Amicable Settlements & Mediation in International Arbitration

Norwegian Arbitration Day, 8 February 2024

Leilah Bruton

Roadmap

1. **Settlements in Arbitration: Key Issues**
2. Part 36 Offers in England and Wales – a Contrast with Sealed Offers
3. Arbitration-Related Mediation

Timing: Before commencement of arbitral proceedings

Multi-tiered dispute resolution clauses

Example clause

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Advantages:

- Significant saving on time and costs.
- Resolves disputes in a less adversarial manner.
- Preserves overall commercial relationship.
- May narrow the issues in dispute.

Disadvantages:

- Potentially futile.
- Unnecessary wasted costs.
- Insufficiently formed views of merits.
- Risks additional jurisdictional / admissibility challenges.

Timing: Before commencement of arbitral proceedings

Multi-tiered dispute resolution clauses: enforceability

Kajima Construction v Children's Ark Partnership Ltd [2023] EWCA Civ 292

Under English law, enforceability depends on whether the overall process is sufficiently certain and so does not constitute an "agreement to agree"

- The dispute resolution procedure was as follows:
  - Certain disputes shall first be referred to the Liaison Committee for resolution
  - The Committee "will convene and seek to resolve the dispute within ten (10) Business Days of the referral" of that dispute
  - The Committee could adopt procedures and practices that it considered appropriate from time to time
  - Any decision of the Committee shall be final and binding unless the parties otherwise agree
  - Disputes would be referred to the English High Court to the extent not finally resolved pursuant to that procedure

This dispute resolution procedure was too uncertain to be enforceable:

"There was no contractual commitment to engage in any particular procedure either covering the referral, or the process to be followed once the dispute had been referred.

As to the process itself, the authorities (such as Cable & Wireless) talk about the need for a binding contractual process to contain a definable minimum duty of participation. It is impossible to look at the DRP and see what, if any, minimum participation is required of either party." [55]-[56]

Timing: Before commencement of arbitral proceedings

Multi-tiered dispute resolution clauses: enforceability

Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd [2014] EWHC 2104

In contrast the following multi-tier clause was held to be sufficiently clear and enforceable

- The obligation to seek to resolve the dispute by friendly discussions in good faith had an identifiable standard, namely "fair, honest and genuine discussions aimed at resolving a dispute".
- It was significant that the obligation to engage in friendly discussion was also time limited, making the procedure clear.

"In case of any dispute or claim arising out of or in connection with or under this [contract]… the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuing period of 4 weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration."

Timing: Before commencement of arbitral proceedings

Multi-tiered dispute resolution clauses: jurisdiction v admissibility?

Is compliance with these DR clauses a question of admissibility or jurisdiction?

Jurisdiction of the tribunal: ultimately a question for the courts of the seat (with supervisory powers)

Admissibility of claims: question for the arbitral tribunal

Position in England and Wales?

Previous position: ***Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd*** **[2014] EWHC 2104**

- Court considered that the multi-tier clause requiring negotiations for four weeks prior to commencing arbitration a "condition precedent to the right to refer a claim to arbitration".
- Compliance with tiered dispute resolution clauses was a jurisdictional issue.

Settled position: ***Republic of Sierra Leone v SL Mining Ltd*** **[2021] EWHC 286**

- Court declined to follow *Emirates Trading*, noting it had been heavily criticised.
- Held that compliance with a multi-tier clause (a three-month period for negotiation) was an issue of admissibility for determination by the arbitrator.
- This decision has been subsequently adopted in later cases.

Practical Consequences?

- **Less delay** – the challenge will be determined by the tribunal and not the supervisory courts.
- **Finality of award** – the final award would not be susceptible to enforcement or set aside challenges on jurisdictional grounds re failure to comply with pre-arbitral steps.

Timing: During the Arbitration

Commonly, disputes settle <u>after</u> commencement of formal proceedings, including arbitration.

<u>Advantages</u>

- More developed **understanding of opponent's case** (particularly once the first round of written submissions have been exchanged).
- Potentially **better bargaining position** - if the client's case is stronger or they are better able to bear the ongoing cost of formal proceedings.

<u>Disadvantages</u>

- **Significant costs** have been incurred – diversion of management time as well as legal fees and expenses.
- Potential long-term **damage to wider commercial relationship**.
- **Organisational pressure** against compromising commercially for a different outcome.

Documenting Settlements

Consent Awards

If a tribunal is in place, parties may also seek a consent award that reflects the terms of their settlement agreement. This is generally permitted under most institutional rules and the UNCITRAL Model Law

UNCITRAL Model Law, Art 30(2)

An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Norwegian Arbitration Act 2004, s 35

A settlement made by the parties before the arbitral tribunal shall, at the request of the parties, be confirmed by way of an arbitral award. An arbitral award confirming a settlement shall have the same effect as any other arbitral award.

ICC Rules 2021, Art 33

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal… the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

Oslo Chamber of Commerce Rules, Art 27

If the parties reach an amicable settlement before an award is made the arbitral tribunal shall at the request of the parties record the amicable settlement, in an arbitration award, provided that the arbitral tribunal has no grounds for objecting to do so. An arbitration award that records an amicable settlement has the same effect as other arbitration awards.

Documenting Settlements

Can a consent award cover issues outside the scope of the arbitration?

Issue: If the parties agree to a global settlement beyond the disputes submitted to arbitration, can a tribunal issue a consent award documenting the terms of such global settlement?

Answer: Tribunals can only render consent awards if they have jurisdiction under the arbitration agreement.

Enforcement issues: New York Convention, Art. V(1)(c)

Recognition and enforcement of the award may be refused… [where]… The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration

Set aside concerns: UNCITRAL Model Law, Art. 34(2)(a)(iii)

An arbitral award may be set aside by the court specified in article 6 [i.e., supervisory court] only if … the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration

Practical solutions?

- Split the settlement agreements between (i) matters covered by the arbitration agreement; and (ii) broader issues. (i) could still be subject to a consent award.
- Limit the consent award to only aspects of the settlement agreement subject to the arbitration agreement.
- Potential reliance on the enforcement regime of the Singapore Convention on Mediation instead of consent order.

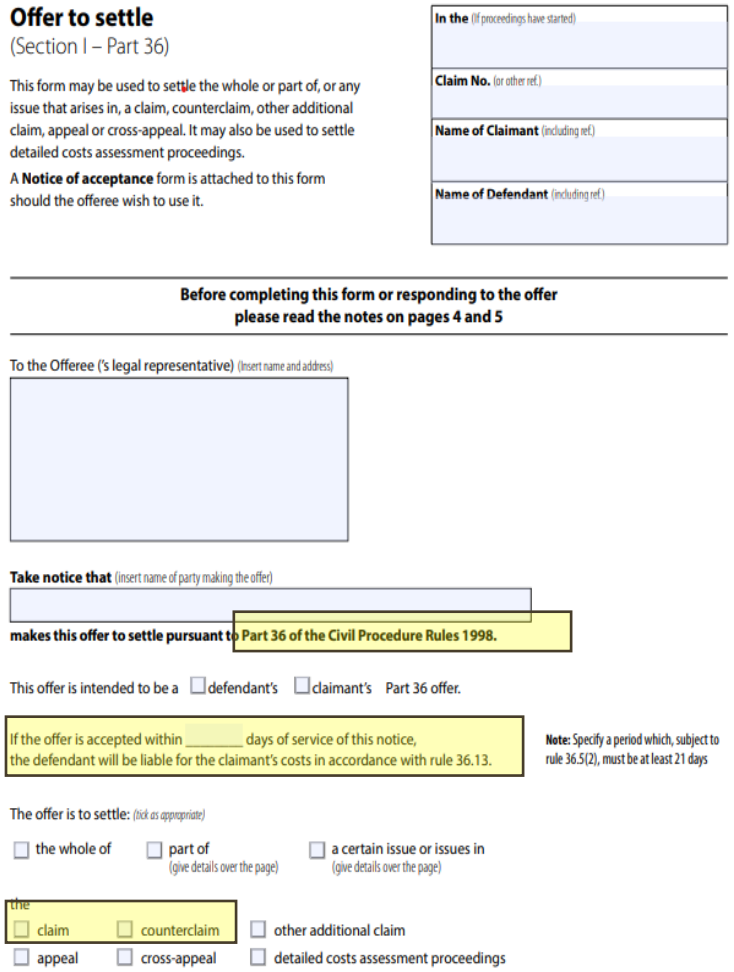
Roadmap

1 Settlement in Arbitration: Key Issues

2 **Part 36 Offers in England and Wales – a Contrast with Sealed Offers**

3 Arbitration-Related Mediation

Formal Requirements of Part 36 Offers



Offer to settle
(Section I – Part 36)

This form may be used to settle the whole or part of, or any issue that arises in, a claim, counterclaim, other additional claim, appeal or cross-appeal. It may also be used to settle detailed costs assessment proceedings.

A **Notice of acceptance** form is attached to this form should the offeree wish to use it.

In the (If proceedings have started)

Claim No. (or other ref.)

Name of Claimant (including ref.)

Name of Defendant (including ref.)

Before completing this form or responding to the offer please read the notes on pages 4 and 5

To the Offeree ('s legal representative) (Insert name and address)

Take notice that (insert name of party making the offer)

makes this offer to settle pursuant to Part 36 of the Civil Procedure Rules 1998.

This offer is intended to be a ☐ defendant's ☐ claimant's Part 36 offer.

If the offer is accepted within _____ days of service of this notice, the defendant will be liable for the claimant's costs in accordance with rule 36.13.

Note: Specify a period which, subject to rule 36.5(2), must be at least 21 days

The offer is to settle: (tick as appropriate)

☐ the whole of ☐ part of (give details over the page) ☐ a certain issue or issues in (give details over the page)

the
☐ claim ☐ counterclaim ☐ other additional claim
☐ appeal ☐ cross-appeal ☐ detailed costs assessment proceedings

To benefit from the costs consequences prescribed by Part 36, an offer must comply with the following formal requirements:

- Be in writing.
- Make clear it is made under CPR Part 36.
- State whether it takes into account any counterclaim.
- Specify a 'relevant period' of not less than 21 days within which D will be liable for C's costs in accordance with CPR r. 36.13 if the offer is accepted.

Offer must involve some degree of concession. See:

***AB v CD* [2011] EWHC 602:**

C sought automatic costs consequences on the basis it had succeeded in full and thereby obtained a judgment "at least as advantageous" as its Part 36 offer seeking 100% recovery. Court refused to order Part 36 costs consequences as there had to be an "element of give and take".

***JMX v Norfolk and Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185:**

The Court held that an offer for 90% of the claim value was effective under Part 36, and that 10% was not "a token discount". This was in the context of a clinical negligence case worth several million pounds.

Costs consequences of Part 36 Offers

Most significant aspect of Part 36 offers: serious costs consequences for a recipient who rejects it and then does not beat that offer at trial.

Where C makes a P36 offer that is rejected, and C meets or beats its offer, the court must, unless it considers it unjust, order that:	Where D makes a P36 offer that is rejected, and D meets or beats its offer, the court must, unless it considers it unjust, order that:
• D pays C interest on all or part of damages up to 10% above base rate for some or all of the period from the end of the relevant period. • D pay's C's costs on an indemnity basis from the expiry of the relevant period. • D pays C interest on those costs of up to 10% above base rate. • D pays an additional sanction, capped at GBP75k (approx. NOK985k) calculated as a percentage of the amount awarded by the court.	• C pays D's costs from the date of expiry of the relevant period. • C pays interest on D's costs.

Comparison between Part 36 Offers and Sealed Offers in Arbitration

Courts' limited discretion to displace Part 36 costs consequences

***Telefonica UK Ltd v Office of Communications* [2020] EWCA Civ 1374**

- C's rejected Part 36 offer was at 96-97% of its claim. C beat the offer at trial.
- The Court of Appeal overturned the judge's decision to award C only 2 out of the 4 costs enhancements under Part 36 and awarded all 4.
- Therefore, whilst the court technically retains a discretion to refuse Part 36 costs consequences if "unjust", the discretion is extremely limited and will rarely be exercised.

Per Phillips LJ at [45], [46]:

"[…] since the court has a wide discretion as to the rate of enhanced interest to award, there is limited (if any) scope for consideration of disproportionality in deciding whether it is unjust to make any such award. […]

The rule provides for the successful claimant (in the terms of CPR 36.17(1(b)) to receive each of the four enhancements and there is no suggestion that the award of one in any way undermines or lessens entitlement to the others."

Comparison between Part 36 Offers and Sealed Offers in Arbitration

Tribunals typically have very wide discretion over costs orders

UNCITRAL Model Rules 2010, Art 42

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

Oslo Chamber of Commerce Rules, Art 33

The arbitral tribunal shall, at the request of a party, allocate the costs of the arbitral tribunal between the parties as it sees fit. The arbitral tribunal may, at the request of a party, order another party to cover all or part of the parties' costs as it finds appropriate.

ICC Rules 2021, Art 38

At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs… the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

Comparison between Part 36 Offers and Sealed Offers in Arbitration

Examples of cost consequences from rejecting a sealed offer and failing to beat that offer in arbitration

***STX PanOcean Shipping Co Ltd v Progress Bulk Carriers Ltd*, LMAA, First Award on Costs, 15 May 2012**

Once interest was included, the charterers beat their sealed offer to accept US$300k, which the respondent failed to accept. The majority of the tribunal awarded the charterers:

(a) costs on indemnity basis (from the date of the offer)

(b) interest on costs, at the rate of 5% compounded at three monthly intervals (from the date of payment of costs to the solicitors) up to the date of reimbursement.

Contrast with had Part 36 applied?

Introducing Sealed Offers in Arbitration

Procedural considerations

The issue: In practice, most final awards deal with costs together with the parties' claims. How to ensure tribunals can factor sealed offers into their costs award, without affecting their view of the merits?

Option 1: invite tribunal to deal with costs separately from award on the merits

- Costs submissions exchanged and costs order made after outcome of the case has been determined, resulting in a separate costs award
- **Advantages:** costs submissions would fully address reasonableness of the sealed offer against the ultimate outcome of the case. Identity of the offeror may be concealed.
- **Disadvantages**: additional costs and prolongs proceedings.

Option 2: provide sealed offer to the institution, for disclosure to tribunal after merits have been determined

- Tribunals will decide the effect of the offer on costs allocation in a single, final award. Endorsed by the ICC.
- **Advantages**: potentially quicker procedure and produces a single award for ease of enforcement.
- **Disadvantages**: absent further submissions, costs submissions would not address the reasonableness of the sealed offer against the ultimate outcome of the case.

Introducing Sealed Offers in Arbitration

The Procedural Order

- Ideally, the sealed offer procedure will be discussed/ agreed at the first procedural conference and included in the first procedural order.
- However, the lack of a procedural order dealing with sealed offers is unlikely to prevent the arbitral tribunal taking them into account.

***Hotel Toc Inc v Trump Panama Hotel Management LLC*, ICC Case No. 23149/MK (sealed offer procedure <u>not included</u> in the PO1)**

- Claimant simply lodged a sealed offer with the ICC Secretariat, to be communicated to the tribunal after its determination of the merits.
- Once the offer came to the tribunal's attention, directions were made for the parties to file submissions on the sealed offer prior to close of proceedings.

***Samsung Electronics Co Ltd v Triller Inc*, ICC Case No. 27112/XZG (sealed offer procedure <u>included</u> in the PO1)**

PO1, para. 27:

"The parties agree that a sealed offer and related communications ("Sealed Offer") may be made and submitted to the Secretariat pursuant to Section XXIV.C of the 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. The Arbitrator may review the Sealed Offer after deciding liability and damages… and may take the Sealed Offer into account in allocating costs in the Final Award on all issues."

Roadmap

1. Settlement in Arbitration: Key Issues
2. Part 36 Offers in England and Wales – a Contrast with Sealed Offers
3. **Arbitration-Related Mediation**

Encouraging tribunals to take a more pro-active role in facilitating mediation

Traditionally, mediation tended to be driven by parties and counsel. There is now a push by certain institutions for **tribunals** to be more pro-active.

ICC Arbitration Rules 2021, Art 22(2)

Encourages tribunals to adopt case management techniques in Appendix IV, which include "encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods, such as, for example, mediation under the ICC Mediation Rules"

CEDR Final Report on 'Settlement in International Arbitration' (2009)

- Tribunals, assisted by institutions, should (unless otherwise agreed by the parties) take steps to assist the parties to achieve a negotiated settlement.
- Recommends that tribunals enforce multi-tier DR clauses and raise with parties/counsel the possibility of ADR processes such as "mediation windows" in the arbitration.

CEDR Rules for the Facilitation of Settlement in International Arbitration	
1.	As early as the first CMC, ensure that the parties are aware of other ADR processes such as mediation (Article 4.2.2)
2.	As early as the first CMC, if appropriate, discuss with the parties how other ADR processes (e.g., mediation windows) for facilitating settlement should be included in the procedural timetable (Article 4.2.3)
3.	If requested by the parties, insert a mediation window in the procedural timetable (Article 5.3.1)
4.	Potentially penalise parties in costs allocations for unreasonable refusal to make use of a mediation window or comply with contractual requirements to mediate in the disputed contract (Articles 6.1.2 and 6.1.3).

Use of Mediation Windows

New Guidance: ICC, 'Facilitating Settlement in International Arbitration', July 2023

How should they be raised?

- By the parties: most common in practice. The ICC recommends parties *pre-agreeing* contractual DR clauses providing for mediation windows and protocol.
- By the tribunal: consistent with the CEDR Report, the ICC proposed that tribunals should be pro-active in raising these with the parties but, absent party agreement, should not include them in the procedural timetable.
- By the arbitral institution: institutions can facilitate mediation by adopting mediation rules to create a ready-made protocol.

Timing and duration?

- Timing: The ICC recommends as early as possible, but recognises the need for the parties to have a sufficiently developed understanding of the relative merits of their positions.
- Duration: depends on the nature of the dispute and (i) the time needed for setting up/running the mediation; (ii) the delay to the arbitration process if mediation is unsuccessful.

Should the arbitration be suspended?

- Targeted/focused mediations: a stay is appropriate (costs-savings, avoids principals and advisers being distracted).
- Ongoing/open-ended mediations: a stay is rarely appropriate (could create extensive procedural delay)

Other Techniques

CEDR and ICC also endorse other techniques which could support mediation/facilitate settlement

Tribunals to give preliminary non-binding views (CEDR Rules, Art. 5.1.2)	Settlement meetings with tribunals (CEDR Rules, Art. 5.1.4)
• Gives the parties a more realistic understanding of the merits of their cases and the tribunal's likely determination. • Parties must expressly agree to the procedure to avoid potential challenge to the Award.	• Parties engaging in settlement discussions may involve the tribunal (or just the presiding arbitrator). Also requires the consent of both parties. • Distinct procedure from med-arb because there are no private meetings and all parties will be present in the same room as the tribunal.

In the CEDR Rules, these techniques are subject to various **procedural safeguards** to reduce the risk of challenge such as:

CEDR Rules, Art. 3.3

"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 for challenging any award rendered by the Arbitral Tribunal."

The Singapore Convention on Mediation

An Overview

What it is: a legal framework for mutual recognition and enforcement of mediated settlement agreements (**SA**) to promote mediation. Functions as:

- A **sword**: signatory courts must recognise/enforce settlement agreements without the need for a suit (Art. 3(1)).
- A **shield**: any qualifying agreement holds *res judicata* effect on further proceedings (Art. 3(2)).

Scope of application: to be enforceable under the SC, any agreement must -

- Be in writing
- Result from mediation: a 'mediator' must lack authority to *impose* a solution upon the parties
- Settle an international commercial dispute

Summary of grounds for refusing relief (Article 5)	
1	A party to the SA was under some **incapacity**
2	The SA is **null and void, inoperative or incapable of being performed**
3	The obligations in the SA **have been performed** or are **not clear or comprehensible**
4	Granting relief would be **contrary to terms of the SA**
5	**Serious breach by the mediator of standards applicable to the mediator or the mediation** without which breach the party would not have entered into the SA
6	**Failure by the mediator to disclose** to the parties **circumstances that raise justifiable doubts as to their impartiality or independence**
7	Granting relief is **contrary to public policy** or the **subject matter of the dispute is not capable of settlement** by mediation in the state of enforcement

Contact Details

Leilah Bruton

P: ++44 20 3985 6770

leilah.bruton@threecrownsllp.com

THANK YOU