

China Arbitration Summit 2016: Session One
Convergence and Differentiation:
Trends of Internationalization and Localization in Arbitration

**NEUTRAL EVALUATION – THE VIENNA APPROACH
CONVERGING SETTLEMENT TOOLS IN ARBITRATION**

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Abstract

Parties who opt for arbitration, expect an efficient resolution of their dispute. It is thus (also) the task of arbitrators to decide the dispute in a speedy, cost-saving manner. One method to achieve this is to **facilitate a settlement** between the parties.

Views on the facilitation of settlement by judges and arbitrators differ around the globe. In certain jurisdictions, judges are obliged by law to also act as settlement facilitators (e.g. Austria and Germany), whereas others consider the judge's task limited to deciding the dispute. Facilitating settlement negotiations or giving preliminary views on points of law, thus receives mixed reactions in international arbitrations. Nevertheless, several arbitral institutions provide for optional conciliation or settlement mechanisms as part of the arbitral proceedings (cf. Art 47 CIETAC Rules). Others, obviously influenced by their jurisdiction's civil procedural law, even oblige the arbitrators to seek to encourage an amicable settlement of the dispute at every stage of the proceedings (cf. Sec 32 DIS Rules). And yet others provide for neutral evaluation independent and separate from the arbitral proceedings (e.g. the AAA).

The presentation introduces **Neutral Evaluation** ("NE"), as a tool of streamlining the proceedings and facilitating a settlement. Neutral Evaluation allows the arbitrators to furnish to the parties a preliminary view either on certain aspects or on the whole case, often already at an early stage of the proceedings. By offering such early assessment of the case, proceedings can be expedited or a consensual solution to the dispute can be facilitated. Beyond that, the transparency of the process as a whole can be increased by addressing sensitive and critical issues. Furthermore, Neutral Evaluation may be used to support efficiency by permitting the arbitral tribunal to limit and focus the relevant issues to be decided.

The Vienna International Arbitral Centre ("VIAC") has seen many cases where parties have made successful use of various neutral evaluation concepts in the course of arbitral proceedings. In 2014, the **VIAC formed a specialized working group** focused on neutral evaluation. Its purpose was to develop a new tool that combines best practice standards known from independent neutral evaluations, state court proceedings and arbitrations, in order to encourage the use of Neutral Evaluation among users of VIAC proceedings. To obtain a better understanding of what practitioners expect from NE, in 2015 VIAC conducted a survey among parties, counsels and arbitrators. An overwhelming majority met the idea with a warm response. However, practitioners also issued concerns, particularly regarding the potential appearance of bias among the arbitral tribunal and the requirement of consent between the parties. Thus, the working group decided to prepare **VIAC Guidelines on the use of Neutral Evaluation** rather than including provisions in the Vienna Rules, serving as a check-list for issues parties, counsel

and arbitrators should be bearing in mind if they (jointly) decide that this would be a good idea at any point during the proceedings.

Under the guidelines the arbitral tribunal may conduct NE only upon express consent of all parties; a mere reference to the Vienna Rules is insufficient. Also, a party's consent can be revoked at any time. In any event, it remains within the discretion of the arbitral tribunal to decide whether or not to conduct a Neutral Evaluation. As to its scope, all submissions and evidence produced during the NE may be used in the ongoing arbitration. Although the NE is only of a preliminary nature and thus not binding, it may be used as basis for a settlement. Lastly, neither the NE itself nor a deviation thereof shall constitute grounds to challenge the arbitrators, decisions of the arbitral tribunal or the arbitral award.

The guidelines are currently under further review and are expected to be published in the near future. It remains to be seen if VIAC's approach to provide guidance as to a preliminary evaluation of the dispute by the arbitral tribunal as part of the arbitral proceedings, encourages other institutions to provide similar guidelines or even distinct sets of rules. VIAC's location in a jurisdiction that expects settlement facilitation by state courts certainly comforts arbitration users in using NE as part of the arbitral process. Strengthening efficiency and transparency of the arbitral process are certainly of importance to every arbitral institution. In light of this, VIAC's regionally developed NE Model could prove a useful tool converging settlement methods and applied in the toolbox of arbitral institutions around the globe.
