

Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background

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1. Is there a correlation between an arbitrator's legal background and propensity to encourage a settlement?

Many disputes are resolved by the parties reaching a settlement during the course of an arbitration. This article looks at the way in which such settlements are negotiated and concluded and, specifically, at the part played by the arbitrator. It may be observed that, although the law and practice of arbitration is becoming increasingly standardized across borders, there still appear to be some differences, one of which is the perception of an arbitrator's role with respect to conciliation. Can—and should—an arbitrator encourage a settlement, or should he refrain from any intervention in this connection?

These differences of perception are not without consequence. On a practical level, they have a bearing on the efficiency of arbitration as a method of dispute resolution.² On a theoretical level, they concern the very definition of an arbitrator's role: should his role be to resolve a dispute *through a binding decision*, in which case encouraging a settlement would be to deviate from that role; or should his role be simply to resolve a dispute, in which case encouraging a settlement would be part of that role? It is not our intention to enter into such a broad discussion,³ but rather to confine ourselves to a precise question it raises, namely the correlation between an arbitrator's legal background or training (which often, although not always, coincides with his nationality) and his propensity to encourage an amicable settlement of a dispute.

To focalize our study, we have adopted a practical—or, more exactly, a statistical—approach, based on an analysis of a certain number of ICC awards. Practitioners know from experience that German arbitrators and arbitrators from German-speaking Switzerland will be more inclined to intervene to encourage a settlement than their English or American counterparts. However, such experience has so far not been borne out by any formal study. The question is therefore whether such experience is confirmed by the facts. In this article we set ourselves the limited and modest task of answering this question. It is important to stress at the outset

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² It may be noted that the highly useful report entitled 'Techniques for Controlling Time and Costs in Arbitration', produced by the ICC Commission on Arbitration and published by ICC in August 2007, does not touch on this subject.

³ We will do so elsewhere; see G. Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Amiable Imposition or Actual Solution?' Clayton UTZ Lecture, Sydney, October 2007, forthcoming in *Arbitration International* 2008, and the work of the CEDR Commission on Settlement in International Arbitration, co-chaired by Lord Woolf and Gabrielle Kaufmann-Kohler, which is in progress and should be completed early in 2008.

that our intention is not to put forward one nationality to the detriment of another, but simply to record certain facts that may be useful to discussions on how arbitration operates.

2. Method: analysis of awards by consent

A settlement results either in the withdrawal of a claim followed by an order terminating the case, or in an award by consent. As a study of withdrawals could not provide the necessary information for our analysis, we have concentrated our research on the awards by consent rendered over a three-year period from 2002 to 2005. For technical reasons linked to the structure of the available databases, our analysis covers 63 of the 136 awards by consent rendered during this period. Of these 63 awards, some describe the background to the settlement and thus show the extent to which the arbitral tribunal contributed to the amicable settlement. Others, on the other hand, say nothing or very little on the subject and have therefore been left aside.

An appendix contains a table summarizing the principal characteristics of each case studied for the purpose of this article.

3. Observation: relevance of an arbitrator's legal background

3.1 Swiss and German arbitrators come top for settlements

The arbitral tribunals that rendered the awards studied for the present article included 15 chairmen or sole arbitrators and 17 co-arbitrators of Swiss origin, followed by 6 chairmen or sole arbitrators and 14 co-arbitrators of German origin and, thirdly, 6 chairmen or sole arbitrators and 9 co-arbitrators of English origin.

What conclusions can be drawn from these observations in the present context? One might be tempted to say none, given that Switzerland is in any event the country that provides the largest number of arbitrators for ICC arbitral tribunals.⁴ However, it would be wrong to stop there, for the results become meaningful when one looks at the figures for English and German arbitrators. In ICC arbitrations, English arbitrators usually far outnumber German arbitrators.⁵ However, this trend is reversed when it comes to awards by consent. This can be seen as an initial sign of the correlation between the legal background of the arbitrators and an amicable outcome to the dispute. It should be noted, however, that the aforementioned figures concern all awards by consent and not just those made in cases where the arbitrators have taken an active part in the settlement process.

3.2 Nature of arbitrator's involvement: record, rectify, conciliate?

The awards by consent show that an arbitrator's involvement in an amicable settlement can take three different forms: the arbitrator may record the parties' agreement, rectify their agreement, or—and it is this category that interests us more especially here—attempt to conciliate the parties.

⁴ See Statistical Report published in the *ICC International Court of Arbitration Bulletin*, Vol. 14 No. 1 (2003) at 12, Vol. 15 No. 1 (2004) at 11, Vol. 16 No. 1 (2005) at 9, Vol. 17 No. 1 (2006) at 9, and Vol. 18 No. 1 (2007) at 10.

⁵ See aforementioned Statistical Reports.

In 46 of the awards analysed, the arbitrators confined themselves to recording the existence of an agreement and drafting an award accordingly. We will not dwell further on this category, as there is no proof of action on the part of the arbitrator to encourage a settlement, so it is without pertinence for our present purpose. It is of course possible that in these cases the arbitrator intervened at an earlier stage to encourage a settlement, but as this is not mentioned in the award, it remains but a possibility and cannot be used as a basis for our conclusions. For this reason, we shall not take account of these awards.

Involvement of a different kind is seen when an arbitrator does not just record an agreement but clarifies or even corrects it,⁶ in consultation with the parties.⁷ In one case, for example, the arbitral tribunal made a number of objections to the agreement that had been submitted to it by the parties: some of the claims listed in the Terms of Reference did not appear to have been settled; it was unacceptable that an addendum to the settlement did not appear in the award by consent; and the method for calculating interest was not altogether clear. A hearing was arranged at which these objections were dealt with, allowing the award by consent to be finalized.

Clearly, the third category—conciliation—is of greatest relevance to our discussion. Of the awards studied, 13 belong to this category. The initiative to seek a settlement came from the arbitral tribunal in 3 of these cases and from the parties⁸ in the other 10 cases.

The first of the three cases in which conciliation was proposed by the arbitral tribunal had its seat in Argentina. The proposal was made by all three arbitrators, all from Argentina.⁹ The parties followed the proposal by resorting to conciliation conducted by a third party separately from the arbitral proceedings. In the second case, an arbitral tribunal comprising three Brazilian arbitrators called upon to decide a domestic dispute confined to Brazilian territory suggested conciliation conducted by the arbitrators themselves separately from the arbitration proceedings.¹⁰ Their suggestion was accepted by the parties. Thirdly, in a case where the place of arbitration was in Germany, the arbitral tribunal composed solely of German arbitrators made a similar suggestion.¹¹

As regards the cases in which the parties requested the arbitral tribunal to intervene, the extent and nature of that intervention varied. In 2 cases, the parties asked for a conciliation hearing to enable the arbitral tribunal to give an initial opinion on the dispute. Once the opinion had been given, the hearing continued with a discussion between the arbitrators and the parties, leading to an agreement. In one of the cases, the arbitral tribunal had its seat in Zurich and was chaired by a Swiss arbitrator with the support of a German co-arbitrator and a Turkish co-arbitrator.¹² In the second case, the arbitral tribunal had its seat in Switzerland and was made

⁶ On the extent of the arbitrator's control over the parties' agreement when rendering an award by consent, see especially Y. Derains & E.A. Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2005) 311; A. Redfern & M. Hunter, *Law and Practice of International Arbitration* (Sweet & Maxwell, 2004) at para. 8-51; M. Bühler & T. Webster, *Handbook of ICC Arbitration* (Sweet & Maxwell, 2005) at para. 26-12; K.-P. Berger, *International Economic Arbitration* (Kluwer, 1993) at 583ff; T. Clay, *L'arbitre* (Daloz, 2001) at para. 970.

⁷ See cases 17, 33 and 38 in the table annexed to the present article.

⁸ Even in these cases, it cannot be ruled out that the parties' request for the arbitral tribunal to intervene as conciliator might have resulted from a move or allusion made by the arbitral tribunal, which was not recorded in the file.

⁹ Case 54 in the table annexed to the present article.

¹⁰ Case 28 in the table annexed to the present article.

¹¹ Case 19 in the table annexed to the present article.

¹² Case 3 in the table annexed to the present article.

up of Swiss arbitrators only.¹³ In another case, again involving Swiss arbitrators and with its seat in Switzerland, the parties asked for the arbitral tribunal to assist towards conciliation. However, the attempt failed. In yet another case, the parties asked the German sole arbitrator to assess their respective positions, after which they began negotiations. Only later on did they invite the arbitrator to take part in their negotiations.¹⁴ By contrast, in a case chaired by an Italian arbitrator with co-arbitrators from Switzerland and Singapore,¹⁵ the parties asked the arbitral tribunal to help them define the conciliation procedure and to hear them present their positions before commencing negotiations without the arbitrators.

There was also another Argentine domestic case,¹⁶ in which the Terms of Reference provided that the arbitrators could act as conciliators and hold conciliation hearings.¹⁷ Following a number of conciliation sessions, the arbitral tribunal set the parties a deadline to reach an agreement. Under the pressure placed upon them by the arbitral tribunal, the parties managed to put an end to their dispute.

To conclude, it may be noted that in this third category, Swiss arbitrators chaired 3 of the 13 cases¹⁸ and there were 5 Swiss co-arbitrators.¹⁹ It may also be noted that this category included 3 German arbitrators acting as chairmen or sole arbitrators²⁰ and 2 German arbitrators acting as co-arbitrators.²¹ One can further note the presence of 2 arbitral tribunals composed solely of Argentine arbitrators²² and a tribunal composed of Brazilian arbitrators.²³ Lastly, it will be noted that in 2 cases the arbitrations were domestic²⁴ and that another case was a multiparty arbitration in which most of the players shared the same nationality and legal background.²⁵

3.3 Additional observations

In addition to the principal question with which we are concerned in the present article, a number of other observations are of interest. First of all, in almost all cases it is the arbitral tribunal as a whole that intervenes for the purpose of conciliation. In only one of the cases studied did the chairman of the tribunal act alone as conciliator.²⁶

Secondly, our study demonstrates the widely recognized fact that certain kinds of disputes are more susceptible of settlement than others. Out of 54 awards by consent, where the nature of

¹³ Case 27 in the table annexed to the present article.

¹⁴ Case 31 in the table annexed to the present article.

¹⁵ Case 23 in the table annexed to the present article.

¹⁶ Case 35 in the table annexed to the present article.

¹⁷ See also case 54 in the table annexed to the present article, where the clause in the Terms of Reference was worded as follows: 'The arbitration proceedings shall be split into two phases. In phase (a) the arbitration proceedings shall extend to all legal issues and claims as may be raised by Claimant and Respondent with the exception of any amounts (in royalties or damages) allegedly owed by defendant to plaintiff. During phase (a), the Arbitrator shall use all reasonable efforts to reach an amicable settlement agreement between the parties. Phase (a) shall close either upon the closing and executing of a final settlement agreement between the parties or by an award of the Arbitrator.'

¹⁸ Cases 27, 31 and 37 of the table annexed to the present article.

¹⁹ Cases 23, 27 and 31 of the table annexed to the present article.

²⁰ Cases 19, 36 and 61 of the table annexed to the present article.

²¹ Case 19 of the table annexed to the present article.

²² Cases 35 and 54 of the table annexed to the present article.

²³ Case 28 of the table annexed to the present article.

²⁴ Cases 28 and 35 of the table annexed to the present article.

²⁵ Case 54 of the table annexed to the present article.

²⁶ Cases 37 of the table annexed to the present article.

the dispute was known, 14 concerned the purchase and sale of company shares, and 10 concerned construction projects or other infrastructure projects. This is hardly surprising, as such disputes often involve many different claims offering wider scope for settlement.

Our study has not shown any particular tendency as regards the moment at which a settlement is most frequently reached in the course of arbitral proceedings. Although it is invariably after the Terms of Reference have been drawn up (in all but one of the cases studied) that settlements are reached, they have been seen to occur after an award on jurisdiction, after an earlier interim or partial award, after briefs, after hearings or after the filing of expert reports.

4. Tentative explanations

Arbitrators wield extensive procedural powers, which may be conferred on them by national legislation governing arbitration or by applicable institutional rules, including the ICC Rules. It seems natural that, when exercising those powers, an arbitrator should refer to concepts from the legal system in which he or she grew up, especially if he or she already has experience as an attorney, a judge or a domestic arbitrator. The importation of concepts from an arbitrator's 'native' legal system is usually implicit and sometimes even unconscious. It is nonetheless clearly demonstrated by the consent awards that have been discussed above.

Although by no means the only example, it is noteworthy that the German Code of Civil Procedure (ZPO) requires courts to assist parties in their attempts to settle their dispute amicably.²⁷ The courts may suggest conciliation on their own initiative or at the request of one of the parties at any point in the proceedings,²⁸ including even at the stage of an appeal against the award.²⁹ This rule is based on the belief that efficiency in the administration of justice is better served by a settlement than by a judgment. The same idea is found in arbitration, for the Arbitration Rules of the German Institution for Arbitration use identical wording for arbitrators to that used for the courts.³⁰

The same applies in some Swiss cantons. For instance, the Zurich Code of Civil Procedure (Zurich ZPO) requires a hearing to be held on the organization of the proceedings. At this hearing the parties are required to present all their arguments and it very often serves as an opportunity or a trigger to reach a compromise.³¹ Also, a court can invite the parties to a conciliation hearing at any moment.³² Switzerland's draft civil procedure, which will in time replace the rules of civil procedure currently in force in the various cantons, provides that the courts are empowered to conciliate the parties.³³ Similarly, Swiss case law considers that a judge's involvement in a conciliation does not compromise his impartiality if he is subsequently required to rule on the dispute.³⁴

²⁷ ZPO, Art. 278 ; see M.E. Schneider, 'Combining Arbitration with Conciliation' in *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Conference, Seoul, 1996, ICCA Congress Series No. 8 (Kluwer Law International, 1998) 57 at 79.

²⁸ ZPO, Art. 278; H.-J. Musielak, *Kommentar zur Zivilprozessordnung* (F. Vahlen, 2007) § 278 No. 15.

²⁹ A. Baumbach *et al.*, *Zivilprozessordnung* (C.H. Beck, 2007) § 278 No. 10.

³⁰ DIS Arbitration Rules, Art. 32.1.

³¹ ZPO Zurich, Art. 118.1; see R. Frank, H. Sträuli & G. Messmer, *Kommentar zur zürcherischen Zivilprozessordnung* (Schulthess Polygraphischer Verlag, 1979) 424.

³² ZPO Zurich, Art. 62; on this practice, see P. Nobel, *Vergleich und Urteil – Konkurrenz zweier Erledigungsformen*, forthcoming.

³³ Swiss draft code of civil procedure, Art. 122.3.

³⁴ See ATF 131 I 113 at 119 mentioning the unpublished judgment No. 1P.32/1997 of 20 March 1997, and ATF 119 Ia 81 at 87: 'the independence and impartiality of a judging authority are not necessarily affected by the declarations made by the judge in charge of the proceedings when an attempt is made to settle a civil dispute by

A similar approach is found in Argentina and Brazil, where some of the cases described above, in which arbitrators acted as conciliators, were located. Brazilian law, for instance, empowers the courts to conciliate the parties³⁵ and even places a similar obligation on arbitrators at the beginning of the proceedings.³⁶ A comparable legal situation obtains in Argentina.³⁷

This view of the role of courts and arbitrators differs from that of the common law, where conciliation is seen as overstepping the power of adjudication³⁸ conferred upon judges and, by extension, on arbitrators. Although US and—since the Woolf reforms³⁹—English courts resort to mediation, it is usually conducted by a third party separately from the judicial proceedings and not by the judge himself.⁴⁰ Hence, as observed above, it is not surprising that there are few US and, especially, English arbitrators on the arbitral tribunals that engaged in conciliation.

It is somewhat surprising, in view of French legislation, not to find French arbitrators in the selection of awards studied for this article. Article 1460 of the French New Code of Civil Procedure (NCPC) states that certain procedural principles are applicable to arbitration, including Article 21 of the NCPC, which says that a judge's functions include that of attempting to conciliate the parties. Could this be due to a lack of actual practice in the field of conciliation on the part of French judges, extending also to arbitrators?

5. Conclusion

To come back to our original question, is there a correlation between an arbitrator's propensity to encourage an amicable solution and his legal background? Although subject to the proviso that an empirical study carried out on the basis of a small sample of cases is necessarily approximate, our study has shown that such a correlation exists. The statistical information collected confirms that there are real differences in the way an arbitrator's role is perceived. While some people see arbitrators only as adjudicators, others consider that they may also act as conciliators.

Over the years, differences concerning many other aspects of international arbitration law and practice have receded, giving way to convergent practices across borders. The same fate may be thought to await the divergence observed in the present study. It is quite another question, however, to know what the content of any transnational rule of practice in this field should be.

conciliation or compromise'; see also W. Wenger, 'The Role of the Arbitrator in Bringing About a Settlement – A Swiss Perspective' in *Best Practices in International Arbitration*, ASA Special Series No. 26 (2006) 139 at 142.

³⁵ Brazilian Code of Civil Procedure, Art. 125(iv).

³⁶ Brazilian arbitration law of 23 September 1996 (Law No. 9307/96), Art. 21(4).

³⁷ See Code of Civil Procedure of the Republic of Argentina, Art. 309, 843, 849.

³⁸ C. Bühring-Uhle, *Arbitration and Mediation in International Business Disputes* (Kluwer Law International, 1996) 157 (this was the view expressed by 83% of the participants in a survey mentioned by the author at 202); A.S. Rau & E.F. Sherman, 'Tradition and Innovation in International Arbitration Procedure' (1995) 30 *Texas International Law Journal* 89 at 105; K.-P. Berger, 'Integration of Mediation Elements into Arbitration, Hybrid Procedures and "Intuitive" Mediation by International Arbitrators' (2003) 19 *Arbitration International* 387 at 398.

³⁹ See the reports by Lord Woolf at <www.dca.gov.uk/civil/reportfr.htm> (last visited April 2008).

⁴⁰ There are exceptions however; for information on US practice in particular, see G. Kaufmann-Kohler, *supra* note 3.

What is certain is that a transnational consensus transcending current differences can only be found by balancing the various conceptions highlighted above.