect. 2A of the Hong Kong Ordinance contains a provision which is repeated literally in Sect. 16(3) of the Singapore Act:

"Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties

(a)

no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration;"

Similarly some recent conciliation and arbitration rules expressly authorize such successive functions of the same person. The Rules for International Commercial Arbitration and Conciliation Proceedings of the British Columbia International Commercial Arbitration Centre state:

“Where an arbitration agreement provides

(a)

for the appointment of a conciliator, and

(b)

that the conciliator shall also act as arbitrator in the event of the conciliation proceedings failing to produce a settlement, a party shall not object to the appointment of a conciliator as arbitrator solely on the ground that he had acted as conciliator in connection with some or all of the matters referred to in the arbitration.”

[\(59\)](#)

The WIPO Mediation Rules, in the rule on the role of the mediator, provide that, with respect to issues on which no settlement may be reached, he may propose, inter alia:

(iv)

“arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator, it being understood that the mediator may, in the arbitral proceedings, take into account information received during the mediation.”

[\(60\)](#)

In view of these enactments and rules, one cannot or no longer argue that it is inadmissible for a conciliator to continue as arbitrator, if the parties so agree. The question whether such continuation is desirable and in the interest of the parties will be discussed below.

2. Conciliation during Arbitration

Many cases in arbitration are settled before the arbitrator has decided all or even part of the dispute. (61) As mentioned above, the arbitration proceedings often are only one among several avenues which the parties pursue in view of a settlement. Parallel settlement attempts often remain unknown to the arbitrator and it is not uncommon even for parties having taken a very antagonistic stance in the arbitration, to suddenly announce to the complete surprise of the arbitrator that their dispute has been settled.

The settlement does not in all cases come as a surprise to the arbitrator. Often the nature of the dispute or certain elements of it suggest settlement possibilities. What can the arbitrator do when he sees such possibilities?

Short of acting himself as conciliator, an approach which shall be discussed below, the arbitrator has some other possibilities to promote settlement. The scope of this action depends to a large extent on the concept which the arbitrator has of his role and on possible restrictions which the applicable procedural law imposes on him in this respect.

a. Enquiry about settlement

The least the arbitrator could do, it would appear, is to enquire with the parties whether they feel that a settlement attempt could usefully be made. However, some parties or counsel may see in such an enquiry a sign of the arbitrator's reluctance to proceed with the case or an interference with matters which should not be his concern; some arbitrators may fear that their enquiry be perceived as such reluctance or interference. However, such reservations would seem to be rare and need not preoccupy us seriously.

One may think that a simple enquiry would not be of much help. This is not necessarily correct: Staring settlement attempts often is difficult for parties in a dispute. If the parties are called to respond to a question from the arbitral tribunal, one or the other might find it easier to take the initiative. Indeed, the City Disputes Panel Arbitration Rules make it a requirement for the arbitrators periodically to enquire of the parties what, if any, progress is being made towards settlement and whether the tribunal is in a position to assist parties to that end. (62) Marriott recommends that this should become standard practice. (63)

b. Recommending separate conciliation proceedings

When he sees potential for a settlement, the arbitrator may recommend that the parties make an attempt at conciliation. The practice of such recommendations is current in the courts

of a number of countries. In the United States, court annexed mediation is a frequent feature and sometimes required by law. [\(64\)](#)

In France, courts practice what is called judicial mediation ("*médiation judiciaire*"). The practice is attributed to Pierre Bellet, now retired *Premier Président* of the Court of Cassation and one of the outstanding personalities in international commercial arbitration, who commenced it in the midst of the 1968 Crisis, when the workers had occupied the Citroen factories and the dispute was brought before him as the President of the *Tribunal de grande instance de la Seine*, as he then was. In this practice, the court appoints a "*médiateur*", also described as "consultant" or an "expert", who discusses the case with the parties outside the court. The mediator reports on the result, success or failure, without any information about the content of the mediation and the parties' positions. The practice has expanded since 1968 and is applied in a variety of cases: contracts, family, real estate, etc. [\(65\)](#)

In England, a Practice Statement has now been issued for the Commercial Court which contains the following recommendation:

"If it should appear to the judge that the action before him or any of the issues arising in it are particularly appropriate for an attempt at settlement by A.D.R. techniques but that the parties have not previously attempted settlement by such means, he may invite the parties to take positive steps to set in motion A.D.R. procedures. The judge may, if he considers it appropriate, adjourn the proceedings then before him for a specified period of time to encourage and enable the parties to take such steps."[\(66\)](#)

The practice can be applied in arbitration. The AAA Commercial Arbitration Rules expressly provide for the possibility of a mediation during the arbitration. Clause 10 contains the following provision:

"With the consent of the parties, the AAA at any stage of the proceedings may arrange a mediation conference under the Commercial Mediation Rules, in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. When the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation."

The idea of such a "Mediation Window" in the arbitration seems to meet with some favour among arbitration practitioners. In Bühring-Uhle's enquiry concerning the admissibility of a mediation suggestion by the arbitration institution, the majority responded positively, although

the support was greater from Common Law countries than from the European continent. (67) That author also reports some arbitration practice, mainly in the United States, where mediation was conducted in parallel to the arbitration. (68) In one case, the mediator was appointed at the beginning of the arbitration, studied the file with the arbitrators and attended the hearings. After a first settlement attempt, conducted during a limited discovery exercise, had failed, the attempt was repeated later at the opening of the hearing and succeeded. (69) "Simultaneous parallel conciliation proceedings (with different arbitrators and conciliators)" have been recommended by Hunter. (70) Santos and de la Garca provide in one of their recommended dispute settlement clauses for conciliation proceedings "[i]mmediately after the arbitration proceedings have commenced, and without suspending or interrupting said proceedings". (71)

Nevertheless such "mediation windows" or, as Pieter Sanders described them, "Intermezzos" (72) seem to be rarely used in international arbitration. (73) Arbitration practitioners who find it acceptable for the arbitration institution to offer mediation may be reluctant to make such a suggestion when they are sitting as arbitrators and the parties might not appreciate such suggestions coming from the arbitrators. The parties have engaged in an arbitration and expect that the arbitral tribunal settle their dispute. While they may find recommendations with respect to settlement attempts a useful service of the arbitral tribunal, they might resent what could be seen as an attempt of the arbitral tribunal to transfer its task to a conciliator. However, there may well be situations in which the services of a conciliator may be useful during the course of the arbitration.

If a conciliator different from the arbitrators is appointed during the arbitration, the arbitrator remains bound by his duty to conduct the proceedings without delay and should normally not suspend the procedure, unless the parties expressly authorize him to do so. (74) For the parties, it is generally not advisable to provide such a suspension, since running time limits in the arbitration are useful incentives in favour of a settlement and, if the proceedings are suspended, time will have been lost in case the conciliation fails.

c. Providing other assistance to the parties through identifying, deciding or expressing views on the critical issues of the dispute

Normally, opposing parties differ in their perception of the dispute and their expectation with respect to the final decision by the arbitrator. These differences are a major, if not the principal factor in the parties' determination to continue the proceedings rather than to accept

a settlement. Clarification in this respect can make a decisive contribution to bringing about a settlement. The question is who should or may provide this clarification.

Among specialists in conciliation technique, it is disputed whether the conciliator himself should express a view about the decision which the parties have to expect in litigation or arbitration. In any event, it is probably not advisable for a conciliator to do so at the beginning of his assignment.

Such views may be more helpful if they are expressed by a person other than the conciliator. Indeed, some indications in this direction, by creating doubts in the final outcome of the dispute, often may be necessary as an incentive for the parties to engage in a conciliation or other settlement attempts. As pointed out by Lord Hoffmann, "nothing more concentrates the mind of the parties upon settlement, than an expression of provisional judicial opinion on the merits."⁽⁷⁵⁾ Therefore, "neutral evaluation", as it is often called, is a recommended tool for promoting settlement, especially in the United States. In England, it is now one of the principal methods foreseen in the 1996 Practice Statement for the Commercial Court, concerning ADR in commercial cases. ⁽⁷⁶⁾

Such early neutral evaluation has its drawbacks, too: Especially in complex disputes, the neutral evaluator may require considerable time and effort to study the case and the file; the parties may ask themselves why they should pay both the arbitral tribunal and the neutral evaluator to do more or less the same work. One might, of course, identify the critical issues and limit the evaluation to them; the procedure might resemble to some extent the "statement of case" procedure in earlier English arbitration legislation which survived in the form of a "determination of a preliminary point of law". ⁽⁷⁷⁾ The risk is that the evaluator examines and determines the issues in isolation and expresses a view which does not adequately take account of the context in which the issues have in fact arisen.

It is suggested that the arbitral tribunal can play an important role in this respect. There should be little doubt that the arbitral tribunal may *identify* the issues which are critical for its decision. These issues may then be submitted to the neutral evaluator. The definition of these issues by the arbitral tribunal may to some extent reduce the risk mentioned above, as they result from a consideration of the issues in isolation from the general context of the dispute; but it can hardly avoid the risk altogether.

The arbitral tribunal may also *decide* certain critical issues in advance of others. This is indeed the classical method for arbitral tribunals to deal with the matter. In many cases,

arbitral tribunals proceed in this manner and, by deciding certain issues in partial awards, hope to prepare the ground for a settlement on the remainder of the dispute. If the parties do not reach agreement on their own, the task of a possible conciliator may be facilitated by the partial award. However, the effectiveness of partial awards is not unquestioned. Since they treat only part of the dispute, they favour the party with the stronger case concerning the issues decided; the same party may be less successful on other issues which have not (yet) been decided. This is also one of the reasons why in some cases it is more difficult to reach unanimity on partial awards than on a single award which decides the dispute in its entirety and thus leaves more room for a "balanced" outcome. Nevertheless, in many disputes, a partial award has prepared the ground for a final settlement by the parties.

The most controversial but perhaps also the most promising form of preparing for settlement is the *indication of preliminary views by the arbitral tribunal itself*. The practice in this respect has been described above in the context of an interactive conduct of the case and the discussion of the case between the tribunal and the parties. The main objection to such an indication of views by the arbitral tribunal is the fear of prejudice or the appearance of it. The English ADR Practice Note for the Commercial Court referred to above, while permitting that the judge "may offer to provide [early neutral] evaluation himself", stipulates that, where a judge has provided such evaluation, he will take no further part in the proceedings, unless the parties otherwise agree. [\(78\)](#) Several of the arbitration specialists consulted in the course of the preparation of this Report have advised that it is not admissible for an arbitrator to express preliminary views or that he should do so only with extreme caution and in any event only with the parties' consent.

While an arbitrator must take account of the sensitivity which parties from certain cultural backgrounds may have with this approach, it is submitted that the expression of preliminary views on the arbitral tribunal's assessment of the dispute and certain of its issues is not only admissible but desirable: In his own mind, the arbitrator does not make his decision all at once, when the presentation of the case is completed; he forms his view in a continuous process. When reading the Request for Arbitration, the Answer, the subsequent written statements and the documentary evidence, when hearing the witnesses and oral argument, the arbitrator does and indeed must form views about the case and the decision which he will have to take. These views are provisional and evolve as the proceedings advance. They may even undergo changes after the argument has been completed and the arbitrators deliberate and draft the award.

Why should the arbitrator leave the parties in the dark about this evolution and surprise them at the end with his award? The possibility for him to change his view and the fact that, on previous occasions, he has done so should reassure the parties that they still may bring argument and evidence to deal with those aspects of their case which the arbitrator finds weak. The arbitrator and the parties may also test the arbitrator's understanding of the file and of the parties' case. At such occasions, misunderstandings and oversights can be corrected; when they find their way into the award this is normally no longer possible. Those who have experienced the practice of arbitrators discussing the case with the parties or at least identifying to the parties the points on which they have difficulties in accepting their respective positions, find it very useful. Practice has shown that the approach is welcomed even by counsel and arbitrators from a cultural background where such discussions are not admitted or not practised.

Of course, the arbitrator must conduct this discussion with prudence and must show to the parties that his mind is still open for their explanations. He must engage in such discussion only after having carefully studied the file. It may well be that, for some arbitrators, this is the principal reason for avoiding such discussions. Indeed, as Alain Hirsch aptly stated, the principal risk for an arbitrator in these circumstances is not the appearance of bias or pre-judgment but the revelation of the arbitrator's ignorance of the File.

In the light of these considerations, it is submitted that the most effective form for an arbitrator to promote settlement, short of engaging himself in a settlement attempt, is a discussion with the parties of their case, indicating to them the strength and weaknesses, subject of course to revision as the case proceeds. If these indications help the parties to understand better their case and prepare the ground for a settlement on their own, all the better. If the parties do not succeed on their own, the grounds may have been prepared for a promising conciliation attempt by a third person and, if this is acceptable to the parties, by the arbitrator himself.

IV. The Arbitrator as Conciliator

In many respects, the most efficient combination of arbitration and conciliation is that in which the same person acts both as arbitrator and conciliator. The arbitrator proceeds with the case and, if he finds the circumstances are appropriate, examines with the parties whether they would want to attempt a conciliation. He is familiar with the case and the strength and weaknesses of the parties' respective positions and thus is well placed to conduct such an

attempt. The combination of the two dispute settlement methods by the same person and the flexibility with which the arbitrator may switch from one method to the other, makes this combination superior to each of the two methods, taken alone. [\(79\)](#)

There are disadvantages, too, in such a combination and limits to what the arbitrator acting as conciliator can do. The most important obstacle, however, is the firm belief of many arbitration specialists that the two roles are incompatible and that it is inadmissible for an arbitrator to act as conciliator.

1. Is the Combination Admissible?

The admissibility and appropriateness for an arbitrator to act as conciliator is among the most controversial issues among international arbitration practitioners. The views and practices in this respect differ widely. Bühring-Uhle's enquiry showed "dramatically" varying attitudes, a "discrepancy between unconditional rejection and unconditional approval". [\(80\)](#) While some respondents to his enquiry found the combination desirable and even described settlement facilitation by the arbitrator as his "noble office", others regarded conciliation efforts by arbitrators as "entirely inappropriate", "disastrous", "bizarre" or "perverse". [\(81\)](#) These results are confirmed by the present author's own enquiry. To the question whether, in the respondent's country, it was admissible for an arbitrator to act as conciliator, whether it was common and whether it was recommended, some respondents answered with yes to all three questions, others responded with no, while yet another group responded that it was admissible but neither common nor recommended. [\(82\)](#)

The differences in the views on this subject clearly have their origin in different legal cultures. The answers to Bühring-Uhle's enquiry showed it: with respect to the question whether it was appropriate for an arbitrator, at both parties' request, (a) to actively participate in settlement negotiations and (b) to propose a settlement formula, a predominantly negative answer came from American respondents (71% and 58% respectively), an overwhelmingly positive answer from the German respondents (92% and 100%) and a positive answer from the rest of continental Europe (65 % and 58%).

The differences are real and important, but they are not quite as dramatic as some of the answers seem to indicate. In order to fully assess the importance of the differences, it should be borne in mind that they are related to differences in two other fields which have been discussed above, viz., different conceptions about the role of the judge or arbitrator and differences in the scope and practice of conciliation.

Traditionally, a judge in the Common Law countries is not permitted to be actively involved in settlement facilitation. (83) This is reflected in the arbitration practice of some countries. (84)

In Civil Law Countries, the position varies: In France, conciliation is expressly mentioned as one of the functions of the judge. (85) The rule applies also to the arbitrator. (86) French arbitration practice, however, is reserved if not hostile to a combination. De Boissésou, for instance, insists on the distinction of the two methods of dispute settlement, both in law and in their practical application. (87) The Working Group formed by the International Arbitration Commission of the French National Committee of the ICC and presided by Jean-Claude Goldsmith confirms this view of a fundamental contradiction between the two methods. The report of the Working Group adds that, even if one would permit an arbitrator to conciliate, his efforts would normally fail. (88)

In Germany, the judge is held at any stage of the proceedings to see to an amicable settlement of the dispute or any of the contentious issues. (89) A similar provision applies in Austria. (90) In Switzerland where the law of civil procedure, apart from the procedure before the Supreme Court, is cantonal, the practice is known in some cantons but not in others. In Turkey where the law of civil procedure has been imported from one of the Swiss cantons, the combination is allowed neither for the judge nor for the arbitrator. (91) No provision exists in Italian civil procedure. (92) In Sweden the law requires the courts under certain circumstances to promote settlement; (93) however, in practice judges are reluctant to get involved in settlement attempts of the parties. (94) In Mexico the combination is not admitted and conciliation efforts, as they are foreseen by the Code of Civil Procedure, are performed by a court official different from the judge trying the case. (95)

In those civil law countries which are more favourable to conciliation efforts by the judge, the rules and practices in the courts find their reflection in a similar and perhaps even more favourable attitude by arbitrators from these countries. (96) The involvement of arbitrators in conciliation in these countries normally is not regulated by an express rule in the legislation on arbitration. An exception is found in The Netherlands where Art. 1043 of the 1986 Arbitration Act expressly allows settlement efforts by the arbitrators:

“At any stage of the proceedings, the arbitral tribunal may order the parties to appear in person for the purpose of providing information or attempting to arrive at a settlement.” (97) The provision corresponds to the practice in The Netherlands where

arbitrators, like in Germany, in Switzerland and Austria but also in Poland, [\(98\)](#) regularly attempt to bring about a settlement between the parties. [\(99\)](#)

Thus, one can note with respect to the role of the arbitrator as conciliator a clear distinction between, on the one hand, the Common Law countries, and, on the other hand, the Germanic tradition; other countries of the Civil Law tradition taking a place somewhere in between.

However, the traditionally hostile attitude to conciliation efforts by the judge and arbitrator in Common Law countries is changing. In Canada, the new favourable approach finds a clear expression in the 1991 Alberta Arbitration Act which contains the following provision:

35(1)

“The members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matter in dispute.

(2)

After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification.”

[\(100\)](#)

In other parts of Canada, this combination of arbitration and conciliation can be found, in particular, in labour disputes. [\(101\)](#)

In Australia, the New South Wales Commercial Arbitration Act, as amended in 1990, provides in Sect. 27, in subsection (1) that the parties

“may authorise the arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them ... whether before or after proceeding to arbitration, and whether or not continuing with the arbitration”.[\(102\)](#)

The provision then continues as follows:

(2)

“Where:

(a)

an arbitrator or umpire acts as a mediator, conciliator or intermediary ... and

(b)

that action fails to produce a settlement of the dispute acceptable to the parties to the dispute, no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

(3)

Unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement under subsection (1)“.

A similar provision exists in the law of Queensland. [\(103\)](#)

The 1990 Hong Kong Arbitration Ordinance [\(104\)](#) and the 1994 Singapore International Arbitration Act, [\(105\)](#) quoted above, both allow an arbitrator or umpire to act as a conciliator and exclude objections to the conciliator “solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration”[\(106\)](#) These enactments also make prescriptions for the conduct of the arbitrator acting as conciliator which shall be discussed below. [\(107\)](#)

The 1993 Bermuda International Conciliation and Arbitration Act, in its Sect. 14, starts with the classical principle referred to above according to which “no person who has served as conciliator may be appointed as an arbitrator for, or take part in, any arbitral or judicial proceedings in the same dispute”but then reserves the contrary agreement in writing by the parties or a contrary provision in the agreed rules. As in the Hong Kong and Singapore enactments, the Bermuda Act contains an express provision excluding objections against an arbitrator on the ground that he previously acted as a conciliator. [\(108\)](#)

One may conclude from this overview of legislation and practice in many countries that, while reservations and even prohibitions still exist in some countries, it can not, or at least no longer, be argued that it is incompatible with the role of an arbitrator to act as conciliator. The

Rules of Ethics for International Arbitrators, published by the International Bar Association, confirm this conclusion and indeed expressly permit the combination of the two roles. Rule 8, entitled "Involvement in Settlement Proposals" reads as follows:

"Where the parties have so requested or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other...."[\(109\)](#)

2. Some Cases

Before examining some questions concerning the procedure which must or may be applied when arbitrators set out to promote settlement, it may be useful to describe some cases and situations of fact encountered by arbitrators and counsel. Some of the material described below has been taken from published sources; other information has been provided by practitioners involved in the cases in one way or another. Where this was acceptable to the person providing the information, the name has been indicated.

In a dispute between a Western private company and a State Trading Organization of a country from what then was the CMEA or COMECON, the parties met with the arbitral tribunal for the preparation of the Terms of Reference (the case was not subject to the ICC Rules) and the organization of the procedure. In the discussion of the issues to be decided, it became apparent that the parties were interested in finding a settlement. The chairman of the arbitral tribunal offered to provide assistance but pointed out that, if the settlement attempt should fail, he and his colleagues would have to decide the dispute. The parties agreed to a conciliation attempt with the chairman alone. They reached agreement on the essential elements of a settlement. The representatives of the State Trading Organization found the settlement acceptable but requested that it should take the form of a settlement proposal from the chairman of the arbitral tribunal. The chairman prepared the proposal, pointing out that it was made on the basis of the present state of his understanding of the case, reserving different conclusions if the case proceeded. The proposal was delivered to the parties the next morning. After return to their respective headquarters, the parties notified the chairman that they had accepted the proposal and requested that an award by consent be issued. [\(110\)](#)

Account of a French counsel with wide experience in international arbitration both as arbitrator and counsel: "I was personally faced with an arbitrator from Zürich who informed the parties, at the Terms of Reference conference (it was an ICC arbitration), that both parties

had a weak position and that they should settle. He made some proposals. My French clients were scared and convinced that the arbitrator was prepared to rule against them. Thus, they accepted the proposals, but not because they thought that they were reasonable but because they felt obliged to do so. I must confess that the case was settled, but I am not sure that the settlement was very fair".[\(111\)](#)

In a dispute between a far eastern and a central European company, the parties had, after unsuccessful attempts to settle the case, commenced arbitration. Each party appointed an arbitrator of its own nationality; an American arbitrator practising in Europe was appointed chairman. Once the parties had presented the case in a first exchange of written statements and after two days of hearing, the arbitral tribunal had reached an understanding of the case and of the parties' respective positions. During the course of the hearing the arbitrators provided indications on their views in terms such as these: "in the light of the present state of the evidence, we tend to believe ...". The chairman then suggested that each of his co-arbitrators discuss with "his" party the arbitral tribunal's provisional understanding of the case and the scope of possible settlement. The discussion with their respective arbitrators brought to the parties an understanding of the case as it was perceived by the arbitrators and their opponent; the fact that this communication was with a person of their own cultural background much facilitated this understanding. The discussions lasted four days and resulted in a settlement. [\(112\)](#)

In another case, a settlement opportunity appeared after the parties had argued in some detail their case. With the agreement of the parties, each of the party-appointed arbitrators first discussed with the "opposite" party; thereafter they discussed with their "own" party. After each discussion, the arbitral tribunal exchanged views on the discussions and further strategy. The chairman then indicated to the parties a range within which the arbitrators situated the possible result. The parties continued their negotiations from there and reached a settlement. [\(113\)](#)

At a very early stage of the proceedings in another arbitration, the procedure was interrupted for a few days, and the parties sent executives with decision-making authority to a mini-trial meeting where each side had four hours to present their case, following which the arbitral tribunal broke down the dispute into a series of issues, presented the list of issues to the decision makers, offered an opinion in the nature of an "impression" on each of these issues, and asked the decision makers to negotiate the issues point by point; the result was a

significant partial success: the executives were able to settle three-quarters of the issues, leaving the rest for decision by the arbitrators. [\(114\)](#)

A Swedish arbitrator reported that, in proceedings with parties from Germany and neighbouring countries with similar practice concerning the combination of arbitration and conciliation, the parties expect guidance from the arbitral tribunal concerning its views and assistance for a possible settlement. This is contrary to his own belief and practice; he feels that parties from this background are disappointed when the arbitrator does not provide such guidance. [\(115\)](#)

In an arbitration between a German party and one from another country on the European continent before a Swiss chairman, the tribunal discussed certain aspects of the case with the parties during the hearing, but no settlement attempt was made. After the completion of the case, counsel for the German party expressed his satisfaction with the manner in which the proceedings were conducted. As explained, a cause for particular satisfaction was that he and his client were under the clear impression that the arbitral tribunal was prepared to decide the case, which in fact it did. He distinguished this experience from that in German courts where he felt frequently excessive pressure for a settlement. [\(116\)](#)

In an arbitration about a long term research and co-operation agreement which had been performed over a long period of time, it was clear for the parties that their relationship had to be dissolved but very complex issues arose in the efforts to settle the details of this dissolution. As the arbitral tribunal advanced in its understanding of the case, it examined possible decisions on the aspects of the dispute which it had to decide. It tested these envisaged decisions in discussions with the parties jointly and separately. In this manner, the arbitral tribunal wished to find out what consequences the decisions which it was about to make would have for the parties. [\(117\)](#)

In another international arbitration, the arbitrators attempted a settlement and, with the agreement of the parties, proposed an amount on which they suggested that the parties settle. The parties did not accept the proposal and the proceedings continued before the same arbitrators. The arbitral tribunal then appointed an expert approved by the parties. The expert reached a result very close to the amount which the arbitrators had proposed. A participant in the process believes that the acceptance by the parties of the choice of the expert was decisive for the successful outcome of the case. Had the expert not been agreed by the parties,

the fact that he reached an amount very close to that of the arbitrators' proposal may have given rise to difficulties. [\(118\)](#)

In a major international arbitration about a long term contract between a Government and a foreign corporation, the arbitral tribunal learned, towards the end of the proceedings, that the Government was prepared to settle. This information and the terms acceptable for the Government were communicated through the arbitrator appointed by it. Through contacts by the arbitrator appointed by the corporation, the arbitral tribunal understood that these terms were acceptable to the corporation. However, the Government did not wish to be seen to accept a settlement with the corporation and insisted on an award. The arbitral tribunal made the award, finding reasons to support the conclusions reached by the parties. [\(119\)](#)

In a similar situation between different parties, one being a Government corporation, the parties reached an understanding about the terms of a settlement. The Government corporation wished to have an award which did not reflect its consent to its terms; the foreign corporation agreed to this procedure. The arbitral tribunal found it impossible to provide a reasoned award for the terms which the parties were prepared to accept. It continued the arbitration and made an award which, in some respects differed from the unofficial settlement which the parties did not wish to disclose formally. [\(120\)](#)

Some other cases have been published and were subject to learned comments. Among the published cases one must mention the IBM-Fujitsu arbitration [\(121\)](#) which is quoted as a particularly successful combination of arbitration and conciliation. Among the unfortunate experiences, one may mention the case which reached the German Supreme Court. This Court annulled a settlement concluded before a lower court because that court had announced that its decision against the defendant had been prepared and that, if the defendant would not accept immediately the settlement offer, the court would render this decision. The Supreme Court saw in this conduct illegal pressure by the court below. The critics of this decision by the Supreme Court find that the conduct of the court below was laudable since it gave to the defendant a last chance before its decision. [\(122\)](#)

3. Procedural Aspects

The preceding sections of this Report have shown the great variety of and the fundamental differences in attitudes towards a combination of arbitration and conciliation. They often reflect deeply rooted cultural differences with respect to arbitration and, more generally, dispute settlement procedures. The comments quoted and, in particular, some of the cases described

have exemplified the conflicts which can arise from these diversities in cases where participants of different cultural background and different experience meet in an international arbitration. It is quite evident that in such situations great care must be taken especially by the arbitrators but also by counsel when conducting any form of combination of arbitration and conciliation and when settling the procedural aspects of such a combination.

Conciliators have great freedom in the manner in which they conduct the procedure. This applies also to arbitrators acting as conciliators. But there are some rules or practices which should be taken into consideration.

a. Raising the idea of settlement discussions

In view of the possibility of differing expectations of the parties, the arbitral tribunal must not engage in settlement attempts without the parties' prior consent. When raising the idea of assisting the parties in settlement attempts, it should be particularly cautious. In this respect, the arbitral tribunal must be aware that the parties, irrespective of possible cultural differences, normally have conflicting expectations and interests.

On the one hand, the parties often are reluctant to show willingness to settle because they may fear that this shows weakness. This is the case in particular before the arbitrator whom they want to impress by their confidence in the strength of their case. An initiative from the arbitral tribunal can be helpful "to break the ice" and may bring about a settlement attempt which one or all parties secretly may desire. Thus, there are good reasons to argue that the arbitral tribunal should take the initiative when it has reasons to believe that at least one of the parties seeks a settlement. [\(123\)](#)

On the other hand, the parties have resorted to arbitration because they were unable to resolve the dispute otherwise, often after negotiations and attempts in other forms of dispute settlement have failed. They have appointed the arbitrators to *decide* the dispute. If the arbitrators emphasize settlement at an early stage of the proceedings, the parties might interpret this emphasis as reluctance to perform the principal assignment. Arbitrators thus should leave no doubt about their willingness to decide the dispute and all issues which the parties fail to settle. [\(124\)](#)

If the arbitrators wish to promote settlement of the dispute, the best strategy may be not to talk about settlement, at least not in the beginning of the proceedings, but to show that they are conducting the proceedings actively and efficiently with the aim of reaching a decision

with all reasonable dispatch. A reluctant party may need to be shown that delaying tactics will not lead very far and a party feeling that it has suffered a wrong from the other party may need to be reassured that it found an ear for its grievances and be confirmed in its expectation that justice will be done. [\(125\)](#) All these considerations speak in favour of great caution by the arbitral tribunal at the beginning of the proceedings.

There are many views about the best moment for raising the idea of settlement discussions. Normally the parties should have been able to present the essence of the case. The discussion of the terms of reference is perhaps the first possibly suitable moment. Often it will be better to wait until the written statements have been exchanged and the hearing has commenced. But, even at the end of the procedure, there may still be room for such an attempt. [\(126\)](#)

When the time seems ripe, the idea of a settlement may be launched in a letter by the arbitral tribunal or at the hearing; but sometimes it can be prepared more discreetly by a hint during a break at the hearing. Such hints, made off the record, can provide a test ground, non committal and without the risk of losing face. [\(127\)](#)

Irrespective of the time when the suggestion of a settlement attempt is first made, it is advisable to raise the matter as a point of principle at the very beginning of the proceedings. If the arbitral tribunal is prepared to assist the parties in a settlement attempt at a later stage of the proceedings, the parties should know this from the start and be able to express reservations, even if the actual attempt is envisaged only for a later stage. Much is to be said for clarifying such matters which affect the style of the proceedings at a very early stage.

b. Initiating the conciliation proceedings

In view of the differences between conciliation and arbitration, it is advisable to clearly distinguish between these two procedures. When the arbitrators commence conciliation, a minimum of formalities should be observed so that all participants are aware that they enter a new stage of the proceedings. [\(128\)](#)

At this occasion at the latest, all those points which may give rise to conflict and difficulties in a combination of arbitration and conciliation must be clarified. This goes in particular for those aspects which, in the absence of the parties' consent, may affect the regularity of the procedure and give rise to challenges against the arbitrators. As stated by Elliott:

“Natural justice’ concerns can be dealt with satisfactorily in a med/arb process, but only if they are canvassed, considered and dealt with by the parties on a fully informed basis”.[\(129\)](#) The result of the discussion should be recorded in writing so as to avoid later controversies. [\(130\)](#)

Among the points to be considered at this opening stage are the following:

- Confirmation that the settlement attempt is made at the request or with the express consent of the parties.
- Confirmation that, in case the settlement attempt fails, the arbitration may proceed before the same arbitral tribunal and that the participation of the arbitrators in the conciliation shall be no ground for objecting to them as arbitrators.
- The parties and the arbitral tribunal may make, at the same occasion, arrangements for other points arising in case of continuation after such a failure; but these arrangements may also be made once this eventuality arises.
- If so agreed, confirmation that the arbitral tribunal is requested to make a settlement proposal.
- If so agreed, confirmation that the arbitrators or the chairman may meet the parties separately.
- Possibly also the objective of the settlement discussions and any rules for the procedure which may have been agreed. [\(131\)](#)

c. Participants in the conciliation

The conciliation often is conducted by the full arbitral tribunal or by its chairman. [\(132\)](#) But other combinations are possible. Where cultural differences exist between the participants in the arbitration, some arbitrators make use of the communication advantages which may exist between a party and the arbitrator which it has appointed, especially when they are both from the same background. Conversely, arbitrators appointed by a party sometimes find it difficult to explain to “their” party certain weaknesses in its case and the need for compromise. In such situations, some steps in the conciliation may be taken by the party-appointed arbitrators with their own or the opposite party. [\(133\)](#) The admissibility of such contacts will be discussed below.

In all cases, it is important that the conciliation process be supported by the full arbitral tribunal. The successive steps in the negotiation and their result should form the subject of regular discussions within the arbitral tribunal.

On the side of the parties, it is a frequently underlined principle of successful conciliation that the meetings should be attended by high ranking members of the parties' organization, with decision-making powers. Where the parties come from distant countries, there are some hesitations to engage the time and the travel costs for such meetings; but the personal appearance and direct contact of senior executives is often of critical importance and the advantages of their presence generally outweigh these costs. (134) Care should be taken that those who were involved in the origin of the dispute do not create a negative impact on the process when their own responsibility or emotions are involved. (135)

Sometimes, arbitrators restrict participation in the discussion, in particular by excluding the parties or their lawyers. This practice should be avoided. (136)

d. Methods and scope of the discussion

The methods which conciliators do or should use in order to succeed in their task have formed the subject of some research and guidance is now being provided by a number of institutions or specialists. (137) Much of this advice applies also to arbitrators acting as conciliators. But there are also substantial differences, due to the specific context in which an arbitrator acting as conciliator proceeds.

A very important tool for the arbitrator in bringing about a settlement is the indication to the parties of the views which he might take when deciding the case. Discussions of the factual and legal issues of a case and their usefulness have been described above. In addition to the advantages mentioned there, such discussions often have the useful effect of reducing excessive expectations of the parties, preparing the ground for settlement discussions. (138) This effect can occur whether or not the arbitral tribunal actually engages in a conciliation attempt. But if it does so, the discussion about the perspectives for the parties is of particular importance, much more so than in ordinary conciliations where the conciliator will be reluctant to present his own views in an early stage of the process.

In their desire to bring about a settlement, some arbitrators tend to over-emphasize the weaknesses in a party's case and the risks which it runs in pursuing the arbitration. The temptation to do so is particularly strong when the arbitrator meets a party alone. While the

intention in such over-emphasizing is good, the method is ill advised since it may lead a party to accept a settlement on the basis of an erroneous appreciation of its true situation and chances. In general, the arbitral tribunal must avoid any exaggerations, be it in the expected costs or duration of the arbitration, in the risk of a negative outcome or even with respect to an uncertainty of the outcome when in reality it has reached a clear view for or against a party on a certain issue. [\(139\)](#)

Normally, the arbitral tribunal should avoid any pressure on parties in its effort to bring about a settlement. [\(140\)](#) However, there are situations in which an arbitrator may be justified in placing the weight of his personality and persuasion behind his settlement efforts. Such situations arise for instance where the solution which he must give to the dispute in a decision based on law may not make commercial sense [\(141\)](#) or where the value in dispute is out of proportion to the costs engaged by the parties. [\(142\)](#)

Provided they are truthful, the arbitral tribunal may use many other arguments in favour of a settlement, such as the work required from all participants in the continuation of the dispute, the business reputation which may attach to particularly litigious companies, future business opportunities etc. [\(143\)](#)

Should the arbitral tribunal limit its settlement efforts to the subject of the dispute or may it include considerations and elements of which it can take no account in its decision? Where the settlement attempt is seen as a part of the dispute submitted to the arbitrator, such limitations might appear as a logical consequence which some arbitrators draw. But such a self-restriction makes little sense and is contrary to the interests of the parties when they request the arbitrators to assist them in search of a settlement. [\(144\)](#)

This being said, it must be recognized that an arbitrator, in his search for solutions beyond the dispute before him, is subject to constraints which a conciliator outside the arbitration does not have. In particular and as pointed out above, [\(145\)](#) an arbitrator will be much more reluctant to probe into the business of the parties unrelated to the dispute and thus is likely to have less scope for innovative solutions in which both sides are winners. [\(146\)](#)

e. Settlement proposals

Among the arbitrators who accept participation in conciliation proceedings, there is some controversy whether it is admissible or suitable for them to make a settlement proposal. Such a proposal is indeed the only aspect under which conciliation by arbitrators is considered in the

IBA Ethics Rules. [\(147\)](#) But a settlement proposal is not a necessary component of conciliation proceedings and, for many specialists, a specific request or authorization must be given to the arbitrators before they may make such a proposal. [\(148\)](#) Others are more sceptical about the admissibility or usefulness of formal proposals, especially at a stage of the proceedings where the arbitrators do not have a full view of the case. [\(149\)](#)

If an arbitrator does make a settlement proposal, it may be specific and state amounts to be paid and actions to be taken. It may also be limited to principles and leave the details to further negotiation. A frequently used approach is for an arbitrator and perhaps even more often an arbitral tribunal to indicate a range of the numbers within which it suggests that the final solution should lie. [\(150\)](#)

Where a proposal is made, it should be reasoned. Reasons for the proposal are essential for its acceptance by the parties. [\(151\)](#)

f. Meeting the parties separately –“caucusing”

The most controversial question about an arbitrator's activity as conciliator is no doubt that concerning the admissibility for him to meet a party in the absence of the others and discuss the case and a settlement with it. In North America, the practice is often described as “caucusing”. It is this aspect of conciliation which raises the most serious objections to settlement efforts by an arbitrator.

The IBA Rules of Ethics for International Arbitrators, for instance, state:

“Although any procedure is possible with the agreement of the parties, 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.”[\(152\)](#)

Arbitration practitioners from the Common Law countries are even more outspoken against such private discussions with the parties. Prof. Martin Hunter expressed the objections very clearly:

"... once an arbitrator has had any private discussion with a party regarding the evidence in a case it is clearly inappropriate – indeed impossible – for that arbitrator to resume his function in the case as an arbitrator."[\(153\)](#)

Similarly, Alan Shilston expressed in 1993 a very categorical view against this practice:

"It seems impossible to contemplate, in an English context, that one can, within an arbitral process, marry in some way mediation with arbitration. That would involve, whatever you write into an agreement, overriding essential terms of the rules of natural justice – or due process. In my untutored mind, I would not have thought it was possible, whatever the parties agreed to in writing, to override what really amounts to (in loose talk) statutory rules. I find this a very real difficulty.... I cannot reconcile the position of a mediator (who has caucused) translated into arbitrator as being compatible with observing the rules of natural justice – or due process.... If one eliminated the caucusing dimension to mediation, I can see a much easier path. Should mediators, translated to arbitrators, do everything in the open and not engage in caucusing, the possibility of linking mediation with arbitration seem more promising."[\(154\)](#) Although Shilston now is one of the principal advocates in England for a combination of arbitration and conciliation in the form of "Med-arb" or "Arb-med", he has maintained his objection to caucusing. [\(155\)](#)

The wide-spread opposition in the Common Law countries to private meetings with the parties is confirmed by Bühring-Uhle's enquiry, although, in the replies he received, the opposition is not as pronounced as one might have expected. 68% of the respondents in the United States have found it "inappropriate", despite both parties' consent, for an arbitrator to meet the parties separately to discuss settlement options. In Germany, too, there was opposition; 36% of the respondents from that country and 50% of the respondents from the rest of continental Europe were against it. [\(156\)](#)

The present author's enquiry produced a less negative reaction. Most of the respondents admitted private meetings, provided the parties had agreed to it. In Hong Kong, the agreement of the parties that the arbitrator may act as conciliator according to Sect. 2B of the Arbitration Ordinance is believed to imply an authorization for the arbitrator to meet the parties separately. [\(157\)](#) A very different situation prevails in India where

"meeting one party in the absence of another is not permissible: it breaches the rules of natural justice as understood in India".[\(158\)](#)

In Switzerland where the practice of private meetings with the parties in the context of settlement efforts by the arbitrators is not uncommon, the practice nevertheless is very controversial, as the discussion at the meeting of the Swiss Arbitration Association, on 8 September 1995, revealed: Prof. Eugen Bucher, the principal Rapporteur on the subject, was strictly against it, but admitted an exception when the arbitral tribunal saw the need to convince a party that its position was unfounded; in such a situation, the other party may find it acceptable that this be done by the arbitral tribunal without its possibly embarrassing presence. Raeschke-Kessler was against it, Blessing supported the practice under certain circumstances and Morand saw in it a useful method in the settlement efforts. [\(159\)](#)

The discussion also revealed that the attitude to private meetings of the arbitrators with one of the parties depends to some extent on the practice with respect to discussions about legal and factual issues with the parties. Arbitrators who conduct the arbitration in an interactive manner and address openly in front of both parties the issues of fact and law which are relevant for their decision, see less need for discussing these matters in private meetings with one of the parties, when they make a settlement attempt. [\(160\)](#)

The objections against private conciliation meetings by the arbitrators, in essence, concern two aspects: the first relates to the effectiveness of the conciliation and specifically the private meetings if the conciliator later may have to decide the case as an arbitrator. The second concerns the continuation of the proceedings after a failure of the settlement attempt and the use of the confidential information obtained by the arbitrator in private meetings. Both aspects pose problems, but it is submitted that these problems are less serious than it might appear from the dramatic language sometimes used in their description.

Concerning the *first of these aspects, a party's willingness to inform the conciliator*, it must be recognized that private meetings with the parties are a regular and important feature of conciliation proceedings outside arbitration. Whether and to what extent a party may have inhibitions to discuss matters relevant for the conciliation with the person who may later have to decide the dispute depends in part and perhaps largely on the manner in which that person has conducted the arbitration prior to the settlement meetings. If the arbitrator, during the arbitration or during meetings with both parties, has shown that he knows the file and has a good understanding of the case and if, in addition, he has shown his discernment in assessing the parties' allegations, a party is likely to be more forthcoming with concessions about its case. In such a case, the party can expect that the arbitrator has discovered or will discover its weaknesses anyway.

In this context, the case of a contractor has been cited who contests in the arbitration that it made mistakes in the design and construction of an industrial plant. During private settlement discussions, the contractor then admits engineering mistakes and defects in the erection of the plant. (161) Now if the arbitrator knows the file well, he is likely to have discovered himself these defects or at least to suspect them. In private discussions, the contractor may be prepared to admit the defects, if only to gain understanding and support from the arbitrator/conciliator for the principal objectives in the negotiations. The contractor may argue:

“Yes, it is true that these mistakes occurred, as you have noted yourself. But we had to contest them since the other side was making exaggerated claims for damages. If the issue of damages is handled reasonably, we are prepared to concede this point.”

The admissions which a party makes in these circumstances to the arbitrator/conciliator are not likely to be true “revelations”. It is not very likely that a party will reveal to the conciliator very damaging facts which the conciliator had not found out or suspected himself if there is the risk that this conciliator later will have to decide the dispute. In so far, the arbitrator/conciliator must count with a shortfall of information and frankness compared to the conciliator outside the arbitration.

However, this shortfall of information and frankness often will be compensated, at least in part, by the thorough knowledge which the arbitrator will (or should) have gained by the study of the file. This knowledge can hardly be matched by a conciliator who spends only a few days on the case. Thus the arbitrator/conciliator, in some cases, may have a deeper insight in the case as the conciliator outside the arbitration, despite the lower level of frankness.

On balance, it is probably in situations where the parties do not have to expect the conciliator as their future arbitrator that he will receive the better information relevant for the settlement. But there seems to be no empirical evidence to measure this advantage and the set-off resulting from the more thorough knowledge of the file. It can be assumed that there is some information advantage to the conciliator outside the arbitration, but this advantage does not appear as dramatic.

The second aspect concerns the use which the conciliator will make of the confidential information in case he returns to his role as arbitrator. This is the true “natural justice” or “due process” problem. But the problem, it is submitted, is much less serious than it is often described.

On the one hand, caucusing is not the only situation in which the arbitrator has to disregard information received. There are cases where improperly submitted documents or argument are rejected or discarded after the arbitrators have taken cognizance of them. (162) Furthermore, arbitrators generally are not quite as gullible as the opponents to caucusing seem to presume. It is a normal phenomenon for an arbitrator that he receives documents and information, for instance with a written statement, of which he takes note and to which the other party replies only weeks or months later in the responding statement. The arbitrator has read the material with a critical mind and assumes that the other side will have counter-arguments against most of what is said in these statements. Why should he react differently to information in private meetings where his critical sense is likely to be sharpened due to the particular circumstances. (163)

On the other hand, the nature of the "revelations" should not be forgotten. Two types of information should be distinguished: The party may make admissions in private which it does not wish the other side to know. Such admissions, or rather a party's reluctance to make them, may pose a problem for the effectiveness of the conciliation as it has just been discussed; but I find it difficult to see here a "natural justice" problem. The other type of private information which a party may communicate to the conciliator consists of allegations favourable to its case or detrimental to that of the other party. This type of information does indeed raise the issue of natural justice or due process. But what the arbitrator hears are allegations as he has heard many before. He can say to the alleging party

"I will consider it in the arbitration only if the allegation is disclosed to the other side and that side is given an opportunity to respond. An allegation not so disclosed will be disregarded." This is a normal process for an arbitrator (164) and, in my opinion, a fully satisfactory protection for the other side.

In conclusion, it may be said that private meetings in a conciliation by the arbitrator risk to be not as effective as such meetings can be in a conciliation outside arbitration. But they are no serious problem from the point of view of natural justice and due process. If the parties agree, there should be no objection of principle against them. This being said, I have a clear preference for conducting settlement discussions in the presence of all parties concerned.

g. After the conciliation

Obviously, in case of success, a different course of action is required, than that after a failure.

If the *conciliation is completed successfully*, it is advisable to record the settlement. The legal nature and the effects of a settlement have given rise to extensive scholarly writings, case law and even some enactments. [\(165\)](#) In an arbitration, the parties and the arbitrators may agree on an award by consent which is enforceable like any other award. They may also bring the arbitration to an end merely by the withdrawal of the case or a procedural decision. These questions are a separate subject which cannot be dealt with here.

If the settlement attempt fails, the arbitration normally will have to continue. A number of procedural decisions will have to be taken for this eventuality. If they have not been taken at the beginning of the settlement attempt, they should form the subject of a formal document to be issued when the proceedings resume.

First of all, it has to be decided whether the arbitration is in any way affected by the conciliation attempt. In particular, the conciliation may have produced clarification on certain points which may be used in the arbitration. In particular, the issues to be decided may have been clarified and limited. In some cases, the task of the arbitrators may be reduced to the choice between the two last offers in the conciliation. [\(166\)](#)

It also has to be decided whether, after the failure of the settlement attempt, new argument and evidence may be presented or whether the arbitrators must decide the case as it presents itself at the end of the settlement attempt. In Germany, the Supreme Court has decided that, if its settlement offer has been rejected by the parties, the court may not decide immediately but must deliberate anew. [\(167\)](#)

It has also been argued that, if the arbitral tribunal has made settlement proposals, it may not afterwards decide outside the range which it considered with the parties in the settlement discussions. [\(168\)](#) It appears doubtful that this conclusion should be correct. If the settlement attempt fails, neither the parties nor the arbitrator are bound by their proposals during the negotiations. However, the principle of good faith reliance which applies with respect to any of the discussions of the arbitrator with the parties must be observed here, too. In other words, if the arbitrator has indicated that he intends to decide in a certain manner, without reserving his position, the parties should not be prejudiced by a change of mind of the arbitrator.

With respect to confidential information obtained by the arbitrators during the settlement discussions, it is sometimes suggested that the arbitrator may and should forget what he has heard in confidential meetings [\(169\)](#) or that the conciliator should decide whether the information obtained during the settlement discussions prevents him from continuing as

arbitrator. [\(170\)](#) It is submitted that the most suitable approach is expressed in the 1990 Hong Kong Arbitration Ordinance:

“Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.”[\(171\)](#)

The provision may cause some inhibitions in private settlement meetings, since a party must expect that confidential information will be disclosed in case the conciliation fails; but it provides the necessary protection for the requirements of natural justice, due process or, in Swiss terminology, the parties' right to be heard in an “adversarial” procedure.

If these precautions are taken, the award which then will be made, should be safe against attack in the courts of the country where it is made and in any country of execution. It is submitted that opinions expressed to the contrary are not well founded. [\(172\)](#)

V. Conclusions and Perspectives: Is There an Expanding Culture Favouring the Combination?

The combination of arbitration and conciliation is a well established tradition in some parts of the world, and in particular in Germany, Switzerland and some neighbouring countries, on the one hand, and in the Chinese tradition, on the other hand. It found some application in international arbitration.

In recent years, the practice of combining these two forms of dispute settlement has been discovered in the United States where it was described as “Med-Arb” and in other parts of the world. Since then, it found some strong supporters. McLaren and Sanderson, for instance, argue that

“Linking the two techniques together creates an ADR dynamic that makes the whole a more effective force than the sum of the two components used individually.”[\(173\)](#) Similarly, Shilston insists on the savings in costs and the gains in efficiency resulting from this combination. [\(174\)](#)

However, reservations against the combination of arbitration and conciliation remain both in the Common Law countries and in other parts of the world. The members of ICCA,

consulted in the preparation of this Report, have expressed diverging views, the majority accepting the combination, if the parties agree. But the support for the proposition was not enthusiastic.

The combination of arbitration with conciliation is no panacea to the complaints against some of the developments which, on many occasions, make arbitration a costly, time-consuming and excessively complex process. Conciliation, as it can usefully be practised in arbitration, faces constraints which do not exist, or not in the same form, when it is used outside arbitration. Nevertheless, elements of the conciliation process may well be introduced in the arbitration process and can bring considerable improvements and, in particular, may promote settlement and increase the satisfaction resulting from it.

The positive response which the combination has found among some arbitration practitioners outside the countries of its traditional application is a welcome sign. So are the legislative changes in this direction. While these developments, in the present author's view, should be welcomed, it appears premature to speak of a trend favouring this combination. The debate at the ICCA Conference indeed showed that the combination has its supporters in the international arbitration community and meets with reservations from other practitioners. However, it appears that the objections to the combination now are less strong than they were some time ago and that the opponents are beginning to see that the combination may have some merit. In so far one may well speak of a trend, and the ICCA Conference contributed to it.

Now that combinations of arbitration with conciliation become more acceptable and possibly may be used more frequently, major efforts must be made to familiarize arbitrators with the particularities of proceedings which incorporate elements of conciliation. The debate at the ICCA Conference was an important step in this direction but much remains to be done for the accomplishment of this challenging task.

* Partner, Lalive & Partners, Geneva.

1 For a contrary view see FISS, "Against Settlement", 93 Yale L.J. (1984) p. 1073 and comments in A. MARRIOTT, "The 1995 Freshfields Lecture", 62 Arbitration (August 1996 Supplement) p. 31 at p. 32.

2 Comments were received from Av. Orhan AZIZOGLU, Me Kamel BEN SALAH, Prof. Albert Jan van den BERG, Dott. Proc. Anna Maria BERNINI, Prof. Karl-Heinz BUCKSTIEGEL, Me Matthieu de BOISSON, Stephen BOND, Dr. Marc BLESSING, Dr. Michael BHLER, Me Yves DERAÏNS, Dr. Antonias DIMOLITSA, Prof. J. ERAUW, Dr. Mauro FERRANTE, Ms. Daphné FEVERY, Ulf FRANKE, Carlos de la GARCA, Dr. Dr. Ottoarndt GLOSSNER, Dr. Richard HILL, Kaj. I. HOBER, Michael F. HOELLERING, Prof. Martin HUNTER, Me Sigvard JARVIN, Neil KAPLAN Q.C., Robert KNUTSON, Prof. Pierre LALIVE, Nils MANGIRD, DDr. Werner MELIS, Carlos NEHRING NETTO, Mrs. Tinuade OYEKUNLE, Dr. Jan PAULSSON, Prof. Pieter SANDERS, Luis D. SANTOS, David SARRE, Prof. Rolf A. SCHTZE, Prof. Zhivko STALEV, Prof. Tadeusz SZURSKI, Prof. Yasuhei TANIGUCHI. The Questionnaire is reproduced in the Annex to this Report.

3 Despite some remarkable exceptions (and the present author is privileged to be in partnership with one), international arbitration is still largely a "man's world". The author regrets this but does not believe that gender discrimination can be abolished by the use of words. The present Report thus follows the traditional British usage and employs the male gender in the designation of persons, inviting the reader to extend it in his (or her) mind to arbitration practitioners of the female gender.

4 The point was aptly made by Mr. NEHRING NETTO who wrote to the present author: "It is absolutely evident that coming from Brazil, I face all the time a major 'cultural difference' between myself (an ICC Court member since 1987) and the legal environment of my country, in terms of arbitration"(letter of 2 September 1996).

5 Observations by Johannes TRAPPE; see also his article on "Conciliation in the Far East", 5 *Arbitration International* (1989) p. 173 at p. 187, where he explained that combination of arbitration and conciliation was used both in Germany and China, and added:

"This fact makes German practice, at least to a certain extent, similar to the Chinese, which contributed to the co-operation between commercial circles of both countries in their attempt to settle commercial disputes by conciliation."

The observation applies to Switzerland and some other countries, too.

6 The *Qadi* in the Islamic tradition, for instance, fits this role model of an independent professional third party.

7 For a description of these models and their impact on the development of dispute settlement mechanisms, see WRIGHT, "Possible Limitations on the Use of North American Mediation Models in Argentina", manuscript prepared for publication and communicated through Arthur MARRIOTT, pp. 5-8.

8 Ch. BHRING-UHLE, *Arbitration and Mediation in International Business* (Kluwer 1996) at p. 309 discusses the subject under the heading "Partisan Facilitation"; Pierre DRAI, *Premier Président* of the French *Cour de cassation*, for instance, refers to the example of the "bon roi Saint-Louis" acting as judge under an oak tree at Vincennes and inviting the parties to conciliate. "Libres propos sur la médiation judiciaire", *études en honneur de Pierre Bellet*(1991) p. 123 at p. 125.

9 However, different approaches are not altogether excluded. D. BRANSON, for instance, writes that

"it may be that both parties to a dispute are from a culture that favours the use of a person who knows the parties personally and may even be familiar with aspects of the dispute. Why ought they not be allowed to choose such a person to assist in the resolution of the conflict?"

"Combining Arbitration with Conciliation or Mediation", American Bar Association, International Commercial Arbitration Committee, Newsletter (Winter 1996) p. 31 at p. 37.

10 The procedure may be subdivided when the arbitral tribunal makes partial awards, but the process remains two-staged.

11 On interactive proceedings see the present author's article on "Lean Arbitration", 10 *Arbitration International* (1994) p. 119 at p. 127.

12 H. RAESCHKE-KESSLER, in the *Bulletin of the Swiss Arbitration Association* (*Bulletin ASA*) (1995) (hereinafter *Bulletin ASA*) p. 594, describes an arbitration as a dialectic process, progressing by argument and counter-argument in open discussion.

13 As examples, see, e.g., the documents from arbitral procedures in the *Bulletin ASA* (1993) pp. 315, 320, 321 and 586.

14 On the question whether the arbitrator should rely on the parties to provide technical expertise through "expert witnesses" or whether he may or should appoint a neutral expert, proceeding under the authority of the arbitral tribunal, see ICC INSTITUTE OF INTERNATIONAL

BUSINESS LAW AND PRACTICE, *Arbitration and Expertise* (1994); A. MARRIOTT, "Evidence in International Arbitration", 5 *Arbitration International* (1989) p. 280 at p. 285; A. REDFERN and M. HUNTER, *International Commercial Arbitration* (London 1991) p. 337 et seq.; M. SCHNEIDER, "Technical Experts in International Arbitration", *Bulletin ASA* (1993) p. 446.

15 For examples, see *Bulletin ASA* (1993) pp. 468, 469, 475, 479, 483 and 486.

16 On the differences in the questioning of witnesses, see SCHNEIDER, "Witnesses in international arbitration", *Bulletin ASA* (1993), Part I p. 302 at p. 311; and Part II p. 568 at p. 572 with examples from arbitration proceedings.

17 For details, see, e.g., SOLUS and PERROT, *Droit judiciaire privé* (Paris 1991) vol. 3, N° 117 et seq.

18 Art. 1502 at 4 NCCP.

19 It is difficult to find a suitable term to translate the expression *contradictoire* as understood in French law. The English term "adversarial", although it expresses, like the French term, basic principles of due process, relates to rather different procedural features.

20 See, e.g., Art. 182(3) of the Swiss Federal Private International Law Act (PILA), setting out the basic principles which must be observed in any international arbitration.

21 Art. 3 of the Swiss Federal Civil Procedure Act stipulates the following:

"Le juge ne peut aller au-delà des conclusions des parties, ni fonder son jugement sur d'autres faits que ceux allégués dans l'instance. Toutefois, il doit attirer l'attention des parties sur les lacunes de leurs conclusions et de les engager à articuler complètement les faits et les preuves nécessaires à la manifestation de la vérité. A cette fin, il peut en tout état de cause interpellier les parties personnellement."

22 Decision of 18 August 1992, ATF 118 II 359, the relevant passage in paragraph E.5b of the decision has not been included in the published extracts.

23 See, e.g., W. HABSCHEID, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, 2nd ed. (1990) p. 325; M. GULDENER, *Schweizerisches Zivilprozessrecht*, 3rd ed. (1979) p. 166, note 16.

24 Sect. 139 CCP (*Zivilprozedur*), entitled "Richterliche Aufklärungspflicht", provides the following:

(1) "Der Vorsitzende hat dahin zu wirken, daß die Parteien über alle erheblichen Tatsachen sich vollständig erklären und die sachdienlichen Anträge stellen, insbesondere auch ungenügende Angaben der geltend gemachten Tatsachen ergänzen und die Beweismittel bezeichnen. Er hat zu diesem Zwecke, soweit erforderlich, das Sach- und Streitverhältnis mit den Parteien nach der tatsächlichen und der rechtlichen Seite zu erörtern und Fragen zu stellen.

(2) Der Vorsitzende hat auf die Bedenken aufmerksam zu machen, die in Ansehung der von Amts wegen zu berücksichtigenden Punkte obwalten.

(3) Er hat jedem Mitglied des Gerichts auf Verlangen zu gestatten, Fragen zu stellen."

See also ST-REMÉR, *Die richterliche Aufklärung im Zivilprozeß* (Tübingen 1982).

25 For the original text, see the previous footnote.

26 A particularly well-known example is the *Referentenaudienz* at the Courts in Zürich.

27 Art. 35 of the Federal Civil Procedure Act:

(1) "Au cours des débats préparatoires, le juge délégué discute avec les parties l'objet du litige et les engage, s'il y a lieu, à préciser, rectifier, simplifier ou compléter leurs moyens. Les parties sont en principe convoquées personnellement à ces débats.

(2) Le juge délégué procède ensuite à l'administration des preuves.

(3) L'administration des preuves est renvoyée aux débats principaux lorsqu'il y a des raisons particulières pour que le tribunal prenne directement connaissance des faits de la cause.

(4) Le juge délégué peut faire abstraction des débats préparatoires si les parties y consentent."

28 Subsection 5(c).

29 P. HAFTER, "Gespräche zwischen Schiedsgericht und Parteien, ein Beitrag zur Technik der Führung von Schiedsgerichten", *Swiss Essays on International Arbitration* (Zürich 1984) p. 203; English summary, p. 212.

30 Sect. III. 2.c.

31 *Op. cit.*, fn. 29, p. 209.

32 For definitions of mediation and conciliation see in particular H. BROWN and A. MARRIOTT, *ADR Principles and Practice* (London 1993) p. 108 et seq. In France, the "médiateur" is sometimes described as a "conciliateur particulièrement actif en ce qu'il ne se contente pas d'essayer de rapprocher les parties, mais également de proposer une solution qui recueille leur assentiment", Ch. JARROSSON, *Revue de l'arbitrage* (1991) p. 473 at p. 475 (hereinafter *Rev. arb.*).

33 BROWN and MARRIOTT, *ibid.* See also the definition of JAROSSON in France as quoted in the previous footnote.

34 BROWN and MARRIOTT, *ibid.*

35 Generally grouped under the heading of *lis pendens*; litispence, *Rechtshängigkeit*.

36 The concept of the "Streitgegenstand" (subject of the dispute) as a legal institution is particularly developed in the Germanic procedural systems but in one form or another is an essential element for such concepts as *lis alibi pendens* and *res judicata*.

37 See in particular H. RAESCHKE-KESSLER, "Der Vergleich im Schiedsverfahren", *Festschrift für Ottoarndt Glossner* (Heidelberg 1994) p. 255 at p. 259.

38 A. BUCHER in *Bulletin ASA* (1995) p. 581.

39 *Op. cit.*, fn. 8, p. 201.

40 The ICC Conciliation Rules, e.g., do not contain such a provision.

41 Sect. 77 of the 1996 Indian Arbitration and Conciliation Ordinance, and in the Conciliation Rules under The Third Schedule of 1988 Nigerian Arbitration and Conciliation

Decree, published as Arbitration and Conciliation Act in Cap. 19, vol. I, *Laws of the Federation of Nigeria, 1990*.

42 Rule 15; the Guidance note on this provision explains: "Although a stay may engender a better climate for settlement, it is not however essential that any proceedings relating to the Dispute should be stayed".

43 E.g., Art. 17 of the WIPO Mediation Rules.

44 E.g., Sect. 81 of the 1996 Indian Arbitration and Conciliation Ordinance.

45 Art. 13(b); for this last solution, see below Sect. IV.

46 E.g., Art. 10 of the ICC Rules; Art. 20 of the WIPO Rules.

47 Art. 10 of the ICC Rules.

48 The draft of Art. 19 of the UNCITRAL Rules contained a specific reservation of a differing agreement by the parties. In the final deliberations the Commission decided to omit this reservation since, according to Art. 1(2) of the Rules, the parties may agree on any modification of the Rules; see 9 *UNCITRAL Yearbook* (1980) p. 20.

49 M. BLESSING, "Streitbeilegung durch 'ADR' und 'pro-active' Verhandlungsführung", *Bulletin ASA* (1996) p. 123 at p. 147.

50 Decision of 28 March 1991 in *Caisse régionale de garantie de la responsabilité professionnelle des notaires de Paris v. Epoux Bruère et autre*, *Rev. arb.* (1991) p. 471 at p. 473:

"notions difficilement compatibles, telle la médiation, la conciliation ou la transaction, avec un pouvoir accordé au juge de 'départager' les parties et de fixer une éventuelle indemnisation, ce qui pourrait laisser supposer l'attribution d'un pouvoir de nature juridictionnelle."

51 "... déplorable en ce qu'elle combinait des éléments qui devaient de par leur nature même rester étranger les uns des autres", JARROSSON, *op. cit.*, fn. 32, p. 476.

52 D.C. ELLIOTT, "Med/arb: Fraught with Danger or Ripe with Opportunity?", 62 Arbitration (August 1996) p. 175; A. SHILSTON, "Med-arb? – Why Not Try Arb-med?", 62 Arbitration (August 1996) p. 161; BLESSING, Bulletin ASA (1996) p. 147.

53 For a description see, e.g., ELLIOTT, *ibid.*, p. 175; P. MITCHARD, "A Summary of Dispute Resolution Options", in MARTINDALE-HUBBELL, ed., *International Arbitration and Dispute Resolution Directory* (1996) p. xx et seq.

54 MITCHARD, *ibid.*, p. xx reports that some States in the United States have passed legislation requiring med-arb in certain cases and cites the case of San Francisco where med-arb is mandatory in the case of collective bargaining disputes with police and fire-fighters.

55 ELLIOTT, *op. cit.*, fn. 52, p. 175.

56 *Ibid.*

57 A. SHILSTON, "Med-Arb – Can it Work?", 60 Arbitration (1994) p. 1; P. NEWMAN, "The Med-Arb Debate – Some Contributions", 60 Arbitration (1994) p. 173.

58 See the 1990 Amendment to the New South Wales Arbitration Act, discussed below in Sect. IV. 1.

59 Rule 11(5).

60 Art. 13 of which other extracts have been quoted above in this Section.

61 See, e.g., P. SANDERS, "The 1996 Alexander Lecture, Cross-Border Arbitration – A View on the Future", 62 Arbitration (August 1996) p. 168 at p. 172 with reference to statistics of the ICC and the Iran-US Claims Tribunal.

62 62 Arbitration (August 1996 Supplement) p. 40.

63 *Ibid.*

64 See, e.g., MARRIOTT, *op. cit.*, fn. 1, p. 35 et seq.

65 DRAI, *op. cit.*, fn. 8, p. 123.

66 "Practice Statement (Commercial Cases: Alternative Dispute Resolution)" (no. 2), [1996] 1 W.L.R. 1024, 1025; also reproduced in 62 Arbitration (August 1996) p. 164.

67 BHRING-UHLE, *op. cit.*, fn. 8, pp. 375, 402; of the 67 participants in the survey (including many of the leading figures in the international arbitration community, but also some persons less known in this community), only 45 (25 from Common Law countries and 18 from continental Europe, p. 376, note 16) replied to this specific question: 24 yes, 11 qualified yes and 10 no. The question was "Is it appropriate for an arbitration institution to suggest, at its own initiative, the use of mediation...?", p. 402.

68 *Ibid.*, p. 370 et seq.

69 *Ibid.*

70 Letter of 17 October 1996 to the author.

71 Standard clause communicated with their letter to the author of 10 October 1996.

72 *Op. cit.*, fn. 61, p. 174.

73 Y. DERAÏNS, response to the author, states that he has not heard of a case where the arbitrator appointed a "médiateur" (letter of 29 August 1996).

74 DERAÏNS, *ibid.*, responded: "due to the obligation of respecting strict time limits for issuing their award, [the arbitrators] could not [appoint a mediator and suspend the arbitration] without the express agreement of the parties".

75 Sir Leonard HOFFMANN, "Changing Perspectives on Civil Litigation", 56 MLR (1993) p. 297 at p. 305, quoted by MARRIOTT, *op. cit.*, fn. 1, p. 43.

76 See above fn. 66.

77 See, in particular, Sect. 21 of the 1950 Arbitration Act, and Sect. 45 of the 1996 Arbitration Act.

78 See above fn. 66.

79 See, e.g., F. NICKLISCH, "Alternative Formen der Streitbeilegung und internationale Handelsschiedsgerichtsbarkeit", *Festschrift für Karl-Heinz Schwab*(Munich 1990) p. 381 at p. 390.

80 *Op. cit.*, fn. 8, p. 201.

81 *Ibid.*, pp. 201-202.

82 The most outspoken negative response came from Prof. van den BERG who wrote "I always refuse to act as conciliator when I have been appointed as arbitrator and therefore I have no experience in talking with two tongues in cross-cultural confusion." (letter of 2 September 1996).

83 See, e.g., the comments from English and American arbitration practitioners but also from a French specialist, in BHRING-UHLE, *op. cit.*, fn. 8, p. 208 et seq.

84 See, e.g., the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon III A, which discourages the participation of a neutral arbitrator in settlement discussions between the parties. In any event, the combination of arbitration and conciliation has "not been popular" in the experience of the American Arbitration Association: comments by Michael F. HOELLERING to the author (letter of 3 September 1996).

85 Art. 21 of the New Code of Civil Procedure (NCCP) stipulates: "*Il entre dans la mission du juge de concilier les parties.*"

86 Art. 1460 NCCP.

87 *Le droit français de l'arbitrage interne et international* (Paris 1990) p. 192 (No. 277); in the response to the present author, de BOISSON insisted on the difference in nature of the two methods of dispute settlement:

"La procédure de conciliation ne saurait déteindre sur l'arbitrage, et inversement le caractère formaliste de l'arbitrage ne saurait pénétrer la conciliation au point d'en dénaturer l'esprit, et aussi l'efficacité, qui provient de la liberté avec laquelle les parties peuvent exprimer leur point de vue auprès de conciliateur, sans craindre nécessairement d'affaiblir leur position"

(letter of 11 September 1996).

This difference in nature, in the eyes of de BOISSON, does not necessarily exclude a combination of arbitration with conciliation but, if the arbitrator turns conciliator and later reverts to his role of arbitrator, he must be aware of the differences in these successive roles and act accordingly (letter of 26 September 1996).

88 "... *force est de reconnaître que les tentatives conciliatoires des juges, seraient-ils même des arbitres, se soldent généralement par un échec quand bien même la faculté de concilier leur est laissée. En effect – et c'est une donnée de base – l'on ne saurait pas plus être à la fois juge et médiateur que juge et partie*". Working Group presided by Me Jean-Claude GOLDSMITH, "Etude sur les modes de règlement alternatif/complémentaire des différends" (RAD), 11 October 1994, p. 23 § 3.2.2.1.

89 Sect. 279(1) CCP (ZPO) provides: "*Das Gericht soll in jeder Lage des Verfahrens auf eine gütliche Einigung des Rechtsstreits oder einzelner Streitpunkte bedacht sein.*"

90 Sects. 182 and 239 of the CCP.

91 Response to the author by Mr. AZIZOGLU (letter of 5 September 1996).

92 Replies to the author from Mauro FERRANTE and Anna Maria BERNINI. The 1996 Bill (No. 2814) envisages a combination of conciliation and arbitration; for details see BERNINI, *Metodi alternativi di composizione delle liti nei servizi bancari e finanziari* (Milano 1996) p. 105 et seq.

93 Sect. 42 §17 of the Code of Civil Procedure and explanations by Sigvard JARVIN (letter of 11 September 1996).

94 Explanations by Kaj HOBBER.

95 L.D. SANTOS and C. de la GARCA in their letter to the author of 10 October 1996.

96 See, e.g., NICKLISCH, *op. cit.*, fn. 79, p. 390.

97 Quoted from the English translation in P. SANDERS and A.J. van den BERG, eds., *ICCA International Handbook on Commercial Arbitration*, "National Report The Netherlands", Annex I (hereinafter *Handbook*).

98 Prof. SZURSKI, in response to the author's enquiry explained that in Poland "a quite considerable number of disputes within the Court of Arbitration at the Polish Chamber of Commerce ends by settlements, due to efforts of arbitral tribunals"(letter of 29 August 1996).

99 Information on the Dutch practice by the response from Prof. van den BERG to the author's enquiry (letter of 2 September 1996).

100 Arbitration Act S.A. 1991 c. A-43.1, quoted from ELLIOTT, *op. cit.*, fn. 52, p. 178.

101 For details see *ibid.*, p. 179.

102 New South Wales 1984 Act No. 160, amended by the Commercial Arbitration (Amendment) Act 1990, N.S.W. Act No. 100, quoted by ELLIOTT, *op. cit.*, fn. 52, p. 179.

103 *Ibid.*, note 21.

104 Reproduced in the *Handbook*, "National Report Hong Kong", Annex I.

105 Reproduced in the *Handbook*, "National Report Singapore", Annex I.

106 Sect. 2B of the Hong Kong Ordinance; similarly Sect. 17 of the Singapore Act; this provision is also quoted by SHILSTON, "The MED-ARB Debate Continued", *Arbitration* (May 1995) p. 111 at p. 112; see also SANDERS, *op. cit.*, fn. 61, p. 172.

107 Sect. 2B of the Hong Kong Ordinance and Sect. 17 of the Singapore Act.

108 Sect. 14(2); the Act is reproduced in the *Handbook*, "National Report Bermuda", Annex I. Part II of the Act, with comments by N. RAWDING, is reproduced in *10 Arbitration International* (1994) p. 99 at p. 104.

109 The Rule continues with some guidance on the procedure which shall be discussed below.

110 Personal experience by the author.

111 Account provided by Y. DERAIS (letter of 29 August 1996).

112 Case reported by counsel who wished to remain anonymous.

113 Account by Prof. Pierre LALIVE.

114 Account by Eric ROBINE, reported by B-HRING-UHLE, *op. cit.*, fn. 8, p. 372.

115 Account by Kaj HOBBER; a similar experience was related at the Conference by Prof. GRAY who referred to the case of an American lawyer who expected settlement efforts from the arbitrator and who was disappointed when no such efforts were made.

116 Personal experience by the author.

117 Account by A. MARRIOTT.

118 Account by W. MELIS at the Conference.

119 The source requested to remain anonymous.

120 Account by Antonias DIMOLITSA.

121 B-HRING-UHLE, *op. cit.*, fn. 8, p. 381 et seq. with further references.

122 Neue Juristische Wochenschrift (1966) p. 2399, with comments by E. SCHNEIDER and F. OSTLER.

123 E. BUCHER, "Die Rolle des Schiedsrichters bei der vergleichsweisen Regelung des Streitiges", Bulletin ASA (1995) p. 568 at p. 573.

124 This was one of the general conclusions of the debate of the Swiss Arbitration Association at the Conference on the subject on 8 September 1995, see Bulletin ASA (1995) p. 568 at p. 617; in the same sense, BUCHER, *loc. cit.*, p. 575 and Observations HAFTER, *loc. cit.*, p. 611.

125 Observations A. REINER, *ibid.*, p. 613.

126 On the timing see BUCHER, *ibid.*, p. 575, HAFTER, p. 611, REINER, p. 617.

127 BUCHER, *ibid.*; W. MELIS, in comments at the Conference, described the practice of an arbitrator or the chairman to have a private discussion with one of the parties during a coffee break in the sight of the other party.

128 De BOISSËSON rightly insisted on the difference in nature between the two methods of dispute settlement and the precautions which the arbitrator must take when moving from one to the other; see above fn. 87.

129 ELLIOTT, *op. cit.*, fn. 52, p. 177.

130 BUCHER, *op. cit.*, fn. 38, p. 578.

131 The principal elements of this list were suggested by BUCHER, *ibid.*

132 In this sense, Rule 8 of the IBA Rules of Ethics for International Arbitration; BUCHER, *ibid.*, p. 579.

133 The process was used specifically in the Taba Arbitration between Egypt and Israel, where the two party-appointed arbitrators consulted with their respective parties in the absence of the three neutral arbitrators; account by Judge K. AMELI at the ICCA Conference.

134 See observations HAFTER, *op. cit.*, fn. 124, p. 612.

135 BUCHER, *op. cit.*, fn. 38, p. 579 et seq.

136 BUCHER, *ibid.*, p. 583

137 See, e.g., BROWN and MARRIOTT, *op. cit.*, fn. 32, p. 246 et seq.; see also the advice of RAESCHKE-KESSLER and HILL in Bulletin ASA (1995) p. 593 at p. 595; see also HILL, "Non-Adversarial Mediation", Journal of International Arbitration (December 1995) pp. 135-143.

138 Observations HAFTER and REINER, Bulletin ASA (1995) p. 610 at p. 615; see also H. RIEGER, "Alternative Dispute Resolution versus Schiedsgericht", Bulletin ASA (1996) p. 190 at p. 195.

139 Observations RAESCHKE-KESSLER and REINER, Bulletin ASA (1995) p. 591 and p. 516 et seq.

140 Observations HAFTER, Bulletin ASA (1995) p. 609.

141 ST-RMER, "Richterliche Vergleichsverhandlungen und richterlicher Vergleich aus juristischer Sicht", *Festschrift Hans Ulrich Walder* (Zürich 1994) p. 273 at p. 285; he gives the

example of a dispute between neighbours in which one party claims, with good chances of success, the demolition of a fence slightly encroaching on its land, while the other party claims, with equally good chances of success, the demolition of the neighbour's garage roof in the small parts protruding into the space of that party's land.

142 In this sense REINER, Bulletin ASA (1995) p. 616.

143 BUCHER, *ibid.*, p. 572.

144 With good reasons, BUCHER, *ibid.*, p. 581.

145 Section II.2.

146 This point was stressed at the Conference by Douglas JONES.

147 See Rule 8 quoted above.

148 E.g., BUCHER, Bulletin ASA (1995) p. 581; REINER, Bulletin ASA (1995) p. 617.

149 HAFTER, *ibid.*, p. 610.

150 BUCHER, *ibid.*, p. 582; REINER, *ibid.*, p. 617.

151 *Ibid.*

152 Rule 8.

153 HUNTER, "Ethics of the International Arbitrator", 53 Arbitration (1987) p. 219 at p. 224; the text had been delivered at a meeting of the Swiss Arbitration Association in Zürich on 4 November 1986; after the passage quoted in the text above, the author continued by saying "I suspect that in making these last remarks that I have stuck my hand into a hornet's nest...." Since then these views have evolved; responding to the present author's questionnaire, Prof. HUNTER replied yes to the question whether an arbitrator who is acting as a conciliator pursuant to a conciliation agreement may hold separate private meetings with the parties, but in his view the risk that he may be disqualified from continuing to act as arbitrator is always present (letters of 4 September and 17 October 1996).

154 Remarks at the Geneva Global Arbitration Forum on 21 October 1993, reprinted in 11 *Journal of International Arbitration* (1994) p. 139 at p. 143 et seq. and B-HRING-UHLE, *op. cit.*, fn. 8, p. 209, fn. 167.

155 SHILSTON, *op. cit.*, fn. 52, p. 161 at p. 162.

156 *Op. cit.*, fn. 8, Question 10 c; results at p. 414 et seq.

157 Response by Neil KAPLAN QC to the author (letter of 7 September 1996).

158 Response by Fali NARIMAN (letter of 29 August 1996).

159 *Bulletin ASA* (1995) pp. 583, 594, 599, 595.

160 See in this sense, in particular, the difference in the comments of RAESCHKE-KESSLER and P.-A. MORAND, *Bulletin ASA* (1995) p. 594 and p. 595.

161 Example given by BLESSING, *Bulletin ASA* (1995) p. 597.

162 See in this sense MARRIOTT, *op. cit.*, fn. 1, p. 40.

163 As pointed out by W. MELIS in a discussion at the ICCA Conference, it is not infrequent in arbitration proceedings that one party makes unsubstantiated allegations. If it has the burden of proof for such allegation, it is sufficient for the other side to contest the allegation. If the party making the allegation fails to show evidence for the allegation, the arbitrator treats it as not established and disregards it. There are many unproven facts which an arbitrator disregards. In the same fashion, he may disregard allegations made by a party in private which, after the conciliation has failed, that party does not establish in adversarial proceedings.

164 Disclosure is indeed the manner in which the matter is dealt with in the recent legislation addressing the issue; see below the Hong Kong and Singapore enactments.

165 See, e.g., BUCHER, *Bulletin ASA* (1995) p. 584 et seq.; observations S. BERTI, *ibid.*, p. 596.

166 B-HRING-UHLE, *op. cit.*, fn. 8, p. 327; BLESSING, *Bulletin ASA* (1995) p. 600.

167 *Neue Juristische Wochenschrift* (1966) p. 2399; the decision in this case, summarized above in Section IV.2, and, in particular, this requirement of new deliberations has been criticized by legal writers.

168 BLESSING, *Bulletin ASA* (1995) p. 598.

169 MARRIOTT, *op. cit.*, fn. 1, p. 40.

170 BRANSON, *op. cit.*, fn. 9, p. 37.

171 Sect. 2B(3); Sect. 27 of the 1994 Singapore International Arbitration Act contains an almost identical provision.

172 BHRING-UHLE, *op. cit.*, fn. 8, p. 209 states that, under English law, “even a written consent may not completely insulate the procedure [of a combined arbitration and conciliation] and, more importantly, the resulting award from a challenge in the courts.” He concedes, however, that no precedents could be found on this point.

173 *Innovative Dispute Resolution: The Alternative* (Scarborough, Carswell 1994) at 6-1, quoted by ELLIOTT, *op. cit.*, fn. 52, p. 176.

174 *62 Arbitration* (1996) p. 162.