

## **Thought on Developing Convention on Enforceability of Settlement Agreements Reached Through Conciliation**

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The UN Commission on International Trade Law (“**UNCITRAL**”) held its 47<sup>th</sup> session in New York on 7-18 July 2014 and the Author had the privilege of attending the conference at invitation of Mr. Yu Jianlong, President of the Asia Pacific Regional Arbitration Group (“**APRAG**”). During the conference, the U.S. Government submitted a proposal suggesting Working Group II (Arbitration and Conciliation) of UNCITRAL (“**Working Group II**”) to develop a multilateral convention with respect of the enforceability of international commercial settlement agreements reached through conciliation (“**Enforceability Convention**”) for the purpose of encouraging the use of conciliation in resolving international commercial disputes.

This Article proposes to share the Author’s understanding on the subject including the necessity of having the Enforceability Convention and current legislations of countries including China on the enforceability of settlement agreements reached through conciliation (“**Settlement Agreements**”) as well as concerns and thoughts on how to build up the Enforceability Convention.

### **I. Necessity of Developing the Enforceability Convention**

In the recent years, conciliation has become an increasingly popular means of resolving international commercial disputes and attracted worldwide attention and discussions from the international community due to its advantages of being time-and cost-efficient, highly successful and effective in maintaining business and the win-win situation as compared with arbitration and litigation. The major international

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arbitration institutions such as the International Chamber of Commerce Court of International Arbitration, American Arbitration Association, Hong Kong International Arbitration Center, and Arbitration Institute of Stockholm Chamber of Commerce have all published rules on conciliation in resolving disputes. Other arbitration institutions such as Korean Commercial Arbitration Bureau and China International Economic and Trade Arbitration Commission (“CIETAC”) have included in their arbitration rules the independent provisions on conciliation procedure and legal effect of Settlement Agreement; and CIETAC has been expressly using the approach that “combines arbitration with conciliation” in dealing with arbitration cases. At the same time, more and more international conciliation institutions and organizations are emerging such as the International Mediation Institute, Singapore Mediation Center, CCPIT/CCOIC Mediation Center, Hong Kong Mediation Center, and Financial Dispute Resolution Center in Hong Kong.

It is a significant progress that conciliation has received the recognition of UNCITRAL. The *Guide to the Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)* states that, “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”<sup>1</sup>. In order to promote the use of conciliation, UNCITRAL issued its *Conciliation Rules* in 1980 and the *Model Law on International Commercial Conciliation* in 2002.

However, one major long-existed obstacle to the greater use of conciliation is that Settlement Agreements update to date still are difficult to be enforced by law in

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<sup>1</sup> *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)*, para 8.

the event that a party refuses to perform. This is because at the current stage, domestic legislations of most countries in the world only recognize and enforce Settlement Agreements as contracts; and under the circumstance where one party fails to honor the Settlement Agreement, the other party is unable to file to court to directly enforce it and instead has to proceed to file an arbitration or lawsuit. Just as the U.S. Government pointed out in its proposal, if two parties spent time and efforts in reaching a Settlement Agreement over their dispute but found that such Settlement Agreement was as difficult to enforce as the contract from which the dispute arises, then conciliation will be much less attractive than arbitration and litigation to the parties. In order to clear up this obstacle, the U.S. government thinks necessary to take measures to assure parties that Settlement Agreements reached between them could be effectively enforced and such enforcement would not cost a lot.

It is exactly for this reason, the U.S. Government proposed to develop the Enforceability Convention to give direct enforceability to Settlement Agreements, “with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration”<sup>2</sup>. The Author supports the U.S. Government’s proposal and thinks that it is necessary to develop an internationally recognized mechanism on the enforceability of the Settlement Agreement in order to foster the use and growth of conciliation.

## **II. Domestic Legislations on the Enforceability of Settlement Agreements**

Although currently domestic legislations of most countries around the world still only give enforceability to Settlement Agreements the same as contracts, a number of other countries have progressed to formulate special provisions to facilitate conciliation and the enforcement of Settlement Agreements in their domestic legal system. To sum up, these special provisions mainly adopt two approaches to ensure enforceability: (1) treating Settlement Agreements reached in arbitral proceedings as arbitral awards or making arbitral awards based on Settlement Agreements; and (2)

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<sup>2</sup> *Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822.*

directly treating Settlement Agreements as arbitral awards despite that the arbitral proceedings are not initiated. Below is a summary of the details:

*1. Approach I: Treating Settlement Agreements as arbitral awards or making arbitral awards based on Settlement Agreements*

The UNICITRAL provides in Article 30 of its *1985 UNCITRAL Model Law on International Commercial Arbitration* that, if the parties settle the dispute during arbitral proceedings, the arbitral tribunal shall, if requested by the parties and not objected to by it, record the settlement in the form of an arbitral award on agreed terms; such arbitral award has the same status and effect as any other awards on the merits of the case.

Germany and Hungary have the similar provisions. The *Germany Code of Civil Procedure*<sup>3</sup> and the *Hungary Act LXXI*<sup>4</sup> both provide that, during arbitral proceedings, if the parties settle the dispute, the arbitral tribunal shall terminate the proceedings, and upon request of the parties, record the settlement in the form of an arbitral award, unless the settlement violates public order or the law; such arbitral award shall have the same effect as any other awards on the merits of the case.

*2. Approach II: Treating Settlement Agreements directly as arbitral awards*

California and Texas of the U.S., India, Bermuda, and Hong Kong of China have adopted a more aggressive approach to enforce the Settlement Agreements.

The *California Code of Civil Procedure*<sup>5</sup> and the *Texas Civil Practice and Remedies Code*<sup>6</sup> both provide that, if conciliation succeeds in settling the dispute, and the result of conciliation is in writing and signed by the

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<sup>3</sup> Germany, *Zivilprozeßordnung*, tenth book, sect. 1053.

<sup>4</sup> Hungary, Act LXXI, sect.39.

<sup>5</sup> *California Code of Civil Procedure*, Section 1297.401.

<sup>6</sup> *Texas Civil Practice and Remedies Code*, Section 172.211.

conciliator(s) and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal and have the same force and effect as a final award in arbitration.

The *Arbitration and Conciliation Ordinance of India*<sup>7</sup> provides that, the settlement agreement drew up either by the parties or the conciliator, when signed by the parties, shall be 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 on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

*Bermuda 1986 Arbitration Act*<sup>8</sup> and *Hong Kong Arbitration Ordinance*<sup>9</sup> both provide that, if the parties to an arbitration agreement reach agreement in settlement of their differences and sign an agreement containing the terms of settlement, the settlement agreement shall, 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 judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the agreement.

### III. PRC Legislations on the Enforceability of Settlement Agreements

Due to the culture and history of China, conciliation has always been encouraged in dispute resolution in China. In terms of enforceability of Settlement Agreement, China is quite advanced to certain extent in its legislation. Under the current legal framework of China, conciliation is classified into three categories: conciliation conducted by court, conciliation conducted by arbitration institutions, and conciliation conducted by People's Mediation Committees or other mediation organizations ("**Third-Party Mediation Organizations**"). Chinese law has recognized the enforceability of the conciliation statements ("**Conciliation Statements**") or Settlement Agreements made through these three types of conciliation.

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<sup>7</sup> *India Arbitration and Conciliation Act* (1996), Article 73 and 74.

<sup>8</sup> *Bermuda 1986 Arbitration Act*, Part II Conciliation, Appointment of Conciliator 3(4).

<sup>9</sup> *Hong Kong Arbitration Ordinance* (effective as of 27 June 1997), Chapter 341, Section 2C.

## 1. Conciliation Statements made by courts

Pursuant to the *Civil Procedure Law of the People's Republic of China*<sup>10</sup> (“*PRC Civil Procedure Law*”), the people’s court may conduct conciliation based on the principles of voluntariness and legitimacy after a law suit is initiated or before the judgment is rendered with consent of the parties. If the parties reach settlement, the court may make a Conciliation Statement based on the terms agreed by the parties. Meanwhile, according to the *Provisions of the Supreme People’s Court on Several Issues Concerning Civil Mediation by the People’s Court*<sup>11</sup>, the parties may conciliate the case by themselves during the litigation process; If a settlement agreement is reached, they may request the court to confirm and make a Conciliation Settlement based on the settlement agreement. The Conciliation Agreement is enforceable by law in China.

In order to build up a mechanism for conducting mediation in China, in 2009 the Supreme People’s Court of China issued the *Several Opinions on Establishment and Improvement of Conflict & Dispute Resolution Mechanism Combining Litigation and Non-Litigation Approaches*<sup>12</sup> (“*Supreme Court’s Opinions on Developing Conciliation Mechanism*”) to encourage mediation before and after a case is officially filed. The relevant provisions are as follows:

- (1) The court of proper jurisdiction of a case may, after receiving the complaint (written/oral) and before the case is officially filed, entrust by itself or upon request of parties, Third-Party Mediation Organizations such as administrative authorities, People's Mediation Committees,

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<sup>10</sup> *Civil Procedure Law of the People's Republic of China*, revised by the Standing Committee of the National People's Congress on 31 August 2012 and effective as of 1 January 2013.

<sup>11</sup> *Provisions of the Supreme People’s Court on Several Issues Concerning Civil Mediation by the People’s Court*, issued by the Supreme People’s Court on 16 December 2008 and effective as of 16 December 2008.

<sup>12</sup> *Several Opinions on Establishment and Improvement of Conflict & Dispute Resolution Mechanism Combining Litigation and Non-Litigation Approaches*, issued by the Supreme People’s Court on and effective as of 24 July 2009.

commercial mediation institutions, industry mediation organizations or other organizations with mediation function to mediate the cases with the parties. The Conciliation Agreement reached through conciliation by any of these organizations and that is signed and affixed the chops by the parties will have the effect of a contract. If the Settlement Agreement is signed by the conciliator and affixed the chop of the mediation organization, the parties may apply to the court of proper jurisdiction to confirm its legal effect. Whereas one party fails to perform the Settlement Agreement confirmed by the court, the other party may directly apply to the court to enforce it.

- (2) Upon consent of the parties or where the court thinks necessary, the court may, after the case is officially filed, entrust the above mediation institutions to mediate the case. If a Settlement Agreement is reached, the parties may apply to the court to withdraw the case or to confirm the Settlement Agreement, or to make a Conciliation Statement based on the Settlement Agreement.
- (3) For a civil case that has been officially filed, the people's court may invite qualified organizations or individuals to conduct conciliation jointly. If a Settlement Agreement is reached, the people's court may allow the parties to withdraw the case, or make a Conciliation Statement based on the Settlement Agreement.

Pursuant to Article 236 of the *PRC Civil Procedure Law*, Conciliation Statements made by people's courts enjoy the same force and effect as effective court judgments. Parties shall perform the Conciliation Statement; otherwise, the other party may directly apply to the people's court to enforce the Conciliation Statement.

## 2. Conciliation Statements made by arbitration institutions

According to the *Arbitration Law of the People's Republic of China*<sup>13</sup> (“**PRC Arbitration Law**”), after arbitration is filed, the parties may reach a settlement over the dispute by themselves and request the arbitral tribunal to make an arbitral award based on the agreed terms; Or the parties may, before the arbitral award is rendered, reach a Settlement Agreement through conciliation by the arbitral tribunal and the arbitral tribunal may make a Conciliation Statement or make an arbitral award based on the Settlement Agreement. According to Article 51 of the *PRC Arbitration Law* and Article 2(3) of the *Provisions of Supreme People's Court on Several Issues Concerning Judicial Enforcement by People's Courts (for Trial Implementation)*<sup>14</sup>, Conciliation Statements signed by the parties shall enjoy the same enforceability as arbitral awards; should one party fail to perform the Conciliation Statement or the arbitral award, the other party may apply to the people's court for enforcement directly.

*CIETAC Arbitration Rules (2012 version)*<sup>15</sup> follow the *PRC Arbitration Law* in terms of conciliation. According to the CIETAC Rules, parties may settle their dispute by themselves or reach a Settlement Agreement through conciliation before or during the arbitration process, and may request the arbitral tribunal to make an arbitral award based on the Settlement Agreement (specially, in the event that a Settlement Agreement is reached through conciliation by the arbitral tribunal during the arbitration process, a Conciliation Statement will be rendered by the arbitral tribunal).

Kindly note that, the *Supreme Court's Opinions on Developing Conciliation Mechanism* mentioned above has a special provision that allows the parties to apply to an arbitration institution to conciliate their disputes even if they do

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<sup>13</sup> *Arbitration Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress on 31 August 1994 and effective as of 1 September 1995.

<sup>14</sup> *Provisions of Supreme People's Court on Several Issues Concerning Judicial Enforcement by People's Courts (for Trial Implementation)*, issued by the Supreme People's Court on and effective as of 8 July 1998.

<sup>15</sup> *Arbitration Rules of China International Economic and Trade Arbitration Commission (2012 version)*, revised by the China Council for the Promotion of International Trade/ China Chamber of International Commerce on 3 February 2012 and effective as of 1 May 2012.



not have an arbitration agreement; the arbitration institution may set up a mediation tribunal to conduct the conciliation on basis of the fair and neutral principles. However, the Settlement Agreements that are reached and signed by the parties through such conciliation shall only have the force of a contract; in order to gain enforceability under law, the parties shall need to apply to the court to confirm the Settlement Agreement.

### 3. Settlement Agreements made by Third-Party Mediation Organizations

According to the *Civil Mediation Law of the People's Republic of China*<sup>16</sup> (“*PRC Civil Mediation Law*”) and the *PRC Civil Procedure Law*, if the parties choose to settle their disputes through conciliation by Third-Party Mediation Organizations such as People’s Mediation Committees or other mediation organizations, they may request the mediation organization to make a Settlement Agreement, which will take effect after being signed by the parties and the conciliators as well as chopped by the mediation organization. However, in contrast with the Conciliation Statements made by courts and arbitration institutions, Settlement Agreements made by Third-Party Mediation Organizations are not enforceable. According to Article 33 of the *PRC Civil Mediation Law* and Article 194 of the *PRC Civil Procedure Law*, in order to make such Settlement Agreements enforceable by law, the parties will have to, within 30 days after the agreement takes effect, jointly apply to the basic-level people’s court of the place where the mediation organization is located for the judicial confirmation. Should one party refuse to perform the Settlement Agreement confirmed by the people’s court, the other party may apply to the people’s court for enforcement.

China Council for the Promotion of International Trade / China Chamber of International Commerce Mediation Center (CCPIT/CCOIC Mediation Center) is a reputable and popular mediation center in China formed in 1987; its

<sup>16</sup> *Civil Mediation Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress on 28 August 2010 and effective as of 1 January 2011.

*Mediation Rules (2012)*<sup>17</sup> are in compliance with the *PRC Civil Procedure Law* with regard to the enforceability of Settlement Agreements. In order to facilitate the enforcement of the Settlement Agreements reached through the center, the Rules allow the parties to provide an arbitration clause in the settlement agreement to refer to CIETAC for arbitration in case of non-performance under a sole arbitrator who shall make an arbitral award based on the Settlement Agreement.

To streamline the procedure for parties to apply for judicial confirmation of Settlement Agreements reached through conciliation by the People's Mediation Committees, the Supreme People's Court further issued the *Several Provisions on Procedures for Judicial Confirmation of People's Mediation Agreements*<sup>18</sup> on 23 March 2011, which reiterate the principle of proximity for application of judicial confirmation, i.e., parties may apply for judicial confirmation with the basic-level people's court in the place where the People's Mediation Committee is located. Generally the people's court shall make a decision on whether to accept the request for judicial confirmation within 3 days after receiving the application, and shall, within 15 days after accepting the application, make a decision on whether to confirm the Settlement Agreement. Furthermore, to speed up the process, the court may at presences of the parties makes an immediate decision on whether to accept or confirm their Settlement Agreement. Lastly, the people's court will not charge any fees for the confirmation of Settlement Agreements reached through conciliation by the People's Mediation Committees.

Apart from the above, the *Supreme Court's Opinions on Developing Conciliation Mechanism* offer two special approaches for Settlement

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<sup>17</sup> *Meditation Rule of Mediation Center (2012)*, passed by the seventh session third meeting of China Council for the Promotion of International Trade / China Chamber of International Commerce.

<sup>18</sup> *Several Provisions on Procedures for Judicial Confirmation of People's Mediation Agreements*, issued by the Supreme People's Court on and effective as of 30 March 2011.

Agreements involving payment obligations to obtain enforceability:

- (1) For Settlement Agreements over civil disputes involving payment obligations and reached through conciliation conducted by Third-Party Mediation Organizations such as administrative authorities, People's Mediation Committees, commercial mediation institutions, industry mediation organizations or other organizations with mediation function, parties may apply to a notary public for making an enforceable notarized document based on the Settlement Agreements according to the *Notarization Law of the People's Republic of China*<sup>19</sup>. Where the debtor fails to perform or improperly performs the notarized document, the creditor may apply to the competent people's court for enforcement.
- (2) For Settlement Agreements effective as contracts and involving payment obligations, creditors may apply to the competent basic-level people's court for a payment order. If the debtor fails to raise an objection to or perform the payment order within the term prescribed in the payment order, the creditor may then apply to the people's court for enforcement.

#### **IV. Opinion and Suggestion**

During the Author's legal practice, the Author has successfully assisted clients in resolving quite a few commercial disputes through conciliation; instead of going to arbitration or litigation, the clients were able to find alternative solutions to their problems and maintain further business relationship which is obviously win-win. In today's world economy which is still in recovery and when arbitration is being complained for being more and more like litigation and no longer cheap, the Author believes conciliation will be increasingly preferred for international companies to resolving commercial disputes due to its advantage of being more time and cost efficient and effective to maintain business relationship.

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<sup>19</sup> *Notarization Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress on 28 August 2005 and effective as of 1 March 2006.

If a multilateral convention or mechanism can be built up by UNCITRAL to address the key enforceability issue of settlement agreements reached by means of conciliation, it will undoubtedly increase the certainty and reliability of the result of conciliation for the parties involved and thus highly encourage greater use of conciliation in dispute resolution. The Enforceability Convention the U.S. Government proposed to develop not only reflects today's trend of using conciliation to solve international commercial disputes, but also will contribute to effective and efficient settlement of disputes which in return will enable the development and growth of international business and transactions.

Before putting into place such an international convention, in the Author's opinion, there are still important issues to be considered and solved.

1. Domestic legislations concerning the enforceability of Settlement Agreements

As stated above, currently there are still many jurisdictions that have not granted Settlement Agreements the same enforceability as arbitral awards or court's judgments in their domestic legislations. Considering this, one of the issues or goals of the Enforceability Convention should be to urge contracting parties to do so through their domestic legal systems or procedural laws. This in turn will form the foundation for the Enforceability Convention to promote the use of conciliation worldwide.

On the other hand, due to the discrepancies among domestic legal systems of different countries, it could be quite difficult for the Enforceability Convention to provide a uniform procedure for the enforceability of Settlement Agreements. Therefore, as the U.S. Government pointed out in its proposal, the Enforceability Convention may consider to follow the New York Convention by only setting forth "the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for

reaching that goal”<sup>20</sup>.

## 2. Qualifications of mediation institutions

Another key issue is the qualities of the mediation institutions. It is advisable for the Enforceability Convention to set certain criteria or restrictions on the qualifications of the mediation institutions by which Settlement Agreements with direct enforceability are made, including on the appointment of conciliators, formulation of mediation rules and procedures, etc.

To set up criteria or thresholds for the qualification of the mediation institutions will be able to prevent the abuse of the judicial resources of countries. Arbitral awards and court judgments, which have been granted enforceability by local laws or the international conventions (the 1958 New York Convention), are made all by professional and authoritative legal institutions. If the Enforceability Convention confers enforceability to Settlement Agreements without screening the mediation institutions that make such Settlement Agreements, a possible consequence would be that any Settlement Agreements, despite the quality, made by any mediation institutions may be submitted to courts for enforcement. This will be likely to greatly reduce the quality, professionalism and reputation of conciliation, harm the solemnity of judicial enforcement, and ultimately hinder the sound development of conciliation in the future.

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<sup>20</sup> *Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822.*