The UNCITRAL Model Law on International Commercial Conciliation

Shawn Conway

In 2002, the General Assembly of the United Nations accepted and passed the Model Legislative Provisions or 'Model Law' on International Commercial Conciliation. The Model Law is comprised of seventeen articles governing a number of issues central to the process of international conciliation or mediation. Contained therein are provisions with regard to the interplay between arbitration and conciliation, confidentiality, appointment of conciliators as well as the often overlooked but crucial question of what exactly constitutes conciliation.

Some may question why the Model Law is needed. In addressing this point, the United Nations Commission on International Trade Law (UNCITRAL) reasoned that due to the growing use of conciliation to settle international commercial disputes, it is desirable to unify the disparate and sometimes conflicting national views of conciliation. The Model Law is also useful as a guide to international arbitrators (and hopefully courts) who seek an international standard as to what constitutes a conciliation (e.g. for the determining the inadmissibility in court proceedings of documents which originate from a conciliation process). Finally, the Model Law is also important for the purpose of promoting the adoption and use of conciliation within areas of the world where it has not yet been embraced.[1] In that last respect, the Model Law can serve a very useful function for many parts of the world.

This article will address four topics of the Model law that are important for the modern practice of international conciliation. These are: the definition of conciliation, confidentiality, procedure for conciliation, and the role of the conciliator.

Definition of conciliation

The first provision of Article 1 of the Model Law states quite simply: 'These model legislative provisions apply to international commercial conciliation, as defined in articles two and three.' One distinctive characteristic of the Model Law is its choice of the word 'conciliation'. Conciliation is a broader concept than a specific term such as 'mediation' and can encompass a number of different approaches to non-binding, third party resolution of commercial disputes.[2] Mediation as known and practiced in the Netherlands would be a subset of the concept of conciliation under the Model Law.[3] This article will discuss the Model Law's concept of conciliation.[4]

Conciliation is defined in Article 2 of the Model Law 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, to assist them in their attempt to reach an amicable settlement arising out of or relating to a contractual or other legal relationship'. Under this definition the Model Law can apply to many different forms of a third-party dispute resolution, a fact confirmed by the annotations to the Law which state: 'The Working Group noted that different procedural styles and techniques might be used in practice to facilitate dispute settlement and that different expressions might be used to refer to those styles and techniques (...) the model law should encompass all these laws and techniques.'[5]

The Model Law only applies to those conciliations which relate to commercial matters (art. 1(1)). This is largely due to the mandate of the UNCITRAL which is limited to commercial matters and the difficulty of developing universally acceptable approaches to matters such as family law dispute resolution, which in many countries involves strong public policy aspects. But according to the notes accompanying the UNCITRAL text, the term 'commercial' is to be given a wide interpretation, covering any matters arising from all relationships of a commercial nature whether contractual or not.

Another important aspect of the Model Law is that it only applies to those conciliations which are considered to be 'international'.[6] Again, the Model Law paints in broad strokes defining the term 'international' as a dispute where the domiciles of each party are in different states. However, included under the definition of 'international' are also those disputes regarding commercial obligations to be performed in a state that is different than the place of domicile of the parties, or where the substantial portion of the obligations are to be performed in a state that is different than

1. U.N. Approves Model Conciliation Law, APR Disp. Resol. J. 2003, p. 7.
2. Jernej Sekolec, Introduction to the UNCITRAL Model Law on International Commercial Conciliation, Yearbook Commercial Arbitration 2002, p. 398.
3. The Model Law's definition of 'conciliation' does contain the critical element for the Netherlands concept of mediation that the neutral third party does not have the authority to impose on the parties a solution to the dispute. It does not, however, prohibit a conciliator from expressing opinion as to the merits of the dispute. Cf. NMI Mediators Code of Conduct art. 2.6.
4. Analysis of how the Model Law would affect mediations in the Netherlands is beyond the scope of this article.
5. Settlement of Commercial Disputes Model Legislative Provisions on Commercial Conciliation: Note by the Secretariat, Art. 2, note 10 (2001).
6. The first note to the draft explains that the Model Law can also be easily revised to apply to domestic as well as international mediations.

the domicile of the parties. In addition, parties may simply agree that the conciliation is 'international' in character, thus invoking the application of the Model Law where it would not otherwise apply. The Model Law thus takes an expansive view to in what is considered 'international'.

In sum, the Model Law's approach to defining conciliation accomplishes a few goals. First, it introduces different categories in national laws differentiating between conciliations which take place in an international context and those in a purely domestic setting. Second, the Model Law provides international commercial law with a persuasive standard for what should and should not be considered a conciliation entitled to the protections of confidentiality. Finally, the Model Law provides a neutral set of guidelines by which parties can fashion their own conciliation process.

Confidentiality vis-à-vis third parties

Successful conciliations typically require open discussions between the parties and conciliator to explore and gain an understanding of the differences between the parties, the background and circumstances that gave rise to the differences, and the possibilities for the parties to overcome those differences and to settle the dispute. Allowing parties to make statements or delve into matters that normally would not be desirable in connection with pending or potential court or arbitral proceedings is one major aspect that sets conciliation apart from traditional forms of dispute resolution. As one commentator puts it: 'Confidentiality is the center-piece of the conciliation regime.'[7] The Model Law properly recognizes that safeguards of confidentiality are critical.

The Model Law's Article 9 establishes a general duty of confidentiality and protections for communications within the conciliation process. 'All information relating to the conciliation proceedings' is protected from disclosure to persons outside of the conciliation. There is an exception, however, 'where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement'.[8]

In addition to the Article 9 general admonition of confidentiality, Article 10 addresses in detail the inadmissibility of conciliation communications in later legal proceedings:

> '(1) A party to the conciliation proceedings the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
> (a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
> (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
> (c) Statements or admissions made by a party in the course of the conciliation proceedings;
> (d) Proposals made by the conciliator;
> (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
> (f) A document prepared solely for purposes of the conciliation proceedings.'

A basic concern when one is conducting a conciliation with a party from another country is whether the courts or arbitrators in that other country will respect the parties' desire for strict confidentiality and not allow the use of views, admissions, proposals, and similar information arising from the conciliation as evidence in subsequent court or arbitral proceedings. The Model Law is designed to provide a legal assurance that such information will not be admitted as evidence in other proceedings.

The Model Law does not just prohibit parties and the conciliator from breaching confidentiality in later legal proceedings, it also requires the courts of the enacting state or those arbitral tribunals seated therein to refrain from accepting or ordering disclosure of documents and information received within the conciliation process. Paragraph 4 of Article 10 clarifies that the prohibition also applies in proceedings which do not relate to the subject matter of the conciliation.

Finally, it should be noted that the parties do not lose the right to use information which already existed or was created for purposes other than the conciliation. In order to put this beyond doubt, paragraph 5 of Article 10 clarifies that 'evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation'. Thus, only the types of evidence specified in paragraph 1 (i.e., views, admissions, proposals, and indications of willingness to settle) are inadmissible, not any evidence that was the basis for expressing a view, admission, proposal, or willingness to settle in the conciliation process.

Confidentiality vis-à-vis participants

When it comes to confidentiality within the conciliation process itself, however, the Model Law deviates from the approach of most well-established mediation institutions. The latter typically provide that all communications between one party and the neutral (e.g., in a caucus – which the Law expressly permits) are to be treated confidentially, *unless* the party agrees that it may be revealed to the other side.[9] The default rule within the Model Law presumes no confidentiality among the participants. Unless the party providing the information stipulates that the information is to be kept confidential, the conciliator may disclose it to the other side. The Model Law states in this respect in its Article 8:

> 'When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.'

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7. Jernej Sekolec & Michael B. Getty, The UMA and the Uncitral Model Rule: An Emerging Consensus on Mediation and Conciliation, J. Disp. Resol. 2003, p. 175.
8. Model Law Art. 9. This exception is intended to allow application of the principles of public policy, when public policy objectives significantly outweigh confidentiality concerns (such as when disclosure is needed to investigate a crime or to prevent a safety or environmental threat). Model Law on International Commercial Conciliation, World Arb. & Mediation Rep. 2002, p. 137.
9. See e.g., NMI Mediation Rules art. 7.5.

Procedures for conciliation

When the parties have not agreed upon dispute resolution rules and procedures the Model Law confirms the parties' freedom to adopt rules (of for example a mediation institute) governing dispute resolution process. These default rules are very basic: 'a manner as the conciliator considers appropriate' with an eye to 'maintain fair treatment of the parties'.[10]

The governing principle of party autonomy is also reflected in other parts of the Law. Paragraph 2 of Article 6 of the Model Law and other procedural provisions (e.g. on the appointment of the conciliator, the commencement of a conciliation process, termination of the process, etc.) are flexible yet general enough to accommodate diverse practices.[11] However, a minimal procedural framework is provided which offers basic procedural guidance to the parties who have not agreed on any set of conciliation rules.

One interesting procedural aspect under the Model Law is its express authorization for the conciliator to make a proposal for settlement at any stage.[12] It is left to the discretion of the conciliator to decide whether, to what extent, and at which stage to make any such a proposal depending on the wishes of the parties and the method which would be most conducive to a settlement.

The conciliation process commences once the parties have agreed to conciliate their dispute. However, the Model Law states in Article 5 that, 'once a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate'. This bright line rule can be important when parties are bound to attempt conciliation in accordance with a contractual dispute resolution clause.

The Model Law does not contain any explicit provisions on choice of law, nor link the law applicable to a conciliation to the place of conciliation. The reason is that the place of conciliation is not necessarily that determinative. For practical purposes, the conciliation could be carried out in several places (or even by electronic means). Hence it would be problematic to insist on the potentially artificial idea of the place of conciliation as the primary basis for triggering the application of the Model Law. The issue is thus left to the agreement of the parties and, failing that, to the rules of private international law.

The conciliation process may be terminated in several different ways as set out in Article 11. In addition to the ideal scenarion of termination 'by the conclusion of the settlement agreement by the parties, on the date of the agreement'. Article 11 further specifies that the conciliation process may be terminated:

> '(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;
> (c) or By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration;
> (d) or By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.'

Role of the conciliator

The conciliator is to be guided by principles of objectivity, fairness and justice while maintaining impartiality and independence. The conciliators should also seek to maintain 'fairness in treatment' as between the parties (art. 6). This obligation is mandatory and is regarded as a 'basic and minimum standard'.[13] This concept was debated heavily during the preparation of the Model Law, therefore emphasis should be placed on paragraph 3 of Article 6 and its establishment of an obligation of the conciliator only with regards to the process conducted by the conciliator, and that this obligation does not extend to the substantive content of the settlement agreement.

Unless otherwise agreed by the parties, a conciliator cannot become an arbitrator in subsequent proceedings. This is sensible since the conciliator may have heard information from one party in a caucus which the other party is unaware of and can thus not respond

In addition, a party may have made unfavourable revelations to the conciliator which the party would not want an arbitrator to know (art. 12). Parties may be less willing to participate in a conciliation process if they would face the possibility that, if the conciliation is unsuccessful, the conciliator might be appointed as an arbitrator in subsequent proceedings. This provision in Article 12 is an important reinforcement to the confidentiality rules in Article 10.

Conclusion

Conciliation is increasingly used in international dispute settlement. The Model Law on International Commercial Conciliation will facilitate such conciliation. A uniform approach to conciliation could reduce the costs of dispute settlement, foster cooperation between parties, and create greater certainty in international trade.

Ideally, a Model Law of this sort would also ensure the enforceability of conciliated settlements in a manner comparable to say arbitration awards. Since it was not possible to find a solution that would be acceptable world-wide, and the Model Law adopted a principle reflecting the lowest common denominator by providing: 'If the parties reach and sign 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].' (art. 14). It is thus left to the enacting State to select the enforcement regime that is best suited to its procedural laws and practices.

The Model Law on International Commercial Conciliation is designed to serve as a template for United Nations member states to enact their own conciliation laws, or as a supplement to existing laws in countries that have them. The U.N. General Assembly's approval constitutes a formal recommendation that member states to adopt the Model Law. The United Nations hope the Model Law will also encourage internationally active companies to use the process to resolve commercial disputes. Let us hope that the Model Law is successful in both of these objectives.

Mr. Shawn C. Conway

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10. World Arb. & Mediation Rep., supra note 9.
11. Sekolec & Getty, supra note 8.
12. Model Law Art. 6(4). This is roughly comparable to a minitrial conciliator's authority under art. 11.4 of the Netherlands Arbitration Institute's Minitrial Rules.
13. Sekolec & Getty, supra note 8.