

Volume 35, No. 3, 2017

# ASA Bulletin

Founder: Prof. Pierre Lalive  
Editor in Chief: Matthias Scherer



Association Suisse de l'Arbitrage  
Schweiz. Vereinigung für Schiedsgerichtsbarkeit  
Associazione Svizzera per l'Arbitrato  
Swiss Arbitration Association

# Settlement Facilitation: Does the Arbitrator have a Role? The “Referentenaudienz” – the “Zurich-Way” of settling the Case\*

HANSJÖRG STUTZER\*\*

## 1. Introduction

Whether at all and, if so, to which extent an arbitrator should assist the parties in reaching a settlement in arbitration seems to be one of the last divides between civil law and common law. Civil law arbitrators generally take more of an engagement in leading parties of arbitral proceedings to a settlement, whereas common law oriented lawyers may be more hesitant in entering into such engagement, fearing that a pro-active approach in this respect is based on facts and arguments not yet sufficiently established and, thus, might expose them to challenges for bias.

But, as a matter of fact, an arbitrator has, throughout the proceedings, most likely to take a position as to the potential outcome of the case anyway. Such is the case if a party asks for preliminary measures. Any decision in this respect has to consider, amongst other, whether “[T]here is a reasonable possibility that the requesting party will succeed on the merits of the case”<sup>1, 2</sup>. Similarly, in proceedings for production of documents, to reach his decision the arbitrator has to evaluate the materiality and relevance of such request for the outcome of the case<sup>3</sup>. And both such

---

\* Amended version of a paper submitted at the AGM of the International Institute for Conflict Prevention & Resolution (CPR), on 2 March 2017 in Miami.

When this article was ready for publication Klaus Peter Berger/J. Ole Jansen presented their view on the topic: The Arbitrator’s Mandate to Facilitate Settlement, *Fordham International Law Journal*, Volume 40, Issue 3, 2017, pp 887 *et seq.* It was no longer possible to integrate their findings into the present article. Suffice it to note that also these authors draw a clear line: no caucusing for the arbitrator in settlement negotiations, even if the parties consent to it (*ibid* p. 915); see in detail p. 161 below.

\*\* Hansjörg Stutzer is a partner and co-founder of Thouvenin Rechtsanwälte, Zurich ([www.thouvenin.com](http://www.thouvenin.com)) and frequently sits as arbitrator.

<sup>1</sup> Art. 17 A (1) UNCITRAL Model Law (2006) and Art. 26 (3) (b) UNCITRAL Rules (2010).

<sup>2</sup> In German: “Hauptsachenprognose”; Daniel Girsberger/Nathalie Voser, *International Arbitration, Comparative and Swiss Perspectives*, 3<sup>rd</sup> ed., Zurich 2016, p. 265; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *International Arbitration, Law and Practice in Switzerland*, Oxford 2015, para. 6.120 *et seq.*

<sup>3</sup> IBA Guidelines on the Taking of Evidence in International Arbitration (2010), Art. 3.

evaluations occur often already at an early stage of the proceedings, where the arbitrator has not gained yet a full view on the case, but he has to establish a preliminary, unprejudicial forecast on how the case might likely end.<sup>4</sup> Why should then such preliminary, unprejudicial prognosis not be acceptable if the arbitrator is asked by the parties to assist in finding, at an early stage of the proceedings, a settlement?

A lot of ink has been spilled on this topic but it seems that reservations still remain, mainly from the common law side. This may also be due to the fact that, so far, the discussion has been held on a more academic level, without really describing in detail how exactly such support of an arbitrator leading the parties to a settlement actually occurs. In the following such practical details are provided, hopefully encouraging also sceptical arbitrators to pro-actively assist the parties in reaching a settlement, with the confidence that in respecting certain rules challenges for bias are without merits.

## 2. The pro-active arbitrator: the flavour of the decade

Arbitration is perceived by many of its users as lasting too long and being too expensive.<sup>5</sup> Therefore, arbitral institutions grant the arbitrators more authority for flexibility in the proceedings and thus hope to increase cost efficiency. The arbitrators are encouraged to strive for tailor-made proceedings. In this respect, at least certain institutions also explicitly invite the arbitrator to assist the parties in finding at an early stage of the proceedings a settlement, granting the arbitrator a dual role, namely adjudicating the case and assisting in settling the dispute<sup>6</sup>.

---

<sup>4</sup> Since the threshold for the likelihood of success in rendering a decision on preliminary measures or production of documents is lower, the earlier such decision has to be rendered in the arbitral proceedings, the more likely an arbitrator may tend towards the conclusion that the claim is not manifestly without merit. But, in any case, the arbitrator has to take a position as to the merits of the case. Daniel Girsberger/Nathalie Voser (fn 2), para. 1089; Gabrielle Kaufmann-Kohler/Antonio Rigozzi (fn 2), para. 6.120; Tobias Zuberbühler/Dieter Hofmann/Christian Oetiker/Thomas Rohner, IBA Rules of Evidence, Zurich (2011), para. 143.

<sup>5</sup> “With the user drum beat demanding faster and cheaper dispute resolution mechanisms ...”; Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communication in the Mediation-Phase*, World Arbitration and Mediation Review, Vol. 7 no. 2 (2013), p. 13.

<sup>6</sup> Andrey Panov/Sherina Petit, *Amicable Settlement in Arbitration*, GAR, The European, Middle Eastern and African Arbitration Review 2015; Edna Sussman (fn 5) p. 5 *et seq.*; Bernd Ehle, *The Arbitrator as Settlement Facilitator*, CEPANI Colloquium 2010, Walking a thin line what an arbitrator can do, must do or must not do, p. 85 and p. 94; Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a*

In the following the “Zurich-Way”<sup>7</sup>, involving parties at an early stage in settlement negotiation, is described. The first section outlines the different approaches of the most relevant institutional arbitration rules in this respect and reveals also what kind of assistance can be found in guidelines for that purpose. In the second section the procedures followed by the Zurich Commercial Court for reaching an early settlement are described and, finally, the third section analyses in how far, if at all, this “Zurich-Way” can and should be converted and applied in international arbitration proceedings.<sup>8</sup> For that purpose a detailed insight on the various steps to be followed in such settlement negotiations is provided – hopefully clearing at least some of the fog which lays over such procedure for sceptical practitioners.<sup>9</sup>

---

Transnational Standard, Arbitration International, 2009, Vol. 25, No. 2, p. 197; Daniele Favalli/Max K. Hasenclever, The Role of Arbitrators in Settlement Proceedings, Mealey’s International Arbitration Report, 2008, Vol. 23, No. 7, p. 5; Hilmar Raeschke-Kessler, The Arbitrator as Settlement Facilitator, Arbitration International, 2005, Vol. 21, No. 4, p. 523.

<sup>7</sup> The term “Zurich-Way” is not used to promote Zurich as internationally recognized hub for arbitration since Geneva has, at least, the same standing in this respect. Nevertheless, it would seem inaccurate to simply refer to the “Swiss-Way”, since the settlement procedures described further below in detail are considerably less used in Geneva. The term “Swiss-Way” would therefore build-up the misleading perception that those settlement endeavors in international arbitration are generally practiced in Switzerland – which is not the case.

<sup>8</sup> In scholarly writing on the involvement of arbitral tribunals in settlement negotiations between the parties reference is frequently made to the “German-Way”, where a procedural feature used in litigation at state courts (“Rechtsgespräch” in general or “Güteverhandlung” pursuant to § 278 (2) German ZPO) is also converted into arbitral proceedings held in Germany. The author has experienced this as counsel in a few cases in Germany. Nevertheless, it would not be appropriate to express a learned view on how this issue is dealt with in Germany. For more details therefore: Klaus Peter Berger, Promoting Settlements in Arbitration: Is the “German Approach” really incompatible with the role of the arbitrator?, New York Dispute Resolution Lawyer, 2016, Vol. 9, No. 2; Klaus A. Gerstenmaier, The “German Advantage”, Myth or Model?, SchiedsVZ 2010, p. 21; Matthias Pitkowitz/Marie-Therese Richter, May a Neutral Third Person serve as Arbitrator and Mediator in the same Dispute?, SchiedsVZ 2009, p. 225.

<sup>9</sup> Christopher Harris, Arbitrators and Settlement – a Common Law Perspective, the Arbitrators Initiative: When, Why and How Should it be Used, ASA Special Series No. 45, 2016 p. 92 et seq.; Gary Born, International Commercial Arbitration, 2<sup>nd</sup> ed., 2014, p. 2006.

### 3. The pertinent provisions of the most relevant arbitral institutions describing the authority of the arbitrator to assist in or even to lead settlement negotiations

In the following the pertinent articles of a number of arbitral institutions are quoted, revealing different degrees of involvement an arbitrator is allowed to deploy in settlement endeavors, reaching from actively supporting such steps up to clearly referring such efforts to a separate mediator – or being silent at all as to potential settlement negotiations.

In the first position the Rules for the Facilitation of Settlement in International Arbitration of the Centre for Effective Dispute Resolution (CEDR, of 2009) have to be mentioned. This seems to be the only set of rules exclusively dedicated to settlement facilitation. It defines in seven articles the do's and don'ts of an arbitrator in settlement facilitation. Those rules represent the conclusions reached by a commission of 75 eminent arbitration practitioners, equally of common law and civil law background, chaired by Lord Woolf and Gabrielle Kaufmann-Kohler. This commission consulted also all relevant arbitration institutions in this respect. Surprisingly, these CEDR Rules have, so far, not found much of an echo in the arbitration community. Its key provisions read as follows:

#### **Art. 5 CEDR Rules (2009)**

*“1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:*

*1.1.: provide all Parties with the Arbitral Tribunal’s preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;*

*1.2.: provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;*

*1.3.: where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;*

*1.4.: where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.”*

*“2. The Arbitral Tribunal shall not:*

*2.1.: meet with any Party without all other Parties being present; or*

2.2.: *obtain information from any Party which is not shared with the other Parties.*”

All of the following provisions of arbitral institutions on this topic are considerably less explicit:

***Appendix IV (h) (ii) to the ICC Rules (2017):***

*Appendix IV – Case Management Techniques*

*“h) Settlement of disputes:*

- (ii) *where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.*”

***Art. 15 (8) Swiss Rules (2012)***

*General Provisions:*

*“With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator’s impartiality based on the arbitrator’s participation and knowledge acquired in the agreed steps.”*

***Art. 32.1 DIS Rules (1998):***

*Section 32 Settlement*

*“32.1: At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.”*

***Art. 22 (1) Milan Rules (2010):***

*Power of the Arbitral Tribunal*

*“1. At any time in the proceedings, the Arbitral Tribunal may attempt to settle the dispute between the parties, including by addressing them to the Mediation Service of the Chamber of Arbitration of Milan.”*

***Art. 7 of the Schedule III to CEPANI Rules (Belgium) (2013):***

*Schedule III: Rules of good conduct for proceedings organized by CEPANI*

- “7. *If the circumstances so permit, the arbitrator may, with due regard to paragraph 6 here above, ask the parties to seek an amicable settlement and, with the explicit permission of the parties and of the secretariat, to suspend the proceedings for whatever period of time necessary.*”

**Art. 47 CIETAC Rules (2015):**

*Article 47 Combination of Conciliation with Arbitration*

- “1. *Where both parties wish to conciliate, or where one party wishes to conciliate and the other party’s consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings. The parties may also settle their dispute by themselves.*
2. *With the consents of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate.*
- ...
7. *Where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award.*
- ...
9. *Where conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings.*”

**Rule 21 CPR for Administered Arbitration of International Disputes (2014):**

*Rule 21: Settlement and Mediation:*

- “21.1. *Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.*

- 21.2. *With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the arbitration by a mediator accepted to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the appropriate CPR Mediation Procedure.*
- 21.3 *The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.”*

#### **4. The pertinent provisions in international arbitration guidelines describing the authority of the arbitrator to assist or even lead settlement negotiations**

Also, the pertinent guidelines offer a wide spectrum of potential engagements of the arbitrator in facilitating a settlement between the parties, but in particular the IBA Guidelines on Conflict of Interest in International Arbitration clearly establish that the arbitrator’s engagement in this respect does not tamper his impartiality – provided certain prerequisites are met.

##### ***Part I (4) (d) and Explanation (d) of the IBA Guidelines on Conflict of Interest in International Arbitration (2014):***

*"An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2 (a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops*



doubts as to his or her ability to remain impartial or independent in the future course of the arbitration."

**CI Arb "Guideline for Arbitrators on the use of ADR Procedures" (2011):**

- "7. The Arbitrator/Mediator in practice
- 7.1 *For the reasons explained above, the safest technique for the arbitrator is normally to encourage the parties to mediate outside the arbitration before an agreed mediator, rather than for the arbitrator to engage in caucusing procedures or to receive confidential information from one party which is not communicated to the other.*
- 7.2 *There are however some situations where an experienced arbitrator may exceptionally consider that the potential benefit of engaging in caucusing procedures outweighs the risk. It is then important that the arbitrator should proceed in an agreed and transparent manner, preferably arranging for the intended steps and procedures to be agreed between the parties and recorded in writing. Where the mediation is successful, no problem of course arises. This risk will only materialize if the mediation is unsuccessful, the arbitrator then resumes the arbitration and makes an award and one or other party then challenges the award on the ground of serious irregularity affecting the tribunal, the parties or the award under section 68 of the 1996 Act. Since this risk cannot be wholly discounted, it has to be emphasized that for an arbitrator to engage in caucusing techniques requires considerable experience and does involve some degree of risk.*
- 7.3 *In view of the potential risk, it is strongly recommended that the parties adopt a written agreement which sets out what will occur if the mediation should fail. The agreement may embody terms for:*
  - (1) *the parties expressly to waive any right of challenge to the award based on the use by the arbitrator of ADR procedures, or*
  - (2) *the arbitrator not to proceed to act as arbitrator after failure of mediation or conciliation without a fresh agreement of the parties and the arbitrator."*

**AAA Code of Ethics Canon IV, Section 7 (2004):**

*CANON IV: An arbitrator should conduct the proceedings fairly and diligently*

*“F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”*

**Section 12 UNCITRAL Notes (2016):**

*“12. Amicable Settlement*

*72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.”*

A number of institutional arbitration rules, such as those listed below, do actually not mention settlement support by the arbitral tribunal at all, but this does not exclude that an arbitral tribunal actually provides such services even if it sits under one of the rules listed below since the *lex arbitri* at the seat of such arbitral tribunal might empower it to assist in settlement negotiations between the parties.<sup>10</sup>

---

<sup>10</sup> Gabrielle Kaufmann-Kohler (fn 6), p. 193: “There are exceptions, however. For instance, the Hong Kong and Singapore arbitration acts provide that the arbitrator may act as conciliator. These provisions are undoubtedly the result of the influence of the Chinese tradition ...”; Hong Kong Arbitration Ordinance (Cap 609) Section 33 (2011).

- Civil Law background<sup>11</sup>: VIAC (Vienna International Arbitration Center); SCC (Stockholm Chamber of Commerce);
- Common Law background<sup>12</sup>: LCIA (London Court of International Arbitration); SIAC (Singapore International Arbitration Center); HKIAC (Hong Kong International Arbitration Center);
- Neutral: UNCITRAL Arbitration Rules.

Finally, it should also be noted that in appeal proceedings before the Court of Arbitration for Sports (CAS) in Lausanne, the arbitrator cannot assist the parties in settlement negotiations since disciplinary matters and doping offenses are generally not open to settlements.<sup>13</sup>

## 5. The “Referentenaudienz” at the Zurich Commercial Court as a model

The “Referentenaudienz” is, in a verbatim translation, “the audience of the judge in charge” i.e. a hearing where the judge in charge of the case presents his preliminary, unprejudicial view of the case to the parties. Though being somehow a tongue twister this term shall continue to be used in this article since it describes best the specificity of this particular procedural step: the “Referentenaudienz” is not just a settlement meeting, where the judge solely assists the parties in finding a settlement, neither is it a mediation, even less so is it just a “splitting the baby” procedure<sup>14</sup>. Rather, the “Referentenaudienz” is a procedural feature of its own; a *sui generis* method of pro-active “managerial judging”<sup>15, 16</sup>, which has been practiced by the

---

<sup>11</sup> Markus Wirth, Settlement Facilitation, 10 Years of Swiss Rules of International Arbitration, ASA Special Series No. 44, 2014, p. 95/96.

<sup>12</sup> Ibid.

<sup>13</sup> Gabrielle Kaufmann-Kohler (fn 6), p. 194.

<sup>14</sup> Joseph W. Bauer/Gregory R. Chemnitz, How Settlement Facilitation differs from Mediation (and why it may be more effective), ABA Insurance Coverage Litigation Committee, 2016; Matthias Pitkowitz/Marie-Therese Richter (fn 8), p. 226.

<sup>15</sup> Bernd Ehle (fn 6), p. 82.

<sup>16</sup> Roland Oskar Schmid, Vergleichsverhandlungen vor dem Zürcher Handelsgericht, in: Alexander Brunner/Peter Nobel (editors), Handelsgericht Zürich 1866-2016, Zuständigkeit, Verfahren und Entwicklung, Festschrift zum 150. Jubiläum, Zürich 2016, pp. 235 *et seq.*; Alexander Brunner, Die Kunst des Vergleiches Eine Anleitung aus Richtersicht in: Peter Breitschmid *et al.* (editor), Tatsachen, Verfahren, Vollstreckung, *liber amicorum* for Isaak Meier, Zurich 2015, pp. 65 *et seq.*, describing the “Referentenaudienz”, using a French term, also as “la méthode zurichoise” (p. 70).

Zurich Commercial Court for more than hundred years<sup>17</sup> and from there found its way into the Arbitration Rules of the Zurich Chamber of Commerce. Those rules were then replaced in 2004 by the Swiss Rules.

The Zurich Commercial Court is a separate division of the Appellate Court of the Canton of Zurich. This court adjudicates as first instance court all disputes between parties which are inscribed in the commercial registry. In case only respondent is registered, claimant has the choice to either file its case at one of the 12 District Courts of the Canton of Zurich or at the Zurich Commercial Court. Generally, the second option is the preferred one since the later court is, with the sitting of Appellate Court judges, better qualified to adjudicate cases with a commercial background. Amongst other, because the Appellate Court judges are assisted by laymen judges, being professionally involved in the area of the particular dispute (such as banking, insurance, construction, pharmacy etc.)

The “Referentenaudienz” generally takes place after the first exchange of written submissions (i.e. statement of claim and statement of defense). If respondent filed a counterclaim, claimant will be asked, prior to the “Referentenaudienz”, to file first its answer to the counterclaim (but not its rejoinder). Based on these submissions, the judge in charge prepares a detailed written, preliminary analysis of the case (“the report”). Since it is common ground that the Zurich Commercial Court always after the first round of submissions summons for a mandatory “Referentenaudienz” the parties involved are well advised to advance already in their first submission all factual elements, supported by all documentary evidence at hand, and all legal arguments, endorsed by persuasive references to scholarly writing and case law. The statement of claim as well as the statement of defence are therefore not just first submissions outlining in more general terms the issues at hand in the particular case, rather these submissions are the first out of two possibilities only to present the case in full, followed by the reply and rejoinder only as second chance. Subsequent introduction of facts to the file is possible under limited circumstances only. Therefore, the judge in charge at the Zurich Commercial Court can base his assessment of the case for the purpose of the “Referentenaudienz” already on fairly conclusive information, be it of factual or legal nature.

---

<sup>17</sup> The term “Referentenaudienz” was actually used already much earlier, namely in § 86 of the Law on the Organisation of the Judiciary of the Canton of Zurich of 1831, but it seems that it did not yet have any significant practical value at that time; Alfred Temperli, *Vom Verbot des Berichtens, liber amicorum* for Guido von Castelberg, Zürich 1997, pp. 245 *et seq.*, in particular p. 249; Paul Meyer, *Beiträge zur Geschichte des zürcherischen Zivilprozesses im 19. Jahrhundert* (1831 – 1866), 1927, p. 65.

Though there are no written rules as to the conduct of a “Referentenaudienz” the Zurich Commercial Court always adheres to the same procedure, by dividing it into a formal and an informal part. It starts with the formal part, where minutes are taken as to attendance, sequence of the “Referentenaudienz”, unprejudicial nature of all statements made at this occasion, confidentiality of information exchanged, etc.<sup>18</sup> In the informal part, without minutes being taken, the judge reads first his report but such report is not handed out to the parties.<sup>19</sup> The report starts with a summary of the relevant facts, distinguishing between undisputed and disputed facts it then addresses any procedural issues raised by the parties. In its central part the report turns to the analysis of the merits of the case, whereby the allocation of the burden of proof plays an important role. The judge may, in his preliminary and unprejudicial view, already be quite explicit on procedural issues and in matters of contract interpretation but the judge is – no surprise – more reluctant in expressing his view in matters where the parties rely on witness testimony or expert reports. In drafting this report, the judge in charge will put particular emphasis on the written evidence submitted, it is his “prime source of cognisance”.<sup>20</sup> The judge will generally also not yet express a view as to the quantum of a potential settlement. In a break the parties can then internally analyse their position as to the view presented by the judge. Thereafter the informal part of the “Referentenaudienz” continues with the parties briefly commenting on what they have heard from the judge and indicating in which areas they still want to file further evidence, which may have an impact on the view expressed by the judge. The parties then, in front of the judge, start exploring possibilities for a settlement which presupposes that claimant indicates its general willingness to reduce its claim and respondent has to reveal its general readiness to actually pay at least “something”. This “ping-pong” may continue for quite some time (read hours!) and, once the judge realizes that no substantial progress can be achieved, he may – upon explicit approval by

---

<sup>18</sup> Roland Oskar Schmid (fn 16), p. 250; Alexander Brunner (fn 16), p. 84.

<sup>19</sup> According to Alexander Brunner the report requires “*full knowledge of the file, the answering of all legal questions arising from the facts presented, with a flawless subsumption and a preliminary assessment of the evidentiary questions, with a clear allocation of the burden of proof and a corresponding risk-analysis for both parties within the framework of an anticipated assessment of proof.*”; in an English translation quoted from Roland Oskar Schmid (fn 16), p. 241.

<sup>20</sup> Alexander Brunner (fn 16), p. 83; this author presently sits as appellate judge at the Zurich Commercial Court.

the parties – engage also in caucusing.<sup>21</sup> Depending on the temperament of the judge the settlement negotiations can occasionally end up in a rather arm-twisting experience. But the success rate of the “Referentenaudienz” at the Zurich Commercial Court is significant: in approx. 70% of the cases a settlement can be reached at the “Referentenaudienz”.<sup>22</sup>

### ***The conversion of the “Referentenaudienz” into the Arbitration Rules of the Zurich Chamber of Commerce***

Arbitration at the Zurich Chamber of Commerce has a long standing tradition which goes back to 1911, the year of enactment of the first arbitration rules of the Zurich Chamber of Commerce. Judges of the Zurich Commercial Court were, together with qualified lawyers, also listed on the panel of arbitrators of the Zurich Chamber of Commerce. It comes therefore as no surprise that procedures under the Zurich Chamber of Commerce Rules followed – in essence – those used at the Zurich Commercial Court. Accordingly, the “Referentenaudienz” found its way also in the pertinent rules of the Zurich Chamber of Commerce, explicitly at least for domestic arbitration, where the version of 1985 in § 33 stated the following:

*“After the filing of the statement of defense and, eventually, the answer to the counterclaim the president or the arbitral tribunal, as a rule, conducts a “Referentenaudienz”, as practiced at the Zurich Commercial Court.*

*The president or the arbitral tribunal may also, at any time during the entire proceedings up to the rendering of the award, lead the parties to a settlement if deemed appropriate”<sup>23</sup>*

The International Arbitration Rules of the Zurich Chamber of Commerce (in their version of 1989) did not explicitly provide for the

---

<sup>21</sup> Christian Kolz, Einzelgespräche an gerichtlichen Vergleichsverhandlungen im Zivilprozess, Schweizerische Zeitung für Zivilprozess und Zwangsvollstreckung (“ZZZ”), 2016, pp. 229 *et seq.*, whereby the author describes caucusing as “an ambivalent tool of the judiciary”, p. 243. For Brunner, as judge of the Zurich Commercial Court, caucusing is “a recognized standard in settlement negotiations” at the Zurich Commercial Court (fn. 16, p. 82). Also for Hans Schmid, a former judge at the Zurich Commercial Court, caucusing is accepted as a “reliable method” (Hans Schmid, Einzelgespräche in Vergleichsverhandlungen, Schweizerische Juristen-Zeitung (“SJZ”) 2014, p. 359 *et seq.*

<sup>22</sup> Philipp Haberbeck, Praktische Hinweise zur früheren Referentenaudienz, bzw. heutigen Vergleichsverhandlung vor dem Handelsgericht Zürich, in Jusletter, 6 January 2016, 2N. 31; Annual Report of the Cantonal Appellate Court for 2015, pp. 51 and 159.

<sup>23</sup> Werner Wenger, The role of the arbitrator in bringing about a settlement, a Swiss perspective, Best practices in international arbitration, ASA Special Series, No. 26, 2006, p. 145.

holding of a “Referentenaudienz” but, nevertheless, article 45 stated the following:

*“Amicable Settlement*

*With the agreement of the parties the arbitral tribunal may, at any stage of the proceedings, seek an amicable settlement.”*

But, even if not explicitly provided for, it was good practice also under the International Rules of the Zurich Chamber of Commerce to hold after the first exchange of written submissions a “Referentenaudienz”. The active involvement of a judge in assisting the parties in settlement endeavors has also been recognised by the Federal Supreme Court as not tampering the independence of such judge, as long as the pertinent framework is respected.<sup>24</sup>

## **6. The relevant parameters for a “Referentenaudienz” in arbitration – the 10 commands for a successful “Referentenaudienz”**

In the following the key elements for a successful “Referentenaudienz” in arbitration are presented. At the heart is, again, the report which has to reflect in a balanced way the pro’s and con’s for each party, considering burden of proof and documentary and legal evidence adduced so far. In order for the “Referentenaudienz” to result in a settlement the arbitrator cannot just restrict his analysis to the standard qualification that the case is difficult, time consuming and, thus, expensive and therefore the parties should settle the case anyway. He has in his report really to dig into the particularities of the case and to carefully analyse, on a preliminary basis but in a succinct way, the position of the parties, without leaving the road of impartiality.

Address it at the very beginning!

The issue of a potential “Referentenaudienz” has to be addressed already at the case management conference by asking the parties whether they want to have a “Referentenaudienz” at all.<sup>25</sup> In the affirmative case the

---

<sup>24</sup> BGE (a decision of the Swiss Federal Supreme Court published in its volume of leading decisions, whereas all other decisions of such court are referred to by “BGer”; see fn 2 above) 132 I 113; (2005), Consid. 3.6 *in fine* and BGer 4P.196/2003 of 7 January 2004, Consid. 3.2.1.

<sup>25</sup> If not, the holding of a “Referentenaudienz” cannot be imposed upon the parties; see Bernd Ehle (fn 6), p. 88, requesting an “informed consent” as stated in Part I 4(d) of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014); Markus Wirth (fn 11), p. 99; Werner Wenger (fn 23), p. 148; but once the parties have agreed on such

parties have to decide further at which stage of the proceedings such attempt for a settlement should take place: (i) after the first exchange of briefs (as at the Zurich Commercial Court), or (ii) after “production of documents” has occurred or (iii) only before the hearing takes place? From a cost saving point the first option is obviously the preferred one.

Fix the date at the very beginning!

If the parties want a “Referentenaudienz” a date for a meeting has to be reserved in the procedural calendar, generally reserving a full day.<sup>26</sup> Even if a “Referentenaudienz” is provided for in the procedural calendar all following procedural steps, and in particular the hearing date, have to be fixed at the same time. This allows for an uninterrupted continuation of the proceedings in case the “Referentenaudienz” fails. In addition, it has to be clearly spelled out, in Procedural Order No.1, that the parties have to advance all their factual and legal arguments as well as any documentary evidence under their control already in their first submission. The successful outcome of the “Referentenaudienz” heavily depends on all relevant facts and arguments being available to the arbitrator already prior to the “Referentenaudienz”. But such early presentation of all facts and legal arguments has become the standard in international arbitration anyway. Since the hearing date, as fixed at the case management conference, is almost carved in stone there is virtually no room for an evolving, open-ended sequence of submissions.

Declare the rules of the game at the very beginning!

The rules of the game have to be put on record already at the very beginning, i.e. (i) the views disclosed by the arbitrator at the “Referentenaudienz” are without prejudice and the parties waive in advance any claims alleging that the arbitrator, by expressing his view at the “Referentenaudienz”, is biased<sup>27</sup> and (ii) a high level representative of each party (such as the CEO or CFO) must attend the “Referentenaudienz” and must have explicit authority to conclude a settlement directly at this “Referentenaudienz”<sup>28</sup>. Failure to comply may lead to the postponement of the “Referentenaudienz”, with the costs to be borne by the non-compliant party.<sup>29</sup>

---

settlement proceedings with the involvement of the arbitral tribunal the services of the arbitral tribunal provided in such respects are not just a “*nobile officium*”, as described by Daniele Favalli/Max K. Hasenclever (fn 6), p. 2, but the arbitral tribunal has accepted the duty to act in this way.

<sup>26</sup> Markus Wirth (fn 11), p. 99.

<sup>27</sup> Markus Wirth (fn 11), p. 99.

<sup>28</sup> Markus Wirth (fn 11), p. 100.

<sup>29</sup> As applied at the Zurich Commercial Court; Roland Oskar Schmid (fn 16), p. 245.



### Prepare!

Once all submissions are filed prior to the “Referentenaudienz”, the arbitral tribunal shall meet for deliberation, again, on a preliminary, unprejudicial basis. In preparation of such meeting the president of the arbitral tribunal has to establish a list of all relevant points to be discussed. The arbitrators must prepare such deliberation by carefully studying the submissions and, in particular, the exhibits.<sup>30</sup> If deemed helpful an arbitrator may also prepare a paper for his position.

### Deliberate!

Based on the agenda prepared by the president, the arbitrators discuss all points addressed in such agenda. It is the task of the president to create a climate of trust, which encourages also the party-appointed arbitrators to express their present, unprejudicial views in an open manner. Generally, the party appointed arbitrator of the party having the burden of proof in the particular point to be discussed goes first in disclosing his present position and, generally, the president comes last.<sup>31</sup> The president records on which points the arbitrators already agree and in which areas the opinions are still split.

### Write!

Based on the deliberation held the president prepares a report – identical to the one drafted by the judge at the Zurich Commercial Court (1. facts, undisputed and disputed, 2. procedural issues, 3. merits of the case). The president may also, with consent of the co-arbitrators, allocate certain undisputed parts to the co-arbitrators for drafting. The report should already be quite explicit on procedural issues and issues of contract interpretation but it will certainly remain relatively open – as in the Zurich Commercial Court – on issues where the parties rely on witnesses and expert witnesses. Nevertheless, in a number of cases open issues in evidentiary matters can even for the purpose of a “Referentenaudienz” be resolved by way of an anticipated assessment of proof.<sup>32</sup> In any case, this report can provide at least important indications as to the way the arbitral tribunal intends to allocate the

---

<sup>30</sup> See above, fn. 20.

<sup>31</sup> Piero Bernardini, *Organisation of Deliberations*, Inside the Blackbox: How arbitral tribunals operate and reach their decisions, ASA Special Series No. 42, 2014, p. 18.

<sup>32</sup> “Antizipierte Beweiswürdigung”, answering the following question: assuming an alleged but disputed fact could be confirmed in evidentiary proceedings would such then established fact have a material and relevant impact on the outcome of the case? By carefully weighing the evidence and its chances of success an arbitrator can provide helpful indications to the parties in this respect. See also: Gabrielle Kaufmann-Kohler/Antonio Rigozzi (fn 2), para. 6.32; BGer 4A\_682/2011, ASA Bull. 1/2014, p. 137, Consid. 4.1.

burden of proof – a very important risk allocator! And, even if the report remains still vague in certain areas, an alert counsel can, nevertheless, read between the lines and draw his own conclusions.

Be as explicit as reasonably possible!

The report then serves as basis for an oral presentation by the arbitral tribunal at the “Referentenaudienz”. The report is not handed out to the parties and there are also no minutes recorded of the views presented by the arbitral tribunal. Even less so are any subsequent settlement negotiations between the parties and the arbitral tribunal recorded at the “Referentenaudienz” and the parties are not allowed to make at a later stage any reference, in case proceedings continue, to any statements rendered at the “Referentenaudienz”. Prior to the oral presentation of the report, the parties are asked to confirm again both, their consent to the “Referentenaudienz” and their waiver for construing the arguments presented by the arbitral tribunal as bias. Such declaration is then formally taken on record. The oral presentation of the report may be divided up between the three arbitrators, at least in areas where their reigns unanimity in the arbitral tribunal. Such dividing of the presentation increases the perception of the parties of having a coherent arbitral tribunal in front of them, which adds weight to the arguments presented by the arbitral tribunal. This oral presentation of the report should, as at the Zurich Commercial Court, be detailed and should also be supported by scholarly writing and court precedents. Therefore, such oral presentation by the arbitral tribunal may take up to several hours. How explicitly an arbitral tribunal already presents its views depends on the particularity of each individual case including the expectations of the parties<sup>33</sup>. There is no “one size fits all”! In addition, the degree of specificity depends also on the level of involvement of the arbitral tribunal, in particular of the president, and also of the degree of unanimity the arbitral tribunal has already gained at such stage of the proceedings. But, as already stated, an engaged arbitral tribunal should at least in matters of contract interpretation and in the allocation of the burden of proof be in a position to provide indications in a degree of specificity helpful to the parties.

No caucusing, no arm-twisting!

Once the parties had the opportunity to “digest” the views presented by the arbitral tribunal in a break, the “Referentenaudienz” reassumes – but then takes a different direction than at the Zurich Commercial Court. The arbitral tribunal – whilst assisting the parties proactively in reaching a settlement – should never engage in caucusing and even less so in “arm-twisting”. The

---

<sup>33</sup> See BGE 4A\_173/2016, ASA Bull. 3/2017, p. 634, consid. 2.3.

latter is in contradiction to the consensual nature of arbitration anyway. And caucusing would inevitably lead to the result that the arbitral tribunal learns from one party certain facts or views which the other party is not privy to – thus, violating the right to be heard or due process in general.<sup>34</sup> In particular cases it might indeed be helpful to apply caucusing in order to better understand where the stumbling block preventing settlement actually lays. But there are simply no convincing instruments available to maintain the integrity of the process, after caucusing, if settlement negotiations have failed. Of course, an arbitral tribunal could commit itself not to use facts and arguments learned in caucusing in the further course of the proceedings<sup>35</sup>, but how to avoid that such facts and arguments indirectly influence the decision making of the arbitral tribunal? As further remedy, the parties could also agree that in case of failure of the settlement endeavors the arbitral tribunal should disclose all information it obtained from one party also to the other party.<sup>36</sup> But such duty would negatively influence the willingness to share relevant internal information with the arbitral tribunal beforehand and thus lead to a truncated caucusing, providing limited assistance only. In balance, it seems therefore more reasonable to abstain from caucusing at all. Such clear “no” to caucusing disposes also of one of the key concerns of the sceptical practitioners against the involvement of the arbitral tribunal in settlement endeavors.<sup>37</sup>

Record immediately!

If the parties reach a settlement at the “Referentenaudienz” such settlement should be recorded immediately and be signed by the parties. In order to achieve this result, the arbitral tribunal is well advised to prepare already in advance the general framework of such document, which then allows the arbitral tribunal to just fill in the results of the settlement. If the

---

<sup>34</sup> Gabrielle Kaufmann-Kohler (fn 6), p. 199; Bernd Ehle (fn 6), p. 92; Hilmar Raeschke-Kessler (fn 8), p. 535.

<sup>35</sup> CIETAC Arbitration Rules, Art. 40 (8).

<sup>36</sup> As provided for in the Hong Kong Ordinance Act (fn 10); Gabrielle Kaufmann-Kohler (fn 6), p. 199.

<sup>37</sup> Judith Gill, The Arbitrator’s Role in bringing about a settlement – an English view, Best Practices in International Arbitration, ASA Special Services No. 26, 2006, p. 159: *“Perhaps the cause of most concern stems from the practice of caucusing. This involves the arbitrator meeting the parties in private without the other party being present. The principle concern is that each party does not know the substance of the discussions between the arbitrator and the other party and accordingly they have no opportunity to respond to points made to the arbitrator’s in that context. This gives raise to fundamental concerns based on natural justice and indeed in England compliance with section 33 of the Arbitration Act 1996 which entitles the parties to have a reasonable opportunity of putting their case and dealing with that of their opponent.”*

parties prefer a more detailed award by consent – the preferred format for enforcement purposes anyway – such document may still be established subsequently, based on the document signed at the “Referentenaudienz”. A well organised arbitral tribunal does also inform the parties at the “Referentenaudienz” about the fees it incurred so far, thus allowing to record its remuneration in a transparent way in the settlement documentation as well.

There are only advantages!

And, finally, what if the “Referentenaudienz” fails to result in a settlement?<sup>38</sup> There is nothing lost, rather to the contrary, because: (i) the arbitral tribunal has, already at an early stage of the proceedings, gained a full view of the details of the case, which is certainly helpful for leading the further course of the proceedings and (ii) the parties have learned from the arbitral tribunal on which points of the case it puts particular emphasis and in which points a party or the parties are expected to still provide further arguments and/or evidence.<sup>39</sup>

A “Referentenaudienz” is therefore never a futile experience: either the parties come at an early stage of the proceedings to a settlement, thus avoiding the vast majority of the costs, or, if the “Referentenaudienz” fails, the quality of the further submissions will certainly improve based on the information and views exchanged at the “Referentenaudienz”.

By respecting the following three prerequisites – first, explicit and informed consent of the parties for holding a “Referentenaudienz”, second, explicit waiver of the parties to construe the views expressed by the arbitral tribunal at the “Referentenaudienz” as bias and, third, abstaining from any caucusing, even if the parties would agree to it – the arbitral tribunal avoids in case of failure of the “Referentenaudienz” that it can successfully be challenged for bias, rather it will continue to be able to execute its adjudicative function in an untampered way. Once the above trinity of prerequisites is met, any arbitrator – irrespective of his cultural or legal

---

<sup>38</sup> There are hardly persuasive statistical data available as to the success rate of the settlement endeavors of arbitral tribunals but such rate is certainly significantly lower than at the Zurich Commercial Court for the pure reason that such settlement proceedings in arbitration are consensual and a party cannot be pushed into a settlement. An analysis of all the ICC Awards by consent rendered in the period from 2002-2005, reveals that in settled cases Swiss arbitrators and German arbitrators were predominantly involved; Gabrielle Kaufmann-Kohler/Victor Bonnin, *Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*, ICC Bulletin Vol. 18, No. 2 (2007), additional data in this field can also be found in Thomas J. Stipanowich and Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, Penn State Yearbook on Arbitration and Mediation (2014) p. 1 *et seq.*

<sup>39</sup> Christopher Harris (fn 9), p. 90.

background – should therefore feel at ease in assisting the parties in finding a settlement. Whether he follows for that purpose the more “provincial” route of the “Zurich-Way” or whether he uses the international CEDR “highway” bears no relevance: the rules of traffic are the same anyway!

And, after all, the sole task of an arbitrator is to resolve a dispute and if he can do so by assisting the parties in a settlement, the better!

Hansjörg STUTZER, *Settlement Facilitation: Does the Arbitrator have a Role? The “Referentenaudienz” – the “Zurich-Way” of settling the Case*

### **Summary**

Whether the arbitrator has a role in settlement facilitation is under aspects of common law and civil law still viewed differently, whereby even in civil law the degree of such an involvement is not assessed unanimously. It seems that arbitrators in Switzerland and Germany take the most pro-active approach in this respect. The common law concern is vested mainly in the assumed change of role of the arbitrator to mediator and – in case settlement facilitation fails – back to arbitrator again (Arb-Med-Arb). In Zurich a procedure practised by the Zurich Commercial Court to summon the parties after the first round of written submissions to a so called “Referentenaudienz” has found its way also into arbitration. The author outlines that such procedural instrument does not follow rules of mediation. Rather it is a procedural tool *sui generis*, which can be used in arbitration proceedings without raising concerns of bias for the arbitrator.

### **Submission of Manuscripts**

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

### **Aims & Scope**

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including the ICC and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

### **Books and Journals for Review**

Books related to the topics discussed in the Bulletin may be sent for review to the Editor in Chief (**Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland**).