THE SETTLEMENT-ENFORCEMENT DYNAMIC IN INTERNATIONAL ARBITRATION
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I. INTRODUCTORY REMARKS

Settlement in international arbitration has been a topic at the forefront of discussion amongst scholars and practitioners for the last twenty years1 and the 2008 School of International Arbitration survey sponsored by Pricewaterhouse Coopers (the “2008 SIA/PwC Survey”)2 confirms the importance of the topic.3 Forms of dispute resolution combining arbitration with settlement techniques (such as med-arb and combined mediation and arbitration)4 exist in many legal cultures and can be found in so-called Chinese, German, and Swiss-style international arbitrations; Australia, Canada, Hong Kong and Japan have actually enacted arbitration laws that contain med-arb provisions.5 This dynamic led the International Council of Commercial Arbitration (“ICCA”) to look more closely at

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2 [reference to long version of the survey in this issue]

3 Id. at …


5 See the final document of the CEDR Commission on Settlement in International Arbitration, available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf (pages 18 et seq. which list various national law provisions, including Australia, Bangladesh, Belarus, Cambodia, Canada, Costa Rica, Croatia, Hong Kong, Japan, Netherlands, Singapore and Uganda), and Onyema, supra note 4, at 413-15.
the use of settlement techniques in arbitration in its Beijing Congress in 2004 and the Centre for Effective Dispute Resolution in the UK (“CEDR”) to explore the issue of Settlement in International Arbitration.

The 2008 SIA/PwC Survey explores more specifically settlement as a means of enforcement of claims in arbitration and arbitration awards and looks at settlement before an arbitration award has been rendered and even settlement in lieu of enforcement, i.e., settlement after an award has been rendered. Here are some of the more intriguing results, in addition to the very specific ones on settlement, which have a bearing on this paper:

- the overwhelming majority (92%) of arbitration cases are “successfully resolved at some stage through the arbitration proceedings;” that is 27% by settlement without an award; 7% by settlement with an award by consent; 47% by awards voluntarily complied with; 11% by awards and subsequent enforcement proceedings; and then the outlying 8% – 6% by awards followed by litigation; and 2% by settlement followed by litigation.

- in the 11% of the cases where enforcement was needed, only 19% of corporations reported difficulties in enforcing awards, and 70% of these difficulties related to the party not prevailing in the arbitration being a “loser” and not having assets or the fact that the losing party was elusive so that identification of assets was problematic;

- for the majority of companies who have to enforce, the enforcement and execution process takes less than a year, with 44% recovering the full amount of the award and 60% recovering 76% or more of the award.

In other words, either before or after an award is obtained a party may use the likelihood of enforcement as a negotiating tool in order to reach a settlement. Laurence Shore observed at a conference in London in December 2008:

[B]ecause of the New York Convention, i.e., enforcement, international arbitration rides in the saddle and international litigation trudges behind on foot, and the possibility of settlement, whether primarily to preserve business relationships or to save time and costs, is enhanced. In this sense, it is hard not to

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6 NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA CONGRESS SERIES NO. 12 (Albert Jan van den Berg ed., 2005) (with numerous contributions on integrated dispute resolution systems, Asian culture of dispute resolution, the combination of arbitration and conciliation and the role of arbitrators as settlement facilitators. Id. at 19-120, 365-585).
8 [reference to long version of the survey in this issue]
9 [reference to long version of the survey in this issue]
10 [reference to long version of the survey in this issue]
see enforcement and settlement as complementary forces in international arbitration.\textsuperscript{11}

Indeed enforcement and settlement should not be characterized as competing forces; quite to the contrary, this is a dynamic relationship, like virtually everything else in international arbitration, often flexible and multi-layered, something that on occasion may be seen as a variation on the otherwise persuasive proposition that effective enforcement paves the way for settlement.\textsuperscript{12}

In this paper we will look at the results of the 2008 SIA/PwC survey in respect of settlement in international arbitration and discuss their importance by looking first at pre-award settlement (Section II) and second at post-award settlement (Section III), and then look at the criteria an ICSID tribunal identified for the validity of settlement post-award (Section IV) and some overall conclusions (Section V).

II. SETTLEMENT BEFORE AN ARBITRAL AWARD

As far as settlement before an arbitration award has been rendered, the main findings are:\textsuperscript{13}

- Most settlements (43\%) occur between the filing of the request for arbitration and the first (usually procedural) hearing in the arbitration;
- Several reasons motivate settlement: in 27\% of the cases disputes were settled in order to preserve business relationships between disputing parties. Other factors that justified settlement include a weak position in the case and a desire not to incur excessive time and costs.

Several specific findings deserve our attention:

- Ninety-one percent of the participating corporations indicated that in the majority of their disputes settlement negotiations are initiated by one of the parties. Only 9\% of the corporations stated that in a large number of cases in-house counsel or their lawyers were the ones suggesting that parties settle the dispute.

\textsuperscript{11} Laurence Shore, “Settlement in International Arbitration.” The unpublished paper was presented at the inaugural conference of AFSIA (Alumni and Friends of the School of International Arbitration) held in London in December 2008.


\textsuperscript{13} [reference to long version of the survey in this issue]
None of the corporations participating in our online questionnaire indicated the contribution of the arbitrators or the arbitration institution in resolving the dispute. However, during the interviews, some corporate counsel revealed there were instances when the conduct of the arbitrators during the proceedings had a major influence over the settlement of the dispute.

A. Settlement Most Often Occurs Before the First Hearing or Before the Hearing on the Merits

The Study revealed that, out of the total number of cases which settle during the arbitration proceedings, almost three-quarters of the settlements occur before the hearing on the merits of the case. A significant percentage of disputes (31%) are settled between the first hearing and the hearing on the merits. This might be influenced by the fact that parties usually exchange at least one substantial written submission after the first hearing and present their written evidence. In these instances, parties develop an image of their chances to win or lose the case and this might be an essential factor in trying to find a convenient solution.14

Figure 1. The time when settlement pre-award occurs

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14 [reference to long version of the survey in this issue]
B. Desire to Preserve Business Relationships is a Strong Driver for Pre-Award Settlement

The data gathered by the online questionnaire revealed that 27% of the participating corporations reach a settlement in order to safeguard their business relationship. Indeed, the desire becomes stronger, the longer the parties have been doing business together.

Two other major reasons have motivated corporations to reach a settlement during the arbitration proceedings: avoiding unnecessary costs (23%) and delay (17%). The weak position of the parties in dispute is indeed one of the factors triggering the settlement, but it is not the decisive one (21%). Concerns over the likely place of enforcement or the lack of assets of the opposing party were not cited as a major influence on the decision to settle.15

![Figure 2. The reasons behind reaching a settlement agreement](image)

C. Corporations Consider the Settlement Pre-Award to be a Satisfactory Alternative to an Arbitral Award

Eighty-nine percent of participating corporations found the settlement agreements reached before an award had been made to be very or fairly satisfactory. Only 5% of the corporate counsel felt disappointed by the outcome of

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15 For regional and industry sector variations see [reference to long version of the survey in this issue]
the settlement pre-award. During the interviews, some corporate counsel explained that this satisfaction derives directly from the advantages of an early settlement, as indicated in the above sections. Some of the counsel acknowledged that the contentment also stems from the unpredictable outcome of the arbitration proceedings and that it is always better to have something tangible rather than mere expectations.  

D. Comments and Conclusions

Settlement before an award has been rendered can be explained by a multitude of factors, not only that enforcement lies in wait for the non-prevailing party, whichever party that may be.

Given that according to the survey, 43% of settlements were reached before the first hearing, it may well be that the filing of a case and relatively familiar procedural timetables are the key settlement prompts, without particular regard to enforcement. Perhaps the traditional perception that some companies choose arbitration over litigation because arbitration provides a better opportunity to contain a dispute (e.g., through privacy/confidentiality) and thereby provides a better opportunity for preserving business relationships would seem to have a modern empirical foundation. The claimant may need to get the respondent's attention by filing a request for arbitration and showing that it is serious about pursuing a remedy, and the respondent may even invite the filing because respondent's counsel cannot get its management to focus on resolving the dispute until it faces an actual arbitration. Then both sides move to reasonable settlement positions before the first hearing: they never really intended to fight. In this respect arbitration institutions provide a real service to parties by keeping registration fees low.

To be sure, enforcement underpins the process, but as the timing element of settlement as set out in the 2008 SIA/PwC survey reveals, much more is at work in the arbitral process in driving the parties to resolve their dispute before an award is issued.

The 2008 SIA/PwC Survey does not address the issue of how settlement would operate in the case of a multi-tier or escalated dispute resolution clause. It is clear from the 2006 SIA/PwC Arbitration Survey that multi-tier clauses are now well established in the dispute resolution landscape and one of their advantages is to contain disputes and facilitate early settlement. There seems to be agreement that the commencement of the arbitration is the key settlement driver. There are,

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16 [reference to long version of the survey in this issue]
18 For example, for the ICC the filing fee is U.S. $2,500, for the LCIA £1,500 and in AAA/ICDR arbitration between U.S. $300 and U.S. $2,500 (depending on size of claim).
19 See Mistelis, supra note 17, at 550 et seq.
of course, variations amongst corporate counsel: some claim that the threat of the commencement of arbitration compels the parties to explore settlement seriously; others argue that the prospect of paying some serious fees for lawyers and arbitrators pushes the parties into settlement action. The settlement dynamic spans a long-view consideration of enforcement effectiveness and shorter-view considerations of the process of getting to an arbitration and then to a preliminary hearing and then to a final hearing and then to an award, and how various stages in that process may be conducive to settlement.

A fundamental question that the parties will always ask is whether at the end of the process they will have an enforceable award. Indeed, there is no denying that for some companies the overriding objective is to obtain a positive award; this implies that settlement decisions will be made regardless of enforcement issues, though for these companies the decision is made not to settle. Even companies that are not so needy may still, for business reasons, want an award above all and apart from anything else. The Naimark-Keer study’s conclusion that “an overwhelming majority of the parties ranked a fair and just result as the most important attribute [of the arbitral process], even above receipt of a monetary award, speed of outcome, cost or arbitrator expertise,” suggests an approach to arbitration in which both settlement and enforcement are very much background issues, whether competing or complementary forces. However, it is also worth noting that the 2006 SIA/PwC survey confirmed enforceability of awards as the top reason for using arbitration.

The 2008 SIA/PwC survey also provides no evidence to suggest that arb-med or that arbitrators who act as settlement facilitators achieve better results. Arguably the realization that if you lose in arbitration you have really lost is what may motivate parties to settle, not the mechanism or the process itself.

III. SETTLEMENT AFTER RECEIVING AN ARBITRAL AWARD

With regard to settlements after an arbitral award has been received, the main findings are:

- Forty percent of the participating corporations negotiated a settlement after the award was rendered and this normally entailed a discounted but prompt payment. In addition almost one in five of the interviewed corporations realized value from their claim or award by selling or assigning it;

20 Naimark & Keer, supra note 12, at 209.
21 Mistelis, supra note 17, at 543-44. In 2006 we asked the question in two different ways, asking participating corporation both to indicate the single most important reason to select arbitration as well as the top three reasons for choosing arbitration. Enforceability of awards was given as the single most important reason. In the comparative context, enforceability ranked second, behind flexibility of the procedure, which was most often listed first.

22 [reference to long version of the survey in this issue]
• Fifty-six percent of those corporate counsel who had negotiated a settlement after an award indicated that they did so in order to avoid the time and costs involved in embarking on recognition, enforcement and execution proceedings in a foreign jurisdiction. For 19% of the participating corporations, maintaining a relationship with the non-prevailing party was an important driver of a settlement;

• Nineteen percent of the participating corporations were content to settle their claim for between 50% and 75% of the amount awarded by the tribunal, while 35% of respondents achieved settlements of more than 75% of the value of the award.

Settlement post-arbitral award is understood as being the agreement reached by the parties after the award is rendered by the arbitral tribunal, that alters the award by changing the terms of its performance (for example by stipulating a different time frame, agreeing payment in installments or agreeing a reduced payment, often in exchange for prompt payment). In many situations, this kind of settlement is convenient for both parties. For the non-prevailing party it might be more suitable to exchange damages for specific performance or to pay a substantial amount over a period of time. For the winning party, renegotiating the award might be more profitable than spending time and money in enforcing the arbitral award.

A. Corporations Choose to Renegotiate Arbitral Awards to Save Money and Time

Respondents’ main reasons for negotiating a settlement after an arbitral award were to avoid costs and save the time that would be incurred in enforcement (56%). The participating corporations are also motivated by a desire to preserve a working relationship with the other party (19%), while only 9% of the corporate counsel reached a settlement because of concerns about the place of enforcement of the award. Some of the interviewed corporate counsel revealed that they prefer to receive less money rather than commencing enforcement proceedings in countries with a corrupt or bureaucratic court system. It is not surprising that the factors influencing settlement after the delivery of an arbitral award are similar to the factors influencing pre-award settlement, albeit with a slightly different emphasis, given the certainty produced by the award.23

When it comes to specific industries, corporations in the construction and energy, oil and gas industries prefer to settle even after an award has been issued in order to avoid the costs that would be incurred in enforcement proceedings (49% and 46%, respectively). Forty percent of the corporations in the industrial manufacturing sector reach a post-award settlement agreement as they prefer to have a prompt receipt of the amount awarded by the tribunal in exchange for a discount, rather than spending money and time for enforcement proceedings. This

23 For the specific results of interviews see [reference to long version of the survey in this issue]
might be an indication of the fact that claimants in arbitration proceedings tend to overestimate the amounts claimed in the proceedings, which makes settlement post-award with a discounted amount a good deal for them. In the insurance industry, 49% of the corporate counsel indicated that they mainly settle after the delivery of an award in order to maintain the working relationship with the opposing party.  

![Figure 3. Reasons for post-award settlement](image)

**B. More than Half of Post-Arbitral Award Settlement Cases are Settled for over 50% of the Award**

The quantitative data gathered by the online questionnaire reveals that following a post-award settlement, 54% of the participating corporations negotiated a settlement amounting to over 50% of the award. Thirty-five percent of the corporations settled for an amount in excess of 75% of the award. Several interviewed counsel were of the opinion that this latter percentage is more than fair, if they consider the time and money spent during enforcement proceedings, including lawyers’ fees. It is intriguing that 43% of the respondents did not have knowledge of the terms of settlement.

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24 [reference to long version of the survey in this issue]
IF THE SETTLEMENT WAS REACHED POST-AWARD, AT WHAT PERCENTAGE OF THE AWARD WAS THE SETTLEMENT AGREED?

<table>
<thead>
<tr>
<th>Percentage of Award</th>
<th>Percentage</th>
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<tbody>
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<td>43%</td>
</tr>
<tr>
<td>Less than 25%</td>
<td>0%</td>
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<tr>
<td>26%-50%</td>
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<tr>
<td>51%-75%</td>
<td>19%</td>
</tr>
<tr>
<td>76%-100%</td>
<td>35%</td>
</tr>
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Figure 4. The value of the post-award settlement

C. Comments - Conclusions

Despite the importance and the effectiveness of enforcement mechanisms in international arbitration, there are certain national intricacies which render it tricky on occasions. These could range from domestic law hurdles at the place of enforcement, or corruption in enforcement or judicial administration, bias towards domestic parties and the like. It is precisely this concern that enforcement potentially may be unsuccessful, or excessively onerous (concern over the lengthy and expensive steps), in other words a high level of uncertainty that enforcement is likely to entail in some jurisdictions, that leads claimants to take a discount – assuming their claims are not inflated to begin with – and settle cases. It is not, however, unheard of (and this is indeed anecdotal evidence) that claims are inflated at the start of a case and claiming parties are genuinely satisfied with smaller amounts. In any event, it is the uncertainty associated with enforcement in specific (unnamed) jurisdictions that drives settlement.

The 2008 SIA/PwC Survey reveals some jurisdictions where enforcement is perceived to be problematic; these include Russia, China, Turkey, India, and some regions, such as Central America and South Asia. It is also clear that most respondents have not always tested the process of enforcement in these “problematic” places: the perception of uncertainty is a sufficient deterrent. One could possibly interpret this as a failure of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, one of whose major successes is supposed to be law unification and the modernization of law relating

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25 Refer to Brekoulakis in this issue!
to arbitration. It appears, however, that such failure, if indeed it is true, cannot be attributed to the New York Convention alone. Quite to the contrary, such a failure does not speak particularly well about the strength of the enforcement process (largely controlled at the final stage by national law and national mechanisms), though it does indicate enough strength that losers are paying enough to leave a significant majority of users satisfied with the arbitral process. Indeed, where the enforcement process is uncertain, settlement may actually be facilitated – and it has been aptly suggested that “uncertainty and risk are, after all, the lifeblood of settlement.” In this sense, enforcement and settlement can well be competing forces: airtight, inexpensive enforcement may deter winners or parties who believe that they are future winners from discounting and settling their claims.

Finally, it is intriguing that, according to the 2008 SIA/PwC Survey, only 7% of arbitration cases are successfully resolved by a consent award. There can be two possible explanations. First, once the arbitration is fully underway the parties fight to the very end and any settlement discussion or offer may appear as an indication of weakness (temporary or not). Second, there is anecdotal evidence that a number of arbitral tribunals are not comfortable with consent awards: of course they will render consent awards from time to time, as this is pretty much a ministerial task, and many arbitrators want to get to their next case. This attitude, however, surely would not deter the parties.

IV. AN ICSID TRIBUNAL’S CRITERIA FOR POST-AWARD SETTLEMENT

Some interesting comments can be made about post-award settlement on the basis of a recent ICSID case, Desert Line Projects LLC v. The Republic of Yemen. The background of the case is that the claimant obtained a commercial

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27 Shore, supra note 12.

arbitral award in Yemen against Yemen, and sought to enforce it in the Yemeni courts. The claimant, however, also signed a settlement agreement with Yemen, which the claimant alleged was signed under pressure. The settlement agreement contained vastly different and less favorable provisions for the claimant than did the award. The claimant sought to rescind the settlement agreement; Yemen refused, and the claimant commenced ICSID arbitration. The experienced ICSID tribunal indicated a rather long list of general propositions determinative of deciding cases like this. Such propositions include:

- “the fact that a party is objectively under financial pressure does not necessarily mean that any agreement reached with such a party is vulnerable to invalidation for duress.”
- “A contractual excuse of duress requires some element of abuse by the other contracting party.”
- “Counsel for the Respondent observed reasonably that settlements frequently involve the relinquishment of a perceived right. One of the parties may accept such an agreement even though it has a judgment in its favor. It may believe that the other party’s obstreperousness in creating enforcement difficulties, or in pursuing frustrating appeals, is in bad faith. Still, such settlement agreements are not automatically considered susceptible to annulment by virtue of coercion. To the contrary, such settlements are routinely not only upheld, but encouraged.”
- However, there is a difference between ordinary pressure created by delay in paying a debt and compulsion created by a superior force in a hostile environment.
- The tribunal held that the settlement agreement was not rescinded by either party, and neither was entitled to rescind it.
- However, international tribunals have refused to give effect to transactions “where Governments have created intolerable pressure to conclude transaction.”
- When a settlement agreement is entered into after an award, the winner, in renouncing certain of its rights, should be compensated by “equivalent advantages.” Here, the concessions by the claimant were so large that there clearly was not an authentic negotiation. A settlement is a standard commercial practice: “each party waives its rights and claims arising out

29 Id. at ¶ 151.
30 Id. at ¶ 152.
31 Id. at ¶ 154.
32 Id. at ¶ 155.
33 Id. at ¶ 160-162.
34 Id. at ¶ 172.
of a dispute on a *quid pro quo* basis.” However, there was no dispute when the parties signed the settlement agreement – there was an arbitral award. Arbitral proceedings are final and binding.35

- The tribunal held that the settlement agreement was imposed on the claimant under duress. The arbitral award “shall be implemented in its entirety.”36

The *Desert Line* tribunal points out that, after the award has been rendered, there is nothing to compromise, because there is no dispute. If something is compromised by the prevailing party, that party should be receiving “equivalent advantages.” This may be slightly greater intrusion by the *Desert Line* tribunal into the bargaining process than is warranted. However, taking the valuable data in the survey on post-award settlement together with the observations of the distinguished *Desert Line* tribunal, we may better appreciate the enforcement/settlement interplay in all its complexity.

V. OVERALL CONCLUSIONS

In the end, irrespective of the reasons why corporations (or indeed state parties) prefer to settle, the reality is that settlement negotiations are a constant presence in international arbitration, regardless of the moment when the settlement occurs. Certainly settlement is used in arbitration (as indeed in negotiations and mediation) as a risk management tool. What really matters is that parties are aware of the risks and the options and use tools sensibly.

There is not sufficient evidence from the 2008 SIA/PwC Survey or otherwise to suggest that an increase of the number of settlements is indicative of an increase in problems relating to enforcement. Of course, there are certain uncertainties associated with the arbitration process and the enforcement of arbitration awards in far away and unfamiliar territories, which have a concrete bearing on settlement discussions. Most uncertainties are associated with national legal systems (laws, regulations and judicial and administrative practices) and on most occasions perceptions and fear far outweigh relevant experience.

Ultimately there is a fascinating dynamic between settlement and enforcement which ranges from competition to complementarity, from tension to cooperation and from motive to result (and vice versa). There is little doubt that this part of the Survey will prompt further research and further discussion.

35 *Id.* at ¶ 176.
36 *Id.* at ¶ 205.