Guided Decision Making: Promoting Settlement During Arbitration

By Ruth V. Glick

Arbitrators are increasingly exploring the appropriate relationship between arbitration and mediation in implementing a dispute resolution process that promotes economy and efficiency and meets the needs of the litigants. Dispute resolution neutrals are often directing the litigants to a more cooperative dispute resolution process that often starts as arbitration, but frequently with some encouragement by the arbitrator, ends in settlement between the parties before an arbitral decision is made. A recent survey conducted at Pepperdine University found that a majority of respondents indicated that a higher proportion of their caseload settled pre-hearing during the last five years than prior to that time.[1]

While careful not to confuse the role of arbitrator and mediator in the eyes of the parties, some neutrals are nonetheless using certain dispute resolution techniques to encourage settlement during the arbitration process.[2] Some new models of resolution are beginning to emerge. In the Guided Choice protocol, mediators work hard to facilitate a settlement when they are engaged before and during the arbitral process. Here the mediator works as a process manager, confidential investigator and diagnostician during the litigation process and before the dispute is arbitrated or adjudicated.[3]

There is no consensus, however, whether arbitrators should become involved in the settlement process. Yet, many seem to do so. In its Guide to Best Practices in Commercial Arbitration, the College of Commercial Arbitrators has spawned an active hands-on managerial arbitrator whose objective is to keep the case moving forward in a timely and cost efficient manner. As a result, arbitrators today are more apt to control the hearing actively, set the tone of professional informality and flexibility, and then involve themselves in setting the stage for settlement more than ever before. As commercial arbitrators have grown more comfortable in their ability to be pro-active managers of the arbitral process, they are increasingly providing opportunities throughout the arbitration process for litigants to seek settlement in what could be called Guided Decision Making, a practice that guides and encourages litigants to seek resolution of their dispute pre-adjudication.

The idea of facilitating settlement during arbitration proceedings is already occurring in the international sphere. The CEDR Rules for the Facilitation of Settlement in International Arbitration are designed to increase prospects that the parties in international arbitrations settle their disputes before the conclusion of those proceedings.[4] It advises that if the parties are not opposed, the Arbitral Tribunal might provide them with preliminary views on the issues, non-binding findings on law or fact, but they may not meet with any party ex parte or obtain information ex parte that is not shared with the other parties.[5]

Many experienced neutrals have served separately as both arbitrators and mediators in various cases throughout their career. Knowing that a very high percentage of commercial disputes settle before litigation and arbitration, these skilled neutrals ponder why a case is being adjudicated and whether the parties have actually made any attempt to settle their dispute. With the American Arbitration Association's new Commercial Rule R-9, an arbitrator is now empowered to advise the litigants without reservation that at any time while the arbitration is pending, they can mediate their dispute. In fact, the new rule encourages mediation to take place concurrently with the arbitration, but not to delay it.[6]

When employing a model of cooperation such as Guided Decision Making, it is important to faithfully adhere to three caveats. First, the neutral must never step out of his or her role as arbitrator. There should never be a doubt in the parties' minds that the arbitrator maintains the power to resolve their dispute. Second, the arbitrator must never meet or talk to the parties ex parte. That way, evidence untested by cross-examination will never be considered. And finally, there is no one-size-fits all format for this protocol. Business cases, where parties are typically more pragmatic and measure risk and reward more than, perhaps, emotion-laden disputes, seem to work well with this model, but it often depends on the parties, their personalities, their lawyers and other intangible factors.

An experienced neutral practicing Guided Decision Making can make a difference in large and complex business or financial matters, by creating a more informal, cooperative and comfortable atmosphere during pre-hearing telephone conference calls or meetings and even at hearings where parties can talk to each other or their attorneys and even collaborate on certain issues. By creating this more cooperative environment, many cases settle between pragmatic parties before the arbitrator makes the decision for them.

Within the arbitration process, there are multiple opportunities for promoting settlement, often utilizing a mediator's skillset to do so. At the first pre-hearing conference, counsel or parties can be invited to tell the arbitrator a little bit about the case and their positions and the issues they believe need resolution. That first conference call is an opportune time to mention mediation and AAA Rule

R-9 if operating under those rules.[7] Usually the parties don't admit to having engaged in mediation, or announce that it hasn't or won't work. At the beginning of arbitration, advocates are out to show the arbitrator the strength of their case and their zealous belief in their client's position. But since the AAA rules now require arbitrators to mention mediation, it gives the neutral license to bring up the concept of possible settlement throughout the arbitration process.

A pre-hearing scheduling order is another initial method to signal collaboration and cooperation. Using language and directives to encourage cooperation between the lawyers is the key. For instance, ordering Counsel to cooperate in the exchange of documents and information and to confer with each other to seek resolution of any discovery dispute is a first step. It the parties cannot agree on a specific matter, they can then notify the Arbitrator who will schedule a conference call. Other instructions to confer with each other on such matters as the scheduling of motions, exchange of documents, or working together on a joint exhibit book can be effective in starting a collaborative process during litigation. In addition, arbitrators should set up regular status conference calls so that they can monitor their progress and remind the parties they can simultaneously be using mediation.

At the onset of arbitration, there are often dispositive motions, which may or may not be productive. The arbitrator's goal should be to encourage motions that are likely to expedite or facilitate the proceedings and discourage those that are time-consuming and not likely to be productive. Certain preliminary matters need a judgment call with reasoned analysis that the arbitrator can provide. And that determination sometimes can lead the parties to think more seriously about their options for settlement.

At some point during the course of the arbitration, experienced arbitrators may see themselves as diagnosticians, asking what has prevented this case from settling. Is it the people, the legal issues, or simply the lack of opportunity to settle? If there is an opportunity to meet in person before the evidentiary hearing, it should be encouraged, particularly if attorneys and their clients can attend. Making them feel comfortable and providing them with an opportunity for talk to each other often sets the stage for meaningful discussion and potential settlement.

Sometimes even the most contentious cases can settle. In a partnership break-up case I recently arbitrated, the first motion from Claimants was to dismiss Respondent's counsel for conflict of interest. Of course, that was not a conducive first step for collaboration between the attorneys. After legal briefing and my ultimate determination and analysis that he could remain as counsel, I continued to have the attorneys work together in providing information for the valuation of the business. We met in person several times for certain pre-arbitration matters, which I believe created some rapport between the opposing lawyers and their opposing clients. The case settled the first day of arbitration before the hearing began and I was named arbitrator in the settlement agreement in case of a breach.

In another large and complex matter with four pre-hearing motions and boxes of documents, exhibits and declarations, an in-person pre-hearing conference was held. Providing the venue for lawyers and their clients to meet in person gave them an opportunity to assess their positions, especially when the arbitrator could communicate to them his or her understanding of the case and question them about the strengths and weaknesses of their respective positions.

Often in these in-person settings, an experienced dispute resolution neutral can employ some mediation techniques, which have proven to be effective. For example, reiterating and restating each party's position shows them how the neutral understands and acknowledges their view. Looking for common ground and beginning to narrow the issues helps them pay attention to the key questions the arbitrator will focus on. Sometimes, even reframing the issues to gain some concession from each of them can be productive in focusing on the major issues. Even, if appropriate, talking about impasse and the risk/reward ratio of going forward in a process where they will have no ability to participate in a final resolution can spur some settlement discussions. And if suitable, a neutral may even use some numbers in her discussion to anchor their thinking.

This is not to suggest that the arbitrator provide the parties with preliminary views on the issues, findings of fact on key issues, or suggested terms of settlement as provided in the CEDR Rules.[8] However, if the parties are open to knowing the arbitrators' understanding of key issues or findings of fact, it might be useful to have an open discussion. Often arbitrators during a hearing will guide parties in communicating to them the evidence they consider important and the issues they would like to see briefed. If there is an opportunity to do so pre-hearing, it might be useful for the litigants in analyzing their case and preparing for settlement.

Continuing to provide opportunities for lawyers and their clients to keep talking, sometimes even leaving the room so that they can negotiate without the decision maker being present, can be effective. Opportunities for client-to-client and lawyer-to-lawyer conferences may also be successful. And if suitable for the case, suggesting other methods of resolution such as baseball or high/low arbitration might be welcomed. Finally, continuing to give the lawyers tasks, which involve collaboration and cooperation, such as working together on certain document or discovery exchange keeps the door open for communication.

This Guided Decision Making protocol folds into the formal procedures of arbitration but sends the message that settlement is encouraged if possible and if desired by the litigants. The demeanor of the arbitrator should be commanding but approachable. And following the three rules: never dropping the role as their independent and neutral arbitrator; never meeting with them ex parte, and never assuming that one size or approach will fit each matter is essential. It is in this manner that promoting settlement during arbitration using a Guided Decision Making approach can become a powerful tool in promoting economy and individualized customization in the arbitral process.

Endnotes

1. Stipanowich and Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 2014 http://www.mediate.com/pdf/SSRN-id2461839.pdf.
2. Confusion about whether the neutral is an arbitrator or mediator when the stipulation between the parties is not clearly stated is ripe for post-award litigation. For example, in *Lindsay v. Lewandowski* (2006) 139 Cal. App. 4th 1618, the court declined to enforce a stipulation between the parties calling for "binding mediation" because it was unclear what the parties meant by that term. But in *Bowers v. Raymond L. Lucia Companies, Inc.*, Do59333 (May 30, 2012), a California appellate court held that an agreement of the parties to submit their dispute to binding mediation, followed by a binding baseball arbitration in the event the mediation was not successful, was sufficiently clearly stated to be enforceable.
3. See Paul Lurie, Guided Choice Interest Group, www.gcdisputeresoltuion.worldpress.com.
4. CEDR Commission Rules for the Facilitation of Settlement in International Arbitration (2009).
5. *Id.* Article 5.
6. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, effective Oct. 1, 2013, Rule R-9.
7. *Id.*
8. CEDR, *supra.*

Ruth V. Glick is a full time independent arbitrator and mediator with the American Arbitration Association. See www.ruthvglick.com.