Strelia
2013-2023 10 YEARS

Dispute Resolution News

April 2023

How arbitration can facilitate settlements

1. Introduction

When parties want to resolve a dispute, and if they fail to negotiate a settlement, they can turn to mediation or conciliation. These alternative dispute resolution ("**ADR**") methods allow them to save time and money. On top of that, they allow parties to take their fate into their own hands instead of seeking a judge or arbitrator to resolve it. However, mediation or conciliation requires that there be two parties to reach a settlement. And despite the mediator or conciliator's level of skills and excellence, there is always a risk that the parties might not be able to settle amicably after all. In such scenario, parties would then proceed to arbitration.

Embarking on arbitration is the normal step if parties commit themselves to a multi-tier contractual clause whereby they follow a cascade system of steps that they must take before bringing the dispute to arbitration. Typically, this type of clause stipulates that parties must first try to settle amicably through mediation for a certain time period. If they do not succeed, they can bring the case to arbitration. But even without a multi-tier clause, parties in a dispute would usually explore the possibility of settling amicably first, with or without a mediator. And if this fails, they would then embark on arbitration. The reason why mediation before arbitration does not often lead to a settlement is that parties conduct negotiations when the dispute is still "hot", so any anger, frustration, or other emotions could cloud their judgement. This would cause their goals to become unrealistic, which consequently reduces the chances of a successful settlement.

Besides the ADR methods available to disputing parties, arbitrators also have certain tools at their disposal to facilitate settlements. Arbitration users are also becoming increasingly aware of this, as 59% of the respondents in the 2021 Queen Mary Arbitration Survey indicated that they preferred to combine arbitration with other forms of ADR methods to resolve their disputes.

2. Combination of arbitration and other adr methods

Regardless of whether negotiations took place with or without a mediator or conciliator, an arbitrator can and should ask the parties if any new settlement attempt could be useful. The arbitrator could even help them by analyzing briefly the main issues at stake in the case. Parties might feel that instead of leaving the decision to the arbitrator, they could still be interested in trying to negotiate based on the analysis presented by the arbitrator.

Even if, after unsuccessful settlement attempts, parties are not interested in renewing their efforts to reach a settlement at the start of the arbitral proceedings, it is worthwhile during the process to always keep a door open to such possibility to settle amicably.

Nothing prevents parties from conducting arbitration and mediation at the same time. If this occurs, the mediator will not be involved in the arbitration but will continue to be informed of the procedural developments. The mediator can convince the parties at an appropriate time during the proceedings that the right moment to start negotiations has come and that he or she can offer his or her help in their negotiations. While an advantage is not having to delay the arbitration proceedings until the mediation is finished, the downside is the sum of expenses associated with having the two procedures (arbitration and mediation) running at the same time. Even if mediation were successful, parties would still have to pay the costs and the fees they owe to the lawyers and arbitrators in the arbitral proceedings.

If the parties or the arbitrator believe that there is potential for settlement, they can provide for a mediation window, e.g., after the first round of submissions or during the document production period. This would stay the arbitration. Parties would get a "cool-off period" during which they can take a step back, get a clearer idea of the other parties' arguments, consider their positions, and express their desire to negotiate with or without a mediator.

Bifurcation can also be a very helpful tool to facilitate settlement, although this is not generally associated with it. By dividing the dispute into parts and deciding on certain issues before others, the arbitral tribunal reduces the scope of the dispute, making it easier for the parties to find common ground on outstanding points. An example of bifurcation could be when the arbitrator first renders an award on a liability issue and then the parties themselves would negotiate the damages that one would owe the other.

Parties can also seek the arbitral tribunal to give its preliminary views on the case. These could consist of a non-binding and preliminary assessment of the disputed issues. The assessment will give parties a realistic picture of the strengths and weaknesses of their case. Additionally, it can also point out the crucial points of discussion for the case, meaning that even if parties cannot reach a settlement, the preliminary views will enable them to spend their time and efforts on the points that matter, making the proceedings more efficient.

To kickstart negotiations between parties, the arbitral tribunal could even draft suggested terms of settlements after its preliminary assessment of the case. These terms can then serve as an effective basis for further negotiations. This is especially effective together with preliminary views by the arbitral tribunal where the arbitral tribunal would first issue its preliminary views to the parties and then provides the parties with suggested terms of settlement based on these views. The parties can then further negotiate on the basis of these terms.

A final possibility is for the arbitral tribunal, or the presiding arbitrator, to chair settlement meetings between the parties. Given that the arbitral tribunal already knows the case and has certain gravitas, its chairing of those meetings could help the parties to reach a settlement. The major downside of the preliminary views or settlement negotiations chaired by the arbitrator occurs when the parties cannot reach a settlement and the arbitration proceedings resume. Therefore, before arbitrators give any of their preliminary opinions, and before they provide parties with suggested terms of settlement, and especially when arbitrators are involved in settlement negotiations, parties should formally agree on either having the arbitration proceedings continued with the same arbitrators or having new arbitrators appointed. In the former scenario, preliminary views or suggested terms of settlement could create the impression that the arbitrators may be biased. Some arbitrators will also find it hard to change their minds later on about the preliminary views they gave. In the latter scenario, new arbitrators will have to start handling the case from the outset, which will lead to additional costs.

3. How to implement these methods in arbitration clauses

The above methods can be implemented in the arbitral proceedings only with the informed consent of all parties to the arbitration.

The most effective way to ensure that these methods can be used by the arbitral tribunal is to incorporate them into an arbitration clause. The clause can read, for example: "*The arbitral tribunal has the power to give its preliminary views on the case after the first round of written submissions if it considers this appropriate. These preliminary views are indicative and non-binding and cannot give rise to any impression of partiality or lack of independence on the part of the arbitral tribunal."* By doing so, all parties will have necessarily consented to having the arbitral tribunal use the desired measures to facilitate their dispute settlement. Admittedly, this clause requires careful drafting, but the benefits thereof will far outweigh the costs if parties decide to eventually pursue arbitration.

When drafting the arbitration or dispute resolution clause, collaboration between the in-house counsel and an experienced lawyer is essential. Such clause should follow a thorough pre-action risk assessment that identifies:

I. the strength and the weaknesses of the case, the legal risks and merits of the issues in dispute. This analysis can lead to a party's internal consensus in favor of a settlement rather than arbitration proceedings that would eventually lead to a final award.

II. the costs associated with each type of dispute resolution and combinations thereof to determine the ideal dispute resolution method for the contract in question. When doing so, the in-house counsel should consider not only the direct financial costs but also other unquantifiable implications such as reputational impact, loss of profits from management (as they have to spend time on the dispute instead of on their daily tasks), unwelcome attention from investors or regulators, reputation, etc.

Jean-Pierre Fierens
Partner
jean-pierre.fierens@strelia.com

Cynthia Gieskes
Senior Associate
cynthia.gieskes@strelia.com

Cyro Vangoidsenhoven
Associate
cyro.vangoidsenhoven@strelia.com