

When your Multi-cultural Dinner Party Conversation becomes an International Mediation

An interview with Mr Jernej Sekolec, Secretary of UNCITRAL, on the 29th September 2003

on

The UNCITRAL Model Law on International Commercial Conciliation*

Alexander

Throughout the world when people talk about conciliation and mediation in a global context there is a tension between diversity and consistency. On one hand, there is the desire to experiment, develop mediation as a flexible process with a diversity of styles; on the other hand there is the aim to ensure consistent quality by regulating mediation. How has UNCITRAL approached this tension?

Sekolec

UNCITRAL treaded lightly on this issue. The general philosophy of UNCITRAL is to avoid over-regulation and rigid procedural recommendations. We are dealing with international mediation. It is referred to by various terms, including conciliation, but there is no difference in the essential concept, at least from the legislative point of view. The Intergovernmental Working Group that prepared the Model Law on Conciliation (MLC) was conscious that the Model Law would need to be grafted on an existing legal system in any given country. There will, in fact, be a number of legislative rules in existing legal systems that will complement the body of the Model Law. So we were aware that we did not have to regulate everything. We just regulated the primary pillars of mediation. The reasons for this were, firstly, that the Model Law is part of a larger picture of international dispute resolution and, secondly, we believed that at this stage in the development of mediation procedural regulation would not be beneficial. I believe that the development of quality in mediation should come from education and promotion rather than through procedural safeguards.

Themes and key words

Diversity versus consistency in mediation practice

Meaning of mediation and conciliation

Regulation of primary pillars of mediation

Quality in mediation

* Referred to in this interview as the Model Law on Conciliation.

Alexander

You are suggesting that at ‘this stage of the development of mediation’ too much regulation is inappropriate. At what stage do you think we find ourselves now?

Sekolec

One cannot give a uniform answer that covers all countries. I think we are at the stage where mediation is very fashionable. This may result in people tending to expect too much from it. But there are core aspects of this fashion, which I think are very useful and here to stay. We do not want to create controversy or stifle development by hasty regulation.

Alexander

So you are really trying to encourage experimentation within a particular framework?

Sekolec

Yes. For example, consider where the initiatives for mediation come from: the courts, arbitrators and even the parties themselves? Who acts as the mediator? Will it be the senior personalities in the trade concerned, village chiefs, the community mediation centers, the big law firms or arbitration centers? All these aspects of international ADR need to develop. If one regulates the process too early then one restricts the options available – and one may be left with commercial mediations between sophisticated parties only. The huge spectrum of mediation needs to be left alone to enable it to expand and thrive.

Alexander

You mention mediation by village chiefs and arbitration centers. One current theme in the literature focuses on the difference between western mediation and some of the traditional forms of mediation-like processes in first nation cultures such as indigenous Australians and Americans where, for example, notions of neutrality and confidentiality have very different meanings, if they exist at all.

Sekolec

Yes, the world of dispute resolution comprises much more than western notions of mediation. The Model Law is drafted in such a way as to accommodate as many cultural concepts of mediation as possible which have the ability to operate within the legal system of a given country.

Alexander

In the MLC are processes such as neutral evaluation or mini-trial also included in the definition of conciliation?

Sekolec

Mediation as fashion

Diversity of mediation initiatives

Traditional mediation versus western mediation

Yes they are. Article 1 defines conciliation. It provides that conciliation is a process where two parties in a dispute engage a third person to help them settle it. Article 1 also provides that conciliation can also be referred to by names such as mediation and other terms with a similar meaning. Therefore mini-trial and neutral evaluation are also covered by article 1.

The Working Group was conscious of the fact that in practice there may be some real differences between conciliation, mediation and mini-trial in terms of techniques and approaches. For example, there may be variations regarding the role of the mediator, whether the mediator has a more active or passive role, whether the mediator proposes solutions to a settlement and variations in the type of persons representing the parties (for example, a mini-trial typically involves the most senior management unlike other forms of ADR). From a legislative point of view, however, these differences do not matter because the legislative rule must be flexible enough to incorporate all non-determinative ADR processes.

Another point is that in practice one will find elements of mediation, conciliation, neutral evaluation and even mini-trial in one single case. *Pure cases* where the mediator does not offer his or her opinion in a direct or indirect manner are rare in international commercial dispute resolution.

So the short answer to your question is yes. All these processes fit into the broad definition of conciliation whereby parties engage a third person to assist them in resolving their differences.

Alexander

So in essence it comes back to the tension between flexibility and regulation. If the Working Group had been clearer about definitions, it would have lost some of the flexibility of conciliation.

Sekolec

Yes. Flexibility is one of the core features of mediation and a feature which makes it a very attractive process for disputants because they can adjust the precise nature of the process to suit their needs.

Alexander

You earlier spoke about the need for quality processes and that in your view quality comes from education. If we link that idea to the different sorts of processes that might arise under the definition of conciliation – mini-trial, neutral evaluation, conciliation and mediation – it seems that a need emerges to educate clients and lawyers about the distinctions between these processes. Clients need to be in a position to give informed consent to the process in which they participate.

Definition of conciliation

Conciliation in practice

Flexibility as a feature of mediation

Quality of the mediation processes

Sekolec

My reaction to your question is that the environment itself would define the need for process differentiation. In a particular country, a party may well be familiar with the kind of processes that would work well for it in that jurisdiction and would select from that range. In commercial disputes one would require a particular type of process and in village disputes between neighbors a very different one. The issues related to quality are diverse across cultures and environments.

Continuing education should be a requirement so that one does not attend a one week course and become a mediator for life. A mediator needs to develop and always learn new things and evaluate their own experience. Only in this way will mediators be able to keep abreast of current techniques and continually improve their skills.

Alexander

The Model Law provides a broad definition of conciliation which includes interest-based facilitative processes, on one hand, and directive, more evaluative processes, on the other. Do you think there is a danger in the international commercial field that mediation practice will become more directive and evaluative because many lawyers and arbitrators trained in directive and determinative processes are moving into international commercial conciliation roles?

Sekolec

I think this danger exists. However, the danger does not come from the Model Law or from the legislator of the enacting state. Rather, it comes from the procedural rules that the lawyers draft in contracts. If the lawyers shoot themselves in the foot by making the process more complex and expensive, then one cannot protect them from it. In some cases a highly structured mediation is not appropriate, while in other cases it is. If the parties and their representatives organize the ADR process poorly, then they have to live with the consequences. They will learn from these lessons and do it differently next time.

Alexander

So in other words, there is a responsibility on the parties themselves and also on the ADR service-providers to take responsibility for the management of the dispute.

In your opinion what is likely to happen in sophisticated international business to business (B2B) transactions in terms of the use of this law? Do you think that international business will embrace mediation or will they rather take a tiered approach and engage in conciliation followed by arbitration or some other ADR process?

Process differentiation

Training, education and continuous improvement

Definition of conciliation; interest-based mediation versus evaluative mediation

Risk of international commercial conciliation becoming directive and evaluative

Responsibility and party autonomy

Tiered approach to ADR and blended forms

Sekolec

We are seeing again and again that the best thing to do is to leave the practice to the parties. The parties can adopt iron-clad, structured sets of procedural obligations if they so choose. One sees this in some construction contracts and it suits the industry. No doubt in five years they will have invented new process solutions.

Then there are hybrids or blended processes that contain elements of arbitration and mediation within the one procedure. For example, in some forms of neutral evaluation, the ADR provider proposes a settlement to the parties. If they do not object to it within 30 days, the settlement becomes binding and enforceable as a judgment. So there are elements of advisory and determinative processes.

Alexander

Would this situation fall within the Model Law – after all there is a potentially binding outcome proposed by the ADR provider?

Sekolec

That is an interesting question. The Model Law specifically states that the conciliator has no power to impose a binding decision on the parties. It is really a matter of interpretation. Has the third party imposed a decision indirectly and by default; or has s/he made a suggestion that the parties have, after 30 days reflection, chosen to adopt in a binding and enforceable form? My own sense is that, as such a process aims at formulating a recommendation to which the parties are invited to agree. The process will be conducted as a conciliation. After all, the parties are free to reject the proposal within 30 days of it being made. Therefore it should fall within the Model Law.

Alexander

Earlier you mentioned the pillars of the Model Law. What are the main pillars of the MLC?

Sekolec

The pillars of the Model Law are confidentiality, party autonomy and fair treatment. The single most important pillar, which I think requires legislative action, is the issue of confidentiality or the evidentiary privilege of admissions, proposals and views expressed during the mediation process.

The first aspect of confidentiality relates to the admissibility of evidence in subsequent proceedings. In order to succeed, parties in a mediation must be able show their cards and have open and frank discussions. The parties do not want to make admissions if these admissions are likely to come back to haunt them. This may occur if in the event of an unsuccessful mediation, the case then goes to arbitration or other determinative

Blended ADR processes

Confidentiality

Admissibility of evidence in subsequent proceedings

proceedings. If for example, during the mediation one party admits that its engineer made a technical error with the expectation of a similar admission from the other party, it is crucial that a legislative guarantee exists to the effect that such a statement is inadmissible as evidence in court or other subsequent proceedings.

Even where the parties commit themselves contractually not to offer what is said during a mediation as evidence in subsequent proceedings, there are many legal systems in which such an agreement may not be binding on the court or an arbitral tribunal. This would be the case in a number of Central European States. In these and other jurisdictions, a judge may insist on hearing the evidence where it is considered crucial to the case. Accordingly, rules of conciliation procedure agreed upon by the parties, such as the UNICITRAL conciliation rules and other institutional rules of conciliation institutions, cannot guarantee the inadmissibility of admissions, proposals and statements made during the mediation as evidence in subsequent proceedings. This is the reason why a legislative regulation on mediation is necessary.

The second aspect of confidentiality is the prohibition of the mediator from acting as an arbitrator or advisor in subsequent proceedings. It is good to enshrine this point in legislation and make the prohibition clear so as to give the parties security on this matter.

A further aspect of confidentiality arises in the context of information received by the mediator from one party on the condition that it is kept confidential. In the circumstances, the conciliator has a duty to keep the information confidential.

The final aspect of confidentiality is that the parties are bound by a general duty of confidentiality not to disclose to anyone what happened during the mediation. They are not at liberty to publish or, for example, have a press conference about what happened during the mediation.

The statutory duty of confidentiality is a useful disciplinary measure. But it would not be recommended to have a law of mediation about confidentiality alone. That is why the Working Group began with a definition of mediation (conciliation) which is the subject of the regulation. Then we considered it useful to offer something like a starter kit for mediation proceedings. So, for example, the Model Law regulates the appointment of mediators and expresses a few general and universally acceptable procedural principles. While it was not essential to do so, it is valuable to include some general procedural regulation in the form of default provisions to give more context to the Model Law. Parties can always regulate these aspects differently by contract. This allows mediation to maintain its flexibility.

Alexander

What would you say to people who criticize the confidentiality provisions as having so many exceptions as to

Prohibition of the mediator to act in another role in subsequent proceedings

Specific duty of confidentiality

General duty of confidentiality

Default procedural provisions

Criticism of the confidentiality

render the concept of mediation facilitating a full and frank discussion meaningless?

Sekolec

I would regard this criticism as unfounded. It is perhaps even dangerous from the viewpoint of public policy. If I am in a mediation and I make an admission or a proposal, of course I want this to be confidential. But if I have an invoice in my hand, before I even become aware of the mediation and I show it to the other party in an effort to convince him/her to pay, then I should not lose the opportunity to use this piece of evidence in subsequent court proceedings. If the law provided that I would lose this piece of evidence, I would be in a quandary. I would want to use the invoice in the mediation, but would scarcely be able to do so because if the mediation failed, I would need the invoice as evidence to prove my case in court. Perfectly admissible evidence that existed before the mediation took place, does not become inadmissible solely by virtue of the fact that it was used in mediation. Admissions, proposals, statements and views, the fact that one party indicated its willingness to accept the proposal – all these matters that actually arise during the mediation process are inadmissible. Everything else is potentially admissible.

In addition, for reasons of public policy, the duty of confidentiality must be subject to further overriding exceptions. For example, if a mediation would reveal a threat to public health, an intent to harm the environment, a terrorist threat or similar, the duty of confidentiality must yield to other principles of law.

There is of course the additional general duty of confidentiality in article 9. Certain information, which does not fall under 10, may be caught by article 9. For example, while certain information may be admissible in evidence in other proceedings, the conciliator and other participants are forbidden from passing on that information to other persons or the public.

I think we drafted the articles on confidentiality very carefully and provided a balanced solution. Such an approach manages potential misuse of the mediation process. For example, it does not attach inadmissibility to something which should be admissible for reasons of public policy. At the same time it provides a commercially reasonable solution to safeguard the legitimate interests of parties.

Alexander

A related issue is the enforceability of agreements to mediate and the enforceability of settlements. Could you make some comments about that?

Sekolec

First let us discuss the enforceability of settlements. Everybody agrees that the settlement agreement is a contract and therefore enforceable as a contract. If parties participating in the

<i>provisions</i>
<i>Exceptions to confidentiality</i>
<i>Additional duty of confidentiality</i>
<i>A balanced approach</i>
<i>Enforceability of settlements</i>

mediation are properly advised, they will draft a settlement agreement that is legally binding as a contract and will be able to obtain a judgment to enforce it. So my first observation is that the problem is not as severe as it seems. There is no compelling need to change the nature of an instrument which is, in essence, a contract. Why do we want to give the settlement agreement the force of a judgment?

Alexander

Or an award?

Sekolec

Indeed. Settlement agreements are the result of the parties taking control of the management of their own dispute with the help of a mediator. They often contain elements that are unique to the parties and not easily enforceable as judgments or awards. Settlement agreements may include revisions of existing contracts, promises to negotiate contractual obligations in the future, or *best efforts* clauses. There may also be clear cut obligations in settlement agreements: for example, to pay an amount of money.

It is a potential source of problems to give a settlement agreement the force of a judgment or an award because it was not formulated by a judge or an arbitrator as the result of an adversarial process. By declaring the settlement agreement an award or a judgment, one may lose the opportunity of addressing potential issues of fraud and duress that may have occurred during the mediation process. Addressing those issues for the purposes of converting a settlement agreement into an award or judgment is complicated and, in the view of many, not worth the trouble.

Therefore, if a settlement were to be regarded as a judgment or an award, there would also be a need for a system of setting aside a settlement obtained as a result of duress or mistake. A court judgment typically cannot be challenged on such grounds because the parties are not responsible for the terms of the judgment. Such additions would introduce technical difficulties in the mediation system.

But these are not the only reasons. If one goes to court with a settlement agreement, the amount of proving one has to do is very limited. It is limited to the existence of the settlement agreement. One does not have to prove liability or fault stemming from the underlying conflict. Everything is crystallized in the settlement agreement. So the process of getting a judgment or an award is much more straightforward than going to court to prove a case.

Alexander

Where there is a settlement agreement and one party is trying to prove that misleading and deceptive conduct or even fraud occurred during the mediation, it will need to refer to events that occurred during the mediation and may want to subpoena the

*Illegal activity,
fraud,
misleading and
deceptive*

mediator? Doesn't this sort of situation open up a Pandora's box of conflicting domestic laws?

conduct and duress during the mediation

Sekolec

Yes, it would open up a Pandora's box indeed. There have been a small percentage of cases in which duress, cheating or other illegal activity occurs in the negotiating phase. I doubt that any legislator would want to forgo the tools that exist in the various domestic legal systems to control and manage these rare instances in the context of mediation.

Giving a settlement agreement the strength of an arbitral award, or a court judgment, in my opinion, means bowing to fashion. Mediation is now a big deal and people are so eager to promote it that they feel it should be institutionalized in order to give it more legal effect. But in my view we should not go overboard.

It is a different matter if one allows the parties to appoint an arbitrator with the specific purpose of incorporating the settlement agreement into an arbitral award or to approach a judge to confer expedited enforceability on the settlement in a standardized process. This may work in a number of jurisdictions and may add a welcome new quality to the mediation. The flexibility of the Model Law allows the parties to make a conscious decision to incorporate processes which involve transforming a settlement agreement into an award or court order. However, the parties will need to ensure they select a jurisdiction, the laws of which will facilitate their dispute processing needs.

Alexander

So to summarize this point, is it fair to say that there are following two views on the enforceability of settlements? First, giving settlement agreements the strength of a judgment or an award would encourage parties to mediate transnational disputes. In particular, there would be more certainty and finality about the enforceability of a mediated agreement. Second, the alternate view (and your view) is that a contract is a very different beast to an award or a judgment. One cannot always include in an award matters which one would include in a settlement agreement. Items such as apologies, acknowledgements of past behavior or acts, statements of intention of future behavior and agreements to negotiate in the future are not typically enforceable and therefore would not be suitable for the terms of an award or judgment in most jurisdictions. Moreover, institutionalizing settlement agreements by turning them into awards or judgments goes against the principles of voluntariness, party autonomy and responsibility in mediation. The idea that parties take responsibility for their dispute, agree on a way forward and remain responsible for the implementation of what they have agreed is abandoned the moment settlement agreements are institutionalized. At this point that parties are relying on the private international justice system

to guarantee an end to their dispute.

Sekolec

Yes that is a fair summary. However, having said that, it is perhaps useful to provide expedited enforceability to certain settlements. Here we come across different domestic procedural traditions and these traditions do not lend themselves to a uniform rule. I would encourage states which adopt the Model Law to use procedures for the enforceability of settlement agreements with which they are familiar and comfortable in their particular legal tradition. For example, in a number of countries if a notary co-signs a settlement agreement then it becomes enforceable in the same way as an award or a judgment. In other countries a similar effect may be achieved if the parties' attorneys co-sign the settlement. These solutions, which are known, for example, Germany and Austria, work well in some systems, but may not work as well in others.

Alexander

Would the German model have been an option that might have worked well in the Model Law?

Sekolec

We did not include it in the Model Law *not* because we did not believe in this form of notarized settlement, but because we wanted countries to consider the law from their own perspective and include it if they so chose. For example, considering the function of US notaries, I doubt that the USA legislator would be ready to permit notarized settlements in the United States of America to have such far reaching legal consequences.

The Model Law only offers limited harmonized rules upon which the UNCITRAL Working Group could agree on a global level. The enforceability issue is left to each country to deal with in the context of the enacting State.

If the parties really want enforceability, they can appoint an arbitrator; they can even appoint a mediator as an arbitrator if it is done with the agreement of both parties. There is, of course, a prohibition in the Model Law on mediators also acting as arbitrators. However, as it is a default provision, both parties can agree to override it.

Alexander

This last point of yours takes us back to one of the pillars of the Model Law: party autonomy.

Sekolec

Exactly. Consider the possibility that the parties, after they have reached a settlement agreement, appoint the mediator to be an arbitrator for five minutes. During those five minutes the mediator/arbitrator could issue an arbitral award on the agreed

Mediator as arbitrator

Appointing mediator as arbitrator to convert settlement into award

terms, which is recognized by article 31 of the UNCITRAL Model Law on Arbitration.

When we discussed this possibility in the inter-governmental Working Group, some people said that it would work well on the basis of the experience in their countries. Others from legal systems such as the United States indicated that while it was an attractive idea, technically it would not work because in order to have an arbitration one needs to have a dispute. By definition once a settlement has been reached, there is no longer a dispute. So from their perspective, it would not work. I would venture to suggest that common law legal systems are particularly susceptible to this argumentation. While some may dispute the validity of this argument, it was considered important enough to exclude this form of med/arb from the Model Law.

Alexander

Why would the idea of the mediator being appointed as an arbitrator to transform the settlement agreement into an award be less of a problem in civil law jurisdictions?

Sekolec

In civil law jurisdictions, the notion of dispute as a condition precedent to arbitration is broader than in common law jurisdictions. Where debtors agree that they are liable but maintain that they do not have the money to pay, then there is no dispute in common law jurisdictions. However, in civil law jurisdictions there may still be a dispute. But this does not apply to all civil law countries. So one may need more than a clearly drafted settlement clause in order to convert it into an arbitral award or make it otherwise directly enforceable.

Alexander

So from what you are saying, the process for enforceability of mediated settlements needs to be developed with practice. I imagine it would be very important at the preliminary meetings of a mediation to look at the level of enforceability desired by the parties and to be very clear about this.

Sekolec

Yes. This leads to the related issues about the applicable law, negotiating the process of enforceability upfront and committing it all to writing.

Alexander

Some people would say that this sort of system would encourage forum shopping. Where one party decides it no longer wishes to abide by the terms of a settlement agreement, that party may forum shop to find the domestic law least likely to enforce the settlement. What are your thoughts on this point?

Forum shopping

established principles of domestic contract law and procedural law.

It is left to the national laws to determine whether an agreement to conciliate is enforceable and to determine the consequences of the violation of such agreements. Whether an agreement to conciliate is enforceable pursuant to the national law depends on the origin of the mediation process – whether it be an existing clause in a commercial contract or an ad hoc agreement by the parties. The enforceability of such an agreement also depends on the drafting of the clause. If, for example, one has an elaborate clause saying that the parties commit themselves not to commence arbitration proceedings until they have had five meetings with mediators and explored all options, it would be reasonable to have some contractual consequences for violating this clause. On the other hand, one could have a more generally worded clause saying that the parties will try to settle their dispute amicably, and, if not, go to arbitration. What does this clause mean? Must the parties engage (and pay) a third neutral mediator before they can go to arbitration? The answer depends on the interpretation of the clause. One cannot determine whether an agreement to conciliate is enforceable, without considering the law of the applicable jurisdiction. Professor Alexander, you mentioned that under your law certain conciliation agreements are not enforceable because their terms are not sufficiently clear and certain. Hence the enforceability of a duty to mediate or conciliate is left to a contractual agreement and the applicable contract law of national jurisdictions. It may be that at some time in the future harmonized rules on the enforceability of agreements to mediate will be prepared, but at this stage I think the international community is not ready for it. Such an agreement would then be enforced either by a court under international private law or an international arbitral tribunal, where conciliation was specified as a precondition to arbitration.

Alexander

Article 13 deals with the possibility of staying arbitral and judicial proceedings as a way to enforce agreements to conciliate, in which the commitment to refrain from arbitrating or litigating until certain pre-conditions are met is clearly set out. The proviso ‘except to the extent necessary for a party, in its opinion, to preserve its rights’ has been criticized for being so wide as to strip the provision of its effectiveness. What are your views on this?

Sekolec

It is true that the provision opens a wide door to instituting arbitral or court proceedings. At the same time, it gives comfort to parties. They will be more likely to agree to mediate because they will not be subject to restrictions regarding their process options.

Stay of proceedings to enforce agreement to conciliate

Alexander

You have spoken about the voluntary nature of mediation and the fact that the parties may *pull the plug* or withdraw from the mediation at any time. In fact, under the terms of the MLC the parties are not compelled to attend a first mediation session. Many institutionalized rules of courts or chambers of commerce such as the ICC require disputing parties to attend the first meeting. Beyond this point, the parties are free to withdraw at any time. The theory is that in the context of a global disputing culture in rapid change, such mandatory attendance rules establish a minimum certainty of participation and, importantly, may enable parties from cultures where negotiating is a sign of weakness to save face. Where parties have engaged a skilled conciliator, they may see an opportunity in the first meeting to settle. If they don't, they have lost nothing. Why did UNCITRAL *not* go down this path?

Voluntary nature of mediation – no requirement of first meeting

Sekolec

There were indeed suggestions that UNCITRAL should draft a rule stipulating that the parties must have at least one meeting. There were several reasons why we did not go down this path. One reason was that, unlike the ICC, which is operating with a specific ADR clause and a set of rules providing a certain predictability of procedure, UNCITRAL is dealing with the broadest spectrum of international situations including 'dinner party mediations'.

Dinner party mediations

Alexander

What is a 'dinner party mediation'?

Sekolec

When two people have a dispute and they call a third person that they trust and say 'Let's go for a beer. Can you help us solve our dispute?' No one may have uttered the word *mediation*. These people do what comes naturally and makes common sense. They ask a business 'elder' to help them solve their problem. Now, according to the Model Law, this is a mediation. These parties and the mediator may therefore be covered by the Model Law. What does it mean 'to meet'? Would this count as a first meeting or would it be classified as a preliminary pre-mediation meeting?

Meaning of meeting in e-mediation

Let's use electronic commerce as another example. What does it mean 'to meet'? If you are in Australia and I am in Austria, we can meet in cyberspace; we could exchange emails. But where are we technically meeting and are we meeting at all in the first place?

Take a very simple dispute resolution clause: 'The parties will try to settle the dispute amicably, and if they do not settle, they will refer the matter to arbitration.' Must the parties on the basis of this clause fly from Australia to London to have one

Utility of requiring first mediation meeting

meeting with the mediator? No. It would be going too far to demand this in all cases. This is why we left any obligation to meet to the agreed procedural rules. It is true that requiring the parties to meet can be very useful in many cases. However, if one applies it to cover the whole spectrum of mediation situations, it is too rigid. UNCITRAL wants to encourage as many countries as possible to enact the Model Law and not to discourage them by being overly prescriptive about procedural elements of mediation.

Alexander

Why is the article on suspension of limitation periods optional rather than one which operates by default?

Sekolec

There were strong arguments in favor of making it a default article. But again, let's put ourselves in the situation where two disputing parties on either side of a European border enlist the assistance of the third person to help them solve their dispute. They do not use the word mediation or conciliation. They just ask the third person over to dinner or for a drink at a bar – a 'dinner party mediation'. Would this conversation officially signify the commencement of conciliation proceedings? Would the limitation period regarding a legal claim be suspended at this point? Here we are in a grey area: what is the point at which a conversation behind a bar becomes a mediation? Are you mediating or are you just engaging in a normal conversation? Technical legal consequences flowing from the commencement of conciliation proceedings function well if linked to structured mediation rules of an institution or a court-directed process. However, if one is involved in a spontaneous mediation, the parties may be totally unaware that they are interrupting something called a limitation period. I think one of the principles governing the interruption of limitation periods is that the party with the claim must be reasonably capable of knowing that it has lost the benefit of the limitation period.

Perhaps the more forceful argument is that in many countries the parties are free to agree on how they will manage the limitation periods linked to related legal claims. For example, the parties may agree to extend the limitation period. In those countries where parties are not free to do so, I would say that the legislator should empower them to manage the limitation period themselves so that when they start a mediation they can agree on the suspension of the running of the limitation period. I see no rational reason why commercial parties should not be able to enter into agreements relating to limitation periods. I regard limitations to this freedom as outdated.

Alexander

You point out that one of the reasons for making the suspension of limitation period provision optional rather than default was that as a default provision, parties may not be aware of

Suspension of limitation periods

the implications of beginning a mediation process. Can't you apply the same reasoning to the confidentiality provisions? Parties might begin a dinner party mediation and not be aware of the confidentiality provisions of the Model Law that apply as a default measure.

Sekolec

Yes, but then one would also have to interpret that particular situation to determine the extent to which the parties have waived the obligation of confidentiality by talking about the mediation in front of other people. This involves interpreting the will of the parties. It may well be that if one party speaks to a friend about the mediation, it will not have not violated any statutory duty.

Alexander

Did the UNCITRAL Working Group draw inspiration from the Model Law on Arbitration?

Sekolec

The Model Law on Arbitration deals with a different animal. Arbitration involves an adversarial process to which the parties have committed themselves. In arbitration, there is a binding decision at the end, whether the parties like it or not. I do not think we drew any direct inspiration from the Model Arbitration Law when drafting the substance of the MLC. More generally, however, the context in which we drafted the Arbitration Model Law was not dissimilar to the context in which we drafted the MLC. In both cases we worked against the backdrop of widely-used influential sets of contractual rules such as the UNCITRAL arbitration rules from 1976 and the UNICTRAL conciliation rules from 1980. We also studied the contractual rules of many mediation and conciliation institutions as we had studied the procedural and contractual provisions of arbitration institutions previously. The model rules from these institutions have rendered tremendous service to the world of arbitration and now to the world of mediation. However we came to realize first with arbitration and then with conciliation that, in addition to a contractual regime, a statute was needed. If the general law thwarts the parties' contractual agreement, they will experience tensions and uncertainty. That is why we prepared the highly successful Model Law on Arbitration and later we decided it would be good to prepare a Model Law on Conciliation. We prepared the MLC with a view to dealing with those few points which are necessary to be addressed by statute.

Alexander

So in other words, the philosophy was to keep it simple and focus on the main features or the pillars that require legislative action, leaving the rest to the national states.

Confidentiality provisions as default provisions

UNCITRAL Model Law on Arbitration; Arbitration and conciliation in context

Sekolec

When we drafted the MLC, we not only had to take into account the governments and industries but also the mediation and arbitration community in order to arrive at a text that was practice-friendly.

If you consult the documentation of the sessions of the UNCITRAL Working Group on Conciliation in which we discuss the provision of the Model Law, you will see the active role of non-governmental organizations. Over the years 90 states have participated in the sessions and 20 non-governmental organizations.

Alexander

Could you comment on the relationship between the Model Law (2002) and the Conciliation Rules (1980)?

Sekolec

We are flexible in terms of the procedural rules that parties choose to use. Where current rules of mediation institutions function well, UNCITRAL does not wish to interfere with them. Over the past 23 years the UNCITRAL conciliation rules have actually radiated a lot of influence. When I look at the mediation rules used in Argentina, Australia or Germany, for example, I notice formulations based on the UNCITRAL Conciliation Rules.

For example, the general Magna Carta of the UNCITRAL Conciliation rules is that the conciliator will respect the will of the parties and will conduct the process as he or she considers appropriate. One sees these principles reflected in many sets of rules.

Alexander

Mr Sekolec, you and Judge Getty of the USA have written an article about the UNCITRAL Model Law on Conciliation and the Model Uniform Mediation Act of the United States (UMA). Could you make some comments about the relationship between these two pieces of model legislation?

Sekolec

The draft Uniform Mediation Act was being discussed at the National Conference of Commissioners for Uniform State Laws, while we were getting together the ideas for the Model Law. It was always interesting to read reports of the NCCUSL. Let me give you an example of how we were inspired by those discussions. America, like many other countries, decided to do something about enforceability. Many said: 'Let's declare that a settlement agreement is as enforceable as a judgment because this would promote the use of mediation'. However, there were some interesting comments from the drafters of the UMA who gave an

*Participation of
NGOs and
governments*

*UNCITRAL
Conciliation
Rules (1980)*

*Uniform
Mediation Act of
the United States
(UMA)*

*UMA;
enforceability of
settlement
agreements*

example of a case in Texas. In this case a woman maintained that she was cheated and coerced in the mediation process. She claimed the other side had acted fraudulently. The drafters considered what to do in the case of fraud. If they were to declare a settlement agreement enforceable as a judgment, then they would need to provide a safety net for fraudulent cases. At UNCITRAL we were able to learn from the deliberations of the NCCUSL, which in turn escalated the pace of our own deliberations.

Alexander

So both the UNCITRAL Working Group on Conciliation and the NCCUSL considered similar issues, but these bodies reached different conclusions on how to regulate certain aspects of mediation?

Sekolec

Yes. Although the issues we were facing were quite similar, the NCCUSL were dealing with mediation in a national context. For example, the right to be represented by an attorney is so sacred in US practice that an attorney or another individual designated to represent a party may accompany the party in a mediation. In circumstances in which a waiver of legal participation has been given before the mediation, such a waiver may be rescinded by the party wanting representation. Furthermore, the definition of mediation in the UMA is narrower than the UNCITRAL definition, but equally legitimate. For instance, the US Uniform Mediation Act only covers mediations by mediators who hold themselves out as providing mediation. At UNCITRAL we were also looking at the interests and experience of other countries in mediation, for example Kenya, India, Argentina, Peru and Australia. We were gathering materials from these countries and were also inspired by them. As you know, in August 2003 the NCCUSL included a new provision in the UMA, subjecting international cases to the UNCITRAL Model Law.

Alexander

So in other words the UMA applies only to domestic cases in the USA?

Sekolec

Yes. If there is an international case, then according to the provisions of the Uniform Mediation Act, the case is governed by a slightly modified version of the UNCITRAL Model Law. Therefore there is a direct incorporation of the UNCITRAL Model Law into the Uniform Mediation Act.

Alexander

Have you received feedback from any countries regarding their interest in enacting the Model Law?

UMA and MLC

Sekolec

Croatia has enacted a mediation law which looks very much like the UNCITRAL Model Law. In fact, it is the Model Law. Hungary also has adopted a law that follows the UNCITRAL Model Law but as that text is still in Hungarian I have not been able to read it. These are just examples. As countries do not always inform us of changes in their laws, even if they do it on the basis of an UNCITRAL model text, we are not able to follow these systematically. Judging by the interest expressed in the Model Law at the 6th Committee of the United Nations General Assembly, as well as elsewhere, many countries are looking at mediation as a promising form of dispute resolution. Countries are also realizing that it is necessary to have minimum statutory regulation as a foundation to support the development of international mediation practice.

Alexander

We have been speaking about the American UMA. Australia has taken a different approach. I would be interested to hear your views on it. There is an interdisciplinary body in Australia, called NADRAC (National Alternative Dispute Resolution Advisory Council) which was set up in 1995 to advise the government on issues relating to ADR. In the year 2000 NADRAC released a report on ADR standards. The report recommended a framework approach rather than uniform mediation standards.

A framework approach provides a model for balancing the desire for diversity and flexibility in practice on one hand, and the need for quality assurance and consistency in practice quality on the other. It involves organizations and industries committing to address specific criteria relating to training and service delivery standards. However, the precise manner in which industries and organizations deal with these issues is left to them.

Sekolec

What you are describing is very interesting and is compatible with UNCITRAL’s approach. As a body proposing model legislation, UNCITRAL has taken the path of minimum regulation of the foundations of mediation (primarily confidentiality) and has encouraged mediation institutions throughout the world to provide rules of procedure suitable to their contexts, taking into account cultural, political, legal and industry factors.

In my view an assurance of the fundamental features of mediation can only credibly be given by the law and not by the agreement of the parties. I think it is a sign of good progress to provide minimum standards.

Beyond the minimum standards, there will be diversity. For example, how does one deal with the issue of the duties of the mediator when s/he caucuses with a party? Must s/he keep that

Enacting states

*NADRAC,
framework
approach*

*UNCITRAL
approach*

information confidential upfront unless the party provides the mediator with special dispensation? Or is it the other way around, so that the mediator can inform the other party of everything unless the first party specifically requests the mediator not to do so on these issues? Life is beautiful because of these differences and the consequences and merits of each approach will unfold as mediation practice increases. Perhaps one approach will emerge as the better, or maybe both will co-exist. It may depend on the atmosphere and the dynamics of the particular case. We will wait and see.

Alexander

I would like to discuss the roles that good faith and natural justice play in the Model Law and in international ADR generally.

Sekolec

This is an important question. Good faith, natural justice, fairness, equity and all related concepts have a different meaning if one moves from legal system to legal system. In arbitration very rigorous adherence to due process of law (natural justice) is required. Without due process, the award will be vitiated. However, mediation is a voluntary process and either party can terminate the process at any moment. Therefore one does not need a rigorous adherence to due process. In arbitration one is dealing with past issues and liabilities, whereas mediation goes beyond this and deals with how to set aside a dispute and restructure the relationship for the future. In mediation one is dealing with the (re-) creation of a contractual relationship, not a statutory-based award. There is no judge or arbitrator who evaluates whether a mediated settlement agreement meets the criteria of good faith. What is fair is ultimately up to the parties. I think it would be a disservice to mediation if UNCITRAL would include in the Rules, or worse in the Law, that a mediated settlement must meet some criteria of equity, fairness or justice.

It is the *process* that must be fair - the procedure rather than the settlement. For example, parties must be able to negotiate without suffering duress from the other side; they must feel confident that the *process* is kept confidential, that the other side is not engaging in misleading, deceptive or fraudulent conduct. One party must not take advantage of the other. The process must be rigorous and fair but the outcome is like any other contract. It is a business relationship and it is for the parties to decide what is good for them. In mediation the law protects the parties from the same risks as in the normal run of contractual negotiations.

We should not invent special concepts of fairness and natural justice for mediation because mediation is nothing more than a more than a sophisticated, third-party assisted contractual negotiation. We already have the appropriate mechanisms and concepts in contract law.

Article 6(3) MLC uses the words 'fair treatment'. It has

Good faith and natural justice

Fair process

been drafted very carefully to indicate that the test of fair treatment applies to the conduct of the parties during the proceedings and not to the outcome or to the substance of the agreement. So the issues of good faith and equity play out differently in mediation compared with arbitration.

Fair treatment

Alexander

So when you say that we have the mechanisms already in place, you are referring to the enacting states.

Sekolec

Each enacting state has contract law that already deals with how far a judge should go in ensuring fairness and natural justice in pre-contractual dealings.

Alexander

I can imagine there might be some criticism of the word *fairness*. *Fairness* is a wonderfully all-encompassing term. However the law of contract and statute law in many jurisdictions would not be able to enforce a contractual clause requiring fairness.

*Law of enacting states;
Fairness*

Sekolec

That is true and that is also the beauty of the Model Law. If a concept does not fit a particular national system, the enacting state can change it.

The word *fairness* has an interesting linguistic meaning. When fairness is translated into Latin-based languages such as French and Spanish it becomes *équité* and *equidad*. These terms are related to the concept of equity. The common law countries were nervous when they saw the word *equity*, because it also has a technical meaning and because the meaning could spill over into the equity of the settlement. We did not want to subject a settlement agreement to the test of equity. Nobody should look over the shoulders of the parties and determine whether the settlement agreement is equitable or not. The Guide to Enactment clarifies that the term *Fairness* refers to the procedural aspects of the conciliation and not to the outcome.

Fairness and equity

Alexander

The concept of good faith in contractual relationships has had a very different history in common law jurisdictions compared with civil law jurisdictions. Could you comment on this in light of the Model Law?

Sekolec

While there were historical differences, it is nowadays too simplistic to refer to how the common law deals with these issues versus how the civil law does. Common law countries consist of over 40 different jurisdictions. Interventionist judges exist in both

Good faith

systems. So-called civil law judges are becoming more and more reluctant to intervene in a legitimate contractual relationship on the basis of the lack of good faith. And in common law jurisdictions recent developments in case law and in legislation have, in certain circumstances, required parties to act in good faith in pre-contractual dealings especially in consumer legislation.

Alexander

So, in your experience, the two systems are effectively moving towards each other?

Sekolec

Yes. So it is becoming increasingly difficult to make generalizations about legal systems and traditions as we did in the past.

Alexander

The provisions in the Model Law have the nature of being default provisions so the parties can contract out of them. Are there any exceptions to this?

Sekolec

There are two exceptions: articles 2 and 6(3). Article 2 is the interpretation provision. I do not think that it is technically necessary to make this provision mandatory but there is no harm. Article 2 (1) provides that: ‘In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.’

The article is a reminder to the judge and it is a guideline for interpretation, which favors harmony in an international context. Article 2(2) provides that where the answer to an issue governed by the Model Law is not expressly settled in the Law, one should look to the general principles on which the Model Law is based. So when there is a technical point that falls within the ambit of the provisions of the Model Law, one should first look for an answer in the philosophy of the Model Law rather than the (national) law outside the Model Law. Article 2 encourages national courts to look to the international character and origin of the Model law, which may include how other countries have understood and interpreted their enactment of the Model Law.

Alexander

Just on that point, won't countries be tempted first to look to what their national law says either in the field of mediation or conciliation or in a parallel field such as arbitration?

Sekolec

If the issue is not governed by the Model Law then judges will look at their national laws to solve the problem and would be

Nature of provisions of MLC - default provisions

Mandatory provisions – article 2

Interpretation of the MLC

justified in doing so. If, however, an issue is governed by the Model Law (but not expressly settled by it), then the user of the law must look to the Model Law for interpretation. This is the same principle that has been adopted in other pieces of legislation such as the United Nations Convention on Contracts for the International Sale of Goods.

Alexander

Was that principle adopted in the Model Law on Arbitration also?

Sekolec

We did not use it in the Model Law on Arbitration because at that time in 1985 the feeling was that a Model Law which becomes a national statute (and not an international treaty) should not be telling a national judge what to do. We were focused on the quality of the provisions rather than the issue of uniformity. This time we gave more emphasis to the fact that the Model Law is an instrument of harmonization of national laws and that it should be interpreted uniformly (that is, taking into account the international character and origin of the law and the need to promote uniformity in its application). The message to all national courts of enacting states dealing with an issue governed by the MLC is to think globally and look at the philosophy underlying this law.

Alexander

You mentioned article 6 as the other mandatory provision?

Sekolec

The other mandatory provision is article 6 (3): ‘In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.’

It is the ‘shall seek fair treatment of the parties’ part of the article which is important. I think public policy is the big hand watching over the well-being of the parties. The obligation of procedural fair treatment is something that should always be there for the parties. If it is not, then the form of dispute resolution loses the character of mediation or conciliation, and becomes something else.

Hopefully this fair treatment will not be translated into something, which will require the substance of mediated agreements to meet equitable criteria.

Alexander

Why did you choose fair treatment to be a mandatory provision but not confidentiality?

Sekolec

Confidentiality is for the benefit of the parties and they can

Mandatory provisions – article 6(3)

Fair treatment

always dispense with it. There may be some situations in which parties do not require all or part of the mediation to be confidential. Indeed, the parties may agree to go public with some or all aspects of their dispute and the legislator should have no reason to prevent them from doing so. Also, as we discussed earlier, there may be certain cultures and dispute resolution traditions where confidentiality does not play such a significant role as in western mediation.

Alexander

The Model Law is envisaged for business to business (B2B) disputes in an international context. It can of course also be used by enacting states as a model for commercial domestic disputes. What about business to consumer (B2C) disputes, particularly in the context of electronic commerce such as eBay? Often consumers commit themselves to mediation in the event of a dispute through a consumer contract. Bearing in mind the power imbalance that exists between an individual consumer and a large corporation, might there not be scope for an argument that more of the MLC should be mandatory, rather than default – for example the confidentiality provisions?

Sekolec

My reply would simply be that the Model Law is indeed meant for commercial (B2B) cases only. Although what is commercial is subject to a somewhat flexible definition referred to in a footnote of the MLC. It provides that: ‘the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not’, and it gives examples of relationships of a commercial nature. Therefore an eBay relationship may in some cases be regarded as commercial and not in others. It is a question of interpretation.

We were confident that this text was suitable for commercial cases; however, we also thought that most of the text, if not all of it, would be suitable for non-commercial cases such as consumer cases. With respect to non-commercial cases there may be scope to amend parts of the Model Law and the nature of the provisions in order to protect the weaker party. Again, UNCITRAL has restricted the application of the Model Law to B2B disputes only and left any extension of the law to B2C disputes and other non-commercial cases to the enacting states. Why? Because the approaches of the legislators in countries like Australia, some European countries and the United States concerning consumer protection are different from the approach of developing countries. And there are differences among developed countries as well.

An interesting possibility is for states to provide that the Model Law applies to B2B and B2C disputes, subject to consumer protection legislation. With the rapid increase in trans border e-

*Confidentiality
as a default
provision*

*Definition of
commercial -
B2B disputes
versus B2C
disputes*

commerce, this is an issue that national jurisdictions will have to consider carefully.

Alexander

Earlier you explained the minimum legislative approach of UNCITRAL, which aims to encourage flexibility and diversity in national and international mediation practice. You also spoke of the need for quality assurance in mediation practice. Which bodies do you think should be establishing quality assurance systems such as benchmarks, trust mark systems, standards for conduct in mediation, ethical codes, and so on. It seems that to leave this only to nation states would encourage a proliferation of different quality assurance systems and methods. This, in turn, could lead to an unnecessarily complex conflict of laws issues, for example, with respect to mediator liability issues. So, who do you think should be regulating these matters?

Quality assurance

Sekolec

I agree with you that a national institution – public or private – is not the ideal body to establish quality assurance schemes for international disputes. At the same time, it would be much too bold, too precipitous, for UNCITRAL as an intergovernmental body to start setting up frameworks for standards of mediation practice.

My reaction is that cross-border private institutions such as the International Chamber of Commerce would be appropriate to manage quality issues. The advantage of such organizations is that they operate on an international or regional basis already and in many cases provide the procedural rules within which international mediations occur. Further, regulations of private institutions can be amended more easily than the regulations created by governments. When governments start regulating, the rules become difficult to change and in some circumstances can become an impediment to trade.

Alexander

After the publication of the Model Law, what steps is UNCITRAL proposing to encourage uniformity of application of the Model Law?

Sekolec

The way we work on promoting unification is through our CLOUT system which stands for ‘Case Law and UNCITRAL texts’. After the Model Law on Arbitration was published, we gathered court decisions and arbitral decisions about the Model Arbitration Law. We published the results and were able to show the world in the six languages of the United Nations how judges and other interpreters of different jurisdictions have applied the law. This system has worked very successfully with the Model Law on Arbitration. We have published a large number of cases

Uniformity of application of the Model Law

and are now considering the preparation of a digest of case law. The CLOUT system reaches many people – lawyers, arbitrators, ADR providers, policy makers and law makers. It influences the future development of international arbitration and I have every reason to believe it will extend similar guidance to the development of international commercial conciliation.

The UNCITRAL approach is a step-by-step approach to the development of a harmonized system of international dispute resolution. We start with a minimal interference approach and then work with nation states, NGOs and international service-providers to further improve the rules and to increase harmonization, whilst still maintaining flexibility in the future.

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Legal instruments referred to in this interview are listed below.

1. UNCITRAL Arbitration Rules 1976;
2. UNCITRAL Conciliation Rules 1980;
3. United Nations Convention on Contracts for the International Sale of Goods 1980;
4. UNCITRAL Model Law on International Commercial Arbitration 1985;
5. UNCITRAL Model Law on International Commercial Conciliation 2002.





