

# CEDR Commission on Settlement in International Arbitration

Consultation document - 2009



# CEDR Commission on Settlement in International Arbitration

*Draft paper for consultation (December 2008)*

## Report of the Commission

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## 1. Introduction

- 1.1 International arbitration is the default choice of dispute resolution forum for cross-border commercial contracts, largely because it offers neutrality and awards that are enforceable around the world.
- 1.2 The international arbitration community is continuously working to improve its product for the benefit of business users. Papers such as the UNCITRAL Notes on Organising Arbitral Proceedings, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration, and the ICC Commission's Techniques on Controlling Time and Cost in Arbitration are all documents aimed at making international arbitration work better.
- 1.3 Although some of these papers refer to the role of the tribunal in encouraging settlement, at present, it is only in certain jurisdictions that tribunals are proactive in this regard. It is certainly very rare for tribunals to recommend that the parties try using mediation during the course of the arbitral proceedings. Indeed, whilst courts in Europe now generally enforce multi-tier dispute resolution clauses and decline jurisdiction where these are not observed, arbitral tribunals tend to accept jurisdiction and proceed with the arbitration, even where one party has clearly breached an obligation to mediate before commencing arbitral proceedings.
- 1.4 Research<sup>1</sup> has shown that settlement rates in arbitration are significantly lower than they are in many national courts, particularly those courts where judges systematically promote early settlement and the use of ADR techniques such as mediation.
- 1.5 The CEDR Commission was formed to review the current practice regarding the promotion of settlement by international arbitral tribunals and to come up with recommendations to improve this aspect of the process for end-users. A key premise of the Commission's work, which is supported by studies of the attitudes of international business to dispute resolution<sup>2</sup> is that parties generally want their problems solved cost effectively and efficiently and that this will often be best achieved through negotiated settlement.
- 1.6 Attached to this Report<sup>3</sup> are the following documents:
  - 1.6.1 Draft CEDR Rules for the Facilitation of Settlement in International Arbitration (Appendix 1).

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<sup>1</sup> *Bucher*, ASA Bulletin 1995, p. 568 estimates the settlement rate at approximately 50%; many authors agree with this assessment. The second survey conducted by *Bühning-Uhle/Kirchhoff/Scherer in Arbitration and Mediation in International Business (2<sup>nd</sup> edition 2006)* (p. 112) delivered a settlement rate of 43% on average.

<sup>2</sup> See for example the PriceWaterhouseCoopers survey, *International arbitration: Corporate Attitudes and Practice 2006*

<sup>3</sup> Please note that the contents of this report do not necessarily reflect the personal views of individual members of the Commission

- 1.6.2 An Appendix outlining safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement (Appendix 2)
- 1.6.3 An appendix on the Effect of Offers to Settle in Arbitration (Appendix 3) A table showing provisions from legislation and the rules of arbitral institutions around the world concerning the arbitrators' role in the encouragement of settlement within arbitration proceedings. This provides an indication of the current approach adopted by the different arbitral institutions. [Note: Additions to this table from countries or dispute resolution institutions not currently included are welcome] (Appendix 4)
- 1.6.4 A list of the members of the CEDR Commission (Appendix 5).

## 2. Objectives, Principles and Summary

- 2.1 The purpose of the Recommendations set out in this Report is to provide tools which can be used by all of the different participants in international arbitration proceedings. These tools are all designed to increase the prospects of parties to the proceedings being able to settle their disputes without the need to proceed through to the conclusion of arbitral proceedings.
- 2.2 The CEDR Commission has considered the different approaches currently adopted for the encouragement of settlement within arbitration proceedings. These include the use by arbitrators in China and in Hong Kong of mediation techniques. They also include the approach prevalent in Germany and Switzerland where arbitrators are generally willing at an early stage in the proceedings to provide the parties with an indication of their preliminary views on the issues in the case. This can encourage settlement discussions between the parties and provide focus for those discussions.
- 2.3 By way of contrast, the typical common law approach is for arbitrators to refrain from engaging with the parties on the substantive issues for fear that this may suggest that they have prejudged the case before hearing all of the evidence and argument. However, the common law jurisdictions do make use of other techniques to promote settlement such as "offers to settle" which are described in more detail below and in Appendix 3. The Commission has identified the techniques and approaches that it considers being of most value and has included these within its Recommendations.
- 2.4 The Commission considers that the following three principles should apply to international arbitration proceedings and these three principles underpin the Recommendations:
  - 2.4.1 An arbitral tribunal has a primary responsibility to produce an award, which is binding and enforceable.
  - 2.4.2 Unless otherwise agreed by the parties, the arbitral tribunal, assisted by the arbitral institution where applicable, should also take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute.

- 2.4.3 In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the Parties separately, or obtain information from any Party which is not shared with the other Parties, unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award or unless the Parties explicitly consent to this approach and its consequences.
- 2.5 The Commission recognises that by applying the third of these principles, an arbitrator will be discouraged from engaging in a med-arb process which involves meeting privately with each party as part of the mediation phase. The Commission has concluded that whilst this form of med-arb has been used successfully by some arbitrators, it carries significant risks to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase. In addition, this form of med-arb may result in a mediation phase which is less effective than would be the case if the mediation were to be conducted by a third party mediator. Whilst currently the Commission does not therefore specifically recommend a med-arb process which involves private meetings with the parties, it has considered safeguards that can be used in order to minimise the risks involved with such an approach. These are set out at Appendix 2 entitled "Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement". (We welcome feedback on these principles.)
- 2.6 The participants in the arbitral process to whom the Recommendations are addressed are arbitrators, arbitral institutions and parties and their counsel. The Recommendations are organised by reference to each of these categories.
- 2.7 In summary, the Recommendations are intended to achieve the following purposes:
- 2.7.1 Remind all participants that arbitration proceedings may be used in conjunction with other processes to achieve efficient and cost-effective outcomes.
  - 2.7.2 Encourage arbitrators to use appropriate techniques in the course of their conduct of the arbitration to promote and encourage settlement. An "appropriate" technique is one that will assist the parties, will not lead to successful challenges to their role as arbitrators and will not jeopardise the enforceability of any award that the tribunal may ultimately make.
  - 2.7.3 Offer suggestions to arbitral institutions on how to design processes which are intended to facilitate settlement and ways to allow them to be more readily accessible to parties to arbitral proceedings.
  - 2.7.4 Produce a list of principles which will give guidance when arbitral institutions, tribunals or parties are considering the use of combined adjudication and settlement processes such as Med-Arb, Arb-Med etc.
  - 2.7.5 Offer guidance on the drafting of arbitration clauses which record the agreement of the parties regarding the approach that the arbitral tribunal is to take to facilitate settlement.

### 3. Draft CEDR Rules for the Facilitation of Settlement in International Arbitration Proceedings

- 3.1 In addition to its Recommendations, the Commission has prepared draft CEDR Rules [See Appendix 1]. *These Rules apply the Recommendations.* They are designed to be incorporated by agreement into the procedure to be adopted in an arbitration<sup>4</sup>. This can be done either in a contractual agreement to arbitrate embodied in a contract, or by inclusion by arbitral institutions in their rules of arbitration, or by way of a procedural agreement made by the parties, possibly recorded in an order made by consent by an arbitral tribunal early in the proceedings.
- 3.2 By adopting the CEDR Rules, Parties will ensure that their arbitral tribunal will facilitate settlement of their dispute and will also know how that facilitation will be undertaken.
- 3.3 The Recommendations in this Report are intended to be of use to arbitrators, arbitral institutions and Parties whether or not the Parties choose to adopt the CEDR Rules.

### 4. Recommendations

- 4.1 These Recommendations are not prescriptive. Many of the Recommendations are already being implemented in some parts of the world both by arbitral institutions and some arbitrators. One of the aims of the Recommendations is to identify techniques that have been used successfully so that they can be adopted more widely.

#### Arbitrators

- 4.2 Steps that arbitrators can take within the context of most existing arbitral rules include the following:
- 4.2.1 *Enforce multi-tier dispute resolution clauses in accordance with the applicable law if pre-arbitration phases have not been completed in accordance with the clause.* If the parties have agreed that they will, for example, conduct a mediation before embarking on arbitration proceedings, then this agreement should be enforced if the applicable law so provides. Not only does this respect the will of the parties (assuming that they have not varied the agreement set out in the multi-tier clause), but it also provides the parties with an opportunity to engage in a settlement process before incurring significant costs in the arbitration proceedings. In general terms, enforcement of such clauses will usually involve either staying the arbitral proceedings or declining jurisdiction.

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<sup>4</sup> CEDR would like to thank the International Bar Association for permission to adopt in these Rules some of the terminology from the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.

- 4.2.2 *Remind the parties' counsel that it is best practice for internal party representatives to be present at the first procedural conference. Arbitrators can remind the parties at that conference that they can settle their dispute at any time.* Direct communication between the arbitral tribunal and the parties will ensure that the parties themselves understand the options available to them. This may be of particular benefit where the lawyers representing the parties come from different legal traditions and may have different expectations of the tribunal's role regarding settlement.
- 4.2.3 *Where necessary, discuss with the parties and their counsel the different ADR processes which might assist and discuss with them ways in which such processes might be accommodated within the arbitral process (for example by way of a "mediation window" during the proceedings).* This form of discussion may be particularly useful where one or more of the parties or counsel is not familiar with mediation or other ADR processes, or where the parties come from different legal traditions.
- 4.2.4 *Question the parties' counsel and the parties themselves at appropriate junctures in the arbitral process regarding the status of settlement discussions and the potential use of other forms of ADR to assist.* The use of mediation or other ADR processes may be appropriate at different stages of the arbitral process, and it can be helpful for the parties' counsel to be reminded of this as the process progresses.
- 4.2.5 *If both parties agree, provide an indication as to the tribunal's preliminary view on the merits of the case.* This can be done in different ways. One approach is for the tribunal to set out the issues in the case that it has identified and what the tribunal considers will be required in terms of evidence from each party in order to prevail on the key issues.
- 4.2.6 *If both parties agree, chair one or more settlement meetings attended by internal representatives of the Parties (or other persons with authority to negotiate and settle) at which possible terms of settlement are negotiated.* The involvement of one or more members of the tribunal or a neutral chairperson can improve the chances of settlement discussions proving successful. Upon the request of the parties, the members of the arbitral tribunal or the chairperson may submit to the parties proposed terms of settlement. Arbitrators should not meet with the Parties separately or obtain any information from one Party which is not shared with the other Parties. The arbitrators must also avoid putting pressure on the parties to settle.
- 4.2.7 *Propose that the parties be at liberty to make offers to settle during the arbitral proceedings with a view to settling the case and protecting their position on legal costs.* Where the Party to whom such an offer has been made has not accepted it and that party has not achieved a better result in the award, the arbitral tribunal shall be at liberty to take this fact into account when considering the allocation of the costs of the arbitration between the Parties. A more detailed description of how offers to settle can operate is set out at Appendix 3.

4.3 If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign.

#### Arbitral institutions

4.4 Institutions administering arbitration proceedings can take various steps to assist. Some of these can be taken within the context of existing rules and procedures. Others would require a change to those rules and/or the introduction of new services.

4.5 Arbitral institutions have a pivotal role to play for several reasons:

4.5.1 It is their rules that are incorporated into the parties' contracts by way of the arbitration agreement. These rules can be structured in a way which facilitates settlement discussions between the parties.

4.5.2 Arbitral institutions can inform the arbitrators that they appoint as to the approach that those arbitrators should take to the encouragement and facilitation of settlement initiatives.

4.5.3 Case managers within the institution are often the first point of contact for the parties once a decision to refer a dispute to arbitration has been taken. They continue to be a contact point for the parties, independent from the tribunal. At all stages they are in a position to check with the parties the status of settlement negotiations and, where appropriate, make suggestions to progress settlement initiatives. In a similar way, they can communicate separately with the tribunal regarding the same matters.

4.5.4 Arbitral institutions are in a position to introduce new approaches and products into the market.

4.6 Operating within their existing rules, institutions could take the following steps<sup>5</sup>:

4.6.1 *Instruct case managers to initiate a discussion regarding settlement with counsel representing the parties when the proceedings are commenced.* This is likely to involve asking whether the parties have already used ADR techniques and discussing with them whether it would be helpful to use such techniques immediately or at some later stage in the arbitral proceedings.

4.6.2 *Provide information to counsel and the parties about ways of facilitating settlement negotiations.* This is likely to be of particular value and importance for parties and lawyers from jurisdictions where ADR techniques are less commonly used.

4.6.3 *Where the institution either offers ADR services (such as mediation), or is able to recommend an ADR institution that provides such services, this can be drawn to the attention of the parties.*

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<sup>5</sup> It is acknowledged that a number of institutions already take some of these steps.



- 4.6.4 *Require arbitrators appointed by the institution to take the steps identified above at paragraph [4.2] and select sole arbitrators and chairmen for appointment who will be pro-active in this regard.*
  - 4.6.5 *Support arbitrators who take such steps if queries are raised by the parties.*
  - 4.6.6 *Provide training to arbitrators in how to give an early view on the merits in order to encourage settlement, without making themselves or their award vulnerable to a successful challenge.*
  - 4.6.7 *Provide training to all participants in the arbitration process on alternative dispute resolution techniques.*
- 4.7 Additional steps which are likely to require changes to existing rules or the introduction of new rules include the following:
- 4.7.1 *Incorporate the CEDR Rules for the Facilitation of Settlement in International Arbitration into their rules of arbitration.* This could be done either for all cases, or as an option which the parties can select.
  - 4.7.2 *Include a provision within the institution's rules of arbitration which provides that a tribunal can and will, with the written consent of all parties, chair settlement meetings and/or provide a provisional view on the merits with a view to facilitating settlement discussions.* This provision can also confirm that the participation in settlement meetings and the fact of providing a provisional view on the merits given in accordance with the rules shall not be the basis for a challenge to the tribunal or to its arbitral award.

#### Parties and their counsel

4.8 Given that settlement is a voluntary process, the approach of the parties, advised by their counsel, is of key importance. Rules of arbitration regarding settlement and encouragement from tribunals and institutions will be of significantly reduced effect if the parties are not willing to engage and work constructively.

4.9 Steps that parties and their counsel can take include the following:

- 4.9.1 *Give careful consideration to the type of dispute resolution process they want at the time of negotiating the dispute resolution clause in their contract.* If the parties agree that it may be helpful to have the assistance of an arbitral institution and an arbitral tribunal that are actively looking for ways to support them in settling the dispute, select the rules of an arbitral institution that behaves in this way. The parties may also consider using multi-tier dispute resolution clauses that provide for negotiation and/or mediation before arbitration.
- 4.9.2 *Consider the use of ADR processes at the outset and throughout the arbitral process and use such ADR processes alongside or in conjunction with arbitration.* It may be appropriate for mediation to take place during a pause in the arbitration (a "mediation window") or a mediation process

can run on a parallel track with the arbitration proceedings so that work on settlement can be undertaken without delaying the arbitration.

- 4.9.3 *Party representatives with authority to settle the dispute should be proactively involved during the arbitration and be ready to engage directly with the arbitral tribunal and other neutrals (where appointed).* This should reduce the risk that opportunities for settlement are missed. It also enables the party to ensure that the approach being taken by its legal counsel is consistent with its own objectives and interests.
- 4.9.4 *Parties and their counsel should be aware that if the counter party to the dispute comes from a jurisdiction with a legal system and tradition which is different to its own, the approach of that party to settlement negotiations and ADR processes may also be very different.* Getting the best result is likely to involve obtaining an understanding of the traditions of the other side and being sensitive to those when proposing and participating in any settlement process
- 4.9.5 *Parties and their counsel should be ready to discuss the question of settlement with the tribunal and/or the arbitral institution and consider the possible use of ADR or other settlement techniques at the outset of or later in the arbitration proceedings.* One technique that the parties may consider is requesting the tribunal to give an early provisional view on the merits of the case so as to facilitate the parties' settlement discussions. An arbitrator may also chair a meeting at which possible terms of settlement may be negotiated.

## 5. New Developments

- 5.1 The CEDR Commission recognises that new approaches and practices are developed from time to time. This report is therefore a work in progress and the Commission welcomes input on any alternative approaches that might be reflected in the next edition of this report. Please address any such comments to CEDR at [arbitration@cedr.com](mailto:arbitration@cedr.com).

## Appendix 1

# CEDR Rules for the Facilitation of Settlement in International Arbitration (DRAFT)

## Introduction

1. These CEDR Settlement Rules are designed to increase the prospects of Parties to international arbitration proceedings being able to settle their disputes without the need to proceed through to the conclusion of those proceedings. The Rules outline steps which Arbitral Tribunals are to take (and are not to take) with a view to facilitating settlement by the Parties.
2. The CEDR Settlement Rules are designed to supplement the legal provisions and the institutional or *ad hoc* rules according to which the Parties are conducting their arbitration<sup>6</sup>. The Rules can be incorporated on an *ad hoc* basis by agreement of the Parties, as part of an institution's rules, or within a contract clause requiring arbitration<sup>7</sup>.

## Article 1 Definitions

1. "Arbitral Tribunal" means a sole arbitrator or a panel of arbitrators
2. "CEDR Settlement Rules" means the CEDR Rules for the Facilitation of Settlement in International Arbitration
3. "First Procedural Conference" means the first conference between the Arbitral Tribunal and the Parties (whether by meeting or otherwise) at which the procedure for the conduct of the arbitration is discussed and established
4. "General Rules" mean the institutional or *ad hoc* rules according to which the Parties are conducting their arbitration
5. "Mediation Window" means a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity
6. "Party" means a party to the arbitration

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<sup>6</sup> CEDR would like to thank the International Bar Association for permission to adopt in these Rules some of the terminology from the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.

<sup>7</sup> The following is sample wording for inclusion in a contract clause: "In the conduct of any arbitration under this [Agreement], the Arbitral Tribunal shall apply the CEDR Rules for the Facilitation of Settlement in International Arbitration Proceedings".

## Article 2 Scope of Application

1. Subject to Articles [2.1 and 2.2], whenever the Parties have agreed to apply the CEDR Settlement Rules, the Rules shall govern the steps taken by the Arbitral Tribunal to facilitate settlement of the Parties' dispute.
2. In case of conflict between any specific provision of the CEDR Settlement Rules and any mandatory provision of law determined to be applicable to the case by the Arbitral Tribunal, the mandatory provision of law shall prevail. The Arbitral Tribunal shall apply the CEDR Settlement Rules in the manner that it determines best in order to accomplish their purpose, without contravention of the conflicting mandatory provision of law.
3. In case of conflict between any provisions of the CEDR Settlement Rules and the General Rules, the Arbitral Tribunal shall apply the CEDR Settlement Rules in the manner that it determines best in order to accomplish the purposes of both the General Rules and the CEDR Settlement Rules, unless the Parties agree to the contrary.
4. In the event of any dispute regarding the meaning of the CEDR Settlement Rules, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the CEDR Settlement Rules and the General Rules are silent on any matter concerning the facilitation of settlement and the Parties have not agreed otherwise, the Arbitral Tribunal may facilitate settlement, as it deems appropriate, in accordance with the general principles of the CEDR Settlement Rules.

## Article 3 General Principles

1. In assisting the Parties with settlement, the Arbitral Tribunal shall not knowingly act in such a way as would make its award susceptible to a successful challenge.
2. Subject to Article 3(1), the Arbitral Tribunal will take proactive steps in accordance with these CEDR Settlement Rules to assist the Parties to achieve a negotiated settlement of part or all of their dispute.
3. The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.
4. Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that the arbitration resumes (save as regards the allocation of costs in accordance with Article [6] of these Rules).
5. The tribunal shall not take into account for the purpose of making an Award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal

shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.

#### Article 4 Discussion at First Procedural Conference

1. The Arbitral Tribunal shall invite the Parties themselves (represented by a member of their management or in-house legal function) to participate in the First Procedural Conference (or such other early hearing or discussion as is used to establish the procedure for the arbitration). The Parties shall be encouraged to speak directly with the Arbitral Tribunal during the First Procedural Conference on matters relating to settlement.
2. At the First Procedural Conference, the Arbitral Tribunal shall:
  - 2.1. ask the Parties whether there have been any prior settlement discussions between them or whether any such discussions are pending;
  - 2.2. ensure that the Parties understand that they can settle their dispute or part of their dispute at any time;
  - 2.3. ensure that the Parties are aware of the different dispute resolution processes (such as mediation) which, in the opinion of the Arbitral Tribunal, might assist the Parties in settling their dispute;
  - 2.4. where appropriate, discuss with the Parties how other dispute resolution processes used to facilitate settlement might be accommodated at an appropriate time within the procedure for the arbitration (for example by way of a Mediation Window);
  - 2.5. discuss and agree with the Parties the steps that the Arbitral Tribunal will be taking in accordance with Article 5 of the CEDR Settlement Rules to facilitate settlement;
  - 2.6. discuss and agree with the Parties whether the Arbitral Tribunal, when allocating the costs of the arbitration between the Parties, is to take into account offers to settle in the manner described in Article [6] below; and
  - 2.7. discuss and agree with the Parties the points during the course of the arbitration when the topic of settlement will be discussed again between the Parties and the Arbitral Tribunal.

#### Article 5 Facilitation of Settlement by Arbitral Tribunal

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. Chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated;

- 1.2. 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 ;
- 1.3. Provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;
- 1.4. Where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation.
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;
3. The Arbitral Tribunal shall:
  - 3.1. Insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place;
  - 3.2. Adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment).

#### Article 6 Costs

1. When considering the allocation between the Parties of the costs of the arbitration, (including the Parties own legal and other costs) the Arbitral Tribunal may take into account
  - 1.1. any offer to settle that has been made by a Party where the Party to whom such an offer has been made has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle;
  - 1.2. any unreasonable refusal by a party to make use of a Mediation Window; or
  - 1.3. any failure by a Party to comply with a requirement to mediate or negotiate in the contract between the Parties which is the subject of the arbitration.

#### Article 7 Arbitrator impartiality and independence

1. If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator shall resign.

END

## Appendix 2

### Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement.

1. The Report of the CEDR Commission states as follows at paragraphs 2.4.3 and 2.5:
  6. *"In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the Parties separately, or obtain information from any Party which is not shared with the other Parties, unless such practices are acceptable in the courts of all jurisdictions which might have reason to consider the validity of the tribunal's award.*
  7. *The Commission recognises that by applying the third of these principles, an arbitrator will be prevented from engaging in a med-arb process which involves meeting privately with each party as part of the mediation phase. The Commission has concluded that whilst this form of med-arb has been used successfully by some arbitrators, it carries significant risks to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase. In addition, this form of med-arb can result in a mediation phase which is less effective than would be the case if the mediation were to be conducted by a third party mediator. Whilst the Commission does not therefore recommend a med-arb process which involves private meetings with the parties, it has considered safeguards that can be used in order to minimise the risks involved with such an approach. These are set out at Appendix 2 entitled "Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement".*
2. In this context, the CEDR Commission recommends the following:
3. If it is proposed that an arbitrator should take on the role of mediator or conciliator and meet with the parties in private session (sometimes referred to as a caucus session) with a view to resuming his or her function as arbitrator if the mediation or conciliation does not result in a settlement of the dispute, the following issues should be addressed.
4. In conducting the mediation/conciliation, the arbitrator is likely to behave in a way which is inconsistent with the behaviour expected of an arbitrator in most international arbitration proceedings. For example, the mediator/conciliator is likely to become privy to information regarding the motivations and interests of the parties which would otherwise be privileged and/or confidential, and/or which might separately influence an arbitrator's judgment in considering the terms of an award.
5. If the parties have not consented to the mediator/conciliator resuming as arbitrator, and have not waived any right to object arising out of his role as mediator/conciliator, the arbitrator and/or his award may therefore be subject to challenge. Even where such consent is given, it may be argued that the consent is not given on a fully informed basis if the parties are not aware of all matters that have been discussed during private sessions. Further, if parties are aware that if no settlement is achieved, the mediator may resume as arbitrator, they may be less inclined to be open and frank in their



discussions with the mediator during the private meetings, thereby reducing the value of such meetings and such a mediation effort.

6. If interest based mediation which involves private meetings is likely to be helpful for the resolution of the dispute (as it often will be), it is recommended that the tribunal explains the risks identified at paragraphs [4 and 5] above, and discusses with the parties the alternative approach of appointing an independent third party mediator. The tribunal can then discuss and agree with the parties how to build the mediation process into the arbitral procedure.
7. The CEDR Commission recognises that parties will on occasion be willing to accept the risks identified at paragraphs [4 and 5] above and will want an arbitrator to engage in interest based mediation using private meetings. In such circumstances, it is recommended that the following steps be taken so as to minimise the risks.
  - 7.1. The parties' consent to the mediator/conciliator resuming as arbitrator should include consent as to the way in which the arbitrator is to deal with information learned in confidence by the arbitrator during the mediation/conciliation. This may require the arbitrator to disclose any such information to all parties and provide them with an opportunity to comment on it. Alternatively, it may provide that the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and that he or she should be under no duty to disclose it.
  - 7.2. Wherever the parties' consent is required, that consent should be recorded in writing.
  - 7.3. The parties should give their consent in writing before the mediation/conciliation phase. Where parties wish to adopt a more robust protection against the risks inherent in the arbitrator acting as mediator, they should insert a requirement that consent is also required after the mediation/conciliation has concluded and prior to the mediator/conciliator resuming in the role of arbitrator. The consent given after the mediation/conciliation phase is particularly important because it is given in the knowledge of developments during the mediation. Consent which is given at an earlier stage (for example in a dispute resolution clause, or by reference to the arbitral rules of an institution) may be less effective. In addition, knowing that it can withhold consent, may encourage a party to be more open during the mediation/conciliation phase.
  - 7.4. The consent should include a statement that the parties agree to the arbitrator meeting with each privately during the mediation/conciliation phase and either that [the arbitrator is under no obligation to disclose information obtained in confidence but should disregard it for the purposes of an arbitration award] or that [the arbitrator is under a duty to disclose any information obtained relevant to a potential arbitration award so that the other party may comment].
  - 7.5. The consent should include a statement that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).
  - 7.6. If as a consequence of his or her involvement in the mediation/conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or



independent in the future course of the arbitration proceedings, that arbitrator should resign.

8. As is noted in paragraph 2.4.3 of the CEDR Commission's Report, the risks which these safeguards are designed to minimise may not arise where the arbitration takes place (and any steps to challenge or enforcement the award will take place) in jurisdictions where the courts consider it to be a common and accepted practice for arbitrators to engage in interest based mediation involving private meetings with the parties. The Commission does not in any way discourage such practice in those jurisdictions, and welcomes the sharing of experience arising from such practice or from use of the safeguards outlined above.

## Appendix 3

### The effect of Offers to Settle in Arbitration

Certain common law jurisdictions use Offers to Settle as a means of encouraging settlement. Offers to Settle encourage settlement because:

- (a) parties are encouraged to make reasonable offers to settle because they can thereby reduce their exposure to costs in the arbitration; and
- (b) a party receiving an offer is encouraged to consider the offer seriously, since it would be at risk of paying more in costs at the end of the arbitration if the offer is rejected and the party does not achieve a better outcome in the award.

Set out below is a procedure which can be incorporated into the procedural rules in an arbitration in order to enable parties to make Offers to Settle which have these costs consequences. Alternatively, it can simply be agreed that an arbitral tribunal may take into consideration any offers to settle that have been made when considering the allocation of costs of the arbitration between the parties.

1. At any time after an arbitration has been commenced, a party may make an offer to settle the dispute to the other party expressed to be (an "Offer to Settle").
2. In order to have the costs consequences which are described at paragraph [6] below, an Offer to Settle must include the following:
  - 2.1. a description of all of the terms of settlement which are proposed by the party making the Offer to Settle to dispose of the claim and any counterclaim, including terms regarding the payment of interest;
  - 2.2. the date by which the Offer to Settle is to be accepted, which date should be at least 21 days from the date the offer is communicated;
  - 2.3. confirmation that the party making the Offer to Settle will pay the reasonable legal costs of the other party or parties to whom the offer is made (including the fees and expenses of the arbitral tribunal and, if applicable, the arbitral institution) up to the time of acceptance of the Offer to Settle.
3. Neither the fact that an Offer to Settle has been made, or the terms of the Offer to Settle shall be communicated to the arbitral tribunal other than in the circumstances described in paragraph [5] below.
4. If an Offer to Settle is accepted within the time stipulated for acceptance, then the dispute shall be settled on the terms set out therein. The parties may choose to ask the arbitral tribunal to embody the terms of settlement in a consent award.
5. If the Offer to Settle is not accepted within the time stipulated for acceptance, and the arbitration proceeds to a final award, then if the party that made the Offer to Settle considers that the outcome in the final award is better than that offered by way of settlement in the Offer to Settle, it may choose to provide the arbitral tribunal with a

copy of the Offer to Settle and ask that it be taken into consideration in the exercise of the tribunal's discretion regarding the allocation of the costs of the arbitration.

6. Where a tribunal has been provided with an Offer to Settle in the circumstances described in paragraph [5], it shall decide whether or not the terms of its final award are more or less favourable to the party that made the Offer to Settle (excluding the issue of costs). If the tribunal concludes that (1) the terms of the final award are more favourable, (2) that the offer was genuine and (3) that the party making the offer was able at the time it made the offer to fulfil the terms of the offer, then the tribunal shall exercise its discretion in respect of allocation of the costs of the arbitration so as to provide that all of the costs of the arbitration (including all of the reasonable legal costs of the parties and the fees and expenses of the tribunal and, where applicable, the arbitral institution), shall be payable by the party that declined the offer from the date that the offer expired onwards.
7. A party may make more than one Offer to Settle.

## Appendix 4 Table of existing Provisions on settlement in arbitration

N.B.: The translations are not official translations.

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Australia New South Wales Commercial Arbitration Act (1984, amended in 2005) <a href="http://www.austlii.edu.au/au/legis/nsw/consol_act/caa1984219/">http://www.austlii.edu.au/au/legis/nsw/consol_act/caa1984219/</a> The Commercial Arbitration Acts of Queensland (1990), Western Australian Territory (1985), Tasmania (1986), Australian Capital Territory (1986) and Northern Australian Territory (1985) contain identical provisions.</p>	<p>Section 27 (1): Parties to an arbitration agreement (a) may seek settlement of a dispute between them by mediation, conciliation or similar means, or (b) 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. Section 27 (5): The time appointed [...] for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire [with regard to settlement attempts].</p>	<p>Section 27 (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.</p>		
<p>Bangladesh Arbitration Act (2001) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Bangladesh/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Bangladesh/</a></p>	<p>Section 22 (1): It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute otherwise than by arbitration and, with the agreement of all the parties, the arbitral tribunal may use mediation, conciliation or any other procedures at any time during the arbitral proceedings to encourage settlement.</p>			<p>Section 22 (2): If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.</p>

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
Belarus International Arbitration Court Law (1999) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Belarus/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Belarus/</a>	Article 31: The arbitral tribunal shall take necessary measures for an amicable settlement of a dispute on the whole or its separate issues at any stage of the proceedings. If a settlement agreement is reached the arbitral tribunal in particular shall apply the provisions of Article 16 of these Rules.	Article 18: By mutual consent the parties may choose a conciliator as a sole arbitrator for settlement of the dispute in the arbitral proceedings after the termination of the conciliation proceedings. Unless it is agreed upon by the parties, the conciliator may not act as an arbitrator as well as a representative or counsel of either party or a witness in any future proceeding in respect of the dispute. [...]	Article 18 (cont.): [...] The parties are deprived of a right to make reference to any statement which has been made during the conciliation proceedings by the conciliator, or by the other party, or by another participant of the conciliation, in a future arbitral proceeding.	Article 16: [...] The agreement shall be signed by the parties or their duly authorized representatives as well as by the conciliator. The identity of the conciliator's signature is certified by the signature of the Executive Secretary and by the seal of the International Arbitration Court. The conciliative proceedings are deemed to be terminated after signing the settlement agreement. On the basis of the settlement agreement the conciliator should draw up an award of the Arbitration Court.

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Bermuda International Conciliation and Arbitration Act (1993)  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Bermuda">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Bermuda</a></p>		<p>Section 14:  (1) 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 unless all parties agree in writing to such participation or the rules agreed for conciliation or arbitration so provide.  (2) Where the parties have agreed in writing that a person appointed as a conciliator shall act as an arbitrator, in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings or to any award, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration; but if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required first to act as a conciliator unless the parties have otherwise agreed in writing.</p>	<p>Section 10:  (1) Unless otherwise agreed in writing by the parties, it shall be an implied term of the written agreement to conciliate that the parties undertake not to rely on or introduce as evidence in any arbitral or judicial proceedings in any jurisdiction, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings -  (a) views expressed or suggestions made by any party in respect of possible settlement of the dispute;  (b) admissions made by any party in the course of the conciliation proceedings;  (c) proposals made by the conciliator;  (d) the fact that the other party had indicated willingness to accept all, or part, of a proposal for settlement made by the other party, or by the conciliator.  (2) Without limiting the obligations created by subsection (1), evidence of anything said or of any admission made in relation to any or all of the matters referred to in subsection (1)(a) to (d) (inclusive) is not admissible in evidence in any arbitration conducted pursuant to Part III or judicial proceeding in Bermuda, and disclosure of any such evidence shall not be compelled in any civil action in Bermuda in which, pursuant to the law, testimony may be compelled to be given.  (3) Where evidence is offered in contravention of this section, the arbitration tribunal or the Court shall make any order which it considers to be appropriate to deal with the matter, including, without limitation, orders restricting the introduction of evidence, or dismissing the case without prejudice.</p>	<p>Section 20:  If the parties to an arbitration agreement reach agreement by means of conciliation or otherwise in settlement of their dispute and enter into an agreement in writing containing the terms of settlement (the "settlement agreement") the settlement agreement shall, for the purposes of its enforcement in Bermuda, be treated as an award on an arbitration agreement and may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the agreement, pursuant to section 48.</p>

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
Cambodia Commercial Arbitration Law (2006) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Cambodia/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Cambodia/</a>	Article 38 (1): Upon request by both parties, prior to commencement of formal arbitration proceedings, the arbitral tribunal may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement of the parties' dispute: If the parties determine that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate.			Article 38 (2): If the parties settle the dispute prior to commencement of the formal arbitral proceedings, or in the course thereof, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, may record the settlement in the form of an arbitral award on agreed terms.
Canada Alberta Arbitration Act (1991, as amended in 2007) <a href="http://www.canlii.org/ab/laws/sta/a-43/20070312/whole.html">http://www.canlii.org/ab/laws/sta/a-43/20070312/whole.html</a>	Section 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 matters in dispute.	Section 35 (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.		Section 36: If the parties settle the matters in dispute during arbitration, the arbitral tribunal shall terminate the arbitration and shall record the settlement in the form of an award.
Canada British Columbia International Commercial Arbitration Act (as amended in 1988) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Canada/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Canada/</a>	Section 30 (1): It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.			Section 30 (2): If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal must terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
Canada Ontario Arbitration Act 1991 <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Canada/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Canada/</a>	Section 35: The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially.			Section 36: If the parties settle the dispute during arbitration, the arbitral tribunal shall terminate the arbitration and, if a party so requests, may record the settlement in the form of an award.

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Costa Rica Law on Alternative Resolution of Disputes and Promotion of Freedom from Social Unrest (2000)  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/CostaRica/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/CostaRica/</a></p>	<p>Article 6:            At any stage of the judicial proceedings, the court may propose a conciliation hearing. The mediator shall be a trial judge or an arbitrating judge. The Supreme Court of Justice shall appoint arbitrating judges as required and determine their powers and responsibilities.            (N.B.: This provision refers to <u>court-annexed</u> conciliation; the Act does not contain a corresponding provision for arbitral proceedings.)</p> <p>Article 13:            The duties of the arbitrator or mediator are to:            a) Remain impartial to all interested parties. [...]            c) Inform the parties as to the mediation or conciliation procedure, as well as the legal implications of the conciliation settlements.            d) Maintain confidentiality regarding the actions of the parties during mediation or conciliation proceedings and preparatory acts for the conciliation settlement. [...]</p>	<p>Article 16:            Unless the parties reach an agreement to the contrary, the extrajudicial mediator or conciliator shall be disqualified from participating as a neutral third party in any subsequent judicial or arbitral proceedings related to the dispute.</p>	<p>Article 14:            Preparatory activities, conversations, and partial covenants to the conciliation settlement are strictly confidential. The mediator or conciliator shall not disclose the content of discussions or partial settlements between the parties. This means that the mediator or conciliator has the right to professional secrets.            The parties may not relieve the mediator or conciliator of such obligation, and the testimony or confession of the parties or mediators regarding what occurred or was expressed in the mediation or conciliation hearing or hearings, shall not have value as evidence, except in the case of civil or criminal procedures in which the possible liability of the mediator or arbitrator has been disputed, or when the purpose is to clarify or interpret the scope of the conciliation settlement that has been reached through such hearings.            If a conciliation settlement is reached and its effectiveness or validity is judicially disputed, the mediator or conciliator shall be considered a witness privileged to the content of the settlement and the process leading to such settlement.</p>	<p>Article 12:            Settlements adopted through a judicial or extrajudicial mediation or conciliation proceedings shall comply with the following requirements:            a) Names and personal information of the parties.            b) Clear statement of the object and scope of the dispute.            c) Names of mediators, arbitrators and, if applicable, the institution which employs them.            d) Specific mention of the agreements reached.            e) In the event of judicial or administrative proceedings that are in progress or pending, an express indication of the institution that is hearing the case, file number, current status, and the willingness of the parties to fully or partially conclude such proceedings.            f) The arbitrator or mediator shall record in the document that the parties have been informed of the rights involved and been advised that the settlement might not satisfy all their interests. The document shall also establish that the parties have been advised as to their right to consult with an attorney on the content of the settlement prior to signing.            g) Signatures of all interested parties, as well as of the mediator or conciliator.            h) Exact address where the parties shall be notified.</p> <p>Article 63 (1):            If, prior to announcing the arbitral award, the parties decide to resort to mediation, conciliation, or any other process of dispute resolution, the tribunal shall issue an order to suspend the proceedings. If the mediation, conciliation, or other process of dispute resolution results in a total or partial settlement, the tribunal shall record it as an arbitral award in the terms agreed-upon by the parties. If this does not lead to a settlement, the parties will present the tribunal with evidence of having made attempts to resolve the dispute through other means in order to issue an order to continue the proceedings.</p>



Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Croatia Law on Conciliation (2003)  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Croatia/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Croatia/</a></p>	<p>Article 16:  1. During a court, administrative or other proceedings a body conducting these proceedings may, in the disputes falling under Article 1 of this Law, recommend the parties to initiate conciliation in accordance with the provisions of this Law.  2. If the parties agree on conciliation proceedings, the body conducting the proceedings falling under paragraph 1 of this Article shall, after consultations with the parties, set a period of time in which the undertaking of further actions in those proceedings shall be suspended, which time may not exceed 60 days. This period of time may be extended only upon a joint proposal of all parties to the dispute.  3. If during the period of time determined in paragraph 2 of this Article a settlement is not reached, the body conducting the proceedings shall continue the proceedings. The proceedings may be suspended again for an attempt to reach settlement only upon a joint proposal of all parties to the dispute.</p>	<p>Article 13:  1. The conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same legal relationship or any related legal relationship.  2. A lawyer who has acted as conciliator shall not represent any of the parties in disputes indicated in paragraph 1 of this Article.</p>	<p>Article 12:  1. Parties to conciliation proceedings, the conciliator or any third person participating in the proceedings, including the staff of the organization for conciliation, shall not rely on or introduce as evidence in any legal proceedings, including judicial, arbitral or other proceedings, any of the following:  a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings  b) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;  c) Statements or admissions made by a party in the course of the conciliation proceedings, except if such statements and admissions are part of the settlement agreement which has been reached;  d) Proposals made by the conciliator in the conciliation proceedings;  e) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;  f) A document prepared solely for purposes of the conciliation proceedings, or a document which the parties have agreed shall not to be used in any other proceedings.  2. Paragraph 1 of this Article applies irrespective of the form of the information or evidence referred to therein.  3. The evidence referred to in paragraph 1 shall not be admissible and the circumstances referred to in paragraph 1 shall be disregarded in any court, arbitration or other proceedings dealing with the same or a different dispute. If such information is offered as evidence, the body conducting the proceedings shall reject such proposal as inadmissible. If a participant in such other proceedings submits a document or gives a statement in contravention of paragraph 1, the body conducting those proceedings shall not use the contents of the information thus disclosed in the deliberation on the decision.  4. In any case, a person acting in contravention of paragraph 1 of this Article shall be liable for the damages incurred, and may be punished for the abuse of procedural rights, if a body conducting the proceedings has such authority.  5. The provisions of paragraphs 1 to 4 of this Article do not relate to the evidence and information necessary under the law to implement or enforce the settlement agreement which has been reached.  6. Except for the situations listed in paragraph 1 of this Article, evidence and statements which would otherwise be admissible in some other proceedings shall not become inadmissible as a consequence of having been used in a conciliation.  7. If a party has relied in the conciliation proceedings on a statement or evidence that might have been refused in the other proceedings, the fact that such a statement was given or evidence used for the purposes of conciliation does not in itself infer consent to the use of such statement or evidence in other proceedings.</p>	

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Hong Kong Arbitration Ordinance (1997)  <a href="http://www.legislation.gov.hk/eng/home.htm">http://www.legislation.gov.hk/eng/home.htm</a>            (Bilingual Laws Information System; the Arbitration Ordinance is to be found in chapter 341)  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/HongKong/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/HongKong/</a></p>	<p>Section 2B (1):            If all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.</p>	<p>Section 2A (2):            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;            (b) if such person declines to act as an arbitrator any other person appointed as an arbitrator shall not be required first to act as a conciliator unless a contrary intention appears in the arbitration agreement.</p> <p>Section 2B (4):            No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.</p>	<p>Section 2B (2):            An arbitrator or umpire acting as conciliator -            (a) may communicate with the parties to the reference collectively or separately;            (b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.</p> <p>Section 2B (3):            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.</p>	<p>Section 2C:            If the parties to an arbitration agreement reach agreement in settlement of their dispute and enter into an agreement in writing containing the terms of settlement (the "settlement agreement") the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the agreement.</p>
<p>India Arbitration and Conciliation Act (1996)  <a href="http://www.commonlii.org/in/legis/num_act/aaca1996265/">http://www.commonlii.org/in/legis/num_act/aaca1996265/</a>  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/India/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/India/</a></p>	<p>Section 30 (1):            It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.</p>	<p>Section 80:            Unless otherwise agreed by the parties, -            a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;            b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.</p>	<p>Section 81:            The parties shall not 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.</p>	<p>Section 30 (2):            If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.</p>

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
Japan Arbitration Law (2003) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Japan">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Japan</a>	Article 38 (4): An arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties.			Article 38 (1): If, during arbitral proceedings, the parties settle the civil dispute subject to the arbitral proceedings and the parties so request, the arbitral tribunal may make a ruling on agreed terms.
Netherlands Arbitration Act (1986, as amended in 2004) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Netherlands/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Netherlands/</a>	Article 1043: 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.			
Singapore Arbitration Act (as amended in 2002) <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Singapore/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Singapore/</a>	Section 17 (1): If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.	Section 16 (3): 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 arbitral 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; (b) if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required first to act as a conciliator unless a contrary intention appears in the arbitration agreement. Section 17 (4): No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section.	Section 17 (2): An arbitrator or umpire acting as conciliator - (a) may communicate with the parties to the arbitral proceedings collectively or separately; and (b) shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless subsection (3) applies. Section 17 (3): Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings 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 arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings	Section 18: If the parties to an arbitration agreement reach agreement in settlement of their dispute and the arbitral tribunal has recorded the terms of settlement in the form of an arbitral award on agreed terms in accordance with Article 30 of the Model Law, the award (a) shall be treated as an award on an arbitration agreement; and (b) may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Provisions (including websites) ↓	Arbitrator's promotion of and involvement in settlement efforts	Settlement facilitator's involvement in subsequent arbitration proceedings	Disclosure of information obtained in settlement negotiations	Recording of the settlement agreement
<p>Uganda Arbitration and Conciliation Act (2000)  <a href="http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Uganda/">http://www.kluwerarbitration.com/arbitration/arb/legislation/NationalLaws/Uganda/</a></p>		<p>Section 66:  (1) The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings.  (2) The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.</p>	<p>Section 67:  The parties shall not 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 or her willingness to accept a proposal for settlement made by the conciliator.</p>	<p>Section 31 (1):  If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties record the settlement in the form of an arbitral award on agreed terms.</p>

## Appendix 5

### Arbitration Commission Members

CEDR would like to thank all those individuals and organisations that have given so freely of their time to assist the Commission in its work so far.

Co-Chairs: Lord Woolf and Prof. Gabrielle Kaufmann-Kohler

Commission Director: Professor Karl Mackie

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Organisations Consulted
Abu Dhabi Chamber Of Commerce & Industry
ACB Conflict Management For Commerce And Industry
ADR Institute Of Canada Inc
AIDA Reinsurance And Insurance Arbitration Service
Arbitration Association Of The Republic Of China
Arbitration Centre Of Mexico
Arbitration Court Attached To The HCCI
Arbitration Foundation Of Southern Africa (AFSA)
Arbitration Institute Of The Central Chamber, Finland
Arbitrators' And Mediators' Institute Of New Zealand Inc
Australian Centre For International Commercial Arbitration
Brussels Chamber Of Commerce And Industry
Cairo Regional Centre For International Commercial Arbitration
Centre For Commercial Arbitration Chamber Of Commerce And Industry Of Geneva
Chamber Of National & International Arbitration Of Milan
Chartered Institute of Arbitrators
China International Economic & Trade Arbitration
Conciliation And Arbitration Centre Of Panama
Court Of Arbitration At Polish Chamber Of Commerce
Court Of Arbitration For Sport Lausanne
Court Of International Commercial Arbitration Russian Chamber Of Commerce and Industry
Danish Chamber Of Commerce Arbitration
German Institution Of Arbitration (DIS)
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ICC Dispute Resolution Services International Chamber Of Commerce
ICSID
Indonesia National Board of Arbitration (BANI)
Institute For Trans-national Arbitration
Institute Of Arbitrators & Mediators Of Australia
International Centre For Dispute Resolution (ICDR)
International Council For Commercial Arbitration
Japan Commercial Arbitration Association (JCAA)
Korean Commercial Arbitration Board (KCAB)
Kuala Lumpur Regional Centre For Arbitration
LEADR
London Court of International Arbitration
Netherlands Arbitration Institute
Paris Mediation And Arbitration Centre
Santiago Chamber Of Commerce Arbitration
Singapore International Arbitration Centre (SIAC)
Spanish Court Of Arbitration
Swiss Arbitration Association
Thai Arbitration Institute (TAI)
UNCITRAL
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