CHAPTER 10

HARMONIZING UNCITRAL CONCILIATION AND STATE MEDIATION LAW: DEVELOPMENTS IN CIVIL MEDIATION REFORM

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I INTRODUCTION

The UNCITRAL Model Law on International Commercial Conciliation was introduced in 2002. Now over a decade later, it is important to assess the impact of the Model Law on domestic mediation regimes including Hong Kong, the UK, China and its impact on judicial efficiency, confidence in courts and perceptions of justice. The research seeks to highlight positive lessons learned from selected jurisdictions, analyze local circumstances, and distil best practices.

II UNDERSTANDING THE CONCEPT OF CONCILIATION AS DEFINED BY THE MODEL LAW

The definition of "conciliation" is provided in article 1 of the UNCITRAL Model Law ("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.[1]

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1 United Nations "Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002) in UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (New York, United Nations, 2004) Part Two <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> at para 5-6.

Conciliation is different 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 non- adjudicatory. 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.[2]

The Model Law uses the term "conciliation" to encompass all the procedures which are assisted by a third person to settle a dispute, such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision in the parties. 'Alternative dispute resolution' procedures are covered by the Model Law. (see A/CN.9/WG.II/WP.108, para 14.) However, its scope is limited to non-binding types of dispute resolution.[3]

III PURPOSE OF THE UNCITRAL MODEL LAW

UNCITRAL prepared a model law on conciliation to support its increased use by courts, government agencies, community and commercial spheres. Such use has been encouraged given its relatively high success rate. (see A/CN.9/WG.II/WP.108, para 15.)[4]

It was noted that while certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings, could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules.[5]

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2 Ibid, para 6.

3 Ibid, para 7.

4 Ibid, para 8.

5 Ibid, para 11.

The provisions in the Model Law governing such proceedings are designed to accommodate differences in procedural details and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate. Essentially, the provisions seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the conciliation are met while also providing maximum flexibility by preserving party autonomy.[6]

The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are important for fostering economy and efficiency in international trade.[7]

IV THE MODEL LAW AS A TOOL FOR HARMONIZING LEGISLATION

A model law is a legislative text that is recommended to States for incorporation into their national law.[8] In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. This provides greater flexibility to States. However, it also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention.[9]

In order to achieve a satisfactory degree of harmonization and certainty, States may consider making as few changes as possible in incorporating the Model Law into their legal systems. Any change should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting State.[10]

V SCOPE OF THE MODEL LAW

The Commission agreed that the title of the model law should refer to international commercial conciliation. While a definition of "conciliation" is provided in article 1, the definitions of "commercial" and "inter- national" are contained in a footnote to article 1 and in paragraph 4 of article 1, respectively. While the Model Law is restricted to international and commercial cases, the State

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6 Ibid, para 12.

7 Ibid, para 15-16.

8 Ibid, para 13.

9 Ibid, para 14.

10 Ibid, para 14.

enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones.[11]

VI STRUCTURE OF THE MODEL LAW[12]

The Model Law contains definitions, procedures and guidelines on related issues based upon the importance of party control over the process and outcome.

Article 1 delineates the scope of the Model Law and defines conciliation in general terms and its international application in specific terms. These are the types of provisions that would generally be found in legislation to determine the range of matters that the Model Law is intended to cover. Article 2 provides guidance on the interpretation of the Model Law. Article 3 expressly provides that all the provisions of the Model Law except for article 2 and paragraph 3 of article 6 may be varied by party agreement.

Articles 4-11 cover procedural aspects of the conciliation. These provisions have particular application to circumstances where the parties have not adopted rules governing a conciliation; thus, they are designed in the nature of default provisions. They are also intended to assist parties in disputes that may have defined dispute resolution processes in their agreement and in this context act as a supplement to their agreement. In structuring the Model Law, the focus was on seeking to avoid situations where information from conciliation proceedings spill over into arbitral or court proceedings.

The remaining provisions of the Model Law (articles 12-14) address post-conciliation issues in order to avoid uncertainty resulting from the absence of statutory provisions governing issues such as subsequent arbitral or judicial proceedings and enforcement.

VII DETAILS OF THE MODEL LAW

Article 1 delineates the scope of application of the Model Law by expressly restricting it to international commercial conciliation. Article 1 defines the terms "conciliation" and "international" and provides the means of determining a party's place of business where more than one place of business exists or a party has no place of business.[13]

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11 See UNCITRAL Model Law on International Commercial Conciliation (2002) at art 1.

12 At para 22-25.

13 Ibid, para 28–39.

Article 2 provides guidance for interpreting the Model Law by courts and other national or local authorities with due regard to its international origin.[14]

Article 3 provides that the concept of conciliation is dependent on the will of the parties.[15]

Article 4 addresses the question of when a conciliation proceeding can be understood to have commenced.[16] Paragraph 1 provides that it arises on the day on which the parties to the dispute agree to engage in conciliation proceedings.[17] Paragraph 2 provides that a party that has invited another party to engage in conciliation may treat this invitation as having been rejected if the other party fails to accept that invitation within 30 days from when the invitation was sent or any other time as specified in the invitation.[18]

Article 5 provides that the default number of conciliators is one, which is different from the default rule of three arbitrators in arbitration.[19] Also, it encourages party agreement on the conciliator.[20] When no agreement is reached on a conciliator, reference may be made to an institution or a third person, recommended under subparagraphs (a) and (b) of paragraph 3. Paragraph 4 sets out some guidelines for the designated person or institution to follow in making recommendations or appointments.[21] Paragraph 5 obliges a person who is approached to act as a conciliator to disclose any circumstance likely to raise justifiable doubts as to his or her impartiality or independence.[22]

Article 6, Paragraph 1 stresses that the parties are free to agree on the manner in which the conciliation is to be conducted.[23] Paragraph 2 recognizes the role of the conciliator who, while observing the will of the parties, may shape the process as he or she considers appropriate.[24] Paragraph 3 provides that the conciliator or panel

14 Ibid, para 40–41.

15 Ibid, para 42.

16 Ibid, para 43.

17 Ibid, para 44–45.

18 Ibid, para 46.

19 Ibid, para 49.

20 Ibid, para 50.

21 Ibid, para 51.

22 Ibid, para 52.

23 Ibid, para 53.

24 Ibid, para 54.

of conciliators should seek to maintain fair treatment of the parties by reference to the particular circumstances of the case, which is the basic obligation and minimum standard to be observed by a conciliator.[25] Paragraph 4 clarifies that a conciliator may, at any stage, make a proposal for settlement.[26]

Article 7 provides freedom of communication by giving the conciliator the authority to meet or communicate with the parties together or with each of them separately.[27]

Article 8 provides for open communication between parties and the conciliator where a conciliator is free to disclose the substance of information received from one party to another party. However, a conciliator should not disclose information if it is subject to specific confidentiality conditions.[28]

Article 9 provides the general rule of confidentiality except when disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.[29]

Article 10 provides for a general prohibition on the use of information obtained in conciliation for the purposes of other proceedings.[30] Article 10 provides for two results with respect to the admissibility of evidence in other proceedings: an obligation incumbent upon the parties not to rely on the types of evidence specified in article 10 and an obligation of courts to treat such evidence as inadmissible. Paragraph 2 provides that the prohibition in article 10 is intended to apply broadly to the range of information or evidence listed in paragraph 1, regardless of whether or not it appears in the form of a written document, an oral statement or an electronic message.[31] Paragraph 3 restricts the rights of courts, arbitral tribunals or government entities from ordering disclosure of information referred to in paragraph 1.[32] Paragraph 4 extends the scope of application of paragraphs 1-3 to all subsequent proceedings, including those related and unrelated to the conciliation.[33]

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25 Ibid, para 55.

26 Ibid, para 56.

27 Ibid, para 57.

28 Ibid, para 58-59.

29 Ibid, para 61–63.

30 Ibid, para 64-66.

31 Ibid, para 68.

32 Ibid, para 69.

33 Ibid, para 72–74.

Article 11 provides the circumstances in which conciliation may be terminated.[34]

Article 12 provides the default rule that a conciliator shall not act as an arbitrator in proceedings concerning the same legal matters which are the subject of the conciliation proceedings.[35]

Article 13 provides limitations on the freedom of parties to initiate simultaneous arbitral or judicial proceedings which are seen to have a negative impact on settlement prospects.[36]

Article 14 provides that the settlement agreement is binding and enforceable. This provision aims to provide for expedited enforcement.[37]

VIII THE IMPACT OF THE MODEL LAW, ON DOMESTIC MEDIATION LEGISLATION IN HONG KONG, THE UK, CHINA AND SINGAPORE

8.1 Hong Kong

In Hong Kong, the Mediation Ordinance was passed and gazetted on 22 June 2012 and took effect on 1 January 2013. It is the first piece of legislation in Hong Kong which applies to private and contractual mediation. It is also applicable to mediation under the Rules of Court.[38] Its origin was derived from the recommendations of the Working Group in the Report of the Working Group on Mediation. The Model Law on Conciliation played an important role when the Working Group decided on the suggestions to be made in the report.

One key question was whether to suggest legislating mediation in Hong Kong. With reference to the UNCITRAL Model Law on International Commercial Conciliation 2002, the Working Group observed that there is an international trend towards the adoption of instruments which promote the use of mediation and the articulation of basic principles of mediation. It noted that such instruments encourage individual jurisdictions to pass more specific but nuanced legislation.[39]

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34 Ibid, para 75-77.

35 Ibid, para 78.

36 Ibid, para 83–84.

37 Ibid, para 87.

38 *Hong Kong Civil Procedure 2016*, Hong Kong White Book 2016 (Sweet and Maxwell, Hong Kong, 2015) at V1/0/1.

39 The Department of Justice, The Government of the Hong Kong Special Administrative Region "Report of the Working Group on Mediation" (February 2010) <www.gov.hk/en/residents/government/publication/consultation/docs/2010/Mediation.pdf> at para 7.11.

The Working Group identified that Article 14 in the Model Law only set out the broad principles concerning mediation and did not go into specific details. It noted that the enacting state is welcome to provide more specific legislative provisions.[40]

The Model Law also played a part when the Working Group decided whether the legislation should be introduced by enacting a stand-alone statute or by merging with the Arbitration Ordinance or by introducing it into existing legislation. In deciding this, the Working Group made reference to the experience of the Model Law. At UNCITRAL, there had been a suggestion that reference be made in the preamble of the Model Law to conciliation as an additional method of settling disputes or even that the Model Law should include some provisions on mediation or conciliation. The Working Group make reference to the fact that the idea of such a preamble was abandoned and the suggestion to include some provisions on conciliation was not adopted.[41]

In deciding the definition of "mediation", the Working Group made reference to the Art 1(3) of the Model Law. It remarked on the variable and interchangeable use of the terms "mediation" and 'conciliation", both in dispute resolution literature and in various statutes.[42]

The role of the mediator under the HK Mediation Ordinance is similar although not identical to the MLICC. This can be observed by comparing ss 2 and 4(1) with arts. 5(4), 6, 7, 8.

Also, the Working Group made reference to the Art 14 of the Model Law when deciding on the enforcement of meditated settlement.

The MLICC leaves it up to each State to impose enforcement mechanism (art. 14) 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 an 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.

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40 Ibid, para 7.14.

41 Ibid, para 7.30.

42 Ibid, para 7.45.

Regarding the enforceability of settlement agreements, Order 73, Rule 10 of the Rules of the High Court note that enforcement is undertaken through the usual summary procedures and applies to the CFI to enforce agreements as if they were arbitral awards.

The Hong Kong Mediation Ordinance is silent on several issues that are raised in the MLICC, namely the commencement of mediation, appointment of the mediator, enforceability of the settlement agreement, and the role of the mediator in subsequent proceedings. However it does give direction on the venue of mediation, which the MLICC does not.

In conclusion, the Working Group identified Hong Kong as one of the first few jurisdictions adopting the Model Law. It referred to the Model Law as a key reference when deciding on various issues related to the enactment of mediation legislation in Hong Kong. Therefore, the Model Law plays an important role in the Mediation Ordinance in Hong Kong.

8.2 United Kingdom

In the United Kingdom, unlike with arbitration, there is no single Act of Parliament governing mediation. The UK has differing regimes governing mediation depending on whether it is purely a domestic or cross-border dispute.

For Domestic cases, the Civil Procedure Rules (82nd update in force on 3 Dec 2015) govern such disputes.

For Cross-border cases, the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011 No 1133) govern such disputes. The European Commission looked to the MLICC when drafting the EU Directive but did not incorporate all of the provisions; eg Arts 8&9 were left to the discretion of member states.

In *Cable & Wireless v IBM United Kingdom,*[43] the UK courts enforced an agreement to mediate. The case was decided in the same year as the MLICC was introduced. The Court held that "An agreement to resolve a dispute by alternative dispute resolution by using a procedure recommended by the Centre for Dispute Resolution was sufficiently certain to be enforceable; the court should not be astute to accentuate uncertainty in the field of dispute resolution references and any unqualified reference to ADR was likely to be sufficiently certain." (Westlaw summary). While the enforceability of the mediation agreement seems to reflect the increased recognition of mediation as highlighted in the MLICC, the specific facts of the case regarding the commencement of mediation appear to go against Art 4 of

43 [2002] EWHC 2059 (Comm) [2002] CLC 1319.

the MLICC which generally require agreement to proceed with mediation within 30 days of initiation by one party.

8.3 Mainland China

Mainland China participated in the drafting stage of the UNCITRAL MLICC, but has not yet informed the Secretariat of its adopting statutes based on the ML. Nevertheless, several statutes could be relevant to the provisions of the MLICC depending on the nature of the mediation. These include the following types of mediation recognized in China:

- Judicial Mediation which is covered by the Civil Procedure Law 2013, Ch. 8. This law is relevant once parties to a commercial dispute initiate court proceedings.
- Community Mediation which is governed by the People's Mediation Law 2011.
- Administrative Mediation which is governed by the Administrative Litigation Law of the People's Republic of China 2014.
- Labour Mediation which is governed by the Labour Dispute Mediation and Arbitration Law of the People's Republic of China 2008.

The MLICC Art 5 gives parties the power to appoint their mediators, but under Arts 94&95 of the CPL it is the People's Court that appoints the mediators on behalf of the parties.

Core principles of mediation in China are the same as under MLICC – namely a recognition of voluntariness and autonomy as to outcome.

Similarly, while non-disclosure of mediation communications are not covered in CPL, however art 19 of the SPC Opinion of 2009 instructs that mediation communications cannot be adduced as evidence unless with consent, required by law, or for the protection of national, social or public interests or the legitimate rights and interests of a non-party in court proceedings. In this regard, "Mediation communications" seems narrower under SPC Opinion than under MLICC in that the SPC Opinion applies to notes of the mediation proceedings, parties' concessions/promises, and views or proposals of the mediators/parties while MLICC: Art 10 applies more broadly to documents prepared for the purposes of mediation, indications of willingness to mediate, admissions, views with regards to a possible settlement, settlement proposals and willingness to accept such proposals.

In China, where conciliation may be conducted by an arbitral tribunal, domestic 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.

IX CONCLUSION

In conclusion, from a review of Hong Kong, the UK and Mainland China we can see that the procedural flexibility of the MLICC corresponds with the diversity of mediation regimes throughout the world. As some observers have noted, "the chances for a uniform template for mediation across the "globalised" world of commerce are limited with the result that private international law and conflicts of law analysis will remain important points of reference for the lawyers and parties involved in international commercial mediations. One size will not fit all."[44]

China and HK institutional rules bear a closer resemblance to the UNCITRAL International Commercial Conciliation Rules 1980 than to the UNCITRAL MLICC 2002. Hong Kong was among the pioneers in incorporating the ideas of the Model Law into its domestic mediation regime. The UK has been indirectly influenced by the MLICC through the implementation of the EU Mediation Directive, however the EU Directive did not entirely adopt MLICC. In general, from the above analysis we see a slow and gradual acceptance of the MLICC overall, despite mediation growing in popularity. At the same time, we see now that the core principles of party autonomy and the impartiality of the mediator are common across all three jurisdictions.

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44 International Bar Association Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation ("MLICC") Singapore, October 2007 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=974ACD9E-BEE6-4F8D-8A3F-4627B156EC1B> at 5, para 11.

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