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Commercial dispute settlement: issues for the future

Conciliation: Enforcement of settlement agreements

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Introduction

This paper discusses problems which may arise in making settlements resulting from conciliation enforceable.

In this context of the UNCITRAL 2007 Congress, it seems natural to discuss the topic of this paper with the UNCITRAL Model Law on International Commercial Conciliation of 2002 (the “Conciliation Model Law”) as a starting point. The text of the Conciliation Model Law, its Guide to Enactment (the “Guide to Enactment”) and the *Travaux Préparatoires* can be found at www.uncitral.org, Commission Texts, The Model Law on International Commercial Conciliation. The Guide to Enactment and the *Travaux Préparatoires* contain very useful information and discussions on conciliation and on the topic of enforcement of settlements resulting from conciliation but stop short of identifying many of the problems arising in the enforcement and in suggesting solutions to those problems.

Conciliation

The Guide to Enactment provides a description of what shall be understood as “conciliation” (paras 5- 7), which description is useful and used for the purposes of this paper.

”The term “conciliation” is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation.”

“An essential feature of conciliation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome, and the process is nonadjudicatory. In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute (see A/CN.9/WG.II/WP.108, para. 11). The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.”

“In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution..”

The Model Law uses the term “conciliation” to encompass all such non-adjudicatory procedures. So does this paper.

The increasing importance of conciliation is reflected in the Guide to Enactment (paras 8 and 39).

“Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. In addition, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted conciliation as a method of dispute settlement, and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation (see A/CN.9/WG.II/WP.108, para. 15). The greater focus on these methods of dispute settlement is justified particularly because the success rate of these methods has been high; in fact, in some countries and industrial sectors, it has been surprisingly high.”

“The Commission noted that conciliation was being used with success in the case of complex, multiparty disputes. Notable examples of these include disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor’s contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations.”

Enforcement

Article 14, “Enforceability of settlement agreement”, of the Conciliation Model Law:

“If the parties conclude an agreement settling a dispute, that settlement agreement 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*].”

reflects the fact that states have different solutions to the question of enforceability of settlements resulting from conciliation, and that UNCITRAL at the time of preparation of the Conciliation Model Law was not ready to suggest a universally applicable solution. Thus, in the Guide to Enactment it is stated (para 88):

“The text of the article reflects the smallest common denominator between the various legal systems. In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation. Article 14 thus leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable domestic law or to provisions to be formulated in the legislation

enacting the Model Law. In finalizing this article, the Commission noted that the purpose of the Model Law was not to discourage laws of the enacting State from imposing form requirements.”

The importance of enforcement in the context of conciliation is reflected in the Guide to Enactment (paras 87 and 89 – 91):

“Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award (A/CN.9/514, para. 77).”

“Various examples of treatment of the issue of expedited enforcement of settlement agreements in domestic legislation are outlined below, with a view to facilitating consideration of possible options by legislators enacting the Model Law.”

“Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts has been restated in some laws on conciliation (A/CN.9/514, para. 78).”

“In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. Such legislation and practice were reported, for example, in Hungary and the Republic of Korea. In China, where conciliation may be conducted by an arbitral tribunal, legislation provides that if conciliation leads to a settlement agreement, the arbitral tribunal shall make a written conciliation statement or make an arbitration award in accordance with the settlement agreement. A written conciliation statement and a written arbitration award shall have equal legal validity and effect. In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. For example, under Australian legislation, agreements reached in conciliation held outside the sphere of court-annexed conciliation schemes cannot be registered with the court unless court proceedings are on foot, whereas, in court-annexed conciliation schemes, a court may make orders in accordance with the settlement agreement and the orders have legal force and are enforceable as such (A/CN.9/514, para. 79).”

“Some legal systems provide for enforcement in a summary fashion if the parties and their counsel signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement. Also, settlements might be the subject of expedited enforcement if, for example, the settlement agreement was notarized or formalized by a judge. For example, in Bermuda, legislation provides that if the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement, the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the court or a judge thereof, be enforced in the same manner as a judgement or order to the same effect, and where leave is so given, judgement may be entered in terms of the agreement. Similarly, in India, a settlement agreement that has been signed by the parties is final and binding on the parties and persons claiming under them respectively and shall have the same status and effect as if it is an arbitral award. In Germany, the *Zivilprozeßordnung* (Code of Civil Procedure) expressly takes account of the practice that amicable settlement of a dispute is often reached during the arbitration procedure by providing that the tribunal shall record the settlement in the form of an arbitral award on agreed terms, if requested by the parties, and such an award shall have the same effect as any other award on the merits of the case. However, in some jurisdictions the enforceability of a settlement agreement reached during conciliation proceedings will only apply if the settlement agreement was reached between the parties to an arbitration or arbitration agreement. For example, in the Hong Kong Special Administrative Region of China, where conciliation proceedings succeed and the parties make a written settlement agreement (whether prior to or during arbitration proceedings), such agreement may be enforced by the Court of First Instance as if it were an award, provided that the settlement agreement has been made by the parties to an arbitration agreement. This provision is supported by Order 73, rule 10, of the Rules of the High Court, which applies the procedure for enforcing arbitral awards to the enforcement of settlement agreements so that summary application may be made to the court and judgement may be entered in terms of the agreement (A/CN.9/514, para. 80).”

Issues

As described in the Guide to Enactment (paras 89 and 90), a settlement resulting from conciliation in terms of enforceability can be understood as distinctly different things, either enforceable as a contract or enforceable as an arbitral award.¹ Here, it is the latter case that will be discussed. More precisely, the discussion will concentrate on a settlement being enforceable after having been recorded in an arbitral award, often called a “consent award”, an “award on consent” or an “award on agreed terms”.

A number of issues present themselves, if the law should permit a settlement reached in conciliation to be recorded in an enforceable arbitral award. The aim is here to highlight issues which may have to be resolved or at least be understood if UNCITRAL should wish to present a solution for legislators to consider for introduction in their arbitration laws. To a large extent this paper draws on problems that have been experienced in various countries, and takes in many instances as a starting point the UNCITRAL Model Law on International Commercial Arbitration (the “Arbitration Model Law”), being the model for arbitration laws in about 55 countries. In its article 30 provisions on awards on agreed terms can be found.

Also international conventions in the field of enforcement of arbitral awards are relevant in this context. Here, I will only look at the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 (the “New York Convention”). The New York Convention does not specifically address awards on agreed terms but the predominant view seems to be that it does cover also such awards².

My hope is that the discussions in this paper shall be useful if UNCITRAL should prepare a proposal on a legislative solution for the enforceability of settlement agreements.

Form Requirements

The requirements as to form varies from country to country. The Arbitration Model Law (article 31) prescribes that the award shall be in writing and be signed by the arbitrators (with one exception of no relevance here), that the date and place of the arbitration shall be stated, and that reasons are to be stated in the award, unless the parties have agreed that no reasons are required or the award is an award on agreed terms. The New York Convention requires an award to be in writing but does not require reasons to be given.³

Although typically not spelled out in the legislative text of arbitration laws, including the Arbitration Model Law, other requirements exist as to what is required to make a decision of an arbitral tribunal an award, such as the specification of the parties with their addresses, information detailed enough to define the dispute between the parties, a clear and precise decision finally disposing of a disputed claim.

In principle, there seems to be no reason to deviate from these form requirements in case of awards on agreed terms.

In the case of an award on agreed terms, there is no identifiable need for reasons for the award other than a description that there has been a settlement. Thus, it seems justified to dispense from the requirement

¹ In some countries such as Bermuda and India, as mentioned in The Guide to Enactment, and Croatia, for the purpose of its enforcement, the settlement agreement itself has the status and effect as an award on agreed terms. I have chosen not to discuss that possibility here because of the problems which are inherent in that solution. The major problem is that, without the scrutiny by an arbitral tribunal, there is a substantial risk of the settlement agreement not meeting minimum requirements necessary for enforcement. Most of the issues discussed in this paper in connection with awards on agreed terms also present themselves with respect to enforceable settlement agreements but an additional problem in this case is that there is no correcting mechanism similar to that which is performed by the arbitral tribunal in the case of awards on agreed terms.

² For example Gino Lörcher, *Enforceability of Agreed Awards in Foreign Jurisdictions*, *Arbitration International*, Vol. 17 No. 3 (2001), pp. 275 and n. 19, Kluwer Law International.

³ The requirement of writing seems for good reasons to be taken for granted. As to reasons for an award, see for example Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, pp. 380 – 382, 1981 Kluwer Law and Taxation Publishers.

that reasons should be included in the award. As mentioned this is also the solution adopted by the Arbitration Model Law (article 31 (2)) and other arbitration laws⁴.

Where parties have settled their dispute, and as the role of the arbitral tribunal is limited (see below), it could be considered if it should be possible for the parties to agree that only the chairman is required to sign the award. The Arbitration Model Law does not include that possibility.

Another question is if the arbitral tribunal shall include the settlement agreement in its entirety or only make extracts from the settlement agreement, and if so, in which situations?

A question which may be referred to as a matter of form is if there is a requirement of clarity for the settlement to be recorded in an award. Must payment and other performance obligations being agreed in the settlement be written with the same precision as reliefs ordered in an award? Or shall the arbitral tribunal reformulate such obligations in the award into orders?

I would assume that the answer to these questions is that the award on agreed terms must be clear enough for enforcement to be possible without any reformulation or interpretation of its meaning. The purpose of recording a settlement in an award is to provide for finality and enable expedited enforcement. Therefore, an award on agreed terms should meet at least those requirements which are needed for enforcement purposes.

In cases where the parties request the arbitral tribunal to make an award on agreed terms, there seems to be a risk that problems of clarity and precision can arise as the parties when negotiating a settlement are more focused on the substance of the settlement than on the need to meet formal requirements of an award.

The Scope and Contents of the Settlement

A situation that can arise is that the settlement of the parties disposes of only some of the claims being arbitrated. Such a situation should not be a problem as it is equivalent with the one when a partial award disposing of some of the claims in the arbitration is made. The remaining issues will then have to be arbitrated.

A more difficult situation is where the settlement includes matters which are not within the jurisdiction of the arbitrators, either because such matters fall outside the arbitration agreement or because they have not been submitted to the arbitrators for determination.

If the settlement disposes of matters not covered by the arbitration agreement clearly the arbitral tribunal does not have jurisdiction to render an award on such matters. Maybe there is a possibility to rectify the situation by the parties, with the concurrence of the arbitrators, extending the arbitration agreement to cover also those matters. Whether such extension can be implied by the fact that the parties request the settlement to be recorded in an award is doubtful. The requirement of the New York Convention that the arbitration agreement has to be in writing (article II 2. and the Recommendation adopted by UNCITRAL in 2006 regarding the interpretation of that paragraph and article VII 1 of the New York Convention⁵) should be taken into account.

Also, if the matters being settled are not covered by the submission to arbitration, the arbitral tribunal does not have jurisdiction. Again, here there may be a possibility to rectify the situation by introducing the matters into the arbitration with the concurrence of the arbitrators.

In case the settlement includes claims which are outside the arbitration, the New York Convention leaves the door open for a partial enforcement of matters dealt with in an award, which are covered by the submission to arbitration, if they can be separated from those matters not submitted to arbitration (article V (c)). However, that possibility may not be applicable to an award on agreed terms as a settlement

⁴ For example the English Arbitration Act, article 52 (4) and the German Code of Civil Procedure section 1053.

⁵ Commission Report UN-Doc A/61/17 Annex II.

typically is a package deal covering several items where some items can not be separated from other items.

A particular situation is the one where the settlement includes matters which are tried in a different forum, which would mean that there could be a problem of *lis pendens*.

A further issue can be that the settlement obliges or gives rights to a party who is not a party to the arbitration. This could be the case for example where both or one of the parties belong to a group of companies where the agreed performance should be made or rights be exercised by a subsidiary, a parent or sister company. An award on agreed terms cannot of course bind or give rights to the third party. A subsidiary question is if the arbitral tribunal this notwithstanding shall record the settlement in an award. In such situations the dispute before the arbitral tribunal is settled and the arbitration shall be terminated. If the law obliges the arbitral tribunal to record the settlement in an award⁶ or both parties request the arbitral tribunal to record the settlement in an award, what shall the arbitral tribunal do?

Another question is if declaratory settlements shall be possible to record in the form of an award on agreed terms. The motive for having settlements recorded in awards on agreed terms that the form of an award can expedite enforcement may not be satisfied in respect of declaratory settlements. On the other hand, the possible *res judicata* effect⁷ could be reason enough.

It is not unusual that settlements enter into force only when certain events have occurred or certain conditions having been met by one of the parties, or are revocable, if certain events occur or certain conditions are not met. The enforcement of awards based on such settlements may be put into question on the basis that such settlements are not final. In particular, settlements where there are conditions for revocation are problematic. Similar concerns may arise with respect to settlements which provide for performance in the future.

Further, it is not unusual that settlement agreements contain a mechanism for settlement of disputes arising out of the settlement agreement, typically arbitration. What is the effect of a provision of that nature in a settlement agreement? Is not a settlement agreement with such provision inconsistent with the notion of an enforceable award? How can a final and binding award be subject to settlement of disputes outside the challenge mechanism?

Generally, the right to have an award on agreed terms requires a request by both parties, or at least the request by one party and the agreement by the other⁸. The question then can arise what an arbitral tribunal should do if the settlement agreement provides that the parties shall request an award on agreed terms but one of the parties fail to make such request. Shall the arbitral tribunal this notwithstanding grant a request by only one party on the theory that the settlement agreement itself can constitute the request by the other party? Or shall (may?) the arbitral tribunal give an award at the request of the non-failing party ordering the failing party to request an award on agreed terms?⁹

Awards can be challenged on a number of grounds typically referable to excess of mandate, errors in the procedure, invalidity of the arbitration agreement, the subject-matter not being capable of settlement by arbitration, and violation of *ordre public*.¹⁰ A question arises to what extent such grounds for setting aside an award are applicable to awards on agreed terms. The mere fact that the parties have settled their differences and have requested an award on agreed terms may be considered as a waiver of the right to challenge an award relying on any of these grounds, except as to matters which are not arbitrable or

⁶ For example Japan, the Arbitration Law of 2003, article 38, Hungary, Act no. LXXI of 1994, section 39, PRC China, the Arbitration Law from 1995, articles 51 and 52, Germany, the Code of Civil Procedure, section 1053, and Québec, the Code of Civil Procedure, article 945.1.

⁷ The *res judicata* effect is another aspect of the finality of awards, and there are also issues relating to the *res judicata* effect of awards on agreed terms similar to those arising with respect to enforcement. However, that effect is not the subject-matter of this paper.

⁸ See for example the Arbitration Model Law, article 30 (1) and Practitioner's Handbook on International Arbitration, edited by Frank-Bernd Weigand, pp 1262 – 1263, Verlag C.H. Beck München DJOF Copenhagen 2002.

⁹ Commission Report, UN-Doc. A/40/17, para 250.

¹⁰ See for example the Arbitration Model Law, article 34.

which constitute a violation of *ordre public*, which should not be waiveable. The reason for these grounds being non-waiveable exceptions is of course the fact that the particular legal system has determined that cases falling within the exceptions may not be left to resolution by arbitration, and, therefore, it should not be possible to circumvent that determination by entering into a settlement. What cannot be arbitrated cannot be subject to a settlement.

The same considerations could be applied to enforcement under the New York Convention.

The Role of the Arbitral tribunal

The Arbitration Model Law states in article 30 that the arbitral tribunal can refuse (“object”) to record a settlement in the form of an award. The same approach is taken by the arbitration law of a number of countries.¹¹ The implication of this principle is that the arbitral tribunal has the power to scrutinize the settlement. The extent of such scrutiny varies from country to country. Such scrutiny may or may not involve the issues discussed above, sometimes, however, limited to questions as to possible violations of *ordre public*¹², and, perhaps, infringements of laws of a lower degree such as laws on corruption and money laundering, if not belonging to the sphere of *ordre public*.

In most modern arbitration laws and rules of arbitration there is a possibility for the arbitral tribunal to correct certain errors in an award¹³. A question then arises how that power shall be understood in the context of awards on agreed terms. Does it only extend to errors in the recording of the settlement agreement or does it also extend to errors in the settlement agreement itself? The same issue arises with respect to the power of the arbitral tribunal to interpret an award.

Another issue which relates to the role of the arbitral tribunal is how to deal with a situation where the parties settle their dispute and only then start arbitration for the purpose of obtaining an award on agreed terms. For example article 30 of the Arbitration Model Law, which empowers the arbitral tribunal to make awards on agreed terms, applies where there the dispute being arbitrated is settled during the arbitral proceedings. The same approach can be found in arbitration laws of various countries.¹⁴ Arbitration presumes conceptually that there is a dispute which requires to be determined and an award is conceptually the outcome of arbitration. In the countries, which have this approach, it does not seem possible to proceed to arbitration when the settlement has been reached, and consequently in these cases the parties will not have the possibility to have the settlement recorded in an award on agreed terms. In those countries where a settlement reached in conciliation can have the same effect as an award this problem does not arise.¹⁵

Summing up

This paper has tried to show that a number of issues will have to be addressed if UNCITRAL should wish to develop a solution for legislators to apply if it is found desirable to make settlement agreements awards on agreed terms for the purpose of enforcement. All these issues may not necessarily have to be introduced in legislation but may need to be understood by the legislator. A forceful advocate for UNCITRAL to present a solution is the Grand Old Man Prof. Pieter Sanders.¹⁶ Whether his proposal is the right one may need to be analyzed in the light of the discussions in this paper.

¹¹ For example England, article 51 (2) of the Arbitration Act of 1996, and Sweden, section 27 of the Arbitration Act of 1999. So do many arbitration rules, for example the UNCITRAL Rules, article 34, the ICC Rules, article 26, the Rules of the Institute of the Stockholm Chamber of Commerce, article 39 (1), the LCIA Arbitration Rules, article 26.8, and the Swiss Arbitration Rules, article 34:1.

¹² For example Germany, the Code of Civil Procedure, article 1053.

¹³ Article 33 of the Arbitration Model Law.

¹⁴ For example Germany, article 1053 of the Code of Civil Procedure, and section 51 of the English Arbitration Act.

¹⁵ For example Bermuda, section 20 of the International Conciliation and Arbitration Act, India, the Arbitration and Conciliation Act, and Croatia, article 10 (2) of the Law on Conciliation.

¹⁶ Pieter Sanders, *Arbitration International*, Vol. 23, Issue No. 1, 2007, pp136 – 139, Kluwer Law International.