

Copenhagen Arbitration Day 2022

# Approaches to Best Practice for Facilitating Settlements in Arbitration

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15 September 2022



**GANTENBERG**  
**DISPUTE**  
**EXPERTS**

1. Facilitating Settlements In Arbitration: Why?
  2. Challenges To Facilitating Settlements
  3. Protagonists for Settlements
  4. Best Practices: Tools and Incentives
  5. If There Is No Settlement: What Then?
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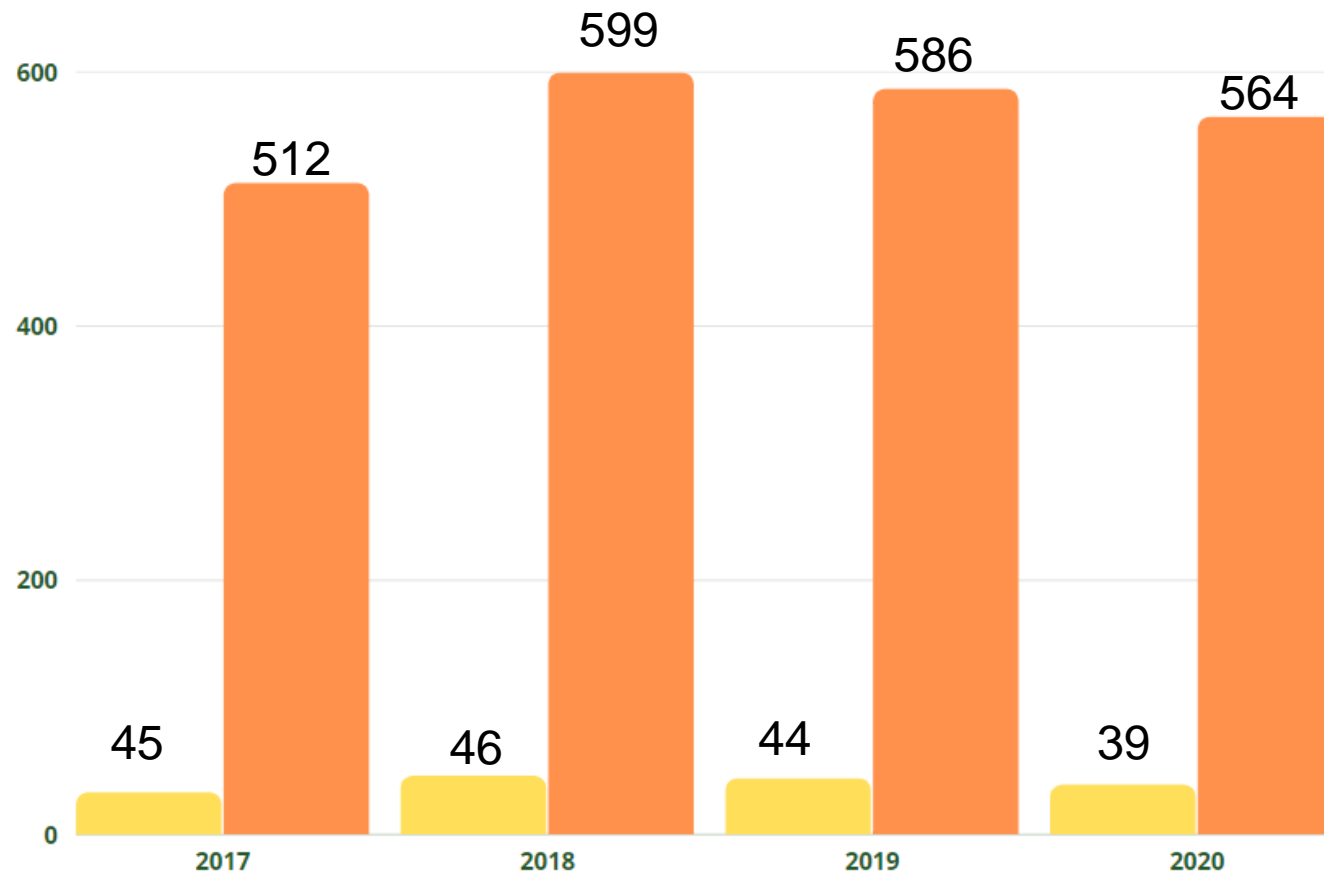
# GANTENBERG DISPUTE EXPERTS

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## International Chamber of Commerce (ICC)

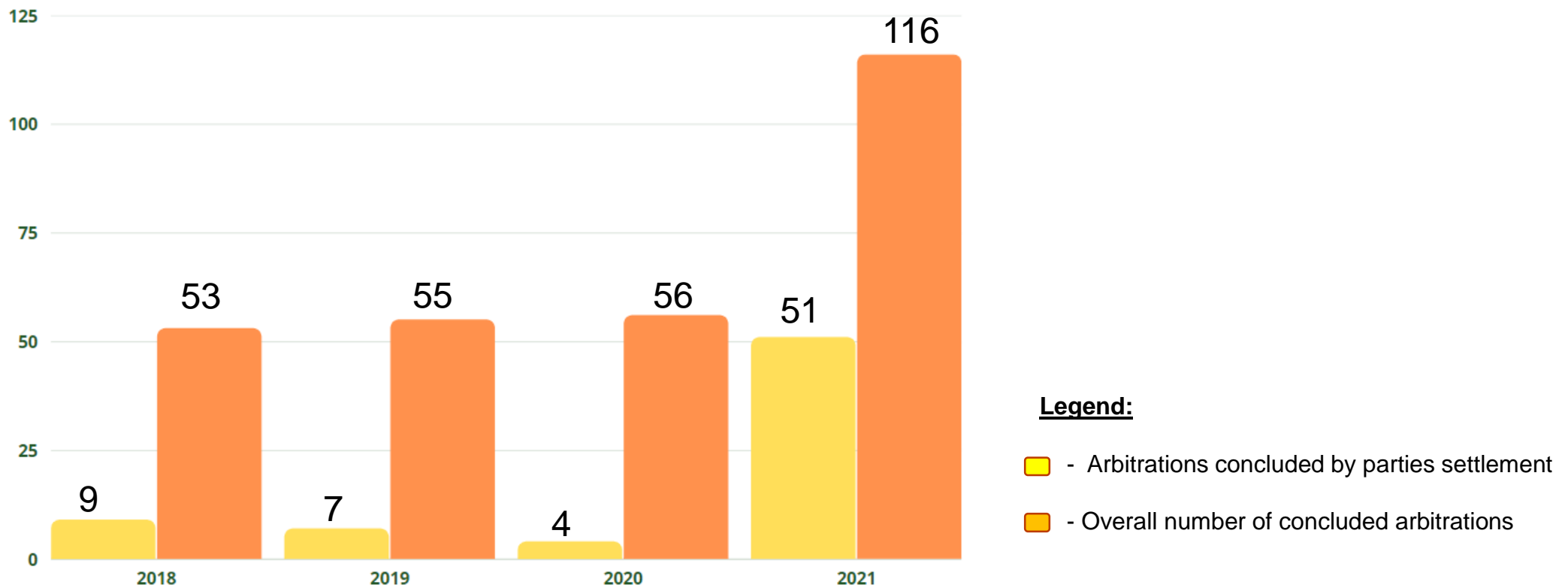


### Legend:

-  - Awards by consent
-  - Awards in total

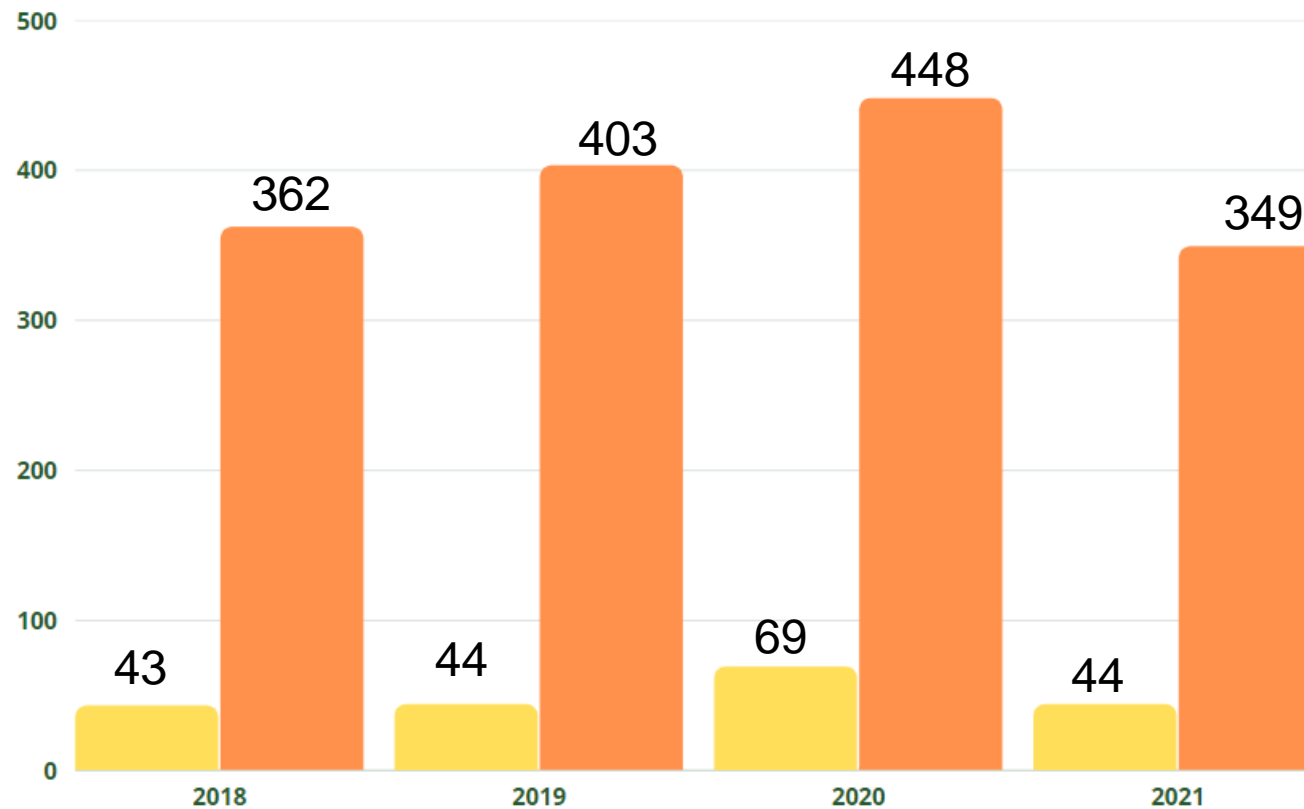
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## Hong Kong International Arbitration Center (HKIAC)





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## Korean Commercial Arbitration Board (KCAB)

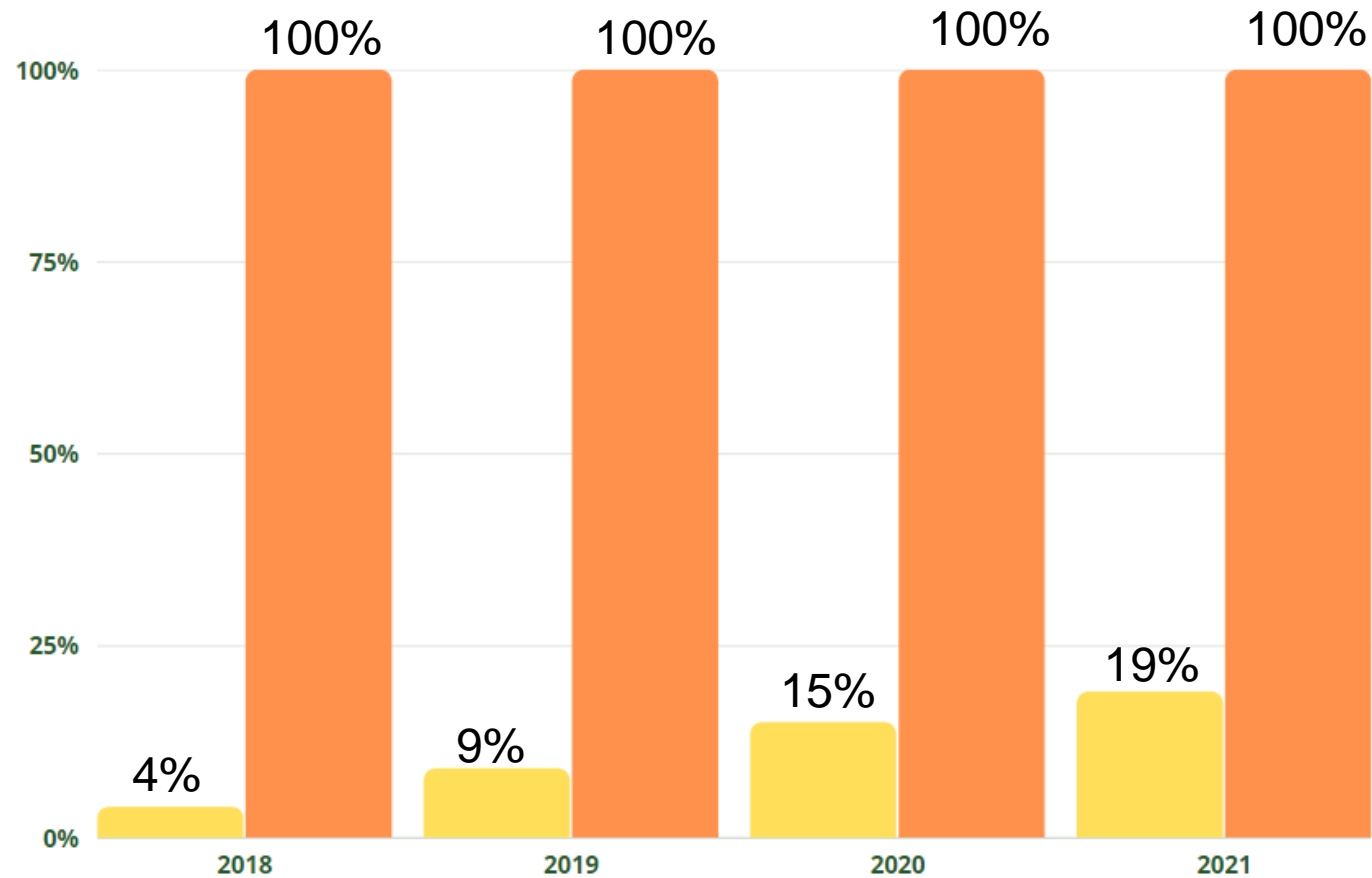


### Legend:



-  - Arbitrations concluded with consent awards
-  - Overall number of concluded arbitrations (domestic and international cases)

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## Vienna International Arbitral Centre (VIAC)



### Legend:

-  - % of the proceedings which were terminated either on agreed terms and recorded settlements or the parties agreement to terminate arbitration
-  - 100% of all terminated arbitrations in that year

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## The situation with ADR in Nordics: the Roschier Disputes Index 2021

- Overall participation in mediation and other ADR methods continues to be fairly low
- Many respondents noted that ADR has not been considered relevant or suitable for their cases, or that negotiations between disputing parties have been considered sufficient
- Even though the Index shows that 63% of the cases that went to ADR resulted in a settlement





## 1. Facilitating Settlements In Arbitration: Why?

### a. Decreasing the costs of arbitration

- Arbitrating is expensive, mostly because of legal fees
- Costs for legal services make up to roughly  $\frac{3}{4}$  of a party's costs of the proceedings





## 1. Facilitating Settlements In Arbitration: Why?

- b. Need for increased cooperation between counsel and for a tribunal's initiative to increase efficiency of the dispute resolution process

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## 1. Facilitating Settlements In Arbitration: Why?

### c. Arbitrators are well-positioned to facilitate settlements, because

- they need to familiarize themselves with the facts of the case anyway
  - they are best placed to know when a good opportunity has arisen
  - arbitration is „flexible“
  - settlement can be recorded as a consent award
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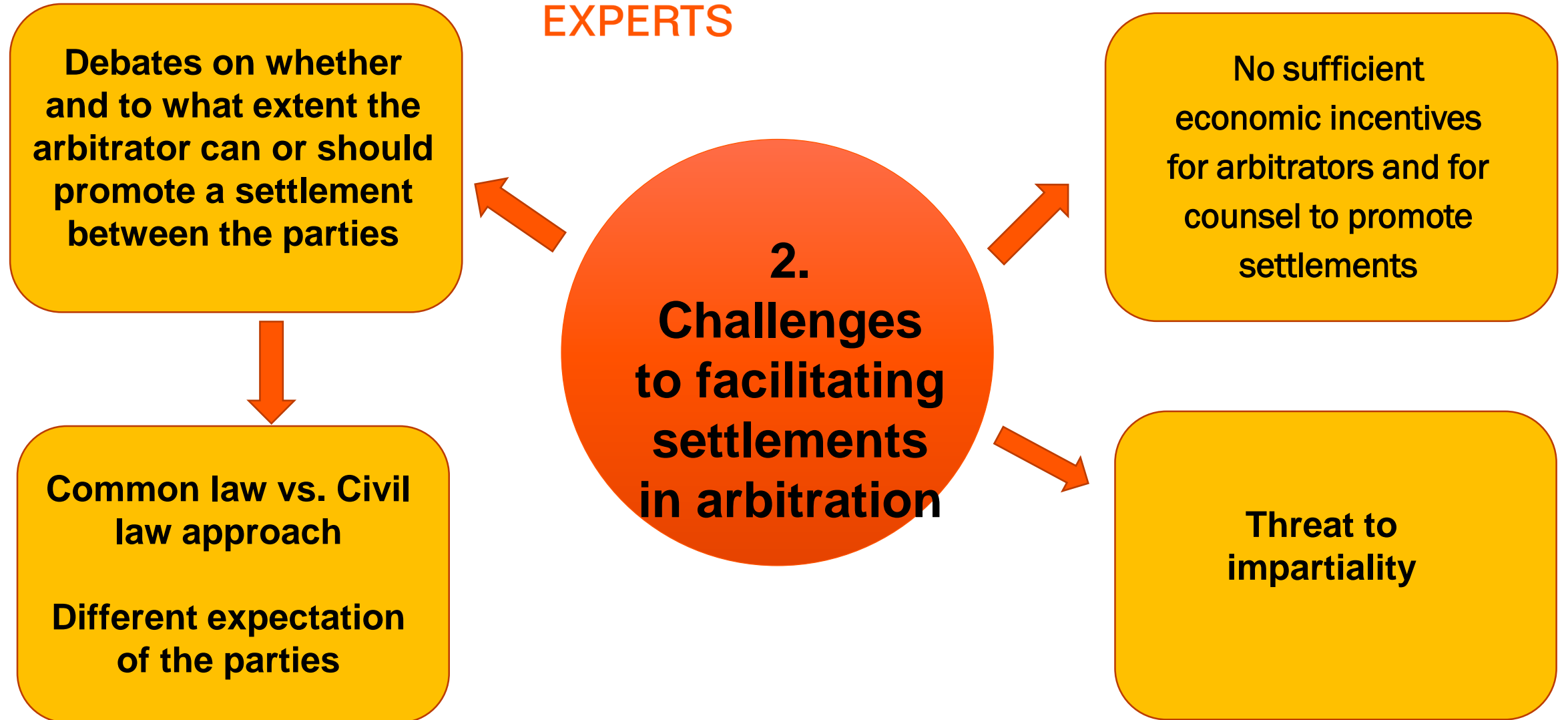


## 1. Facilitating Settlements In Arbitration: Why?

d. Settlement may save a friendly  
and  
profitable relationship



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### **3. Protagonists for Settlements**





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## a. Arbitrators

Arbitrators are hesitant or reluctant to facilitate settlements unless expressly obliged to do so.

2018 Queen Mary International Arbitration Survey: The Evolution of International Arbitration (p.6) confirms:

*„Another recurrent theme in these discussions was the position arbitrators tend to assume with regard to ADR. **The vast majority of interviewed respondents reported that, in their experience, unless the dispute resolution clause compels the parties to attempt amicable resolution, arbitrators will not refer the parties to ADR at any stage of the proceedings.** The reason that interviewees cited the most for this is that arbitrators take the view that they have been given a mandate to resolve the dispute before them through arbitration and thus they do not feel it falls within their prerogatives to persuade parties to seek other avenues.“*

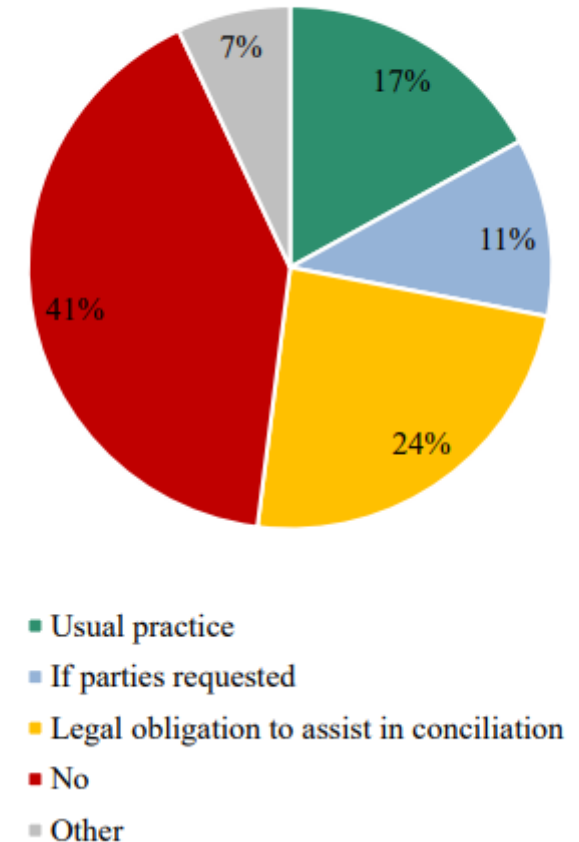
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## b. Arbitration laws, rules, and guidelines

### (i). Arbitration laws

According to the Results of the Survey on Inquisitorial Practice of the Taking of Evidence conducted by the Russian Arbitration Association among practitioners coming from 30 civil law countries, 24% of the Respondents noted that the tribunal is obligated or entitled to assist the parties in facilitating settlement by *lex arbitri*.

Chart 19. Tribunal's facilitation of settlement



## 3. Protagonists for Settlements



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## b. Arbitration laws, rules, and guidelines

### (i). Arbitration laws: **the Netherlands**

Article 1043 of the Dutch Code of Civil Procedure

*“Order for personal appearance of the parties*

*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.”*

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## b. Arbitration laws, rules, and guidelines

### (i). Arbitration laws: **Japan**

#### Article 38(4) of the Arbitration Law of Japan

*“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.”*

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## b. Arbitration laws, rules, and guidelines

### (i). Arbitration laws: **Canada**

Article 35 of the Arbitration Act of the Province of Alberta

#### ***“Mediation and conciliation***

*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.*

*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.”*

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## b. Arbitration laws, rules, and guidelines

### (ii). Arbitration rules

Provisions referring to the powers of tribunal to facilitate settlements

Institution	DIS	LCIA	CIETAC	CRCICA	DAI	FAI	HKIAC	ICC	SWISS RULES	KCAB	SCC	VIAC
Provision	Art. 26, Art. 27.4 (iii)		Art. 47.1, Art. 47.2			Art. 26.6		Art.22 (2), Appendix IV(h)	Art. 19.5			Art. 28.3

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## b. Arbitration laws, rules, and guidelines

### (ii). Arbitration rules

#### 2021 ICC Arbitration Rules, Appendix IV: Case management techniques

*“The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases [...]:*

*[...]*

#### *h) Settlement of disputes:*

*(i) 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;*

*(ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.”*

[Emphasis added.]

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## b. Arbitration laws, rules, and guidelines

(ii). Arbitration rules

2021 VIAC Rules of Arbitration and Mediation, Article 28(3):

*“At any stage of the proceedings, the arbitral tribunal is entitled to facilitate the parties’ **endeavors to reach a settlement.**”*

2018 DIS Arbitration Rules, Article 26:

*“**Unless any party objects,** the arbitral tribunal, shall at every stage of the arbitration, seek **to encourage an amicable settlement** of the dispute or of individual disputed issues.”*

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## b. Arbitration laws, rules, and guidelines

### (ii). Arbitration rules

4 out of 12 arbitration rules include either provisions that encourage parties to recourse to ADR to settle some or all issues during arbitration (DIS, ICC, SAC) or Med-Arb provisions (CIETAC)

#### 2021 Swiss Rules, Article 19.6

*“At any time during the arbitration proceedings the parties may agree to resolve their dispute, or any portion of it, by mediation, including under the Swiss Rules of Mediation, or any other forms of alternative dispute resolution. Unless the parties agree otherwise, the arbitration proceedings will be stayed during that period.”*

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## b. Arbitration laws, rules, and guidelines

### (iii). Guidelines

#### Prague Rules

Article 9.1.: “Unless one of the parties objects, the Arbitral Tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration;”

Articles 9.2.-9.3. allow “any member” of the tribunal “upon written consent of all parties” to “act as a mediator to assist in the amicable settlement of the case.”



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## b. Arbitration laws, rules, and guidelines

### (iii). Guidelines

IBA Guidelines on Conflicts of Interest in international Arbitration, General Standard 4(d):

***“An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation [...] If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver [unless] as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.”***

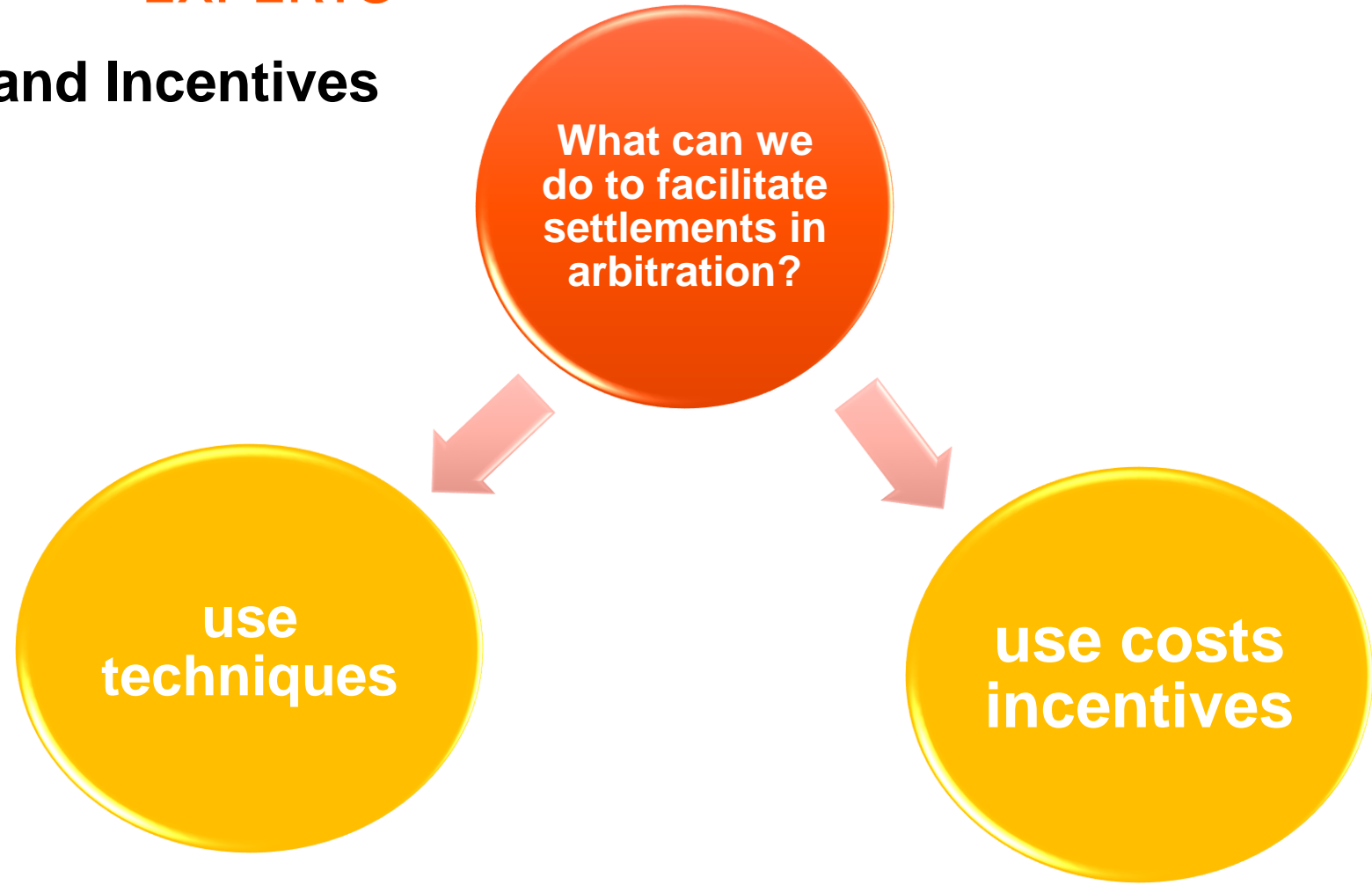
[Emphasis added.]

## 3. Protagonists for Settlements

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## Best Practices: Tools and Incentives



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## a. The Rules of the Center for Effective Dispute Resolution for the Facilitation of Settlement in International Arbitration (“CEDR Rules”)

### Article 5:

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. 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;
  - 1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;
  - 1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;
  - 1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.

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## a. The Rules of the Center for Effective Dispute Resolution for the Facilitation of Settlement in International Arbitration (“CEDR Rules”)

- Article 5:
- 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.

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## b. Town Elder Arbitration Rules

<https://www.debevoise.com/-/media/files/pdf/1000812074v5town-elder-arbitration-rules.pdf>

### *Article 13*

1. Within 30 days after its constitution, the arbitral tribunal shall conduct a meeting with the parties (“Initial Meeting”). In addition to counsel, each party shall include in the meeting a representative who is familiar with the dispute.
2. During the Initial Meeting, the parties and the arbitral tribunal will discuss the main issues in dispute in the arbitration in order to provide the arbitral tribunal with sufficient information to draft the first version of the Decision Tree set forth in Article 15 of these Rules:

[...]

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## c. Application of case management techniques

### 2021 Rules of Arbitration of the Danish Institute of Arbitration

#### “Article 24

*[...] From such referral, all correspondence shall occur directly between the Arbitral Tribunal and the parties, with copies to the Secretariat, which shall follow the developments in the case so that, if necessary, it may assist the Arbitral Tribunal and the parties in ensuring that the case progresses in a timely and efficient manner.”*

#### “Article 28

*(1) [...] The Arbitral Tribunal and the parties shall ensure that the case is conducted within a reasonable time and in an efficient and cost-conscious manner.”*

#### “Article 32(a)

*The Arbitral Tribunal shall as soon as possible convene a preparatory meeting with the parties. The meeting may be held using telecommunication. In the notice convening the meeting the Arbitral Tribunal shall set out the particular issues to be addressed at the meeting, such as:*

*(a) The position of the parties in relation to the facts and the legal points of the case, including a determination of which facts and legal points are undisputed, and which facts and legal points shall require the taking of evidence. [...]”*

[Emphasis added.]

## 2021 ICC Rules of Arbitration

### Appendix IV

a) *„**Bifurcating** the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.”*

*[...]*

g) *“Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and **the arbitral tribunal can indicate to the parties issues** on which it would like the parties **to focus at the hearing.**”*

## 2018 DIS Arbitration Rules

### Annex 3

#### Measures for Increasing Procedural Efficiency

During the case management conference, the arbitral tribunal shall discuss with the parties the following measures for increasing procedural efficiency:

*“C. Dividing the proceedings into **multiple phases**.”*

*“F. Providing the parties with **a preliminary non-binding assessment** of factual or legal issues in the arbitration, provided all of the parties consent thereto.”*

To the extent **that the parties disagree** as to whether to apply one or more of the above measures, the arbitral tribunal shall, during or as soon as possible after the case management conference, decide in its discretion whether to apply such measures.



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## a. Allocation of costs

### CEDR Rules, Article 6

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.

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## a. Allocation of costs

### “Sealed Offers” or “Calderbank Offer”

- In addition, in 2018 Queen Mary International Arbitration Survey: The Evolution of International Arbitration, p. 34, 46% of Respondents answered that provisions on “sealed offers” should be included in arbitration rules
- The ICC Report “Decisions on Costs in International Arbitration” suggests that arbitral tribunals may, at their own initiative, suggest at the terms of reference meeting that Calderbank Offers are incorporated into the terms of reference, if the parties themselves do not do so.

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## **b. Reduction of administrative expenses**

2021 ICC Rules of Arbitration, Appendix III, Article 2.12

*“When an arbitration is preceded by proceedings under the ICC Mediation Rules, one half of the ICC administrative expenses paid for such proceedings shall be credited to the ICC administrative expenses of the arbitration.”*

## 5. If There Is No Settlement: What Then?

- Ongoing duty of an arbitral tribunal to ensure a time and cost-efficient proceedings

Art.22(2) of the ICC Rules of Arbitration

*“In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as [...] in Appendix IV.”*

Art. 28(1) of the DAI Arbitration Rules

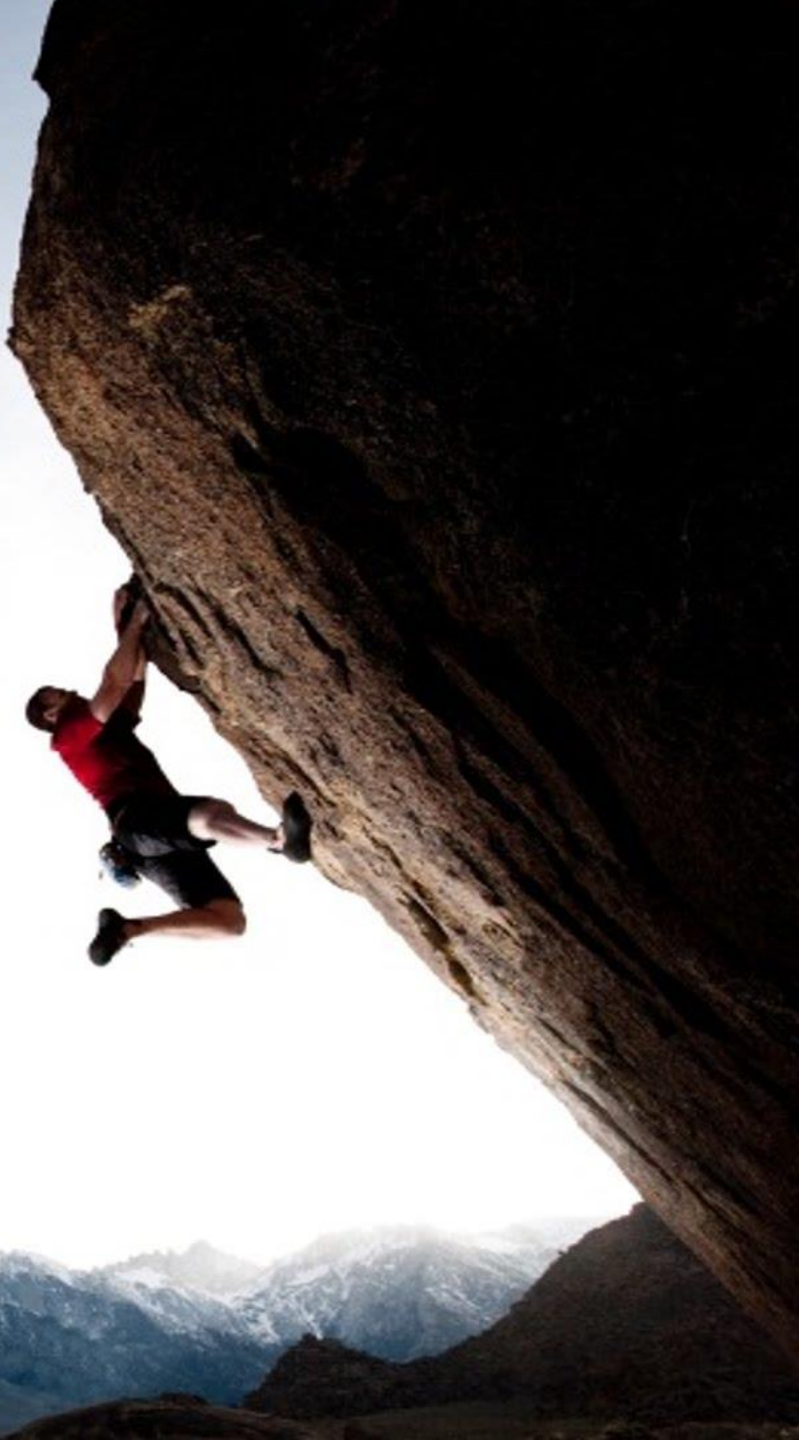
*“[...] The Arbitral Tribunal and the parties shall ensure that the case is conducted within a reasonable time and in an efficient and cost-conscious manner.”*

- Use other tools, e.g. bifurcate, bundle topics that may give some dynamics to the case once decided or delt with up front, keep on asking questions, keep on having open-minded approach to arbitration

**AND....**

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NEVER.  
GIVE.  
UP.



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A better end  
starts here \_\_\_\_\_