KluwerArbitration Wolters Kluwer | Kluwer Law International

Some Remarks on the UNCITRAL Model Law on International Commercial Conciliation

José Maria Abascal Zamora (*)

Author

- José Maria Abascal Zamora

Source

- José Maria Abascal Zamora, Some Remarks on the UNCITRAL Model Law on International Commercial Conciliation in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, 2004 Bejing Volume 12 (Kluwer Law International 2005) pp. 415 - 420

I. Introduction

In this paper I will make a few reflections on the purposes of the making of the UNCITRAL Model Law on International Commercial Conciliation (MLC) (II), what the MLC does not deal with (III), a panorama of the MLC (IV), and some considerations on two debated topics (V).

Many methods fall under the concept of alternative dispute resolution methods or ADR; and different terms are used in practice. The meanings of the terms “conciliation” and “mediation” are especially controversial. For the sake of clarity, in this paper, and following the approach of the MLC, I give the term “conciliation” a broad meaning. Thus, “‘conciliation’ means any process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby the parties request a third person or persons (‘the conciliator(s)’) 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.” (1)

II. Objectives of UNCITRAL

When UNCITRAL undertook to draft model legislation on conciliation, its purposes were to provide the world with: (i) non-mandatory legislative provisions to serve as default rules, (ii) certainty regarding the admissibility of certain evidence in future litigation or arbitration proceedings, (iii) certainty regarding the role of the conciliator in future litigation or arbitration, (iv) uniformity regarding the enforcement of page "415" settlement agreements reached in conciliation proceedings and (v) provision on the suspension of the limitation period or prescription.

There is little uniform law in legislative instruments. The largest part of uniform law is to be found in contracts, usages, case law, rules or soft law and similar instruments. The possibilities for reaching uniformity in drafting international conventions and model laws are scarce. Legislative efforts are limited to what is feasible with a reasonable expenditure of time and effort. Therefore, the general desire to achieve complete treatment of a subject in a

legislative text is ultimately never fulfilled. Ambitious attempts usually delay or prevent any acceptable result.

The MLC was not an exception; indeed, its subject matter touches upon delicate points of law of the different legal systems in the world. The negotiation of the MLC was limited to issues that were feasible; as a consequence, many issues that are relevant in conciliation proceedings are left to the applicable law.

In any conciliation there are always present: (i) a dispute, (ii) an agreement to conciliate – which may be previously agreed or result from an invitation made by one party, accepted by the other – or a direction of a court or other authority to conciliate, (iii) the conciliation proceeding, (iv) an event of termination of the conciliation proceeding, which may be a settlement agreement, and (v) in case there is a settlement agreement, its performance or (vi) its enforcement by a court or other authority.

In sum, a complete body of legal provisions on conciliation must enter into, inter alia, the law of obligations and contracts and the law of civil procedure of all countries. Today these two subjects are amongst the most difficult ones to negotiate uniformity at a universal level; the law of obligations and contracts is the core of any legal system, and the law of civil procedure is based on the particular structure of the judicial organization of each country.

III. What the Model Law on Conciliation Does Not Deal With

1. Existence, Validity and Enforceability of the Agreement to Conciliate

The MLC does not deal with the existence, validity and enforceability of the agreement to conciliate. Art. 4(2) MLC does not deal, as some may believe, with the agreement to conciliate; thus nothing is missing in it regarding the formation of the agreement. Art. 4 only deals with commencement of conciliation proceedings and para. 2, modelled on Art. 2 of the UNCITRAL Conciliation Rules, only allows the offering party to treat its offer as rejected – and no more.

Agreements to conciliate are often breached by skipping the agreed conciliation, and instead commencing arbitration or litigation in courts. The solution to this issue must be found in either the applicable law of contracts or, in the alternative, the law of the arbitration or litigation.

2. Judge or Arbitrator Engaging in Conciliation

The MLC is neutral regarding the legal possibility of the arbitrator or judge to engage in conciliation. Art. 1(9) only clarifies that, if an arbitrator or a judge engages in a *page "416"* conciliation, the ensuing conciliation proceeding is not regulated by the MLC. It is wrong to construe this provision as the legal authorization for a judge or an arbitrator to conduct a conciliation.

3. Breaches of the Conciliator

The MLC does not deal with the legal consequences of the conciliator's breaches of the agreed rules, or the provisions of the

MLC. The negligence, bad faith or fraud of a conciliator may cause the failure of the efforts to conciliate. Failure of a conciliation may trigger the conciliator's liability, which is not addressed in the MLC. Also, in the event a settlement agreement is reached, a party may consider it was wrongfully led to settle. In this latter case, the affected party may claim either that the settlement agreement be nullified, or damages from the conciliator and any other liable party; or both, nullity and damages.

The conciliator may be implicated in other breaches, such as passing on information received from a party with the request that it cannot be transmitted to the other; testifying in a related litigation or arbitration; or disclosing information that must be kept confidential in terms of the rules or the provisions of the MLC. (2)

The MLC does not deal with the legal consequences of the conciliator's breaches of his duties, including his liability. These are left to the applicable law on obligations and contracts or, if a national legislator deems it appropriate, to be enacted in the national law on conciliation. Especially regarding the liability of the conciliator, domestic public policy considerations would make reaching a uniform solution practically impossible.

IV. What the Model Law on Conciliation Provides

In a nutshell, the MLC defines its scope of application as restricted to international commercial conciliation, but allows freedom to the enacting legislations to make it applicable to domestic conciliation. Also, parties may opt in or out of the application of the MLC. (3) The MLC provides an important rule on the universal uniform interpretation of it and fulfillment of lacunae (4) and it is based in the principle of party autonomy. (5)

Regarding the conciliation proceedings, the MLC deals with the commencement of the conciliation, (6) the number and the appointment of conciliators, (7) the conduct of the conciliation, (8) communication between the conciliator and the parties, (9) disclosure of the  *page "417"* information received by the conciliator, (10) the confidentiality of the conciliation proceedings, (11) the non-admissibility of certain evidence in other proceedings, (12) the termination of the conciliation, (13) the conciliator acting as an arbitrator, (14) the prohibition on resorting to arbitral or judicial proceedings, (15) and the termination of the conciliation.

Finally, there is a harmonized, non-uniform provision regarding enforcement of settlement agreements reached in conciliation proceedings, (16) and an optional provision, offered to national legislators, on the limitation period or prescription. (17)

V. Prescription and Enforcement: Two Difficult Issues

In the drafting of the MLC, two issues were especially difficult and debated. One was whether, and if so in what terms, there should be a provision on the suspension of the limitation period or prescription. The second was the enforcement of settlement agreements reached in conciliation proceedings. Because of their importance, I will make short comments on both.

1. Suspension of the Limitation Period or Prescription

The advantages of an article on the suspension of the limitation period, as alleged during the debates, were that it would offer a practical, simple and useful solution for a large number of cases "and it would enhance the attractiveness of conciliation by preserving the parties' rights without encouraging them to initiate adversarial proceedings".

Those who were against the provision, argued, among other reasons, that such an article (i) was not needed and Art. 14 solved the problem; (ii) it would not produce effects outside the enacting state; (iii) in some states, it would only produce procedural effects, while in others it would be part of the substantive law, and this difference would make it difficult for the states to implement the article; and (iv) that the retention of the provision would complicate the termination or other provisions, such as Arts. 4 and 14.

No solution could be found and the provision was put in a footnote, as an option to national legislators.

page "418"

2. Enforcement of Settlement Agreements

a. Why not a uniform rule

Enforcement of settlement agreements proved to be an extremely complicated subject. Incidentally, the same occurs with arbitral awards, especially when they are poorly made. Settlement agreements may be very complex, reciprocal rights and obligations to be performed in the future may be agreed. Many of them even contain dispute resolution clauses.

Additionally, there are no reasons to give to settlement agreements reached through conciliation a higher status than those reached through negotiation. In this regard, also new problems would be created as well: for example, whether an agreement reached after the termination of the conciliation, but adopting a solution considered and rejected during the conciliation proceedings, would be enforced under the MLC.

b. Differences in legal systems

Regarding the provision on enforcement of settlement agreements, legal systems offer different solutions, as follows: (i) no special provisions, thus settlement agreements are enforceable as any contract between the parties; (ii) the restatement in the law on conciliation that settlement agreements are enforceable as contracts; (iii) settlement agreements as awards (quasi-awards); (iv) settlement agreements to be deemed enforceable titles, and the rights and obligations that are certain, express and capable of being enforceable, and that are recorded in the settlement agreement are enforceable pursuant to the provisions established for the enforcement of court decisions; (v) settlement agreements as res judicata. All of them showed difficulties.

i. As contracts

An article stating that settlement agreements would be treated as contracts was tantamount to stating the obvious. Furthermore, this solution would not provide for an expedited and strict enforcement mechanism. Even a provision granting enforcement if it is expressly stipulated in the settlement agreement that it arose out of a conciliation and that it would be enforceable under the UNCITRAL Model Law on International Commercial Arbitration (MLA) is not appropriate. It would be cumbersome and discriminatory. It would also have many of the inconveniences set forth below.

ii. Quasi-awards

Regarding the treatment of settlement agreements as awards, the legal solutions also vary. The solutions are: (i) to enforce the settlement agreements as if they were arbitral awards, or (ii) to give the parties the right to appoint an arbitrator who will give the settlement agreement the form of an award. Then the award would be enforceable as such.

At first sight, the solution of treating the settlement agreements as awards seems attractive, but further examination shows that it may be misleading and problematic. In any event, it falls short of providing legal certainty and universal uniformity.

There is no certainty that such settlement agreements will be enforced as awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) or under the MLA or similar systems regarding the enforcement *page "419"* of awards. At least in some jurisdictions, a dispute is needed to start a valid arbitration and if the parties settle, the dispute ceases to exist. Thus, it is doubtful that the quasi-awards are indeed arbitral awards. Thus, uncertainty remains regarding their universal enforceability. Even if a uniform rule would be provided, the uncertainty will remain, until a reliable international case law supporting enforcement is established.

It is questionable that the causes for denying enforcement under the NYC and the MLA would be applicable to quasi-awards. A party who signed a settlement agreement cannot allege (i) nullity of the conciliation agreement; (ii) that it did not participate in the appointment of a conciliator, or could not present its case; (iii) that there is ultra petita in the settlement agreement; or (iv) that party concerned could not participate in the appointment of conciliators or the proceedings were not conducted in accordance with the rules or the applicable law.

On the other hand, there could be valid claims and defenses that are not listed in NYC Art. V(1) and Art. 36(1) MLA; for instance, if the settlement agreement is null and void, or the requesting party did not perform substantive obligations that deprive that party of the right to request performance. It cannot be alleged that enforcement of awards on agreed terms is provided in accordance with Arts. 30, 35 and 36 MLA, because in this regard the MLA allows the arbitrator to deny the request of giving a settlement agreement the form of an award (Art. 30).

iii. Res judicata

The main problem of this solution is that res judicata is a term of

art, with particular different meanings, and different legal consequences, in different jurisdictions. The unification would only be apparent.

c. Harmonizing the law on enforcement

Sometimes it is not possible to negotiate a uniform legal provision. In those cases a less perfect, but useful solution is to provide for harmonization; that is, to give guidelines on ways of implementing divergent legal solutions that may satisfy the expectations of the international community.

There is a wide agreement that, regarding the enforcement of settlement agreements, an expedited procedure with limited defenses is desired. Therefore, Art. 14 MLC, provides that if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable. The text of Art. 14 suggests to enacting States the insertion of a description of the method of enforcing settlement agreements or refers to provisions governing such enforcement. A footnote to Art. 14 also suggests that, when implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory. Finally, in the Guide to Enactment and Use of the MLC, examples and comments appear that would help the national legislator in attaining a satisfactory solution.
page "420"

---

* Counsel, advisor and arbitrator; Chairman of the UNCITRAL Working Group on Arbitration and Conciliation; Chair of the Committee of the Hall during the UNCITRAL Plenary in New York, June 2002, that considered the draft and adopted the Model Law on International Commercial Conciliation.

1 MLC Art. 1(3).

2 MLC Art. 8.

3 MLC Art. 1.

4 MLC Art. 2.

5 MLC Art. 3.

6 MLC Art. 4.

7 MLC Art. 5.

8 MLC Art. 6.

9 MLC Art. 7.

10 MLC Art. 8.

11 MLC Art. 9.

12 MLC Art. 10.

13 MLC Art. 11.

14 MLC Art. 12.

15 MLC Art. 13.

16 MLC Art. 14.

17 MLC Art. X, in a footnote to MLC Art. 4.

© 2013 Kluwer Law International BV (All rights reserved).
KluwerArbitration is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.
If you would like to know more about this service, visit www.kluwerarbitration.com or contact our Sales staff at sales@kluwerlaw.com or call .