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GERMAN APPROACH TO SETTLEMENT IN ARBITRATION

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The German perspective on arbitration is mainly formed by the rules of biggest German arbitral institution, the German Arbitration Association (DIS-Rules), by statutory provisions and by the court practice.

Form of the settlement

If the parties agree to settle the dispute in the arbitration, they are well advised to use the award with the agreed wording (Art. 41 DIS-Rules, sec. 1053 para 1 German civil procedure law (ZPO). Upon parties' application, the arbitral tribunal has the obligation to issue such award. It has the quality of a final arbitral award and can be declared enforceable worldwide under the New York Convention.

Less useful, but also possible is a settlement agreement outside of the proceedings. In that case, parties should include provisions on what shall happen with the arbitral proceedings after the settlement. In the most cases, the parties will agree to their termination.

Facilitation of the settlement by the tribunal

There is a dispute in the international arbitration community, whether and to what extent the arbitral tribunal should facilitate the settlement in arbitration. While Anglo-Saxon legal tradition does not support an active role of the tribunal in initiating and brokering settlement, continental countries are more settlement-friendly.

German pro-settlement approach

Germany follows the continental pro-settlement approach, which is influenced by the proceedings in German courts. A German judge has a statutory duty to facilitate settlement at any stage of the proceedings (sec. 278 para 1 ZPO). In practice, German judges usually make settlement proposals without a request and even apply significant pressure on the parties to settle. In turn, the parties expect the judge to actively promote the settlement and incorporate this expectation into their procedural strategies.

The settlement-friendly approach also benefits from the fact that in a German-style arbitration parties make their case not only in the hearing, but already in the written submissions early in the proceedings ("front loaded" proceedings).

Tribunal encourages the settlement

DIS Rules provide for a duty of the tribunal to encourage the settlement in *Article 26: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage*

an amicable settlement of the dispute or of individual disputed issues."

The rule has a reservation: The tribunal shall only do so if no party objects, but this reservation is designed as an opt-out right of the parties. In comparison, Art. 33 ICC Rules provides for an opt-in solution. The parties have to agree to any facilitation of a settlement by the tribunal.

The DIS Rules constitute the duty of the tribunal to encourage settlements not only of the entire dispute but also "*of individual disputed issues*". Parties may agree, supported by the tribunal, on specific facts or legal issues, avoiding extensive evidential hearings and limiting legal uncertainty.

Pushing parties for settlement by the tribunal may cause challenge requests of the parties. However, German courts have a lot of understanding for such practice. For example, in a published *ad hoc* case, a party challenged arbitral award in court since the presiding arbitrator pressured one of the parties hard to consent to an unfavourable settlement. The court ruled that the tribunal may, even emphatically, urge a party to settle without being impartial (OLG Dresden, 26.07.2012, No. 3 Sch 3/12).

Delivery of preliminary assessment of the case

By delivering preliminary assessment of the facts, of the law and of the possible legal outcome of the case during the proceedings, tribunal facilitates settlement. DIS-Rules urges the tribunal, in the case management conference, to provide the parties "*with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto*" (Annex 3 to the DIS-Rules).

In an *ad hoc* arbitral proceedings under German law tribunal may provide parties with preliminary legal assessment and make settlement proposals even without parties' consent. The court of Cologne had to decide on a challenge of the arbitrator for impartiality, who made unsolicited settlement proposal to the parties. The court rejected the challenge (OLG Koeln, 2.4.2004, No. 9 Sch (H) 22/03).

Opening a window to mediation

Under DIS-Rules (Art. 27.4 (iii)) tribunal has to discuss with the parties in the case management conference "*the possibility of using mediation or any other method of amicable dispute resolution*". With consent of the parties, using elements of mediation by arbitral tribunal itself belong to the best practice in German arbitration. This includes separate meetings of the tribunal with parties to discuss settlement.

Promotion of settlement at every stage of the proceedings

According to Art. 26 DIS Rules the tribunal shall promote settlement "*at every stage of the arbitration*". This can be fairly early in the proceedings, even right after the constitution of the tribunal on basis of the initial submissions of the parties or already on basis of only a statement of claim. The tribunal may address the possibility of the settlement again and again in the proceedings. It may use for it additional case management conferences, which the tribunal may set up according to Art. 27.6 DIS Rules.

Conclusion

German approach to arbitration is settlement-friendly. DIS-Rules allow and urge the tribunal to encourage settlement throughout the proceedings. Arbitral tribunal may make unsolicited settlement proposals, unless one party objects. In ad hoc arbitration, arbitral tribunal may deliver without request preliminary assessment of the case, without being impartial. Tribunal promotes meditation and uses elements of mediation in arbitral proceedings.