# THE USE OF CONCILIATION OR MEDIATION FOR THE RESOLUTION OF INTERNATIONAL COMMERCIAL DISPUTES

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## I. INTRODUCTION

My interest in conciliation (or mediation) as a method for the settlement of international commercial disputes dates back over 15 years.[1] At that time I argued for the greater use of conciliation in resolving such disputes, although with some caveats, and in particular I argued for its use as an optional first step in a layered dispute resolution process, which could culminate in arbitration or litigation.[2] What has happened to the international law on commercial conciliation or mediation in the intervening years? Has conciliation/mediation been avoided in preference for international commercial arbitration, which has taken on a quasi-litigation complexion in the past decade, or has it come to play a more important role in international commercial dispute settlement? How has Canadian law on international conciliation/mediation developed?

This article focuses on international commercial disputes, which are typically between private parties. Today, conciliation/mediation is still rarely used to settle international commercial disputes. However, there is more interest in this form of dispute settlement in the commercial law sector. There are also more international rules and model laws for the use of conciliation or mediation as an alternative or prelude to adjudication, and there is more exposure to the possibility of mediation or conciliation during arbitration (called med-arb).[3] Further, Canadian law is evolving. Many jurisdictions

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1. Linda C. Reif, "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes" (1990-1991), 14 Fordham Int'l L.J. 578.
2. *Ibid.*, at pp. 634-37.
3. This article does not cover the use of conciliation to settle host state-foreign investor international investment disputes, notably through the ICSID Convention, which is seldom used compared to the number of ICSID arbitrations: Convention

have accepted the possibility of holding mediation/conciliation during international commercial arbitrations held in Canada, and Canadian jurisdictions are starting to consider legislation to support international commercial mediation.

## II. TERMINOLOGY: CONCILIATION AND MEDIATION

Litigation and arbitration are adjudicative methods of dispute resolution wherein neutral third party judges or arbitrators apply facts and law to reach a decision that is binding on the disputants. Arbitration of international commercial disputes has become the preferred mechanism for a variety of reasons.[4] These include the legally binding nature of arbitral awards, supportive international and domestic legal frameworks for the enforcement of arbitral agreements and awards, party autonomy in the formulation of the arbitral process, the privacy of the process and the relative speed and cost-effectiveness of arbitration compared to litigation. However, the popularity of international commercial arbitration has negatively affected some of these factors, resulting for example in increased expense and time.

Other non-adjudicative means of conflict resolution can also be used for international commercial disputes. These methods include mediation and conciliation. Mediation and conciliation involve impartial third parties who are not empowered to impose a binding decision on the disputants. Rather, the disputants are left to try to resolve the dispute amicably by agreement, which may be based on proposals made by the third party. In contrast to arbitration where the proceedings will continue if the respondent fails to appear, if one or both parties to a mediation or conciliation decides to withdraw, usually the proceedings will terminate.

Under international law on inter-state dispute settlement, mediation and conciliation are dispute settlement methods that are very close on the spectrum of dispute settlement mechanisms. However, a distinction between the two is maintained.[5] Mediation is

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on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), 575 U.N.T.S. 159 (in force 1966), ICSID online at: <http://www.worldbank.org/icsid>. As of July 2006 there had been five ICSID conciliation cases compared with 101 completed and 103 pending ICSID arbitrations. Canada signed the ICSID Convention in December 2006 and Ontario, British Columbia, Saskatchewan, Newfoundland and Nunavut had passed implementing legislation by summer 2006.

4. See, *e.g.*, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London, Sweet & Maxwell, 2004).
5. J.G. Merrills, *International Dispute Settlement*, 4th ed. (Cambridge, Cambridge University Press, 2005), cc. 2 and 4.

considered to be closer to negotiation. The mediator acts as a conduit for disputant proposals, although the mediator can provide her own proposals albeit "informally and on the basis of information supplied by the parties, rather than independent investigations".[6] Conciliation is more structured than mediation. An impartial third party conciliator investigates the entire dispute, including the facts and the applicable law, and provides the disputants with formal recommendations for the settlement of a dispute.[7] However, although conciliation is often included in treaties as a mechanism for inter-state dispute settlement, it only "retains a modest place among the procedures actually used by states when disputes arise".[8]

In international business law, however, where one or more private entities are involved in a dispute, there are different perceptions and practices at play. As a result many have stopped (or never started) drawing the line between mediation and conciliation. Some still argue that the concepts of mediation and conciliation remain distinct in the realm of domestic or international business dispute settlement.[9] However, the terms mediation and conciliation are often used interchangeably by practitioners in the international commercial dispute resolution business to denote a third party "neutral" who facilitates settlement of the dispute and who may or may not make proposals to the parties.[10] In this vein, it is stated that the difference in terminology is merely based on comparative law differences: common law practitioners tend to use the term "mediation" while those in civil law jurisdictions use "conciliation".[11]

6. *Ibid.*, at pp. 28-29.
7. *Ibid.*, at pp. 28, 64 and 72-76.
8. *Ibid.*, at p. 90. For example, a recent treaty including conciliation as an alternative for inter-state dispute settlement is the World Trade Organization Agreement's Dispute Settlement Understanding, Marrakesh Agreement Establishing the World Trade Organization (1994), 33 Int'l Legal Materials 1141, art. 5(1) (use of good offices, conciliation or mediation if the disputing member states agree).
9. See, *e.g.*, Michael B. Shane, "The Difference Between Mediation and Conciliation", [1995] Dispute Res. J. 31 at p. 31; Erik Langeland, "The Viability of Conciliation in International Dispute Resolution", [1995] Dispute Res. J. 34; Australia, National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms, online at <http://www.nadrac.gov.au>; Tobi P. Dress, "International Commercial Mediation and Conciliation" (1988), 10 Loyola L.A. Int'l & Comp. Law J. 569 at p. 574.
10. On the different views see Jacqueline Nolan-Haley, Harold Abramson and Pat K. Chew, *International Conflict Resolution: Consensual ADR Processes* (St. Paul, Thomson West, 2005), pp. 95-97; Noah Rubins and N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Dobb's Ferry, Oceana Publications Inc., 2005), pp. 365-68; Redfern and Hunter, *supra,* footnote 4, at p. 38.
11. Redfern and Hunter, *ibid.*; Rubins and Kinsella, *ibid.*, at p. 366, note 6.

This difference in approach is still reflected in the international law instruments on international conciliation. In the investment disputes arena — which is closer to inter-state dispute settlement because a state is one of the disputants — the International Centre for the Settlement of Investment Disputes (ICSID) still maintains the distinction between conciliation and mediation.[12] However, in the recent instruments on conciliation of international commercial disputes where private disputants predominate, the UN Commission on International Trade Law (UNCITRAL) treats conciliation as synonymous with mediation and the International Chamber of Commerce (ICC) has dropped its conciliation rules and refers to mediation as one form of "amicable dispute resolution".[13]

In this article, I will use the term "conciliation" often since most of the international rules and model laws on the settlement of international commercial disputes maintain the use of the term (although it is not used to denote a process distinct from mediation). The term mediation will be used interchangeably with conciliation where appropriate.

## III. ADVANTAGES AND DISADVANTAGES OF CONCILIATION/ MEDIATION IN COMPARISON WITH LITIGATION OR ARBITRATION

Conciliation/mediation processes can be completed for considerably less expense in shorter periods of time than either litigation or arbitration.[14] A third party neutral can make both parties more objectively aware of the weaknesses of their cases and the benefits of an up-front financial settlement that avoids the uncertainties of an adjudicative process.[15] As Thomas Wälde states, mediation operates "not for determining the dispute in increasingly legalistic and highly formalistic rituals and procedures, but by facilitating communication and building a deal between the disputing parties. Mediation in its best form does not simply aim at ending a dispute, but at creating additional value by restructuring the

12. Ucheora Onwuamaegbu, "The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience" (2005), 22 News From ICSID 12 at p. 14 ("The process of conciliation as presently offered by ICSID is akin to *nonbinding arbitration*, whereas what we seek to introduce [possible establishment of a further mechanism to be called mediation] is more similar to a system of *assisted negotiation*."); *supra*, footnote 3.
13. See *infra*, text accompanying footnote 75.
14. Rubins and Kinsella, *supra*, footnote 10, at pp. 372-74; Reif, *supra*, footnote 1, at p. 634.
15. W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (Dobbs Ferry, Oceana Pubs. Inc., 2000), p. 700.

relationship so it becomes as profitable for both parties as possible."[16] However, it is also argued that if the conciliation/mediation fails and the disputants need to move on to arbitration or litigation, the total expenses and time taken will be greater than would have been the case if conciliation/mediation had not been used.[17] Yet, "even if the conciliation fails, the resultant costs will not have been inordinate, and there will be some carry-over benefits that will enure to any subsequent adjudication".[18] Similar to other ADR methods, conciliation/mediation gives the parties great freedom of choice in structuring the process, choosing the conciliators/mediators, etc. For disputants from Asian states that prefer the face-saving types of dispute settlement such as mediation/conciliation over adjudicative methods, the former better fits their cultural perspective.

As with other ADR methods, conciliation/mediation offers confidentiality and privacy compared to litigation.[19] The conciliation/mediation process is not open to the public. Any resulting agreement will not be made public unless the parties agree otherwise, and the process is carried out "without prejudice" to any later adjudicative proceedings.[20] International instruments continue to prohibit the use of views and information elicited during the conciliation/mediation in subsequent arbitration or litigation of the subject-matter unless the disputants agree otherwise or disclosure is required by law or for the enforcement of a settlement agreement.

Conciliation/mediation may be a suitable means of dispute settlement when the disputing parties want to preserve a business relationship that is structured for the long term.[21] Litigation and arbitration are seen to be destructive of business relationships because of the polarization that tends to occur, whereas softer mediation/conciliation allows the disputants to agree on the resolution of the conflict.

Other perceived disadvantages of conciliation/mediation are as follows:

> conciliation is more often talked about than attempted. Once a dispute has arisen, many claimants are convinced that they have already exhausted all possibilities of reaching amicable settlement and are impatient to start adversarial proceedings. They suspect that conciliation would be a waste of

16. Thomas Wälde, "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" (2006), 22 Arb. Int'l 205 at p. 206.
17. Rubins and Kinsella, *supra*, footnote 10, at pp. 373-74.
18. Reif, *supra*, footnote 1, at p. 635.
19. *Ibid.*; Rubins and Kinsella, *supra*, footnote 10, at pp. 374-76.
20. Rubins and Kinsella, *ibid.* at p. 375; Reif, *ibid.*
21. Rubins and Kinsella, *ibid.* at pp. 377-78; Reif, *ibid.*

> time and money, and works only to the advantage of the respondent by postponing the ultimate day of reckoning.[22]

Wälde also notes that there may be a "narrow window of opportunity" for the use of mediation/conciliation.[23] Disputants must feel that they can no longer settle the dispute themselves; they cannot be dead set on adjudication as the solution and they must be willing to address what they perceive as a "common problem" through methods that involve company personnel to a greater degree than with adjudication and its dependency on lawyers.[24]

The issue of enforcement of any resulting settlement agreement between the disputants is also problematic for a number of reasons, including lack of or differential treatment of this matter in various jurisdictions.[25]

## IV. METHODS BY WHICH CONCILIATION/MEDIATION CAN BE USED BY THE DISPUTING PARTIES

Parties to an international commercial contract often address potential future disputes by including a dispute resolution clause in their contract. In commercial relationships, international commercial arbitration is often preferred over litigation. In some cases, such clauses may include negotiation, conciliation/mediation or other forms of ADR as first-stage forms of dispute settlement, typically backed up by agreed resort to arbitration or litigation in the event that the non-adjudicative dispute settlement mechanism(s) fail. These are called multi-tiered, step, escalation or integrated dispute resolution clauses.[26] These multi-tiered clauses are increasingly included in international construction and engineering contracts.[27]

22. Craig, Park and Paulsson, *supra,* footnote 15, at p. 700; Reif, *ibid.*
23. Wälde, *supra,* footnote 16, at p. 217.
24. *Ibid.*
25. Reif, *supra,* footnote 1, at p. 636. But see the Canadian uniform act on international commercial mediation, *infra,* footnote 130, s. 11 (settlement agreement may be registered with court making it enforceable as if it were a judgment); Japan Shipping Exchange Conciliation Rules, *infra,* footnote 37, s. 14 (settlement agreement must contain an arbitration clause so disputes over its enforcement settled by arbitration).
26. Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001), 18 J. Int'l Arb. 159 (popular in complex construction contracts); James H. Carter, "Issues Arising From Integrated Dispute Resolution Clauses" in Albert Jan Van Den Berg, ed., *New Horizons in International Commercial Arbitration and Beyond* (The Hague, Kluwer Law International, 2005), p. 446; Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in Albert Jan Van Den Berg, ed., *New Horizons, ibid.*, p. 470; Ariel Ye, "Commentary on Integrated Dispute Resolution Systems in the PRC" in Albert Jan Van Den Berg, ed., *New Horizons, ibid.*, p. 478; Klaus P. Berger, "Law and Practice of Escalation Clauses" (2006), 22 Arb. Int'l 1.

Also, as discussed below, conciliation/mediation is often used in or applied to contracts involving one or more parties from Asia. However, even if a dispute resolution clause is not included in the commercial contract, it is still possible for the parties to agree on such methods for the settlement of a contract dispute after the dispute has arisen.

Whatever the circumstances, if parties to a contract do agree to try to settle their dispute using conciliation/mediation, they need to be able to agree on the rules to be used to guide the conciliation process. These rules can be inserted in their initial commercial contract or in a later *ad hoc* agreement on dispute settlement.[28] As a result, a number of conciliation/mediation rules have been drafted by international or domestic institutions for adoption by the contracting parties in a contract. Finally, "med-arb" (or "arb-med", "concilio-arbitration") is commonly used in some Asian countries such as the People's Republic of China (PRC),[29] although the possibility of its use engenders a mixed reaction in other parts of the world, including from a number of North American practitioners and commentators. Med-arb is the use of mediation/conciliation during an arbitration in an attempt to obtain an amicable settlement of the dispute before the arbitrator renders an award.[30] The mediation may be conducted by a

27. Berger, *ibid.*, at p. 1.

28. There is some debate about the enforceability of a mediation or conciliation clause. Whether the contractual language states that conciliation shall or may be used will make a difference. One view is that "[a]t most, contractual undertakings to conciliate would generally have the effect that arbitration may not be instituted until conciliation (however half-hearted) has been attempted": Craig, Park and Paulsson, *supra,* footnote 15, at p. 699. Court decisions and/or statutes in Australia, the United Kingdom, Ireland, Germany and France hold that some ADR clauses place the contracting parties under a legal obligation to attempt ADR before they can arbitrate or litigate. See Erik Schäfer, Herman Verbist and Christophe Imhoos, *ICC Arbitration in Practice* (The Hague, Kluwer Law International, 2005), p. 177; Michael Pryles, ed., *Dispute Resolution in Asia*, 2nd ed. (The Hague, Kluwer Law International, 2002), pp. 50-51; Pryles, "Multi-Tiered Dispute Resolution Clauses", *supra,* footnote 26; Berger, *supra,* footnote 26, at pp. 6-7.

29. See *infra*, text accompanying footnotes 47 to 55.

30. See generally Steven J. Burton, "Combining Conciliation with Arbitration of International Commercial Disputes" (1994-1995), 18 Hastings Int'l & Comp. L. Rev. 637; Michael E. Schneider, "Combining Arbitration with Conciliation" in Albert Jan Van Den Berg, ed., *International Dispute Resolution: Towards an International Arbitration Culture* (The Hague, Kluwer Law International, 1998), p. 57; Wang Sheng Chang, "Combination of Arbitration with Conciliation and Remittance of Awards — with Special Reference to the Asia-Oceania Region" (2002), 19 J. Int'l Arb. 51; Haig Oghigian, "The Mediation/Arbitration Hybrid" (2003), 20 J. Int'l Arb. 75; Klaus Peter Berger, "Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003), 19 Arb. Int'l 387; Julian D.M. Lew, "Multi-

third party other than the arbitrator or, more controversially, the arbitrator may undertake the mediation herself. If the mediation fails, the arbitration resumes. If it is successful, relevant laws and arbitration rules may permit the arbitrator to render an arbitral award in accordance with the terms of the settlement agreement.

## V. SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING ASIAN PARTIES BY CONCILIATION/ MEDIATION — ASIAN LAWS AND RULES

Mediation/conciliation has long been preferred over adjudicative forms of dispute settlement in a number of East Asian countries for cultural and political reasons. The use of mediation/conciliation in the PRC and Japan will be addressed in this section. Other Asian nations or territories that demonstrate similar preferences for mediation/conciliation include Hong Kong (SAR),[31] Korea,[32] Thailand[33] and Singapore.[34] Canadian parties to commercial contracts with Asian parties may be faced with the situation that when contractual disputes arise, conciliation/mediation may be resorted to prior to or during arbitration if there are applicable Asian laws and/or if Asian dispute settlement rules are incorporated in their contract.

### 1. Japan

In Japan, long-standing cultural attitudes and historical political influences have resulted in a preference for non-adjudicative forms of dispute settlement, primarily conciliation/mediation, for domestic civil disputes.[35] Although in contemporary Japan civil litigation has

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Institutional Conciliation and the Reconciliation of Different Legal Cultures" in *New Horizons*, *supra*, footnote 26, at p. 421; Arthur Marriott, "Arbitrators and Settlement" in *New Horizons*, *supra*, footnote 26, at p. 533; Tang Houzhi, "Combination of Arbitration with Conciliation — Arb-Med" in *New Horizons*, *supra*, footnote 26, at p. 547; Michael Hwang, "The Role of Arbitrators as Settlement Facilitators — Commentary" in *New Horizons*, *supra*, footnote 26, at p. 571.

31. Pryles, ed., *Dispute Resolution in Asia*, *supra*, footnote 28, at pp. 107-109 (including use of med-arb).
32. Jay K. Lee, "Non-binding Dispute Resolution Processes — Experience in Korea" in Van Den Berg, ed., *New Horizons*, *supra*, footnote 26, at p. 433.
33. Pryles, ed., *Dispute Resolution in Asia*, *supra*, footnote 28, at pp. 361-62.
34. *Ibid.*, at pp. 319-20.
35. Dan F. Henderson, *Conciliation and Japanese Law, Tokugawa and Modern* (Seattle, University of Washington Press, 1965), pp. 8 and 171-81; John O. Haley, "The Myth of the Reluctant Litigant" (1978), 4 J. Jap. Studies 359; David A. Livdahl, "Cultural and Structural Aspects of International Commercial Arbitra-

increased, a number of these cases are actually resolved by compromise or by conciliation, which is used by judges after halting the litigation.[36]

By the 1980s, however, it was found that conciliation/mediation was rarely used as a method for the settlement of international commercial disputes involving a Japanese party, with the disputants preferring international commercial arbitration.[37] It is posited for example that Japanese parties opt for arbitration in international business disputes because Japanese parties feel that their foreign counterparts are unfamiliar with conciliation/mediation and they also recognize the popularity of arbitration for the settlement of international business disputes.[38]

Yet, by the 1990s Japan saw a growing use of med-arb for the settlement of international commercial disputes, whereby conciliation/mediation is used during an arbitration and not before or instead of arbitration.[39] The rules of the major Japanese international commercial arbitration bodies permit med-arb, which is used with frequent success.[40] The new arbitration law in Japan, in

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tion in Japan" (2003), 20 J. Int'l Arb. 375 at pp. 378-81; Russell Thirgood, "A Critique of Foreign Arbitration in Japan" (2001), 18 J. Int'l Arb. 177 at p. 178.

36. Michael K. Young, "Dispute Resolution in Japan: Patterns, Trends, and Developments" in I. Shapiro, ed., *Legal Aspects of Doing Business With Japan* (Practising Law Institute, 1985), p. 319 at pp. 340-42; Livdahl, *ibid.*, at p. 380; Thirgood, *ibid.*, at p. 178 (and noting that in domestic dispute settlement arbitration is more unpopular than litigation).

37. Yoshiaki Nomura, "Some Aspects of the Use of Commercial Arbitration by Japanese Corporations" (1986), 33 Osaka U. L. Rev. 47 at pp. 47, 55 and 60-61;Young, *ibid.*, at pp. 342-43 (conciliation not popular for domestic commercial disputes); Reif, *supra,* footnote 1, at p. 629. But see Conciliation Rules of the Japan Shipping Exchange, online at <http://www.jseinc.org/en/tomac/conciliation/conciliation_rules.html>.

38. Thirgood, *supra,* footnote 36, at p. 179; Reif, *ibid.* at pp. 629-630.

39. Thirgood, *ibid.*, at pp. 180-84; Yasunobu Sato, "The New Arbitration Law in Japan: Will It Cause Changes in Japanese Conciliatory Arbitration Practices?" (2005), 22 J. Int'l Arb. 141; Christopher Lake, "ADR Techniques and International Commercial Arbitration: Are There Lessons to be Learnt from Europe, the Far East and America?" in Geoffrey M. Beresford Hartwell, ed., *The Commercial Way to Justice: The 1996 International Conference of the Chartered Institute of Arbitrators* (The Hague, Kluwer Law International, 1997), p. 213 at p. 217.

40. Thirgood, *ibid.*, at pp. 180-81. See the Japan Commercial Arbitration Association (JCAA), online at <http://www.jcaa.or.jp>, and the Japan Shipping Exchange (JSE), online at <http://www.jseinc.org>. The JCAA Commercial Arbitration Rules (rev. July 1, 2006), Rules 47 (arbitral tribunal may attempt to settle dispute if all the parties consent) and 54(2) (settlement agreement may be put into arbitral award), <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e.shouji.pdf>; JSE TOMAC Arbitration Rules (rev. March 1, 2004), arts. 8 (recommends conciliation after application for arbitration accepted) and 32 (parties may attempt to settle dispute amicably during arbitration, arbitral tribunal may attempt to settle

force in 2004, permits one or more of the arbitrators to attempt to settle the dispute if the disputing parties provide their written consent, thereby effectively allowing the arbitrators to use med-arb.[41]

## 2. People's Republic of China

The legal system of the PRC has been deeply affected by the competing philosophies of Confucianism and the legalist school of thought.[42] Chinese dispute settlement methods still reflect the Confucian tradition, which emphasizes hierarchy, social harmony and maintaining relationships through compromise.[43] Thus, mediation/conciliation has been favoured historically for dispute settlement over adjudicative means. In the domestic context, conciliation/mediation of disputes and mediation by the courts during litigation have long been used in the PRC and, although the rate of litigation has increased in the current era of economic reform, the government continues to support conciliation/mediation.[44]

Mediation/conciliation is also used in the international commercial context. Some PRC legal codes on aspects of international business and investment law suggest that the disputants use mediation or conciliation before resorting to adjudicative methods.[45] Conciliation rules and services are provided by the Conciliation Centre of China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) and other institutions.[46] The 1994 PRC arbitration law permits conciliation/mediation during international commercial arbitration proceedings, *i.e.* med-arb.[47] Mediation can take place during the arbitration, if the parties agree

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dispute at any stage of proceedings), online at <http://www.jseinc.org/en/tomac/arbitration/rules_index.html>.

41. Arbitration Law, Law No. 138 (2003), art. 38(4) and (5); Sato, *supra*, footnote 39, at pp. 143-46.
42. Luke T. Lee and Whalen W. Lai, "The Chinese Conception of Law: Confucian, Legalist and Buddhist" (1978), 29 Hastings L.J. 130.
43. Jingzhou Tao, *Resolving Business Disputes in China*, 1st ed. (The Hague, Kluwer Law International, 2005) at 1,012-1,013; Reif, *supra*, footnote 1, at p. 630.
44. Tao, *ibid.*, at 1,013-1,014, 1,201-1,401.
45. See, *e.g.*, Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (1988 as am.), art. 26 (consultation, mediation or arbitration); Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (1979 as am.), art. 15 (consultation, conciliation or arbitration); *Contract Law of the PRC* (1999), art. 128 (settlement, mediation, arbitration or litigation); Tao, *ibid.*, at 1,011, 1,013.
46. Tao, *ibid.*, at 1,014.
47. *Ibid.*, at 1,401; Wang Wenying, "Distinct Features of Arbitration in China: An Historical Perspective" (2006), 23 J. Int'l Arb. 49.

the tribunal may conduct the mediation, and if it is successful, the tribunal shall enshrine the terms of the settlement agreement in the arbitral award.[48]

The main institutions that handle international commercial arbitration in the PRC are the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC).[49] Med-arb is commonly used in international commercial arbitrations held under the auspices of CIETAC and CMAC.[50]

The CIETAC Arbitration Rules were revised in 2005.[51] The CIETAC arbitration rules also provide for med-arb to be conducted by the arbitral tribunal in the manner it considers appropriate where both parties agree or where one party desires med-arb and the other agrees thereto when approached by the tribunal.[52] If a settlement agreement is reached, whether via the mediation or by the parties alone, the arbitral tribunal will close the case and render an arbitral award in accordance with the terms of the agreement.[53] If the mediation fails, the CIETAC rules prohibit the use of any opinions, statements, proposals, etc. made by either party or the tribunal in the mediation process in the subsequent arbitration or in any judicial or other proceedings.[54] Statistics show that CIETAC med-arb is used more for joint venture investment disputes than for commercial sale of goods cases, although the rate of successful med-arbs decreased considerably between 1986 and 2000.[55]

48. 1994 PRC Arbitration Law, art. 51, online at <http://www.cietac.org.cn/english/laws/laws_5.htm> (a reconciliation document can also be executed which is equally binding). Art. 49 permits the parties after an application for arbitration to reach settlement on their own initiative and, if they are successful, permits them to request that the tribunal render an arbitral award based on the settlement agreement.
49. Wenying, *supra*, footnote 47, at p. 55. CIETAC is established under the CCPIT/CCOIC. Domestic arbitration commissions have been able to hear foreign-related arbitrations since 1996, *ibid.*, at p. 70.
50. Tao, *supra*, footnote 43, at 1,401-1,603.
51. Online at <http://www.cietac.org.cn/english/rules/rules.htm>; Wenying, *supra*, footnote 47, at p. 52; Michael J. Moser and Peter Yuen, "The New CIETAC Arbitration Rules" (2005), 21 Arb. Int'l 391.
52. CIETAC Arbitration Rules, *ibid.*, art. 40(2) to (3).
53. *Ibid.*, art. 40(5) to (6). Also if there is a CIETAC arbitration agreement but the parties reach a settlement themselves without CIETAC, the parties can request CIETAC to render an arbitral award in accordance with the terms of their agreement: art. 40(1).
54. *Ibid.*, art. 40(8).
55. In 1993, 27.27% of med-arbs involved investment disputes and 45.45% involved sale of goods cases, and in 2000, 31.58% concerned investments and 15.79% sale of goods: Wenying, *supra*, footnote 47, at p. 77, Table 5. While 70% of CIETAC

## VI. RULES FOR USE BY BUSINESS PARTIES FOR THE CONCILIATION/MEDIATION OF INTERNATIONAL COMMERCIAL DISPUTES — UNCITRAL AND INTERNATIONAL CHAMBER OF COMMERCE RULES

As discussed earlier, parties to an international commercial contract often include dispute settlement clauses in their contracts that may include the use of conciliation/mediation. This section will focus on the UN Commission on International Trade Law (UNCITRAL) Conciliation Rules and the International Chamber of Commerce (ICC) ADR Rules issued for possible adoption by the parties to an international commercial contract. Underlying these rules is a philosophy of extreme party autonomy and flexibility. Thus, for example, disputants are permitted to exclude or vary these rules in most cases. Canadian parties to international commercial relationships who are considering the inclusion of mediation/conciliation rules in their contract (for example, in a multi-tiered dispute resolution clause) are likely to opt for one of these well-known international rules. However, many other conciliation/mediation rules have been created by various organizations and arbitration institutions around the world for adoption by disputants, including those in Asia as discussed above and those provided by the British Columbia International Arbitration Centre.[56]

### 1. 1980 UNCITRAL Conciliation Rules

UNCITRAL was established to promote the progressive harmonization and unification of international trade law through the creation of treaties, rules, model laws and uniform laws, the latter designed for use by states in formulating their domestic legislation.[57] UNCITRAL has addressed both arbitration and conciliation.[58] UNCITRAL issued Conciliation Rules in 1980, followed more recently by its 2002 Model Law on International Commercial Conciliation.[59]

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med-arbs were successful in 1986, by 2000 only 27% were: Wenying, *ibid.*, at p. 77.

56. See., *e.g.*, World Intellectual Property Organization (WIPO) Mediation Rules, online at <http://www.wipo.int/amc/en/mediation/rules/>; British Columbia International Arbitration Centre Mediation Rules, online at <http://wwwbci-cac.com/bcicac_mediation.php> (also encompasses med-arb).
57. UN G.A. Res. 2205, 21 UN G.A.O.R., Annex 3, UN Doc. A/6369 and Add. 1 an 2 (1966). See UNCITRAL online at <http://www.uncitral.org>.
58. See generally Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, 2nd ed. (The Hague, Kluwer Law International, 2004), *infra*, text accompanying footnotes 87 to 119.

The UNCITRAL Conciliation Rules are designed for adoption by parties to a dispute, either in the underlying contract or on an *ad hoc* basis, who wish to use conciliation as a means to settle their dispute.[60] Pursuant to Article 1(1) of the UNCITRAL Conciliation Rules (the Rules), they apply to the "conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply". While the Rules are not limited to business disputes or to an international relationship, the UN General Assembly resolution adopting the Rules recommended that they be used to settle disputes arising out of international commercial relationships.[61]

Article 1(2) of the UNCITRAL Conciliation Rules permits the parties to agree to, vary or exclude any of the Rules at any time. Pursuant to Article 2 of the Rules, conciliation proceedings can be started only if one party accepts a written invitation to conciliate made by the other party. The Rules provide for the appointment of one conciliator unless the parties agree that there shall be two or three conciliators.[62] The UNCITRAL Conciliation Rules contain a number of provisions governing the conciliation process. They include provisions dealing with the initial submission of party statements on the dispute and the matters in issue to the conciliator and to the other party, the right of the parties to be represented or assisted by persons of their choice and the role of the conciliator.[63] In particular, Article 7(1) of the Rules states that the conciliator is to assist the parties in an independent and impartial manner in their attempt to obtain an amicable settlement of the dispute. Moreover, in assisting the parties, the conciliator clearly can go beyond the strict application of law:

> The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.[64]

59. The UNCITRAL Model Law on International Commercial Conciliation is discussed below, see *infra*, text accompanying footnotes 95 to 119.
60. UNCITRAL Conciliation Rules, Report of the 13th Session, 35 UN G.A.O.R. Supp. (No. 17) at 12, UN Doc. A/34/17 (1980), UN G.A. Res. 35/52, 35 UN G.A.O.R. Supp. (No. 48) at 260, UN Doc. A/35/48 (1980); Reif, *supra*, footnote 1, at pp. 615-19.
61. UN G.A. Res. 35/52, *ibid.*, para. 1.
62. UNCITRAL Conciliation Rules, *supra*, footnote 60, art. 3. In the latter situation, art. 3 states that the conciliators "ought, as a general rule, to act jointly". Art. 4 contains detailed rules for appointment of the conciliator(s).
63. *Ibid.*, arts. 5-7.
64. *Ibid.*, art. 7(2).

Beyond these provisions, the conciliator is free to conduct the conciliation process in the manner she thinks appropriate, taking into account the circumstances of the case, the wishes of the disputing parties and the need for a speedy settlement.[65] Furthermore, the disputants undertake not to start arbitral or judicial proceedings over the same dispute while the conciliation process is ongoing unless such proceedings are, in the opinion of the acting party, necessary to preserve its rights.[66] The conciliator may meet or communicate with the parties, either separately or together. However, if factual information is received from one party, the conciliator must disclose the substance of that information to the other party unless it was initially provided on a confidential basis.[67] Article 7(4) of the UNCITRAL Conciliation Rules states that the conciliator may make dispute resolution proposals to the parties at any stage of the proceedings. In addition, the disputants are directed both to cooperate with the conciliator and to submit to the conciliator, on their own initiative or at her invitation, suggestions for the settlement of the dispute.[68] After the conciliator has been able to make a settlement proposal to the disputing parties, the parties are to provide their observations on the proposed terms. The conciliator may reformulate her recommendations in the light of these observations.[69] If the parties reach agreement on a settlement of their dispute, they must draft their own written settlement agreement unless they ask the conciliator to assist them or to draft it for them; once they have signed the agreement, they are bound by it and the dispute is deemed to have ended.[70] Alternatively, if the conciliation is seen to be unsuccessful, pursuant to Article 15 the conciliator or one or both of the disputing parties can terminate the conciliation proceedings. Article 14 of the Rules states that the parties and the conciliator must keep confidential all matters relating to the conciliation proceedings and the settlement agreement, except where disclosure of the latter is necessary for implementation and enforcement purposes. Pursuant to Article 19 of the UNCITRAL Conciliation Rules, the parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party, or be called as a witness, in any arbitration or litigation covering the same dispute. However, Article 1(2) of the

65. *Ibid.*, art. 7(3).
66. *Ibid.*, art. 16.
67. *Ibid.*, arts. 9(1) and 10.
68. *Ibid.*, arts. 11 to 12.
69. *Ibid.*, art. 13(1).
70. *Ibid.*, art. 13(2) to (3).

Rules indirectly permits the parties to agree otherwise to permit subsequent conciliator involvement in another capacity. Under Article 20, the parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not the proceedings relate to the dispute which was addressed in the conciliation, all views or suggestions made by a party concerning a possible settlement of the dispute, admissions made by a party during the conciliation proceedings, proposals made by the conciliator, or indications of a party's willingness to accept a settlement proposal made by the conciliator. Again, Article 1(2) of the Rules permits the parties to agree to vary or exclude this undertaking.

### 2. International Chamber of Commerce Rules: From Conciliation to ADR

The ICC plays an important role in the settlement of international business disputes. The ICC is particularly well known for its international commercial arbitration rules supported by the institutional mechanism of the International Court of Arbitration.[71] In addition, the ICC also supported conciliation as a mechanism for the settlement of international business disputes from its inception in 1923. ICC conciliation was actually more popular than arbitration prior to World War II.[72] However, international commercial arbitration became increasingly popular and, as a result, ICC conciliation has been very much underused in recent decades.[73] Various editions of the ICC Optional Conciliation Rules (the Conciliation Rules) had been offered for adoption by parties since 1923. The final version of the Conciliation Rules issued in 1988 was applicable to all business disputes of an international character, used a sole conciliator and gave the conciliator great freedom in the conduct of the conciliation process.[74]

On July 1, 2001, the ICC scrapped its Conciliation Rules and replaced them with its more generic ICC ADR Rules.[75] In the ICC context, "ADR" stands for "Amicable Dispute Resolution" given that

71. International Chamber of Commerce, online at <http://www.iccwbo.org>. See generally Craig, Park and Paulsson, *supra*, footnote 15; Schäfer, Verbist and Imhoos, *supra*, footnote 28.

72. Eric A. Schwartz, "International Conciliation and the ICC" (1995), 10 ICSID Rev.-F.I.L.J. 98 at p. 99; Reif, *supra*, footnote 1, at pp. 614-615; Schäfer, Verbist and Imhoos, *ibid.*, at p. 175.

73. Reif, *ibid.*, at pp. 612-15; Craig, Park and Paulsson, *ibid.*, at pp. 697-701. During the 1920s, when ICC conciliation was first used, conciliation was more popular than arbitration. However, starting in the late 1970s the ratio of requests for conciliation compared to requests for arbitration stood at a mere 1 to 3%.

74. ICC Rules of Optional Conciliation (in force January 1, 1988).

the ICC's ADR Rules exclude arbitration, which is covered under the separate ICC arbitration rules. The ICC ADR Rules can be modified by agreement of the parties subject to the approval of the ICC.[76] Broader than the former Conciliation Rules, the new ADR Rules apply to both domestic and international business disputes.[77] Also, the new ICC Rules envisage that ADR can be used not only as a replacement for or prelude to arbitration, but also during arbitration or litigation if the parties agree.[78]

The new ADR Rules allow the disputing parties to choose from a variety of dispute settlement mechanisms using a third party "Neutral". The disputing parties can jointly choose the Neutral but, in the event that they cannot do so, the Rules provide that the ICC shall make the selection.[79] The ICC ADR Rules contain basic directions on the conduct of the ADR procedure. Article 5(1) states that the Neutral and the parties shall promptly discuss and seek to reach agreement on the settlement technique to be used. However, specific dispute settlement methods that can be used are not even mentioned in the ADR Rules — with the exception of mediation, which is specified as the fallback mechanism in the event that the parties cannot agree on a method.[80] The definition of mediation found in the *Guide to ICC ADR* is that of the informal "settlement technique in which the Neutral acts as a facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The Neutral is not requested to provide any opinion as to the merits of the dispute."[81] Although this definition of mediation falls on the more informal end of the third party dispute settlement spectrum, given that it is not found in the Rules themselves and given the ability of the disputants to choose almost any kind of ADR method, the disputants should be able to empower the Neutral to provide an opinion on the merits of the dispute and also present written settlement proposals to the parties.

Beyond this, the ICC Rules are spare in content, providing "essentially for third-party-assisted negotiations, with the parties remaining in ultimate control".[82] Article 5(3) states that the Neutral

75. ICC ADR Rules (in force July 1, 2001), online at <http://www.iccwbo.org/index_adr.asp>. See also ICC, *Guide to ICC ADR* (2001).
76. ICC ADR Rules, *ibid.*, art. 1; *Guide to ICC ADR*, *ibid.*, at p. 3.
77. ICC ADR Rules, *ibid.*, art. 1.
78. ICC ADR Rules, *ibid.*, Preamble; *Guide to ICC ADR*, *supra,* footnote 75, at p. 4.
79. ICC ADR Rules, *ibid.*, art. 3(1). Art. 3(4) allows for designation of more than one Neutral if the parties agree or the ICC considers it appropriate.
80. ICC ADR Rules, *ibid.*, Preamble, art. 5(1) to (2). *Guide to ICC ADR*, *supra,* footnote 75, at p. 12, provides a non-exhaustive list of methods that could be used: mediation, neutral evaluation, mini-trial, any other settlement technique or a combination of settlement techniques.
81. *Guide to ICC ADR*, *ibid.*, at p. 12.

shall conduct the procedure in the manner she sees fit and that in all cases the Neutral shall be guided by the principles of fairness and impartiality and by the wishes of the parties. Article 5(5) states that each party shall cooperate in good faith with the Neutral. The ICC Rules also provide for the events that result in termination of the ADR proceedings, including when the parties sign a settlement agreement or one of the parties decides to end its participation in the proceedings.[83]

The ICC ADR Rules contain various protective provisions (also seen in the UNCITRAL Conciliation Rules), which can be altered if the parties agree otherwise or where in some cases the conduct is required by the applicable law. These cover confidentiality of proceedings and the settlement agreement;[84] prohibition on the use as evidence in later judicial, arbitral or other proceedings of documents, statements etc. submitted in the ADR proceedings, views expressed or admissions made by a party, views or proposals made by the Neutral or the indication given by a party that it was ready to settle;[85] and prohibition of the Neutral both against giving testimony and against acting (as a judge, arbitrator, expert or representative/adviser of a party) in any judicial, arbitration or similar proceedings relating to the dispute subject to the ADR proceedings.[86]

## VII. REFORMING DOMESTIC STATUTE LAW — UNCITRAL 2002 MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION

### 1. State Adoption of 1985 UNCITRAL Model Law and Addition of Conciliation/Mediation Provisions

By 2006, the 1985 UNCITRAL Model Law on International Commercial Arbitration (MLICA) had been used by over 70 countries to modernize their domestic statute law on international commercial arbitration.[87] While the MLICA makes no express mention

82. Schäfer, Verbist and Imhoos, *supra,* footnote 28, at p. 180.
83. ICC ADR Rules, *supra,* footnote 75, art. 6. For example, if there is agreement between the disputants to submit their dispute to the ICC ADR Rules, arts. 2.A and 6(1)(b) together provide that the party who wishes to withdraw can do so only after the Neutral and the parties have their initial discussion pursuant to art. 5(1). Pursuant to art. 2.B of the Rules, if there is no agreement to submit to the Rules and one disputant unilaterally files a request for ADR, the other disputant can decline to participate and the proceedings will not commence. If the other disputant accepts, art. 6(1)(b) will apply.
84. *Ibid.*, art. 7(1).
85. *Ibid.*, art. 7(2).
86. *Ibid.*, art. 7(3) to (4).

of the use of mediation or conciliation, over the years a number of states and territories when adopting the MLICA also added provisions to their legislation on the use of conciliation or mediation as a prelude or alternative to arbitration and/or in the context of med-arb.[88] These have ranged from simple policy statements, through some mention of the use of conciliation/mediation (*e.g.* Hong Kong), to a full legislative treatment of conciliation/mediation (*e.g.* Bermuda and India, relying on the UNCITRAL Conciliation Rules for their legislation).[89]

Canada quickly moved to adopt the MLICA in 1986. The Uniform Law Conference of Canada (ULCC) provided draft uniform legislation, and enacting statutes were passed at both the federal and provincial/territorial levels.[90] The ULCC uniform act added a supportive reference to the use of mediation and conciliation.[91] This provision does not call for mediation or conciliation to be used prior to or instead of arbitration; rather, it provides for consensual med-arb, *i.e.*, mediation or conciliation used during the arbitration, if both parties agree. While a few adopted statutes omit any reference to med-arb, most of the provinces and one territory replicated the ULCC provision in their legislation applicable to international commercial arbitrations held within their respective jurisdictions.[92] For example, Alberta's International Commercial Arbitration Act states that:

87. UNCITRAL online at <http://www.uncitral.org> (the Canadian provincial/territorial statutes implementing the MLICA are not included on the UNCITRAL status list).

88. The drafters of the 1985 Model Law did discuss the inclusion of references to conciliation in the Model Law: Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer, Kluwer, 1989) at p. 1118, pp. 1142-145.

89. Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (The Hague, Kluwer Law International, 2001), pp. 70-72; Nigel Rawding, "ADR: Bermuda's International Conciliation and Arbitration Act 1993" (1994), 10 Arb. Int'l 99; India: Ranbir Krishan, "An Overview of the Arbitration and Conciliation Act 1996" (2004), 21 J. Int'l Arb. 263; Pryles, ed., *Dispute Resolution in Asia, supra,* footnote 28, at p. 108 (Hong Kong SAR) and pp. 137-38 (India).

90. Uniform Law Conference of Canada, Uniform International Commercial Arbitration Act (April 1987), online at <http://www.ulcc.ca/> "Uniform Statutes"; *Proceedings of the Uniform Law Conference of Canada 1986 Meeting*, online at <http://www.bcli.org/ulcc/proceedings/1986.pdf> at pp. 25 and 54.

91. Uniform International Commercial Arbitration Act, *ibid.*, s. 6.

92. International Commercial Arbitration Act, R.S.A. 2000, C. I-5, s. 5; International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2, s. 4; International Commercial Arbitration Act, C.C.S.M., c. C151, s. 5; International Commercial Arbitration Act, R.S.O. 1990, c. I.9, s. 3; International Commercial Arbitration Act, S.N.B. 1986, c. I-12.2, s. 5; International Commercial Arbitration Act, R.S.N.S. 1989, c. 234, s. 6; International Commercial Arbitration Act, R.S.P.E.I. 1988, c. I-5, s. 5; International Commercial Arbitration Act, R.S.N.L. 1990, c. I-

> For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.[93]

Most of the provinces and territories including a med-arb provision followed the ULCC uniform Act and incorporated the MLICA in their legislation by schedule. Article 30(1) of the MLICA states that if the parties settle the dispute during the arbitration, the arbitral tribunal can record the settlement in the form of an arbitral award on agreed terms if requested by the parties and not objected to by the tribunal. Article 30(2) states that such an award has the same status and effect as any other arbitral award on the merits. While the MLICA does not expressly refer to settlement using mediation or conciliation, Article 30 is drafted sufficiently broadly to encompass settlement by any means, including conciliation or mediation. Accordingly, the successful use of med-arb permitted in these provincial and territorial statutes leads to the operation of Article 30 of the MLICA and the ability to incorporate an ensuing settlement agreement in a binding arbitral award.

British Columbia has adopted the same ability to use med-arb and then incorporate any resulting settlement agreement in an arbitral award using its own statutory language. Section 30 of the British Columbia International Commercial Arbitration Act states:

> (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
>
> (2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal must terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
>
> . . . . .
>
> (4) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.[94]

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15, s. 6; International Commercial Arbitration Act, R.S.Y. 2002, c. 123, s. 3. The federal Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), NWT International Commercial Arbitration Act, R.S.N.W.T. 1988, c. I-6, Nunavut's statute which duplicates the NWT Act, and the Quebec Code of Civil Procedure, R.S.Q., c. C-25, ss. 940 to 951.2 do not contain references to med-arb.

93. International Commercial Arbitration Act (Alberta), *ibid.* These legislative provisions, based on the uniform statute, appear to maintain a distinction between mediation and conciliation.

The inclusion of the med-arb provision in the settlement section of the B.C. legislation makes it clear that a settlement agreement obtained through med-arb in an international commercial arbitration held in British Columbia can be enforced through the vehicle of an arbitral award.

Thus, most Canadian jurisdictions have a very supportive approach to med-arb during an international commercial arbitration, allowing consensual med-arb and effectively permitting any ensuing settlement agreement to be incorporated into a binding arbitral award.

### 2. 2002 UNCITRAL Model Law on International Commercial Conciliation

UNCITRAL interest in a model law on international commercial conciliation was engendered by the practice described above where some states unilaterally added provisions on mediation and conciliation when they adopted the MLICA in domestic law.[95] UNCITRAL was motivated to try to unify domestic laws on conciliation because of the differing statutory treatment and the increasing use of conciliation/mediation in commercial dispute settlement globally.[96] UNCITRAL began its consideration of a model law in 1999, and in 2002 the UNCITRAL Model Law on International Commercial Conciliation (MLICA) was adopted both by UNCITRAL and the UN General Assembly.[97] The MLICA follows the general contours of the earlier UNCITRAL Conciliation Rules. This approach has been criticized on at least two grounds. First, it is said that the

94. The International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, s. 30(1). Art. 30(1) does not expressly refer to resumption of the arbitration by the same arbitrators if the mediation fails but this can be inferred from the language used.

95. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, 2nd ed., *supra*, footnote 58, at p. 199.

96. UNCITRAL, *UNCITRAL Model Law on International Commercial Conciliation With Guide to Enactment and Use 2002*, online at <http://www.uncitral.org> (hereafter *UNCITRAL MLICC Guide to Enactment and Use 2002*), paras. 8, 17.

97. Adopted by UNCITRAL on June 24, 2002 and by UN General Assembly on November 19, 2002, UN G.A. Res. 57/18, UN Doc. A/RES/57/18 (January 24, 2003). See *UNCITRAL MLICC Guide to Enactment and Use 2002*, *ibid.*; Eric van Ginkel, "The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal" (2004), 21 J. Int'l Arb. 1; Shavit Matias, "Developing Mechanisms for the Resolution of International Disputes: The UNCITRAL Model Law on International Commercial Conciliation" in Albert Jan Van Den Berg, ed., *International Commercial Arbitration: Important Contemporary Questions* (The Hague, Kluwer Law International, 2003), p. 190; José Maria Abascal, "Some Remarks on the UNCITRAL Model Law on International Commercial Conciliation" in *New Horizons*, *supra*, footnote 26, at p. 415.

provisions should have been reviewed and updated where necessary. Further, the UNCITRAL Rules were designed for incorporation in a contract whereas a model law is a template for legislation, requiring the consideration of broader public interest concerns.[98]

The MLICC applies to international commercial conciliation, with "international",[99] "commercial"[100] and "conciliation" defined. The MLICC also allows the parties to agree to the application of the law to domestic commercial conciliation. For the purposes of the MLICC, conciliation is defined as:

> 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. The conciliator does not have the authority to impose upon the parties a solution to the dispute.[101]

Thus, mediation, conciliation and other types of non-binding ADR are treated synonymously, and this is likely to be reflected in the choice of terminology used by enacting states, who may use the term "mediation" when it is more familiar in the domestic context. The basis for the conciliation/mediation is irrelevant (*i.e.* whether it is based on agreement of the parties or an obligation established by law), but the MLICC does state that it does not apply to med-arb or where a judge attempts to facilitate settlement during judicial proceedings.[102] Thus, the MLICC applies only to conciliation/mediation conducted prior to or instead of litigation or arbitration.

98. van Ginkel, *ibid.*, at pp. 8-9.

99. UNCITRAL Model Law on International Commercial Conciliation, *supra,* footnote 96, art. 1(4). Art. 6 of the MLICC also permits the parties to agree that the conciliation is international. UNCITRAL also allows that the MLICC can be extended to cover domestic conciliation with minor amendments, *UNCITRAL MLICC Guide to Enactment and Use 2002*, *supra,* footnote 96, at para. 34.

100. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 1, footnote 3, with "commercial" to be defined widely, covering matters arising from all relationships of a commercial nature whether contractual or not, and including a non-exhaustive descriptive list including sales of goods or services, indirect sales, construction, consulting, engineering, investment, concessions and joint ventures.

101. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 1(3); *UNCITRAL MLICC Guide to Enactment and Use 2002*, *supra,* footnote 96, paras. 7 and 31.

102. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 1(9). Other laws of the state may allow med-arb and the MLICC is not designed to affect this situation, leaving it to the discretion of arbitrators and disputants on the basis of the applicable law: *UNCITRAL MLICC Guide to Enactment and Use 2002*, *ibid.*, paras. 38 and 81. UNCITRAL also avoided rules for determining the place of conciliation given the disputants often do not specify the place of conciliation in advance and the proceedings may be held in more than one place: *ibid.*, para. 30.

As with the UNCITRAL and ICC rules, the MLICC allows the parties to agree to exclude the application of the MLICC (as enacted in domestic law).[103] The MLICC also permits the parties to agree to exclude or vary any of the provisions of the law, with several limited exceptions.[104]

Conciliation proceedings start on the date that the parties agree to engage in conciliation, but if the invitation to conciliate made by one party is not accepted by the other within specified time limits, the former can treat this as a rejection of the invitation.[105] The MLICC specifies that there will be one conciliator unless the parties agree otherwise, and provides fallback rules for the appointment of the conciliator(s).[106] The MLICC rules for the conduct of the conciliation are simple and generally flexible. The disputants can agree on the rules governing the conduct of the conciliation (such as the UNCITRAL or ICC rules discussed above), but if they are unable to reach agreement the conciliator is permitted to conduct the proceedings in a manner she considers appropriate taking into account the circumstances of the case, any wishes of the disputants and the need for speedy settlement.[107] The conciliator is required to seek to maintain fair treatment of the parties in conducting the proceedings taking into account the circumstances of the case, and this rule cannot be modified or excluded by the parties.[108] The MLICC permits the conciliator to meet or communicate with the parties together or with each of them separately, and permits the conciliator to disclose the substance of information received from one party to the other unless it is given on a confidential basis.[109] The conciliator may make proposals for dispute settlement at any stage of the proceedings.[110] Conciliation proceedings terminate on the occurrence of listed grounds, such as conclusion of a settlement agreement or by declarations made by the disputants or the conciliator.[111]

103. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 7.
104. *Ibid.*, art. 3, prohibiting changes to arts. 2 (rules of interpretation of the MLICC) and 6(3) (conciliator shall seek to maintain fair treatment of the parties in conducting the proceedings).
105. *Ibid.*, art. 4.
106. *Ibid.*, art. 5.
107. *Ibid.*, art. 6(1) to (2); *UNCITRAL MLICC Guide to Enactment and Use 2002, supra,* footnote 96, at para. 53.
108. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, arts. 6(3) and 3; *UNCITRAL MLICC Guide to Enactment and Use 2002, ibid.*, at para. 55, considers this to be a "minimum standard to be observed mandatorily by a conciliator".
109. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, arts. 7 to 8.
110. *Ibid.*, art. 6(4).
111. *Ibid.*, art. 11.

The MLICC also includes the protective provisions found in other international rules on conciliation/mediation. All information relating to the conciliation proceedings shall be kept confidential unless the parties agree otherwise or if disclosure is required by law or for the purposes of implementation or enforcement of the settlement agreement.[112] Any party to a conciliation, the conciliator and any third parties are prohibited from using information surrounding or arising out of the conciliation proceedings in arbitral, judicial or similar proceedings whether or not these later proceedings relate to the dispute that was the subject-matter of the conciliation proceedings.[113] Similarly, disclosure of this information cannot be ordered by a court, arbitral tribunal or other competent government entity.[114] Also, the conciliator is prohibited from acting as an arbitrator of a dispute that is or was the subject of the conciliation proceedings or of another dispute unless the parties agree otherwise.[115]

The MLICC also addresses the issue of the enforcement of an agreement to conciliate. Article 13 of the MLICC states:

> Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.[116]

While the drafters were unable to agree on a general rule to prohibit disputants from launching adjudicative proceedings while a conciliation is pending for fear that it might dissuade parties from entering into agreements to conciliate, they did provide for enforcement of an agreement to conciliate in the limited situations described in Article 13 which, if enacted in domestic systems, will provide some legal uniformity and certainty.[117]

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112. *Ibid.*, art. 9.

113. *Ibid.*, art. 10; *UNCITRAL MLICC Guide to Enactment and Use 2002*, *supra*, footnote 96, paras. 24 and 64 ("similar proceedings" catch *e.g.* depositions and discoveries).

114. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 10(3).

115. *Ibid.*, art. 12. An early draft of the MLICC contained a provision on arbitrators acting as conciliators but it was deleted because it was thought to be inappropriate to provide uniformity in an area with such conflicting practice internationally: *UNCITRAL MLICC Guide to Enactment and Use 2002*, *supra*, footnote 96, para. 81.

116. UNCITRAL Model Law on International Commercial Conciliation, *ibid.*, art. 13.

Based on the wide disparities in treatment among jurisdictions, the drafters of the MLICC were also unable to agree on a mandatory provision for the enforcement of any resulting settlement agreement (for example, treating it as or like an arbitral award or court judgment rather than as a mere contract between the parties), effectively leaving it to enacting states to decide the issue for themselves.[118]

As of 2006, the MLICC has been enacted into law in differing degrees in four countries, and the United States was influenced by the MLICC negotiations in the drafting of its uniform mediation legislation.[119]

### 3. Implementation of the UNCITRAL Model Law on International Commercial Conciliation in Canadian Law

Given the subject-matter of the MLICC and the federal-provincial division of powers, any enacting legislation in Canada will have to be passed by the provincial/territorial legislatures (and by Parliament for ADR of disputes under federal jurisdiction). In August 2004, the ULCC created a Working Group to draft uniform legislation to enact the MLICC.[120] The Uniform [International] Commercial Mediation Act was adopted by the ULCC in 2005 with the recommendation that it be adopted by jurisdictions in Canada.[121]

The ULCC uniform act follows the MLICC closely, although some language was simplified and modifications were made to adapt the act to the Canadian environment.[122] The term "conciliation" is

117. See evolving jurisprudence on this issue in some countries, *supra*, footnote 28; *UNCITRAL MLICC Guide to Enactment and Use 2002*, *supra*, footnote 96, at para. 83.

118. UNCITRAL Model Law on International Commercial Conciliation, *supra*, footnote 96, art. 14; *UNCITRAL MLICC Guide to Enactment and Use 2002*, *ibid.*, at paras. 87-88. Art. 14 states: "If the parties conclude an agreement settling a dispute, that settlement is binding and enforceable . . . *[the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]*", with a note that an enacting state may consider the possibility of an settlement enforcement procedure being mandatory.

119. Hungary, Croatia, Nicaragua and Canada (Nova Scotia). Six U.S. states have enacted statutes based on the U.S. uniform legislation: Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington. See online at <http://www.uncitral.org.>

120. Uniform Conference of Canada, Civil Section, *Activities and Priorities of the Department of Justice in Private International Law*, Report of the Department of Justice Canada 2006 (Edmonton, August 20-24, 2006), online at <http://www.ulcc.ca/en/poam2/DOJ_Activities_Private_Intl_Law_2006_En.pdf>, at para. 82.

121. *Ibid.* The Canadian Bar Association (CBA) also issued a 2005 report supporting the adoption of the MLICC in Canadian legislation: Canadian Bar Association, Submission on Adoption of UNCITRAL Model Law on International Commercial Conciliation in Canada (February 2005). The CBA Report at p. 8 recommended that the ULCC prepare a Canadian version of the MLICC and make some adaptations to the MLICC, some of which are found in the uniform act.

replaced by "mediation" to reflect Canadian usage.[123] Canadian jurisdictions are given the option of applying the act to domestic as well as to international commercial mediations.[124] The MLICC flexibility given to disputants to exclude or modify most provisions is maintained in s. 1(2) of the uniform act.[125] The uniform act's provisions on commencement and termination of the mediation proceedings are simplified while maintaining most of the substance of the MLICC.[126]

The MLICC provisions on protecting confidentiality of information *vis-à-vis* third parties (MLICC Article 9) and on non-admissibility of evidence obtained in a mediation in any other proceedings (MLICC Article 10) are enacted in the uniform act and supplemented by an additional exception to the non-disclosure and non-admissibility rules that permits the mediator to disclose information and admit it in evidence as required for the mediator to respond to a claim of misconduct.[127] Article 13 of the MLICC on enforcement of a conciliation agreement is altered slightly in s. 10 of the uniform act.[128] However, s. 11 of the uniform act does state that a resulting

122. Uniform Law Conference of Canada, *Briefing Note — Uniform International Commercial Mediation Act* (September 7, 2005).

123. Uniform Law Conference of Canada, *Uniform [International] Commercial Mediation Act* (adopted 2005), online at <http://www.ulcc.ca/> "Uniform Statutes", Title, Comment. Section 1(3) of the uniform act defines mediation as: "a collaborative process in which parties agree to request a third party (a mediator) to assist them in their attempt to try to reach a settlement of their commercial dispute. A mediator does not have any authority to impose a solution to the dispute on the parties."

124. *Uniform [International] Commercial Mediation Act*, *ibid.*, s. 1, Comment. However, s. 1(6) of the act enables jurisdictions to exclude mandatory mediation systems (*e.g.* Ontario Mandatory Mediation Program) from the ambit of the act.

125. *Ibid.*, s. 1(2), excepting ss. 2 (interpretation of the act) and 5(4) (mediator must maintain fair treatment of the parties).

126. *Ibid.*, s. 3. The MLICC art. 11(b) requirement that the conciliator is to consult with the parties before declaring the conciliation terminated was excluded in the uniform Act.

127. *Ibid.*, ss. 7(2) and 8 (*e.g.*, claims of malpractice or professional misconduct).

128. *Ibid.* Compared with art. 13 of the MLICC, *supra*, text accompanying footnotes 116-17, s. 10 of the uniform act states:

> (1) The parties to a mediation may agree not to proceed with arbitral or judicial proceedings before a mediation is terminated. However, an arbitrator or court may permit the proceedings to proceed if the arbitrator or court considers that it is necessary to preserve the rights of any party or is otherwise necessary in the interests of justice. The arbitrator or court may make any order necessary.
>
> (2) Commencement of arbitral or judicial proceedings is not of itself to be regarded as a termination of the agreement to mediate disputes or as termination of a mediation.

settlement agreement may be registered with the courts, making it enforceable as if it were a judgment.

While s. 9 of the uniform act states that a mediator must not act as an arbitrator in the same or a similar dispute, s. 1(2) permits the disputants to exclude this provision. Thus, the disputants can agree on the use of the same person as mediator and arbitrator in a sequential mediation and arbitration. Although the *Report of the Working Group* states that "med-arb . . . is not allowed under the act but parties may expressly agree to it",[129] the MLICC express non-application to med-arb is not found in the Canadian uniform act. The latter provides merely a simple clause enabling jurisdictions to exclude the application of the act to provincial mandatory mediation programs.[130] Accordingly, if the parties to a mediation exclude the application of s. 9 of the uniform act, it can be argued that the uniform act can also be applied to the mediation element of a med-arb held within a Canadian jurisdiction (unless the statute drafters add a new provision expressly excluding med-arbs from the scope of the enacting legislation). As discussed above, most of the international commercial arbitration statutes in Canada already permit the disputants to agree on the use of med-arb in an international commercial arbitration held in the particular province or territory.

In Canada, there was slight legislative movement by mid-2006. Nova Scotia adopted its Commercial Mediation Act in 2005 based on the MLICC and the ULCC uniform act.[131] It is interesting to note that Nova Scotia did address the application of its act to med-arbs, excluding the act from applying to mediations conducted in the course of an arbitration under the Commercial Arbitration Act unless the parties to the mediation agree otherwise.[132] The enacting legislation is silent on the med-arb provisions in Nova Scotia's international commercial arbitration statute.

## VIII. CONCLUSION

Although conciliation/mediation is used infrequently in the settlement of international commercial disputes, this form of ADR

129. Uniform Law Conference of Canada, Civil Law Section, *Uniform Act on International Commercial Mediation, Report of the Working Group* (St. John's, Newfoundland and Labrador, August 21-25, 2005), at para. 25.

130. *Ibid.*, s. 1(6); UNCITRAL Model Law on International Commercial Conciliation, *supra,* footnote 96, art. 1(9); Uniform Law Conference of Canada, Civil Law Section, *Uniform Act on International Commercial Mediation, Report of the Working Group, ibid.*, at para. 25.

131. Commercial Mediation Act, S.N.S. 2005, c. 36.

132. *Ibid.*, s. 4(3)(a).

does appear to be gaining in popularity at the contractual drafting stage as a preliminary or alternative to arbitration, for example in the construction sector. Increasing numbers of practitioners are supportive of the greater use of mediation/conciliation in this fashion in international commercial dispute settlement as evidenced by the burgeoning literature.[133]

Canadian parties should consider mediation/conciliation as a first stage dispute settlement process in a multi-tiered dispute settlement clause in their international commercial contracts, and they may also encounter contractual partners who wish to draft dispute resolution clauses in this manner. The international rules on mediation/conciliation issued by UNCITRAL and the ICC are good choices for incorporation in the contract. They provide flexible rules but with provisions that protect the confidentiality of the proceedings and the neutrality of the third party conciliator/mediator. They also guard against the subsequent use of information presented during the mediation/conciliation (although even these provisions can be excluded or modified by the parties). This use of mediation/conciliation, while under-utilized, is relatively uncontroversial.

However, the use of mediation during an international commercial arbitration (med-arb) is more controversial (especially where the arbitrator also acts as the mediator), although it is an accepted practice in East Asia. Canadian businesses that contract with East Asian parties and contemplate international commercial arbitration for the settlement of their disputes need to consider that if Asian commercial arbitration rules are selected they often permit the use of mediation by the arbitrators if the disputants consent thereto. Med-arb provisions have also been included in laws and in arbitration institutional rules in some other jurisdictions. Canada is one of these jurisdictions. Many of the provincial international commercial arbitration statutes permit the arbitrators to use mediation or conciliation during the arbitration if the parties agree and the B.C. International Arbitration Centre Mediation Rules encompass med-arb.[134]

The recent UNCITRAL Model Law on International Commercial Conciliation (MLICC) attempts to promote the unification of domestic statute law to support international (and domestic) mediation/conciliation held within the jurisdiction. The MLICC applies to mediations held prior to or instead of arbitration or litigation and does not apply to med-arb. The ULCC quickly adopted the Uniform

133. *E.g.* on multi-tier clauses, *supra*, footnote 26; Craig, Park and Paulsson, *supra*, footnote 15, at pp. 700-701; Wälde, *supra*, footnote 16.

134. See *supra*, footnotes 92, 94 and 56.

[International] Commercial Mediation Act based on the MLICC and the uniform act has already been used by one province to enact commercial mediation legislation. The uniform legislation, however, is drafted in such a way that it is also possible for the disputants to agree to apply the legislation to the mediation element of a med-arb. If this result is not desired, statutory drafters should include a provision in the enacting legislation that expressly excludes the law's application to med-arb. At this date, it remains to be seen whether the remaining jurisdictions in Canada will enact (international) commercial mediation legislation based on the ULCC statute and whether the use of international commercial mediation in Canada will become more popular.

# SYMPOSIUM ON THE CANADIAN SECURITIES TRANSFER LEGISLATION*

## CONTENTS



* The following papers and the comment by Professor Khimji were delivered at the 36th Annual Workshop on Commercial and Consumer Law held at the Banff School of Fine Arts on October 27-28, 2006. The comprehensive and authoritative paper by Eric Spinks on the Uniform Securities Transfer Act will be published in the next issue of the *Canadian Business Law Journal*.