

The Future of Legal Harmonization

– New Horizons for International Commerce

2016 UNCITRAL Symposium Thailand

PANEL 4: International Commercial Conciliation: Enforceability of Settlement Agreements

Enforceability of Settlement Agreements: Practical Advantages for MSME's

5 April 2015

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I. Introduction

- **What is International Commercial Conciliation?**
 - UNCITRAL Conciliation Rules (1980)
 - UNCITRAL Model Law on International Commercial Conciliations (2002) (the “**UNCITRAL Model Law**”)
- **Benefits of Conciliation**
- **When to Use Conciliation**

I. Introduction (cont'd)

- **Benefits of Enforceability of International Settlement Agreements Resulting from conciliation of international commercial disputes**

II. What is International Commercial Conciliation?

- **“*Conciliation*”** – see Section 3 of the UNCITRAL Model Law
 - **a process:**
 - whether referred to by the expression conciliation, mediation or an expression of similar import
 - whereby parties request a third person or persons (“the conciliator”)
 - to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship

II. What is International Commercial Conciliation? (cont'd)

- **The conciliator does not have the authority to impose upon the parties a solution to the dispute.**
- **Role ranges**
 - **From strongly interventionist to a mere overseer of procedural arrangements**
 - **Can suggest the terms of settlement or “deal” between the Parties**

II. What is International Commercial Conciliation? (cont'd)

- ***EU Directive 2008/52/EC (the Directive) – Article 3(a)***

“Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.”

II. What is International Commercial Conciliation? (cont'd)

***“International”* – see Section 4 of the UNCITRAL Model Law**

- “(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or*
- (b) The State in which the parties have their places of business is different from either:*
 - (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or*
 - (ii) The State with which the subject matter of the dispute is most closely connected.*

II. What is International Commercial Conciliation? (cont'd)

“*Commercial*” – see footnote 1 to Article 1.1 of the UNCITRAL Model Law

- Should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.
- Relationships of a commercial nature include, but are not limited to, the following transactions:

II. What is International Commercial Conciliation? (cont'd)

- any trade transaction for the supply or exchange of goods or services
- distribution agreement
- commercial representation or agency
- factoring
- leasing
- construction of works
- consulting
- engineering

II. What is International Commercial Conciliation? (cont'd)

- licensing
- Investment
- banking
- insurance
- exploitation agreement or concession
- joint venture and other forms of industrial or business cooperation
- carriage of goods or passengers by air, sea, rail or road

III. When to Use Conciliation?

- **One size of dispute resolution does not fit all types of:**
 - Disputes
 - Users
- **Preamble (6) of the EU Directive**

“Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties”

III. When to Use Conciliation? (cont'd)

“Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.

These benefits become even more pronounced in situations displaying cross-border elements.”

III. When to Use Conciliation? (cont'd)

ICC Statistics - Success Rate of Mediation	
Average Duration	4 months
Settlement Rate if File Transferred to the Mediator/Neutral	74%
Settlement Rate if First Meeting with Mediator/Neutral Took Place	Over 80%
ICC Users who would use ICC ADR Clause in their contract	Over 90%

Source: ICC per Ms Hannah Tumpel, Senior Manager and counsel (2014)

III. When to Use Conciliation? (cont'd)

<i>Hong Kong High Court</i>	2011	2012	2013
Number of mediated cases	421	575	637
Full or partial agreement/rate	159 (38%)	217 (38%)	286 (45%)
Disposal within six months of mediation occurring	N.A.	49	77
Total number of cases with settlement		266 (46%)	363 (57%)

Source: Le Pichon J (retired Hong Kong High Court Judge)

III. When to Use Conciliation? (cont'd)

- **Linklaters 2013 Commercial Mediation – A Comparative Review**
 - *UK – unaudited - CEDR settlement rate of 50 – 75%.*
 - *Australia - study considering court referred mediations in the New South Wales Supreme Court over a period of three years revealed a settlement rate of 46%*
 - *Germany – unaudited settlement rate is approx 80%.*

www.linklaters.com/pdfs/mkt/london/mediation_2013_7053.pdf

III. When to Use Conciliation? (cont'd)

- **Able to Tailor Conciliation to Specific Needs**
 - Cheap
 - Quick
 - Can be repeated
 - Preserves Relationships
 - Confidential

III. When to Use Conciliation? (cont'd)

- **Whether binding decision needed?**
 - Non binding (negotiation and conciliation)
 - Contractually binding (expert determination)
 - Statutorily binding (if not challenged)
 - Final and Binding (arbitration/litigation)
- **Escalation in costs**
- **Degree of Confidentiality**
- **Impact on Parties' Relationship**

III. When to Use Conciliation? (cont'd)

- ***August 2012 Survey on Payment Practice in the Hong Kong Construction Industry (“August 2012 Payment Practice Survey”)***
 - 8100 companies for 2 year period (2009-2010)/5 main categories surveyed
 - Private sector developers
 - Public sector employers
 - Consultants
 - Sub contractors
 - Suppliers

III. When to Use Conciliation? (cont'd)

August 2012 Payment Practice Survey (cont'd)

- **Prevalance of sub-contracting?**
 - 92% of main contractors had subcontracted
 - 5% were affiliates or subsidiaries of private sector developers
 - Lower rate of outstanding payments
 - 60% of subcontractors had subcontracted
 - 68% of consultants had engaged sub-consultants
- **Use of written agreements in Hong Kong common**

III. When to Use Conciliation? (cont'd)

August 2012 Payment Practice Survey (cont'd)

- **Provisions for Alternative Dispute Resolution Methods in Contracts**
- **ADR methods were usually specified in contracts with upper-tier parties:**
 - Main contractors (61%)
 - Consultants (60%).
 - Sub-contractors (29%)
 - Suppliers (13%)
- **Negotiation and Mediation most common ADR**

III. When to Use Conciliation? (cont'd)

- **Can use with Other ADR**
 - Med-Arb
 - Expert Determination
 - Engineer's Architect's decision
 - Dispute Review Boards
 - Adjudication
 - Short Form Arbitration
- **Can use to avoid issues escalating into disputes**

IV. Why an International Agreement on Settlement Agreements of Commercial Disputes?

- **Effective enforcement internationally needed**
- **Convention similar to enforcement of Arbitral Awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”)**

IV. Why an International Agreement on Settlement Agreements of Commercial Disputes? (cont'd)

- **Some jurisdictions allow parties to apply to the Court to enter a settlement agreement as a consent judgment eg**
 - US
 - Indonesia
 - Hong Kong
 - Singapore
 - The EU Mediation Directive

IV. Why an International Agreement on Settlement Agreements of Commercial Disputes? (cont'd)

- **Some jurisdictions provide for the entry of an arbitration award to record an agreement reached in mediation eg**
 - South Korea (Korean Commercial Arbitration Board)
 - Sweden (Stockholm Chamber of Commerce)
 - Singapore
 - Hong Kong (where arbitration commenced before mediation)

IV. Why an International Agreement on Settlement Agreements of Commercial Disputes? (cont'd)

- **Many countries where a “dispute” has to exist at the time that the arbitrator is appointed, before the award can be recognised**
 - Once a settlement agreement had been reached, there would technically not be a “dispute” any more when the mediator is subsequently appointed as an arbitrator in order to make an arbitral award.
- **International Convention/Instrument will remove an obstacle to enforcement and make conciliation more effective**

V. CONCLUSION

THANK YOU!

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