The Different Meanings of International Commercial Conciliation

by

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1 Introduction

The meanings of legal textual objects, such as laws, legal principles, concepts, and judgments, change over time. New meanings are proposed by legislators, courts, lawyers, and other legal actors, and are then argued over in courts. In this article, based on my 2011 Master's thesis, I discuss some of the different meanings proposed for *conciliation*[1] in the context of international commercial dispute resolution. On the basis of contemporary legislative material, caselaw and jurisprudence, I identify three distinct legal meanings. The first meaning is that of a blanket denial of any legal effect of conciliation agreements. Under this meaning, courts simply leave conciliation agreements unenforced. The second meaning is that of applying a restrictive interpretation on conciliation agreements. Under this meaning, conciliation agreements must be drafted in a particular form and any deficiency in them may cause the agreement to be denied legal meaning. The third meaning is that of applying a liberal interpretation to conciliation agreements. Under this meaning, any clearly expressed intention to conciliate is given independent legal effect, if necessary through a constructive interpretation that overcomes deficiencies in form.

Lacking any binding international legislation on conciliation, I reflect on these three different meanings of conciliation in light of the brocard *pacta sunt servanda*; agreements must be kept. A key problem is that no single content can be identified for *pacta sunt servanda* itself; courts use this brocard to represent not only different interpretive paradigms, but also the more general principles of equity. Agreements are enforced to the extent that their content is understandable and acceptable to the relevant legal system. Discourse over this acceptability takes place through the principle of *pacta sunt servanda* and all the concepts and ideas used to clarify that principle. Thus, identifying the true motives of courts that apply different kinds of meaning to conciliation agreements is difficult. Therefore, I argue that the only meaning that can reasonably be attributed to conciliation in the international commercial context is that of a liberal interpretation seeking to assign legal effect to all agreements to conciliate. Doing so would alleviate paradigmatic confusion when courts interpret conciliation agreements and better protect the true intentions of the parties.

Another compelling reason for adopting a liberal interpretation of conciliation agreements is the inherent value of conciliation for international dispute resolution in general. It has been recognised by business actors, international dispute resolution institutes, international and national legislation, and courts of law. In practice, while leading authorities view preparing for a restrictive interpretation of conciliation agreements as a "safe choice", business actors should

[1] In this article, the words conciliation and mediation are used interchangeably to refer to a consensual method of dispute resolution under the guidance of a neutral third party.

also acknowledge that courts have increasing possibilities for applying a liberal interpretation to conciliation agreements. Thus, business actors should avert negative consequences, for example in relation to the validity of arbitral awards, by acting to uphold any contractual intention to conciliate prior to commencing litigation.

Section 2 provides an overview of the legal and practical contexts of international commercial conciliation. In Section 3, I review a number of legal instruments and caselaw on conciliation and, based on these, identify three different meanings given to conciliation in different legal contexts. Finally, in Section 4, I evaluate the three different meanings of conciliation in light of their legal and practical implications. Section 4.4 provides an overview of the key findings on a general level and particularly in relation to Finnish law.

2 Contexts of conciliation

From the point of view of abstract legal norms, societal phenomena can be framed in a multitude of ways. In this section I sketch a theoretical framework to examine the practical and legal contexts of international commercial conciliation. In particular, I argue that conciliation should not be viewed separately as a novel form of dispute resolution in itself, but as an integral part of existing forms of litigious dispute resolution. Thus, the same ideas and principles that are used in evaluating the method underlying dispute resolution, such as arbitration or court proceedings, should also apply to conciliation. Similarly, any legal meanings afforded to conciliation should necessarily take into account the greater context of international commercial dispute resolution.

2.1 General legal-theoretical framework

This article is based on the underlying position that law is a discourse that not only directs societal practice, but also necessarily reflects upon it. Every time a provision, a legal principle, a decision, or some other legal textual object is applied, the circumstances of that application

build upon and change the meaning of the legal textual object in question.[2] This discourse between legislators, judges, scholars, and other users of law changes and challenges our understanding of what is considered expected behaviour in particular circumstances and under particular ideas of law. In order to study that discourse successfully it needs to be set into a framework that can highlight meaningful differences in the types of argumentation used by different actors.

The framework used in this article is the traditional Nordic concept of sources of law.[3] However, I propose that this concept needs to be expanded. Any idea of law depends on the point of view adopted as regards to *context*. Despite any possibly increased textual stability that law brings to legal textual objects, interpreting law is in the end a process of contextualisation, de-contextualisation and re-contextualisation of a particular justification in different circumstances. Discussing Emily Dickinson's poems from the perspective of textual criticism Marta Werner notes that:[4]

> …the editor…is charged with the task of re-making Dickinson in the image of the present critical and cultural age. Of particular interest here will be the ways in which [the edition] responds to recent readings of Dickinson—many feminist and poststructuralist in orientation—that challenge, among other things, the "hierarchies of traditional textual components (e.g., truth and error, reading and variant, center and margin)," and that are clearly antithetical to masterpiece theories of art.

[2] The changing meanings of textual objects and the relationship of this meaning to perceptions of context are discussed for example by Derrida (1988) and Foucault (2009). For law in particular, see e.g. Amstutz (2007) and (2008) on Swiss codification and interpretive methodology and Votinius (2004) on the general principle of *pacta sunt servanda* in a Nordic context. Latour (2009) sees "Law" affect the meaning of legal textual objects as a system of discourse and translation through which various kinds of input from society interact with each other in order to determine what is "right", the relevancy of societal input being identified by its nature as so called "*value objects*". These ideas are universal for all legal systems based on human language. Whether one talks about the interpretation of statutes or the creation of new caselaw, the underlying discoursive process is the same. Law redefines the meaning of legal textual objects through the discourse through which they are applied into societal circumstances.

[3] In effect, "the sources of law" form a list of legitimate sources of arguments for creating normative reasoning and identifying what is just in a society (e.g. Tolonen 2003 p. 169). From a Nordic point of view, Tolonen identifies as valid sources of law in a somewhat descending order of hierarchy legislation, *travaux préparatoires*, caselaw, legal principles and jurisprudence, custom, and factual consideration (2003 p. 103 ff.). The actual relationship of these different sources of law under particular circumstances is often unclear, especially where law provides no "obvious" solution for example in situations where legislation is lacking or where laws contradict each other or some more general perception of "justice". Some general rules for interpreting the relationship of sources of law have nonetheless been proposed. For example, under traditional Finnish legal theory the value of *travaux préparatoires* as an indication of the legislator's intent is typically seen as great when a new law is promulgated. Over time, the importance of the *travaux préparatoires* wanes and is replaced by judicial interpretations in the form of caselaw (Tolonen 2003 p. 116). Thus, a number of general structuring principles are used to organize the discourse network formed by these various legal arguments.

[4] Werner 1998 p. 256.

A similar process of re-evaluation of the possible contemporary readings of a justification as interpreted in relation to previous readings creates various voices that propose different kinds of argument. Gradually, new voices gain momentum and replace older voices as the more or less agreed upon default reading of law. A key question is how exactly this happens. Latour has tried to identify all the different value objects that affect decisionmaking in the French supreme administrative authority, the Conseil d'État.[5] One of Latour's main findings was that law as a system cannot be diluted to what are seen as traditional doctrines of sources of law such as the Nordic concept that lies at the foundations of this article.[6] Instead, law is much more complex and requires at least all the different value objects identified by Latour to make it possible for courts to translate societal phenomena into legal output. Similarly, in the Nordic context Pöyhönen has criticized the present Finnish system of contract, property, and tort for being locked into an old-fashioned legal paradigm that cannot adequately reflect in its argument structures the plurality of different factual circumstances caused by societal development.[7] The discrepancy between the legal and the societal causes a severe strain on courts, in particular by making it difficult to create absolutely coherent legal arguments that also reflect changing views on equity. The result is that law is a systemic framework that highlights the difficulties and open-ended nature of legal argument; no hierarchy of argument seems to be able to provide a single viewpoint on what is just. This point of view has been recently noted by the Swiss Federal Supreme Court that has declared that it no longer can convincingly interpret every aspect of law in a unitarian and authoritative manner with the traditional legal argumentative tools they have at hand.[8]

How then, can the forces that affect the course of law be portrayed in judgments in such a manner that legislators can more effectively remedy any perceived problems in law and that citizens can better understand, discuss and criticize the contents of law? The uncertain nature of law as a process of translating societal expectations that arise in individual situations into the abstract and general language of law has the power to conceal more than it reveals. A number of proposals have been made to overcome this democratic deficiency, for example by increased reliance on the context of individual cases and different technologies to systematize these contexts.[9] I try to take this into account in this article. In short, law should respect the context more, and openly take into account how different actions can be perceived in different ways depending on how things are looked at. Therefore, in addition to trying to cover the traditional sources of law listed by Tolonen this article tries to place conciliation into a particular context, that of international commercial dispute resolution in general, and to evaluate the legal aspects of conciliation from within this context.

[5] Latour 2009.

[6] Latour 2009 p. 194–5.

[7] Pöyhönen 2000.

[8] See Steinauer 2009 and Amstutz 2008 for viewpoints criticizing and lauding this approach.

[9] Pöyhönen 2000 p. 140ff., p. 159ff.

2.2 Practical contexts of conciliation

In his treatise on international commercial arbitration, Born duly notes the adage that a "contract means no more than what it is interpreted to say".[10] A contract can be interpreted in a number of ways. One is to have the parties themselves negotiate a common interpretation for the contract. Another possibility is having some third party such as a court of law or an arbitral tribunal do the interpretation. Yet another possibility is that the parties reach a common interpretation with the help of a third party such as a conciliator or mediator. But why would the parties choose one over the other? In Section 2.2.1, I explore this question in light of the benefits associated with arbitration in relation to proceedings in national courts and by comparing conciliation to the perceived benefits of arbitration. In Section 2.2.2, I highlight the benefits and problems of conciliation especially when coupled with another form of dispute resolution such as arbitration or litigation. In doing so, I place conciliation in the context of international commercial dispute resolution and hope to underline not only the similarities in the objectives of conciliation and arbitration, but especially the intertwined nature of these two forms of dispute resolution. In effect, Section 2.2.3 reaches the outcome that, from the point of view of international dispute resolution agreements, it is more useful to conceive of arbitration and conciliation not as separate individual dispute resolution mechanisms, but as two integral aspects of a single dispute resolution mechanism.

2.2.1 Arbitration and conciliation

According to Born, objectives for international arbitration come down to having a forum that is as equal and efficient as possible for the parties and one that provides for internationally effective judgments.[11] Specifically, some factors can be identified as prominent including having; a neutral and centralized dispute resolution forum; enforceable agreements and awards; final decisions; tribunals with adequate commercial competence and expertise; the possibility for party autonomy and procedural flexibility; benefits of cost and speed; confidentiality; and facilitating amicable settlement.

The neutrality of the dispute resolution forum is enhanced by the parties' mutual agreement on the composition, location and procedure of the arbitral tribunal. A centralized dispute resolution forum helps avoid jurisdictional and choice of law difficulties that might result in the fragmentation of the dispute and thereby increasing transaction costs. Any award ordered by an arbitral tribunal is useless unless it can be effectively enforced. Similarly on the question of enforceability, the finality of a decision relates to transaction costs and legal certainty in the sense of to what extent decisions can be taken up for review by national courts. The possibility

[10] Born 2009 p. 64.

[11] Born 2009 p. 72 ff.

of agreeing on choosing their own arbitrators may help the parties ensure the tribunal's commercial competence and expertise instead of having to rely on generalist judges struggling with caseloads that have little relation to the subject matter at hand. Further, the procedural flexibility brought in by the principle of party autonomy may help the parties tailor a procedure that is not only more efficient, but also more just. Confidentiality and privacy are typically easier to achieve through arbitration than through national courts, which are often obligated to publicity. The cost and speed of arbitration is greatly variable and depends on the other factors such as choices made regarding forum and procedure.[12] Finally, Born claims that the procedural cooperation required by arbitration and "the prospect of a competent, expert decision by a commercially-sensible tribunal often facilitates the settlement process".[13]

On the other hand, all these factors are relative. Any neutrality in choice of procedure is subject to the relative equality of the parties.[14] As noted in Section 2.1, law is a process of translating societal circumstances into the legal; the arbitrators' possibilities to use their expertise in assessing what is just in a concrete situation are limited by the requirement that the ensuing award must retain its enforceability and finality when the award is reviewed by judges operating in national legal systems. Even under the New York Convention[15] the enforceability of arbitral awards is not guaranteed and problems in enforcement may be used as a means of coercing settlement.[16] Organizing arbitration in an efficient and flexible way requires additional effort in

[12] Bühring-Uhle's questionnaire study found that practitioners typically experience arbitration as faster but not less expensive than court litigation (2005 p. 38ff.). Born reflects factors such as arbitrators' and institutional fees and the logistical costs of organizing an arbitral process, all these increasing if the process lingers on (2009 p. 84). On the other hand, transaction costs at national courts may similarly be considerable for example in cases of appeal. Regarding speed, Born estimates that arbitration is "usually less slow" with meaningful commercial disputes often taking 18–36 months before a final award is reached, though this again depends on how well the agreed arbitration procedure fits the dispute at hand (2009 p. 85). From a Finnish perspective, Ovaska estimates that arbitration and ordinary court proceedings face roughly equal costs but that arbitration would on average be clearly faster due to the lack of appeals and taking into account the "attention that chambers of commerce pay on expeditiousness" for example with the one year time limit for arbitrations issued by the Finnish Central Chamber of Commerce (2007 p. 376, p. 387).

[13] Born 2009 p. 87–88.

[14] E.g. Ben-Shahar and White 2006.

[15] United Nations 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[16] PricewaterhouseCoopers 2008.

the drafting phase, and even then, one size rarely fits all.[17] If the parties' relationship has deteriorated, bespoke arbitration procedures intended to ensure swift resolution of disputes may become prime objects of dispute themselves.[18] Finally, while the institutionalisation of arbitration also has its benefits, the interaction that has ensued between the arbitral and the judicial has lead to arbitration becoming more and more like "normal" litigation with potentially rigid procedure legislated nationally and internationally and further defined by caselaw.[19] In short, increased procedural intricacy and increased involvement of judicial systems bring arbitration closer and closer to formal judicial procedure, a starting point from which arbitration traditionally has tried to distance itself.

Conciliation is defined by Hill as a "voluntary, non-binding" process "using a neutral to guide the parties towards a mutually beneficial resolution of their dispute".[20] A conciliator cannot impose a decision on the parties like a judge or arbitrator, but only "helps the parties to decide for themselves whether to settle and on what terms".[21] Thus, in conciliation the objectives of arbitration mentioned above are of somewhat different weight. Instead of guaranteeing a final decision for the parties, the non-adjudicatory procedure tries to facilitate a mutually acceptable settlement. Amicable settlement is emphasised to such an extent that if settlement cannot be reached, the procedure results in no decision at all. Either party may decline the proposed

[17] See e.g. Berger (2008) on fast-track arbitration. How institutionalisation has turned into increased drafting, contract-management and co-operation requirements becomes clear from O'Neil's presentation of arbitration from a commercial client's perspective (2008). However, achieving O'Neil's objectives for a fast and cost-efficient process may become impossible once a dispute has escalated (2008 p. 73):

- Appoint a tribunal that has the necessary expertise, availability and reputation of being expeditious, be they one or three arbitrators.
- Co-operate in agreeing to an expeditious programme.
- Prepare submissions that are concise, use simple language and clearly identify the key issues…
- Make use of party autonomy—encourage and assist the arbitrator to limit discovery, the number of experts and the size of submissions.
- Make sure arbitration does not become litigation under another name.
- Agree on a process to narrow the issues if possible.
- Control of costs is all-important. Clients hate being ambushed with large unexpected legal bills– provide us with a budget for approval in advance and if it looks like being blown tell us that well in advance, because it may affect our decision.

[18] As is seen in the Swiss Federal Supreme Court case 4A_18/2007 discussed in Section 3.2.3.

[19] E.g. Brower 2007 p. 181, p. 184. Increased procedural intricacy is clear from the great interest on various procedural issues such as disclosure. A recent example on the relationship of arbitration to European law is the 2009 *Allianz Spa (formerly Riunione Adriatica di Sicurta Spa) v. West Tankers Inc* decision on anti-suit injunctions. The ECJ ruled that anti-suit injunctions based on arbitration agreements are not compatible with Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Arbitration is thus increasingly intertwined with judicial procedure: even when arbitration is specifically left outside the scope of Council Regulation (EC) 44/2001 (see Article 2), the ECJ nevertheless found itself competent to rule on the use of anti-suit injunctions in arbitration.

[20] Hill 1998 p. 175.

[21] Hill 1998 p. 175.

solution without any harm to its rights. Volition is thus one of the most important aspects of conciliation.[22]

The heavy emphasis on volition changes the balancing of objectives of arbitration, so that in conciliation, there is no guarantee of a final decision. Apart from the lack of guaranteed decisions, conciliation seems to better fulfil those objectives, than arbitration. There is no fixed procedure, unless the parties agree to such. In this, conciliation seems similar to the arbitration of yore: a relatively free procedure that is not cluttered by procedural restraints unless the parties wish so. Once a conciliator has been appointed, they are free to conduct the proceedings as they see fit.[23] The parties are free to choose a conciliator they see as competent and expert on the matter in question and they are also free to formulate their conciliation agreement and procedure as required. The dispute resolution forum is even more neutral than in arbitration as parties have equal power over whether any ensuing decision is accepted. The dispute resolution forum is as centralized as the parties wish, as the parties may include in their settlement any disputes they want to, even ones that have no direct relevance to each other. While the parties have no obligation to accept a settlement proposed in conciliation, the outcome of the process, if accepted, can be a final and binding agreement; an arbitral tribunal or court may even be requested to turn the settlement agreement into an enforceable decision. The transaction costs of conciliation with regard to time and money are lower than in arbitration or court proceedings as the parties need not invest as much in a legal process that attempts to subordinate the other side's arguments at all costs. As seen in Section 2.2.2 below, the procedure has potential to maximize the circulation of dispute-related information even while maintaining overall confidentiality. By emphasising volition over everything else and by avoiding the tribulations of adversarial procedure, conciliation helps further amicable relationships between disputing parties.

The questions remaining, then, are whether a procedure with no guarantee of resolving a dispute can work and whether it can and should be imposable on parties as a binding obligation. The question of whether and how a non-binding procedure such as conciliation does work is examined in Section 2.2.2 below. The latter question is addressed in detail in Section 4 below.

[22] E.g. Sanders 1999 p. 355.

[23] For example, according to Article 6(2) of the UNCITRAL Model Law on Conciliation:

> *Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.*

Redfern and Hunter describe conciliation as a kind of scuttling back and forth between the parties that the conciliator undertakes while trying to pinpoint the essence of a dispute and any middle ground (2004 p. 44). A more detailed example of how a conciliation process may take place is provided for example in AAA's *Guide to Mediation and Arbitration for Business People* (2007 p. 10–14).

2.2.2 How conciliation works and how it doesn't

The theoretical foundations of non-adjudicatory dispute resolution have been examined for example by Hill.[24] Hill notes the essential distinction between *interests* and *rights*.[25] Interests are "defined by a party in interaction and are the things that that party is interested in", with examples such as money, physical goods, and recognition, while rights are "given by an external framework" such as laws or agreements. The key difference between litigation (including arbitration) and conciliation is that the first attempts to settle disputes in relation to parties' rights while the latter attempts to settle disputes in relation to parties' interests.[26] Interest-based conciliation, Hill argues, is a non-zero-sum game aiming at a solution that tries to guarantee both parties' interests, whereas rights-based litigation is zero-sum due to the restrictions of litigation, which typically require that the rights of one party are given precedence over the rights of another.[27]

In light of the discussion in Section 2.1 above, interests thus reflect real world situations in particular circumstances while rights reflect abstractions of justice translated over time from real world circumstances. In litigation or arbitration, interests would have to be approximated and translated into rights through the legal system, while conciliation can directly try to tackle the underlying interests of a dispute. Conciliation is therefore of fundamental interest not because it is more efficient time-wise and cost-wise than litigation, but because it can be more effective by allowing solutions that better reflect both parties' interests than rights-bound judicial decisions or arbitral awards ever can.[28] Furthermore, conciliation allows for conflict-avoidance; unlike litigation, parties may be able to find a solution that does not force them to cross swords at all.

According to Hill, what makes conciliation work as a non-zero-sum game are factors such as, confidential information exchange, interweaving of information exchange, characteristic matching, de-conflicting, and the mere fact that solutions are not judicially constrained.[29]

[24] Hill 1998.

[25] Hill 1998 p. 173

[26] While *purely facilitative* conciliation concentrates solely on interests, *evaluative* conciliation tentatively sketches the parties' respective rights positions in order to facilitate a settlement. Thus, evaluative conciliation is akin to litigation but with the key difference that it only attempts to identify probable rights positions without having the capacity of definitively fixing them. Even tentative information about each other's respective power positions may change the parties' actual power positions in negotiations. Hill notes that litigation itself is often also used as an expensive version of evaluative conciliation on the results of which settlement negotiations are based. Similarly, Redfern and Hunter conclude that an arbitral award may often be only the beginning of settlement negotiations and especially so with the added risks of enforcement difficulties or appeals on the arbitral process (2004 p. 560).

[27] Hill 1998 p. 176.

[28] Hill 1998 p. 174.

[29] Hill 1998 p. 175.

Confidential information exchange is important because parties typically weaken their own bargaining positions, if they disclose relevant information to each other. A neutral conciliator, on the other hand, may be able to access the relevant information without weakening the bargaining position of either party. The *interweaving of information exchange* is important as in litigation parties typically communicate through a fixed procedure that is limited to rigid and formal exchanges of documents, statements and pleadings.[30] In conciliation, however, information exchange can be more fluid and responsive with one party providing the other with a piece of information and proceeding further only after the other party has sufficiently responded to the first request by directly acknowledging or challenging the information or with new information. *Characteristic matching* refers to the increased possibility of a conciliator to identify the common denominators in parties' interests.[31] For example, in technically complex disputes the mere requirement that each party presents complex cases to the conciliator in an understandable manner may lead to the dispute being broken down into more manageable entities. *De-conflicting* directs parties away from the absolutely-right-or-absolutely-wrong frame of reference of law, based on what either party sees as supposedly provable facts and supposedly clear interpretations of law, to the more relativistic frame of reference of extra-legal reality. Instead of winning a legal claim parties can for example concentrate on how a particular resolution to the dispute affects the parties' image, financial positions, and future sales and profits. Drafting from such a relativistic frame of reference may help identify the actual interest of the dispute from the abstract legal framework of rights that may be distanced from the actual problem. Finally, that *solutions are not bound by judicial constraints* is important due to the limitations of litigation with regard to the above-mentioned divide between abstract rights and concrete interests.[32] Judges and arbitrators are constrained by the parties' claims and the limits of law. Conciliation is not limited by such bounds. Parties are free to settle as they wish, even by compromising their potential rights positions in order to secure their interest positions.

From a game-theoretical perspective as presented by Hill, one of the basic ideas behind conciliation is that if one party cooperates but the other does not, then the cooperating party may weaken its bargaining position by revealing useful information to the other side without gaining anything in return. If neither does, then either both parties stand to lose or the result is uncertain. This is the case for example in rights-centred litigation, where one party wins acknowledgment of its rights position while the other party loses such acknowledgment. In particular in cases with complex legal issues it may be impossible to know beforehand which party will prevail and the ensuing legal battle will be akin to the classic example of auctioning a twenty dollar bill. If both parties, however, overcome any one-sided views of their bargaining positions, then the ensuing result may be better for both due to lesser transaction and image

[30] Hill 1998 p. 177.

[31] Hill 1998 p. 178–9.

[32] Hill 1998 p. 181.

costs and the possibility for more equal decisions than those possible through litigation. But due to the information blackout often associated with legal bargaining, it may be nearly impossible for disputants to reach such settlement without outside help.

With regard to using information positions and the possibilities for proposing different types of settlements, there is a major difference between negotiation, conciliation and litigation. Between free-for-all negotiation and rigid litigation procedure, conciliation offers middle ground on which a conciliator has the possibility to make maximum use of both parties' information positions with neither party having to fear losing bargaining power. Further, as a neutral evaluator, the conciliator is in the best position to use this advanced information position for characteristic matching in order to propose de-conflicting solutions, even beyond what would be judicially possible. Especially in escalated disputes all this may only be achievable through an experienced conciliator and a binding conciliation procedure. If both parties see the conciliator as trustworthy, he or she may be able to identify and propose solutions that the parties could not achieve due to the locked-in status of their negotiations.

Unlike Hill, in their treatise on international arbitration Redfern and Hunter concentrate on what they see as the five key limits of conciliation[33]. First off, they point out what they see as the cultural specificity of conciliation. This is their belief that conciliation works best when all parties and the conciliator share the same cultural and legal background. To an extent this is true; as seen above with regard to the discussion on the objectives of arbitration and conciliation, parties in dispute most certainly wish for a competent and expert conciliator who can take into account the particularities of their respective fields and backgrounds. It is well within the scope of party autonomy to try to decide on a conciliator or arbitrator suitable also in this regard. Beyond this, in an increasingly global world I argue that cultural specificity will increasingly cease to be an issue for capable conciliators.

Another issue raised by Redfern and Hunter is that in some cases one party can simply be seen to be wholly right about its rights position and the other wholly wrong. Redfern and Hunter claim that compromise in brokering a deal in such situations may not be morally justifiable and may have a poor impact on fairness in general.[34] Then again, party autonomy with regard to the possibility of settling on whatever grounds is a key principle of private law. Parties are typically free to settle cases, whether or not an ensuing settlement might be seen by some to be morally questionable or not, and neither does conciliation impose any obligation to settle. Further, from other perspectives accepting a smaller settlement instead of a full reparation that is attainable only through time-consuming litigation may be justifiable with regard to minimising transaction costs both on the parties themselves and the judiciary. Redfern and Hunter themselves note that the result of litigation may be perceived as merely the starting point for

[33] Redfern and Hunter 2004 p. 53.

[34] Redfern and Hunter 2004 p. 53.

settlement proceedings on the basis of "a bird in the hand is worth two in the bush".[35] Finally, whether or not conciliation is futile in such situations is difficult to judge beforehand. It is not atypical for disputing parties to see their rights positions as "right" prior to litigation, only to see the same rights positions change during the legal process, as noted for instance by the English justices discussing the effects of declining court-proposed conciliation on cost-awards.[36]

Third, Redfern and Hunter note that conciliation may be used as a tactical ploy by a party that, while not willing to negotiate, nevertheless claims to be so up to the point at which it turns down the suggested settlement. The use of law as a tactical measure for achieving goals foreign to the meaning of law is of course a very real possibility. However, the possibility of abuse of rights exists with regard to almost any legal measure. Any courts that assess whether for example interim measures for securing assets are justified during conciliation proceedings or whether pre-arbitral procedure as a condition precedent for further dispute resolution has been complied with should take this possibility into account under relevant doctrines on abuse of law.

The two remaining issues discussed by Redfern and Hunter are more pertinent to the non-binding nature of conciliation. Fourth, they acknowledge that conciliation aims at a compromise, a situation in which both parties win or at least do not lose as bad as they would under litigation. However, all issues cannot be compromised. One example are clauses in standard form that, depending on their interpretation, may affect numerous other contracts in which the same standard form is used. In such cases, and in others where a legal precedent is sought, a final decision on the interpretation of the clause may be required instead of an *in casu* compromise. Fifth and finally, Redfern and Hunter note that even with genuine effort, conciliation does not always work. The conciliating parties are free to decline any proposed settlement as they wish. In such a case, conciliation would according to them only have been an obstacle towards reaching a final result to the dispute, incurring additional costs and delays to the parties involved. Thus, out of the five issues raised by Redfern and Hunter only the last two seem to be particularly pertinent to conciliation. These issues are neatly summed up by the English Court of Appeals in the 2004 *Halsey* decision:[37]

[35] Redfern and Hunter 2004 p. 560. This position is also supported by a PricewaterhouseCoopers study conducted among major corporations engaged in international arbitration, according to which "56% of the participating corporate counsel who had negotiated a settlement after an award indicated they did so in order to avoid the time or costs involved in embarking on recognition, enforcement and execution proceedings in a foreign jurisdiction" and that for 19% maintaining a relationship with the non-prevailing party was a major incentive to settle (PricewaterhouseCoopers 2008 p. 3). Further, corporations relatively seldom manage to recover the full award for example due to lack of funds, problems in identifying recoverable assets or local enforcement and execution proceedings (ibid.).

[36] See e.g. *Susan Dunnett v Railtrack plc.*

[37] *Halsey* para 17.

> Even the most ardent supporters of ADR acknowledge that the subject-matter of some disputes renders them intrinsically unsuitable for ADR. The Commercial Court Working Party on ADR stated in 1999:
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> "The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated."
>
> Other examples falling within this category are cases where a party wants the court to resolve a point of law which arises from time to time, and it is considered that a binding precedent would be useful; or cases where injunctive or other relief is essential to protect the position of a party. But in our view, most cases are not by their very nature unsuitable for ADR.

However, the fact that some legal issues are not solvable through conciliation does not in itself necessarily make conciliation useless. Mackie and Allen claim that even when conciliation has led to trial or appeal instead of settlement "preparation work that will have been needed to be done anyway is done at an earlier stage than otherwise, and the issues thereby usefully defined and limited" and that because of this "mediators tend to talk not of failed mediations but mediations which did not settle the claim immediately or at all".[38] Similarly, Lightman notes that conciliation is always a good exercise for stepping into the shoes of the other party, i.e. "opening the eyes of parties to the merits of the opponent's case, the issues involved, the risks and costs of litigation and the attractions of a settlement".[39] Even where no settlement is reached directly through the conciliation process, parties (and indirectly the judiciary) benefit from the case analysis that parties undertake during conciliation. The American Arbitration Association sums up these possible benefits of conciliation in "plain talk", noting that even when not resulting in a settlement, conciliation can:[40]

- reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- open discussions into areas not previously considered or inadequately developed;
- communicate positions or proposals in understandable or more palatable terms;
- probe and uncover additional facts and the real interests of parties;

[38] Mackie and Allen 2009.

[39] Lightman 2007 p. 401.

[40] AAA 2007 p. 7.

- help each party to better understand the other party's view and evaluation of a particular issue, without violating confidences;
- narrow the issues and each party's positions, and deflate extreme demands;
- gauge the receptiveness for a proposal or suggestion;
- explore alternatives and search for solutions;
- identify what is important and what is expendable;
- prevent regression or raising of surprise issues; and
- structure a settlement to resolve current problems and future parties' needs.

2.2.3 Best of both worlds?

Because it cannot guarantee a final resolution to a dispute, conciliation is not used as the sole method of dispute resolution in international commercial contracts. Instead, it is typically used as one tier of a multi-tiered dispute resolution clause and accompanied by some form of litigation or arbitration.[41] Parties typically start their contractual dispute resolution process with voluntary methods such as negotiation and conciliation and only use litigation or arbitration in case other methods fail to resolve the dispute. As seen in the previous section, conciliation may not be capable of offering an ideal solution to all cases. However, as also seen in the previous section, neither does conciliation harm the parties' interests; on the contrary, it eases the burden of litigation if conciliation has more precisely narrowed down the nature of the dispute than what would be possible under litigation.

Conciliation does not need to provide a final solution in order to facilitate litigious dispute resolution. The question is rather of having the possibility of conciliation as a first step before more costly methods of dispute resolution.[42] Conciliation itself should be seen less as an independent method of dispute resolution and more as pre-arbitration or pre-litigation that helps carry the burden of litigation, with the added bonus that the first step may be able to prevent litigation completely. Thus, there seems to be little need to consider conciliation as a

[41] Pryles describes multi-tiered dispute resolution clauses as clauses designed to deal with future disputes that are multifarious in nature; they are "likely to contain, in one tier or another, a procedure appropriate for a particular dispute" (2001 p. 158–159). Such clauses typically escalate from a negotiation tier to a conciliation tier to a litigation tier, and do not, as a rule, make a differentiation between what kinds of disputes are resolved with which method (see, for example, Dobbins 2005).

[42] As with all *ex ante* agreements on the resolution of future disputes, it is impossible to know the exact nature of future disputes beforehand. There seems to be no way of realistically determining in advance whether conciliation, litigation or some other method would be optimal under particular circumstances. Hill's discussion of conflict system design provides an example of a dispute resolution mechanism in which there is a case-by-case *ex post* decision over what dispute resolution method from a number of alternatives is used (1998 p. 182–3). In such cases the power to decide the appropriate methods of dispute resolution would be relegated to an external party, in Hill's example to the Dispute Resolution Advisers used in the construction industry in Hong Kong. Having such a third party on standby of course requires considerable resources.

fully independent dispute resolution system. Instead, it should be seen as an integral and effective part of arbitration or litigation, a kind of pre-arbitral or pre-judicial procedure that parties should agree on in order to increase the efficiency of their dispute resolution process.

In general, settlement is by far the most common way to solve commercial disputes and most probably as old as the very idea of dispute.[43] Civil courts have also been susceptible to settlement for long.[44] This also applies to procedures that assist reaching settlement.[45] It is beyond the scope of this article to reflect on the exact history of helping people settle their disputes without resorting to litigation, but it seems that conciliation as assisted settlement does not lag far behind from the reputation of settlement in general. Conciliation seems to be increasingly gaining the favour of business.[46] Also institutions organising conciliation proceedings are very positive about their results. Mackie and Allen, representing the UK organisation CEDR, note that in 2009:

> The investment [into conciliation] pays off in anything from 60-90% of cases, depending on the sector, the mediator, and on the willingness of the parties to buy up the risks in their respective cases. Many which do not settle on the mediation day settle later and as a direct result of the shifts in thinking produced by the mediation.

The AAA claims not only that "85% of commercial matters and 95% of personal injury matters" that are conciliated end up in "written settlement agreements", but also that conciliation is successful on an extremely broad spectrum of disputes:[47]

[43] Born 2009 p. 70.

[44] See also the frequent evocations of settling disputes outside courts in Sachs' analysis of the practice of medieval courts in relation to modern perceptions of *lex mercatoria* (e.g. 2006 p. 721–722). For example in the 1302 decision *Darlington v. Burser* reported by Sachs, the St. Ives Fair Court, instead of issuing a general ruling, "granted permission to settle".

[45] According to Roebuck's research (in particular 2006 p. 102–3; 2007 p. 115), conciliation has been a prime method of dispute resolution in all kinds of cultures and throughout the ages, from prehistoric times to our own.

[46] PricewaterhouseCoopers' 2006 survey *International arbitration: Corporate attitudes and practices* studied the attitudes of 103 "leading corporations" towards transnational litigation, international arbitration, and conciliation and other forms of ADR. The study found that the preferred dispute resolution method for international disputes were multi-tiered dispute resolution procedures combining arbitration and ADR for 44% of the respondents, international arbitration for 29% of the respondents, international conciliation and other ADR for 16% of the respondents, and transnational litigation for 11% of the respondents (PricewaterhouseCoopers 2006 p. 5). While the study does not give a clear picture on the prevalence of conciliation, one may assume that conciliation, which is seen as the default ADR method for example by the UNCITRAL Conciliation Model Law and the ICC ADR Rules, is well represented by the almost two thirds of the respondents who mention ADR either alone or in conjunction with arbitration as their preferred method of dispute resolution. Further, the study indicated a trend toward the development of "more sophisticated dispute resolution policies" that will "[i]ncreasingly… take the form of escalating, multi-tiered dispute resolution procedures" (PricewaterhouseCoopers 2006 p. 22).

[47] AAA 2007 p. 2; AAA 2009.

> [i]t is widely acknowledged that the majority of disputes submitted to mediation result in a settlement agreement. However, there is no one specific answer to this question because of the diversity of issues submitted to mediation and the various fields in which mediation is practiced, e.g. family, community, commercial, employment, international, etc.

2.3 Legal contexts of international commercial conciliation

In this section I study the relevance to conciliation of various legal instruments on international commercial dispute resolution. Conciliation will be approached from the perspective of the more extensive legal material available on international arbitration. Section 2.3.1 provides an overview of international regulation and Section 2.3.2 discusses the effects and potential of this regulation on the enforceability of arbitration and conciliation agreements. Finally, instead of concentrating on regulation solely aimed at conciliation, Section 2.3.3 proposes identifying international commercial dispute resolution as the relevant legal context from which to examine the meaning and effects of conciliation agreements.

2.3.1 International regulation

This discussion on regulating international commercial conciliation starts with a detour through the most generally accepted legal instrument on international commercial arbitration, the 1958 New York Convention. The New York Convention provides a widely accepted international basis for the evaluation of arbitration agreements.[48] It does not, however, provide much regulation on what arbitration agreements look like or how the actual arbitration process should proceed. Further, the New York Convention does not directly state how arbitration agreements should be interpreted; the assessment of whether an agreement to arbitrate exists is primarily left to national laws of contract. Nevertheless, because the majority of the nations in the world adhere to the New York Convention, international arbitration is well established and recognised by law.

There is no such international law on conciliation. International regulation on conciliation consists primarily of non-binding soft law instruments. For example UNCITRAL, in connection with its work on arbitration, decided in 1978 to take steps in providing a common legal framework for conciliation.[49] This resulted in the 1980 *UNCITRAL Conciliation Rules* and the 2002 *UNCITRAL Model Law on International Commercial Conciliation* ("UNCITRAL

[48] See in general Born 2009 for the New York Convention and its interpretive effect.

[49] According to the *travaux préparatoires*, one of the priority items of the new work programme adopted at the eleventh session of UNCITRAL was, under the general heading of international commercial arbitration, "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules" (UNCITRAL 1979). This programme eventually led to the UNCITRAL Conciliation Rules.

Conciliation Model Law"). While these are non-binding, they nevertheless have some institutional support in that they have been promulgated by UNCITRAL as models for international commercial conciliation. Further, the UNCITRAL Conciliation Model Law may be adopted by states as the basis for binding national legislation on conciliation and the UNCITRAL Conciliation Rules may be similarly incorporated into a contract. However, as will be seen in Section 3.1.1 below, even when incorporated into legislation or a contract these instruments retain a curiously non-binding nature unless they are extensively modified. Nonetheless, both instruments serve as an international model for the legislation and interpretation of conciliation. They provide a basic benchmark for conciliation procedure, thus helping promote the uniformity of international conciliation. They have also gained a level of international acceptance as binding national legislation. According to the UNCITRAL website, as of August 2010 legislation based on the UNCITRAL Conciliation Model Law has been enacted in seven countries.[50] Further, ten US states and the Federal District of Washington have adopted the Uniform Mediation Act, which is claimed to be influenced by the UNCITRAL Conciliation Model Law.[51] Sanders notes that some national conciliation legislation based on the UNCITRAL Conciliation Rules have also been enacted.[52]

Further international soft law on conciliation is available through international dispute resolution institutions that have established their own conciliation rules. Some of the better-known regulations are the ADR Rules of the International Chamber of Commerce ("ICC ADR Rules"), the International Mediation Rules of the International Centre for Dispute Resolution ("ICDR Mediation Rules") and the Mediation Rules of the World Intellectual Property Organization ("WIPO Mediation Rules"). These constitute non-binding soft law that may be seen as even less official than the UNCITRAL Conciliation Model Law and Conciliation Rules, lacking the general institutional basis of the UNCITRAL. However, similarly to the UNCITRAL regime, they nevertheless serve as additional competing models on how to understand conciliation. Parties are free to incorporate such rules in their contract for which purpose the rules provide a number of model clauses, ranging from optional clauses requiring parties only to consider alternative dispute resolution to clauses specifying mandatory ADR procedures. As is seen in Section 3.1.2, such non-UNCITRAL regulations more clearly provide for binding conciliation.

The key difference between international regulations on arbitration and conciliation is thus that with regard to conciliation there is no clear international authority that would require national courts to recognize and enforce agreements to conciliate. Instead, there are merely non-binding models on how an agreement to conciliate might be construed. Whether or not an

[50] UNCITRAL 2010b.

[51] UNCITRAL 2010b.

[52] Sanders 1999 p. 358 ff., pp. 371–2.

agreement to conciliate in fact exists is thus ultimately left to national laws of contract.[53] This position is not all too different when compared to arbitration. Despite the New York Convention, which requires courts to recognize and enforce foreign arbitration agreements, it is ultimately up to national contract law to decide whether or not an agreement to arbitrate exists. Born, for example, notes that international arbitration conventions do not and national arbitration legislations only very rarely do prescribe specific rules governing the interpretive process of arbitration agreements.[54] Thus, the overall presumption made in this thesis that the enforceability of conciliation clauses is in general subject to national contract law is basically identical to arbitration agreements. The only major difference is that there is no overriding international legal instrument that would outright compel courts to uphold international conciliation agreements as the New York Convention does.

2.3.2 The greater juridical contexts of arbitration and conciliation

As seen in Section 2.3.1, it is up to national contract law to evaluate whether or not a valid conciliation or arbitration agreement exists. Besides the requirement to uphold valid arbitration agreements imposed by the New York Convention, international and national regulation on arbitration and conciliation primarily provides a procedural framework through which to support any arbitration or conciliation process that does take place on the basis of an agreement. With regard to such procedural frameworks, arbitration is clearly in a more favourable position than conciliation.

The international and national law on arbitration has two major effects on the enforceability of arbitration clauses. First of all, the New York Convention and other international arbitration conventions are seen to contain a distinct pro-arbitration bias requiring courts to recognize international arbitration agreements.[55] For example, Article V(1)a of the New York Convention does not *require* a court to deny recognition of an arbitral award based on an arbitration agreement that is found to be invalid "under the law to which the parties have subjected it";

[53] Conciliation has in general been recognised in numerous jurisdictions by granting enforceability at least to what for example Dobbins calls "properly crafted mandatory mediation clauses" (2005 p. 169). See e.g. Berger (2006 pp. 6–9) on Germany, France, England, New South Wales, Ireland, and the USA and Jolles (2006 pp. 329–334) for Switzerland, Germany, USA, England, and the ICC. Dobbins notes that in the USA "state and federal courts are willing to recognize the strong public policy favouring alternative dispute resolution proceedings" (2005 p. 169). In some cases noted by Dobbins, such as the Seventh Circuit's 1987 *DeValk Lincoln Mercury* and an Ohio Federal District Court's 1993 *Bill Call Ford*, parties have even lost their right of access to court due to the annulment of judgments made prior to proper conciliation and the consequent running out of limitation periods. Similar conclusions, though with less severe consequences due to policy disfavouring the loss of limitation periods, have been made for example in Germany (BGH decision VIII ZR 344-97 of 18 November 1998) and Austria (OGH Wien decision 8 ObA 28/08p of 2 September 2008).

[54] Born 2009 p. 1060.

[55] Born 2009 p. 1060.

instead, the court *may* refuse such recognition. This pro-arbitration bias has led to liberal rules for the construction of international arbitration agreements. Typically, arbitration agreements are in cases of doubt seen as enforceable rather than not even to the extent that meaning is sought for an arbitration clause even when that clause contains discrepancies or omissions. This is done on the basis of the apparent intent of the parties to arbitrate as expressed by their arbitration clause.[56]

Second, national legislations on arbitration such as the Finnish Arbitration Act, the US Federal Arbitration Act and the over 70 national laws based on the UNCITRAL Model Law on International Commercial Arbitration[57] provide a framework for the arbitral process that often allows for suplementing imperfect arbitration clauses. For example, if arbitration has been agreed to under Finnish law but the parties have not agreed on the specifics of the arbitral procedure they wish to follow, the Finnish Arbitration Act provides for a basic arbitral procedure starting with the constitution of the arbitral tribunal and, under Article 23, bestowing upon that tribunal the power to decide any procedural issues not agreed upon by the parties on the basis of the Finnish Arbitration Act, and principles of equality and procedural efficiency.

These two features leave very little demands on arbitration agreements. For example, simple statements in international contracts such as "Arbitration, Finland" or "Arbitration, Finnish law" are probably enforceable as agreements to arbitrate. Even between disputing parties not able to agree on anything at all, the arbitral procedure can be filled out with the help of the Finnish Arbitration Act and the New York Convention provides additional motivation to enforce the agreement even if it for some reason would be seen as open to interpretation.[58]

At first glance there seems to be relatively little regulatory support for conciliation agreements. There is no widely accepted and binding international law convention requiring courts to recognize and enforce conciliation agreements. Individual legislations on international conciliation based for example on the UNCITRAL Conciliation Model Law and the UNCITRAL Conciliation Rules do exist, as noted in Section 2.3.1 above. However, the extent of these is not as far-reaching as that of relevant legislation on international arbitration. Thus agreements such as "conciliation, Finland" or "conciliation, Finnish law" would quite possibly be good for nothing due to the apparent lack of a specific legal framework on conciliation in Finland. Lacking such a framework, agreements such as these typically lack necessary substance

[56] See generally Redfern and Hunter 2004 p. 197 ff. and the more extensive analysis of Born 2009 p. 654 ff., p-1066 ff., p. 2710 ff., and *passim*; for a critique acknowledging the considerable extent of the pro-enforcement bias see Auchie 2007**;** Born extends this pro-enforcement view also to for example the UNCITRAL Arbitration Model Law (2009 p. 287).

[57] UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006). For a current list of national laws based on the UNCITRAL Arbitration Model Law, see UNCITRAL 2010a.

[58] For similar examples from caselaw from different jurisdictions and more generally, see Born 2009 p. 656 ff.

and certainty to be enforceable. Thus, whereas arbitration is institutionalised to the point that very little is required in relation to arbitration agreements, conciliation is not. Furthermore, in order for a conciliation agreement to be enforceable, that agreement would seemingly need to take into consideration the conciliation procedure in far greater detail than an agreement to arbitrate.

To what extent, then, can and should national courts give meaning to international agreements to conciliate? The procedural requirements for an enforceable conciliation agreement and to what extent these requirements, if lacking, can and should be filled out by courts is open to question. One possible solution is using existing international soft law instruments, such as the UNCITRAL regime, as a basis for filling out imperfect conciliation agreements. Another is using legislation and legal principles related to arbitration by analogy to support conciliation agreements. Both ideas find support in national contexts.[59]

[59] In the United Kingdom, the Commercial Court made mention of both filling out the duties of an agreement to conciliate and the analogy between arbitration and conciliation in the 2002 decision *Cable & Wireless v. IBM*:

> *34. Before leaving this point of construction I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether, as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms – "shall take such serious steps as they may be advised". The wording of each reference will have to be examined with these considerations in mind. In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find. ...*
>
> *36. The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. ...*
>
> *38. On the face of it, there can be no doubt that [claimant] has declined to participate in any ADR exercise. As such it is in breach of clause 41.2. [Defendant] is thus at least prima facie, entitled to the enforcement of the ADR agreement. However, given the discretionary nature of the remedy it is important to consider what factors might also be relevant to the way in which the court's discretion should be exercised. Analogously to enforcement of a reference to arbitration, strong cause would have to be shown before a court could be justified in declining to enforce such an agreement. For example, there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise. ...*

According to Roebuck, legal-historical research shows that the analogy argument has prominent roots (2007 p. 115). In the 2003 *Fisher* case, the US 6th Circuit District Court noted that "[as the cases listed] indicate, federal policy favors arbitration in a broad sense, and mediation surely falls under the preference for non-judicial dispute resolution". An analogy can also be made with regard to the enforcement of settlement agreements resulting from conciliation and arbitral awards (Sanders 1999 p. 362). For an example from legislation, according to Section 1297.491 of the California Code of Civil Procedure:

> *If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.*

2.3.3 Towards a uniform interpretation of international dispute resolution

In addition to the possibility of an analogous interpretation mentioned in Section 2.3.2 above, there is a further interesting nexus between arbitration and conciliation on an international level. This is that of multi-tiered dispute resolution clauses, which typically contain a requirement to conciliate as a prerequisite to litigation[60]. In such circumstances, arbitral tribunals in principle have the competence to assess their own jurisdiction under the doctrine of *competence competence*[61]. This assessment also entails evaluation of the validity and effect of any conciliation clause that serves a prerequisite to arbitration. Therefore, the pro-enforcement bias of international arbitration agreements affects international conciliation agreements under such circumstances. But what is the effect of this arbitrational pro-enforcement bias on conciliation in multi-tiered dispute resolution agreements? Should conciliation give way when faced by the pro-enforcement bias of arbitration, or should conciliation be included under the umbrella of the pro-enforcement bias of a dispute resolution agreement culminating in arbitration?

The validity of arbitration agreements is typically governed by the New York Convention, which sets the legislative standard for effective arbitration agreements by requiring that if no valid arbitration agreement exists, then an arbitral award does not need to be enforced or recognised. According to Article II(1):

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The typical understanding of this article is that all material terms of an agreement to arbitrate should be recognized.[62] But if there is no such valid agreement, then grounds for arbitration under the New York Convention can be contested. Thus, whether or not parties can arbitrate is clearly grounded on principles of contractual interpretation, i.e. whether or not a valid agreement to arbitrate exists, as according to Article V:

> 1. Recognition and enforcement of the award may be refused…[if]
> (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made…

[60] E.g. Dobbins 2005.

[61] Jones 2009.

[62] Born 2009 p. 2734.

If the conciliation clause within a multi-tiered dispute resolution clause is seen as a procedural prerequisite to arbitration, a valid agreement to arbitrate may not exist before the requirement to conciliate is fulfilled. Scholars typically acknowledge this position on the basis of caselaw.[63] Clearly, parties agreeing to conciliation as a mandatory prerequisite to arbitration have expressly wished to agree that no agreement to arbitrate exists until the requirement to conciliate has been fulfilled. This already makes a conciliation clause an integral part of an ensuing agreement to arbitrate.

On the other hand, in multi-tiered dispute resolution agreements any requirement to conciliate should in my opinion be construed as a material term of the overall dispute resolution agreement that includes the agreement to arbitrate. The very idea of a multi-tiered dispute resolution clause entails that any single element of the clause, such as a last tier requirement to arbitrate, should not be forcibly separated from the whole. The traditional doctrine of the severability of an arbitration clause from the rest of a contract should be seen as separating the *dispute resolution mechanism* of a contract from that contract and not just a part of the dispute resolution mechanism.[64] For example in *Westacre Inv. Inc*, the English Queen's Bench found that:

> [A]n agreement to arbitrate within an underlying contract is in origin parasitic. It is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract.

Thus, conciliation as an integral part of a dispute resolution clause should not be separable from the rest of the clause and therefore should fall under the pro-enforcement bias of any arbitration tier also included in such a clause.

Either way, any requirement to conciliate should be upheld under relevant international law on arbitration as an integral part of an agreement to arbitrate. Similarly, the pro-enforcement bias should cover any agreement to conciliate as already argued on a more general level in Section 2.3.2 above.

The New York Convention is also seen to set a common standard of interpretation for its provisions and therewith for arbitration agreements.[65] Thus, caselaw on multi-tiered dispute resolution agreements containing international arbitration as one tier, also sets a requirement of uniform interpretation on conciliation agreements and, as argued above, on international dispute resolution agreements in general. A broader requirement of uniform interpretation of international conciliation agreements in particular is supported by the idea that international contract law should in general be interpreted uniformly. This principle is recognised for

[63] e.g. Jolles 2006, Boog 2007.

[64] On severability in general, see Born 2009 p. 315 ff.

[65] Born 2009 pp. 99–100.

example by CISG Article 7, the existence of collections of general principles of international contract law such as the UNIDROIT principles, and in particular Article 2 of the UNCITRAL Conciliation Model Law, which specifically states the uniformity of application as a basis for its interpretation. While there is no overriding law governing international conciliation, there is general precedence for the uniform interpretation of conciliation agreements internationally.

2.4 Summary—conciliation and adversarial dispute resolution intertwined

The general practical and legal context of international commercial conciliation agreements was presented above. In sum, conciliation seems to be a beneficial stage of most dispute resolution procedures even when it does not directly lead to settlement. The lack of having to translate to and be limited by the language of law and other legal constraints provide better possibilities for disputing parties to explore and understand the actual interests and positions underlying their dispute. This is especially important when conciliation is contrasted with arbitration or litigation before ordinary courts, both being procedures which tend to distance the actual dispute from an abstraction that does not always reflect the parties' aspirations. Courts and tribunals should recognize the usefulness of conciliation for helping understand and resolve disputes.

Even as a non-binding means of dispute resolution, conciliation at the very minimum serves to alleviate the problems of litigation and arbitration. Because conciliation, if it fails, necessarily leads to litigation or arbitration, conciliation should not be seen as a fully independent method of dispute resolution, but as a form of pre-litigation procedure that parties may specifically agree to. This point of view receives support from the regulatory frameworks of arbitration and conciliation. Conciliation should be seen as a part of the whole dispute resolution procedure, typically a multi-tiered dispute resolution agreement, and not as an independent agreement separate from the other tiers of a dispute resolution agreement.

This supports the reasoning that conciliation should, due to the similarity of their legal and operative contexts, be likened to arbitration. International legislative objectives, such as the pro-arbitration bias mentioned above, and the supportive legislative framework of arbitration, should thus apply also to international commercial conciliation, at least when conciliation is coupled with arbitration. The same should apply with regard to other forms of litigation when conciliation is used in conjunction with these.

Despite this, a key problem for international commercial conciliation is the lack of any binding international legislation that would absolutely require courts to recognize and enforce agreements to conciliate. The existence of an agreement to conciliate persists as the *sine qua non* for international commercial conciliation. Arbitrators and courts may advice parties to

conciliate even in the absence of such an agreement, however, conciliation imposed by a court or arbitral tribunal without prior agreement, can not be seen as equitable even when it would have positive effects on the dispute.[66] This is due to the principle of party autonomy and the materiality of the dispute resolution agreement as recognised by international law on dispute resolution. But if the parties have expressed an intention to conciliate, how much is in practice inferred from this expressed wish? Section 3 below discusses different meanings given by international regulation and caselaw for different kinds of expressions of an intention to conciliate. These different meanings are then evaluated in Section 4 in light of the context of international commercial dispute resolution that was provided by this section.

3 The different meanings of conciliation

In this section I examine what conciliation agreements entail in light of international conciliation regulation, caselaw and scholarly writing. It is difficult to give a single overriding definition for conciliation due to the freedom of parties to agree on different kinds of conciliation proceedings and, absent such an agreement, the freedom of conciliators in conducting the proceedings as they feel best. Therefore, I instead study conciliation by asking the question "what kind of conciliation agreements are given legal effect by courts".

Litigation necessarily results in a decision being imposed on the parties by a court or tribunal. Courts can thus define litigation, including arbitration, by its outcome; a binding judgment. With regard to conciliation, this outcome-centred perspective does not work. As a general rule, while successful conciliation can be defined by its end product, a settlement agreement, unsuccessful conciliation proceedings are much more difficult to define for the lack of any such end product. As seen in Section 2.2.1 above, it is in the very nature of conciliation that a decision cannot be forced upon the parties, but must instead be reached in a voluntary manner. If a settlement cannot be reached, at what point, then, should conciliation be judged to be so futile that courts should declare the obligation to conciliate fulfilled? Most importantly, it was further argued in Section 2.2.1 that conciliation should be seen as a successful form of pre-litigation procedure even when it does not directly result in a tangible end product in the form of a settlement agreement. Thus, the success or failure of conciliation as a process should be judged through other means than those used for final litigation.

The question of how to define conciliation as a process is crucial in order for courts to be able to give legal effect to conciliation agreements as such and not just to their tangible outcome. Therefore, this section concentrates on what kind of a process conciliation is considered by

[66] For example at the threat of losing a costs award as may be done in a national context under the English Court Procedure Rules; see e.g. the *Susan Dunnett* and *Halsey* cases.

legislators, courts, and scholars. On the basis of this analysis, I arrive at three different general meanings attributable to international commercial conciliation.

3.1 International regulation of conciliation

As noted in Section 2.3.1 above, legislation on international commercial conciliation is scarce. In this section I discuss in detail the process of conciliation identified by UNCITRAL soft law and the conciliation rules of three different international dispute resolution institutes. These three are the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), and the World Intellectual Property Organization (WIPO).

Even when constituting non-binding soft law in itself, the UNCITRAL regime is the only truly international effort at legislating conciliation and therefore merits discussion on its own. The three dispute resolution institutes discussed here have been chosen because of two reasons. First, their relative reputation in the field of dispute resolution is high in Europe, North America and also internationally.[67] ICC and ICDR represent dedicated international dispute resolution centres. While ICC is a purely international organization, ICDR is the international counterpart of the American Arbitration Association (AAA) and the conciliation rules of AAA and ICDR are practically identical; the ideology behind the ICDR rules also reflects that of AAA and therefore a viewpoint that seems generally more open towards conciliation.[68] WIPO, on the other hand, represents a more particular form of international dispute resolution relating to intellectual property. However, the WIPO rules are of special interest due to their extensive scope and their background as a set of rules adopted by a special agency of the United Nations, thus arguably having an additional degree of international acceptance. Additionally, the WIPO conciliation rules also provide useful background to the analysis of a Swiss case on international conciliation in Section 3.2.3 below. Second, these three in my opinion best describe the different kinds of regulatory approaches to conciliation. This notion will be described in more detail in Section 3.1.3 below.

3.1.1 Conciliation in light of UNCITRAL soft law

Due to their similarity, the 1980 UNCITRAL Conciliation Rules ("Conciliation Rules") and the 2002 UNCITRAL Conciliation Model Law ("Model Law") are here discussed side by side. As seen in the following, both instruments have been based on a non-binding commitment to conciliate. While a number of national legislations have adopted either of the UNCITRAL

[67] Born 2009 p. 146 ff.

[68] Visible for example in the ample material on conciliation available on ICDR's and AAA's websites.

instruments as the basis of their conciliation laws[69], in some if not all of these cases there has been a tendency to give more binding meaning to conciliation.[70] This, however, does not change the notion of conciliation in the UNCITRAL instruments.

According to Article 2 of the Model Law, the general interpretive basis of the Model Law is formed by its international origin, the need for uniformity in its application, and good faith. Thus, even if adopted into national legislation, the Model Law cannot be interpreted solely in light of the local context but must instead aim at a harmonized interpretation on an international level.[71] Good faith is, similarly to for example CISG Article 7, only used as a basis for interpreting the Model Law itself. With regard to the substance of individual cases, the Model Law specifically distances itself from imposing any requirement of good faith between the parties. Even when the Model Law Guide to Enactment acknowledges that parties may agree on a requirement to conciliate in good faith, the Model Law itself does not deal with the consequences of a breach of such an obligation.[72] In contrast to the Model Law, the Conciliation Rules contain no regulation on their interpretation; however, the interpretive basis is most probably similar to that of the Model Law.

Dore, who compares the UNCITRAL Arbitration Rules to the Conciliation Rules, contends that the former are not binding without prior agreement and the latter are "even less binding".[73] For example, Article 1 of the Conciliation Rules does not require the parties to conciliate any dispute, but only to *apply* the Conciliation Rules if they decide to conciliate; thus, any reference in the contract to conciliation under the Conciliation Rules is not in itself enough to obligate the parties to conciliation. This non-binding nature becomes even clearer from the model clause attached to the Conciliation Rules. As in Article 1 of the Conciliation Rules, the only commitment required by the model clause is the use of the rules themselves and even this only if the parties wish to conciliate *ex post*. Thus, if either party does not wish to conciliate after a dispute has arisen, then there will be no conciliation:

> Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.
> (The parties may agree on other conciliation clauses.)

[69] See Section 2.3.1.

[70] E.g. Sanders 1999 p. 358 ff., for a particular case see also Canadian Bar Association 2005 p. 3 ff.

[71] UNCITRAL 2002, paras 40–41.

[72] e.g. UNCITRAL 2002, paras 46 and 76.

[73] Dore 1986 p. 15.

The drafting commission for the conciliation rules did propose a more binding alternative. This was to be an alternative model clause included in the Conciliation Rules that would require one of the parties to at least send a proposal to conciliate[74], and contemplated a third alternative that would have been even more binding.[75] However, Dore notes that the alternative clauses were rejected by the drafting commission which decided "not to draw the attention of the parties to the possibility of a binding commitment to conciliate".[76] Dore quotes UNCITRAL as fearing that more binding clauses would create uncertainty and "that a commitment to conciliate would 'not be consistent with the voluntary concept underlying the Rules'".[77] The Conciliation Rules, if not modified by the parties, are thus completely noncommittal. So is the Model Law, as noted for example by Sanders.[78] However, as seen below, underneath its textual surface the Model Law does more actively take into account alternatives that allow for a somewhat more binding conciliation procedure.

Suppose that, unlike under the model clause of the Conciliation Rules, both parties have bindingly committed themselves to conciliation under either UNCITRAL instrument. Even in such a case, both instruments provide numerous exit possibilities. These exit possibilities are discussed in the following and contrasted to the possibility of providing for more binding conciliation under the UNCITRAL instruments.

Both the Model Law and the Conciliation Rules provide for the possibility of terminating conciliation right away at its onset by not accepting a request to conciliate within 30 days of its receipt or within any other time limit the parties may have agreed to:

[74] Commentary on revised draft UNCITRAL Conciliation Rules, para 94.

[75] Ibid., para 96.

[76] Dore 1986 p. 16.

[77] Dore 1986 p. 16.

[78] Sanders 2004 p. 234.

UNCITRAL Conciliation Model Law	**UNCITRAL Conciliation Rules**
Article 4. Commencement of conciliation proceedings 1. Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings. 2. If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.	*COMMENCEMENT OF CONCILIATION PROCEEDINGS* **Article 2** (1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute. (2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing. (3) If the other party rejects the invitation, there will be no conciliation proceedings. (4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

According to the Model Law's Guide to Enactment, the possibility to evade conciliation by not replying to an invitation to conciliate is not intended to mean that a party would have an "opportunity to disregard its contractual obligation".[79] Instead, the drafters have intended to leave the consequences of any intentional disregard of contractual obligations to the general law of obligations and only to "provide certainty in a situation where it is unclear whether a party is willing to conciliate … irrespective of whether that failure is or is not a violation of an

[79] UNCITRAL 2002, para 46.

agreement to conciliate under the general law of obligations".[80] Thus, a binding agreement to conciliate is in effect detached from any real requirement to conciliate under the Model Law, at least from a procedural point of view. This is criticized by Sanders: "In spite of the agreement to conciliate a second agreement is required to enter in conciliation proceedings when a dispute has arisen".[81]

Already from this it is clear that the legislative setting of the Model Law highly stresses procedural certainty over the agreement of the parties. This echoes the close proximity of conciliation and arbitration under the UNCITRAL regime. Legislation on conciliation arose under the auspices of UNCITRAL's efforts at institutionalizing international arbitration and thus as subsidiary to it.[82] The Model Law has clearly been designed to offer, in case of any lack of volition, a smooth transgression from the procedural uncertainty of conciliation as a non-final means of dispute resolution to the finality of arbitration.

Also the older Conciliation Rules overtly allow the party receiving the conciliation invitation to break any agreement to conciliate and to reject the invitation. As already noted above, the underlying position of the Conciliation Rules, however, is somewhat different from that of the Model Law. The *travaux préparatoires* of the Conciliation Rules simply point out the fact that conciliation is not possible unless all parties are willing to participate.[83] Unlike under the Model Law, there is no mention about the possibility that the parties' agreement might lead to even substantive repercussions if the parties do not engage in a conciliation process.

In addition to termination of conciliation already in the invitation stage, both the Model Law and the Conciliation Rules allow any party involved in conciliation to unilaterally terminate conciliation once it has been initiated:

[80] Ibid.

[81] Sanders 2004 p. 211

[82] Commentary on draft UNCITRAL Conciliation Rules A, paras 1–2.

[83] Commentary on draft UNCITRAL Conciliation Rules B, para 30.

UNCITRAL Conciliation Model Law	**UNCITRAL Conciliation Rules**
Article 11. Termination of conciliation proceedings	TERMINATION OF CONCILIATION PROCEEDINGS. Article 15
The conciliation proceedings are terminated:	The conciliation proceedings are terminated:
(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;	(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;	(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or	(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.	(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

According to Sanders, no reason needs to be given for such unilateral termination.[84]

Again, despite the similarity of the texts, a slight difference exists in the legal contexts of the articles. The Model Law's Guide to Enactment is clear to state that any obligation to conciliate in good faith is separate from the right to terminate under Article 11 and that "the Model Law does not deal with [obligations to conciliate in good faith]".[85] Even if the parties have added

[84] Sanders 2004 p. 225–6.

[85] UNCITRAL 2002, para 76.

further weight to their agreement to conciliate, such as a requirement to conciliate in good faith, the effects of such further obligations are not procedural in light of the Model Law. Not abiding with a good faith negotiation requirement cannot stop a party from proceeding to arbitration from a procedural perspective.

The *travaux préparatoires* of the Conciliation Rules simply denounce that the rules would attach a binding effect to a submission to conciliate, such as an obligation to conciliate until a set period of time or the rejection of a settlement proposal.[86] Instead, the termination clause is "inspired by the absolute freedom of the parties" and "based on the premise that a policy compelling parties to continued participation … would not, in all circumstances, lead to a genuine settlement".[87]

The freedom of contract of parties, with regard to agreeing to conciliation ex-ante, is clearly a relative concept dependent on the adopted notion of conciliation. The notion of conciliation under the Conciliation Rules reflects a point of view that does not take into account the possibility of conciliatory procedure that might turn the heads of initially unwilling parties or that might be otherwise useful in light of any litigation that were to follow conciliation. The notion of conciliation under the Model Law reflects a point of view where such conciliatory procedure is acknowledged but not given procedural weight in itself. To this extent, the parties themselves can according to the Model Law specify a "period of time" or "event" that terminates any requirement to conciliate. When expressly stated, such specification would prevent the dispute from progressing to arbitration under the Model Law. No such possibility is made explicit under the Conciliation Rules:

[86] Commentary on the revised draft of UNCITRAL Conciliation Rules B, para 72.

[87] Ibid.

UNCITRAL Conciliation Model Law	**UNCITRAL Conciliation Rules**
Article 13. Resort to arbitral or judicial proceedings Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.	*RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS* Article 16 The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Again, the Model Law stresses procedural certainty by maintaining that any derogation from its systematisation must be expressly pronounced by the parties (emphasis added):

> Where the parties have agreed to conciliate *and* have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute…

If this is not done, under the Model Law either party may terminate conciliation at its will without suffering any procedural setbacks, such as the inadmissibility of an arbitration clause. An *agreement to conciliate* is thus separate from an *agreement not to litigate*. Parties can terminate conciliation at will while nevertheless being barred from litigation if they have expressly agreed not to litigate until a particular time or event that does not coincide with the termination of conciliation. Taking into account that the Model Law does not include a good faith obligation , a requirement to conciliate in good faith does not constitute an event that forbids a party from using its unilateral right to terminate conciliation. From a procedural point of view, conciliation is fully detached from litigation. Any barriers to litigation are construed as agreements separate from the agreement to conciliate.

Sanders states that he much prefers the formulation of the Conciliation Rules to that of Article 13 of the Model Law.[88] The Conciliation Rules tie the litigation bar only to the duration of the conciliation proceedings, stating that the parties may not initiate litigation "during the conciliation proceedings, except [when necessary for preserving their rights]". The *travaux préparatoires* refer only to the possibility of either party unilaterally terminating the proceedings at will, and no binding effect is given to the fact that conciliation has started.[89] Further, the *travaux préparatoires* emphasise that, instead of an objective requirement, only either party's subjective view is necessary for proceeding to litigation "in order to avoid controversy as to whether the initiation of adversary proceedings is justified".[90] Thus, under the Conciliation Rules, either party can litigate at will despite having initiated conciliation if either of them unilaterally terminates the conciliation proceedings.

In sum, in light of the UNCITRAL instruments the possibility to terminate conciliation proceedings takes precedence over the agreement to conciliate or, for example, the situation assessment of an appointed conciliator. Even when parties have agreed that they will attempt to conciliate prior to other forms of dispute resolution, this requirement may be reduced to a minimal procedural detour as conciliation may be unilaterally terminated by either party immediately. The only requirement is that any party first commences, or tries to commence, proper conciliation in accordance with the Conciliation Rules or the Model Law. This removes the instruments from party autonomy in the sense that the parties' mutual agreement to conciliate can be reduced to the minimal procedural detour of initiating and then terminating conciliation.

There is a certain progression in the notion of conciliation when one compares the Conciliation Rules of 1980 to the Model Law of 2002. The Conciliation Rules, while emphasising party autonomy in conciliation, do not overtly acknowledge the possibility that parties might have agreed on a more fixed kind of conciliation than the one presented by the Conciliation Rules.[91] In effect, conciliation according to the Conciliation Rules is necessarily such that parties cannot bindingly agree to conciliate, unless one understands with conciliation the initiation and possibly instantaneous subsequent termination of a procedure; if the other party refuses to reply to the invitation to conciliate, then even termination is unnecessary. Doing otherwise would require a complete revision of not only the model clause of the Conciliation Rules but also of, at least, their Articles 2, 15 and 16. This idea of conciliation as 100% dependent on the willingness of all parties to negotiate is not in line with the modern concept of conciliation presented in Section 2.2 above. Neither are the Conciliation Rules, if

[88] Sanders 2004 p. 230.

[89] Commentary on draft UNCITRAL Conciliation Rules B, para 75.

[90] Commentary on draft UNCITRAL Conciliation Rules B: para 76.

[91] Dore 1986 p. 16, fn. 29.

read in this light, in line with the concept of party autonomy, unless the modern notion of conciliation is discarded in favour of the notion of conciliation presented by the Conciliation Rules: agreeing on binding conciliation only to have the opposing party terminate the proceedings right away. Thus, the agreement to conciliate amounts to almost nothing at all.

The Model Law, on the other hand, does acknowledge the possibility of parties agreeing on a set time or event before which they cannot refer a dispute to litigation. This would, however, require an additional express agreement that the forbidding the parties to proceed to other dispute resolution mechanisms until a particular event or point of time has been reached. Further, the Model Law makes it clear that a mere requirement to conciliate in good faith does not suffice to strip parties of their unilateral power to terminate conciliation. Interestingly, while a lack of conciliation in good faith cannot deter the parties from continuing to litigation under the Model Law, it could, however, be subject to the substantive provisions for breach of contract under national legislation.

The UNCITRAL instruments have clearly been drafted having in mind an antecedent for arbitration. This is reflected in the smooth progression from conciliation to arbitration provided by both; at default, even if the parties have agreed to conciliate, conciliation can be unilaterally terminated in favour of arbitration without any procedural side effects. While the Model Law does acknowledge the possibility for a more binding form of conciliation, this is not the default rule, but it is subject to additional drafting requirements. Further, even the Model Law does not allow a mere requirement to conciliate in good faith to hinder the easy procedural progression from conciliation to arbitration.

Sanders discusses the Model Law's approach that allows parties to reject an invitation to conciliate. In particular, while he sees the possibility for unilateral termination in itself as "an essential element of conciliation", he opposes the possibility that a party may avoid its contractual obligation to conciliate by not responding at all to the invitation to conciliate.[92] Instead, he proposes that an agreement to conciliate should present a clear obligation to participate in conciliation at least until a conciliator has been nominated and has commenced his or her task. After that, the parties could freely terminate the proceedings on the basis of the voluntary nature of conciliation. Sanders' emphasis is very similar to that of the ICC ADR Rules discussed in the following subsection.

[92] Sanders 2004 p. 226.

3.1.2 Conciliation in light of institutional rules

In this section I discuss conciliation under the ICC ADR Rules, the ICDR International Mediation Rules, and the WIPO Mediation Procedure.[93] All three present a more independent understanding of conciliation than the UNCITRAL instruments.

The 2001 ICC ADR Rules are an instrument provided by the International Chamber of Commerce to govern the use of all kinds of non-judicial dispute resolution mechanisms in contracts. Parties may opt-in to the rules as they wish. As per Article 5(1), the different dispute resolution mechanisms covered by the ICC ADR Rules include conciliation, neutral evaluation, mini-trial, and any other ADR technique or combination of techniques. However, according to Article 5(2), conciliation is the default in case parties cannot agree to a specific method of ADR.

Terminating conciliation under the ICC ADR Rules is relatively similar to UNCITRAL. According to Sanders, the approach to termination in ICC's earlier 1988 Rules of Conciliation was exactly the same as that adopted in UNCITRAL's Model Law and Conciliation Rules.[94] The newer ICC ADR Rules that replace the 1988 ICC Rules of Conciliation, however, add an additional twist. First of all, Article 2A of the ICC ADR Rules requires that parties cannot avoid conciliation simply by not replying to an invitation to conciliate. Even if a request to conciliate is made unilaterally to the ICC, Article 2A requires a third party "Neutral" to be nominated to initiate conciliation. According to the ICC ADR Guide, this provision "preserves the parties' intention to agree to ICC ADR, by obligating them to evaluate the potential of the ICC ADR proceedings together with the Neutral".[95] Thus, instead of the need for two agreements under the UNCITRAL regime, where an extra agreement is necessary to bar the initiation of litigation until a particular event or point of time, the ICC ADR Rules actually guarantee individual effect to an agreement to conciliate.

Parties who have agreed to conciliation under the ICC ADR Rules are required by Article 6(1)b to participate in a preliminary discussion before they can unilaterally terminate the proceedings (emphasis added):

> ADR proceedings which have been commenced pursuant to these Rules shall terminate upon the earlier of: … b) the notification in writing to the Neutral by one or more

[93] See ICC 2001b for the ICC ADR Rules, in force as of 1 July 2001, ICDR 2009 for the ICDR Mediation Rules, contained in International Dispute Resolution Procedures, as amended and effective of June 1, 2009, and WIPO 2009 for the WIPO Mediation Rules, contained in the 2009 WIPO Arbitration, Mediation and Expert Determination Rules and Clauses.

[94] Sanders 2004 p. 211.

[95] ICC 2001a p. 7.

> parties, *at any time after the discussion referred to in Article 5(1) has occurred*, of a decision no longer to pursue the ADR proceeding…

This procedural obstacle is, however, a small one. Article 5(1) of the ICC ADR Rules only requires the parties to participate in a discussion on the procedure of the dispute resolution with the Neutral:

> The Neutral and the parties shall promptly discuss, and seek to reach agreement upon, the settlement technique to be used, and shall discuss the specific ADR procedure to be followed.

Whether the requirement of a preliminary discussion as a prerequisite for termination under the ICC ADR Rules is a major change in relation to the UNCITRAL instruments is debatable. According to the ICC ADR Guide, there are few requirements for the preliminary discussion between the parties and the Neutral.[96] The parties need not meet live, as pretty much any form of meeting such as "telephone conference, videoconference or any other suitable means" will suffice. Further, there is no requirement to consider the substantive issues of the dispute. The first discussion is primarily meant to identify the procedure that the parties see best fit for the dispute at hand. Of course, discussing appropriate procedure probably cannot avoid discussion on substantive issues. Nonetheless, there is no concrete requirement for the Neutral to conduct, for example, a preliminary evaluation of the dispute before the parties are allowed the procedural right to terminate conciliation.

The ICC ADR Rules include what the Guide to ICC ADR specifically claims are not model clauses but *suggestions* for conciliation clauses.[97] What the difference between model clauses and mere suggestions is remains unclear, but perhaps hints at the lesser interpretive weight of the suggestions. In any case, the first suggestion makes conciliation fully optional.[98] The second obligates the parties to consider conciliation; they must "discuss and consider submitting the matter to settlement proceedings". The third suggestion obligates the parties to pursue conciliation for 45 days, while the fourth is similar to the third but incorporates ICC arbitration in case conciliation fails.

What is important is that the third and fourth "suggested clauses" refer to time limits despite the ICC ADR Rules giving parties the possibility to terminate conciliation only after a specific event, the preliminary discussion mentioned in Article 5(1). Such a time limit seems to override Article 5(1) of the ICC ADR Rules as the time limit "allows the parties to know precisely when they are no longer obligated to continue the proceedings".[99] In order to prevent any abuse of

[96] ICC 2001a p. 11 ff.

[97] ICC 2001a p. 18; for a discussion on these clauses see e.g. Jimenéz Figueres 2003.

[98] ICC 2001b p. 4.

[99] ICC 2001a p. 18.

rigid time limits, the parties are expected to apply such a time limit in "good faith".[100] Thus, while the ICC ADR Rules provide for a more binding conciliation procedure than UNCITRAL, they nevertheless contain a clear reference to UNCITRAL's system of two agreements; one to conciliate and another to bar litigation.

In any case, the ICC ADR Rules incorporate by default one example of what Article 13 of the UNCITRAL Model Law calls an event prior to which litigation cannot be commenced. Thus, even if only a small step for effective conciliation in individual cases, and even if supplemented by an express time limit in the suggested conciliation clauses, the requirements of the ICC ADR Rules are nevertheless a step towards establishing content to the idea of independent conciliation procedure.

The 2009 ICDR International Mediation Rules go further than the ICC ADR Rules. Under Article 12 of the International Mediation Rules, pending successful settlement, the mediator's understanding that the situation is hopeless, or the agreement of the parties to terminate mediation, the proceedings may be terminated only:

> When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

The mediation conference mentioned in the rules may be an extensive procedure. Under Article 7, the mediator has relatively free hands to communicate with the parties together or separately prior to, during, and after the conference. For example, the mediator may request:

> the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

Further, under Article 8, both parties are required to participate in this procedure:

> The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.
>
> Prior to and during the scheduled mediation conference(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

Thus, under the ICDR International Mediation Rules, a party may unilaterally terminate mediation only after having participated with their best efforts in a mediation procedure culminating in a mediation conference. Lacking agreement between the parties, the actual

[100] ICC 2001a p. 18.

extent of proceedings is up to the mediator. In any case, the parties must participate in that procedure also with regard to the substance of the issue. This approach is radically different from that of the UNCITRAL and ICC instruments. Further, there is no mention at all of rigid time limits prior to which litigation is barred, as opposed to the UNCITRAL Model Law or the suggested clauses of the ICC ADR Rules. Instead, any time limit starts running only after a set event, e.g. the mediation conference. This mediation conference is much more demanding on the parties than the "procedural meeting" required under the ICC Rules, both in that it may deal with the substance of the issue and that the parties are required to participate with their best efforts and, further, in that the mediator may engage in mediation even before the mediation conference.

As the third and final example, the WIPO Mediation Rules can be positioned somewhere between the ICC ADR Rules and the ICDR International Mediation Rules in their understanding of conciliation. As under the ICDR International Mediation Rules, under the WIPO Mediation Rules the conciliator has relatively free hands to organise the proceedings as they wish (Articles 11–12) and the parties to conciliation have an obligation to cooperate in good faith (Article 10). As under the ICC and ICDR regulations, the conciliation may be terminated only after attending a "first meeting" (Article 18). This first meeting depends greatly on the conciliator's efforts but seems to be closer to the more extensive and substantive procedure required under the ICDR International Mediation Rules than the procedural discussion under the ICC ADR Rules. However, similarly to the conciliation clauses suggested by ICC ADR Rules, the WIPO Mediation Rules also include in their combined conciliation and arbitration clause by default a 60 or 90 day time limit for barring arbitration. While such time limits are not included in the "conciliation only" clause, the WIPO Mediation Rules nevertheless seem to share the understanding that conciliation clauses should contain two agreements: one to conciliate and another to delay arbitration. In the Swiss Federal Supreme Court decision discussed in Section 5.2.3 the court, in relation to a contract referring to WIPO Mediation without a clear time limit for delaying arbitration, did not seem to view such a time limit as explicitly required but merely as typical and expected when binding conciliation is agreed upon. Thus, the WIPO Mediation Rules, while portraying an independent view of conciliation similar to that of the ICDR Mediation Procedure, nevertheless contain traces of the thinking prevalent under the UNCITRAL and ICC ADR regimes.

3.1.3 Legislation and institutional rules–a summary

The instruments provided by UNCITRAL, ICC, WIPO, and ICDR create a continuum of increasingly strong legal meaning attributable to conciliation clauses. The unmodified UNCITRAL instruments provide practically no legal meaning to an agreement to conciliate, instead requiring a specific, additional agreement to delay arbitration in case the parties want to prohibit the possibility of overriding an agreement to conciliate and proceeding directly to arbitration. This position is of course modifiable; national legislations adopting either of the UNCITRAL instruments have tended to give conciliation a stronger, more independent meaning so that parties cannot simply opt out of their agreement. Nevertheless, under the

default UNCITRAL instruments, conciliation agreements have little independent legal meaning; if one party does not want to conciliate, this unilateral lack of volition overrides the conciliation agreement.

The other instruments, on the other hand, provide for increasingly extensive and intricate meanings. The ICC ADR Rules require parties at least to participate in a discussion on conciliation procedure. The independent meaning of conciliation agreements finds its culmination in the ICDR International Mediation Rules, which require parties to engage in best efforts conciliation over substantive issues. Thus, as opposed to the UNCITRAL instruments, the ICDR International Mediation Rules clearly provide for an independent meaning to conciliation agreements in the sense that substantial conciliation efforts must have been undertaken before an agreement to conciliate is seen to be fulfilled and the parties may proceed to litigation. These efforts consist precisely of negotiations with the other party, via the help of an appointed conciliator, regarding the substance of a dispute at hand, and not just the procedural discussion proposed by the ICC ADR Rules.

The conciliation process required under the ICDR International Mediation Rules gives conciliation agreements independent meaning whereby conciliation agreements in themselves are enough to block litigation. No additional agreement on barring litigation is necessary, contrary to the notion of conciliation under the UNCITRAL rules and the more blurry, hybrid distinction under the ICC and WIPO instruments. International regulation on conciliation is clearly dependent on different kinds of notions of what it means to conciliate and how these notions are reflected in regulation: whether conciliation is seen as an end result based on volition that cannot be agreed upon in advance, as under the UNCITRAL regulations, or whether it is seen as a process that must be gone through for the benefit of the parties even when a concrete end result cannot be guaranteed, as under the ICDR regulation.

3.2 Caselaw on conciliation

In this section, I provide a brief look at caselaw on international commercial conciliation. Due to the extent of such caselaw, I will in Section 3.2.1 discuss three perspectives on caselaw provided in scholarly literature. In Section 3.2.2 I look at a particular continuum of argumentation on non-binding dispute resolution from the common law jurisdiction of New South Wales in Australia. Through that analysis, I will try to point out some of the phases that New South Wales courts have gone through in their migration from a volition-based point of view on conciliation towards a process-based point of view on conciliation. I hope that this examination will prove useful for argumentation for conciliation on a practical level, even when it in name deals with conciliation from a national perspective. Finally, in Section 3.2.3 I analyse a recent Swiss Federal Supreme Court case on what it means to agree on international commercial conciliation.

3.2.1 Scholarly perspectives on caselaw

Jolles examines whether the non-fulfilment of a pre-arbitration tier in a multi-tiered arbitration clause can be seen as a procedural prerequisite that prevents parties from proceeding to arbitration.[101] The alternative would be to treat them either as non-issues or as substantive issues that may merit contractual remedies but which do not stop parties from proceeding to arbitration. Examining Swiss, German, US, UK, and ICC positions on the topic, Jolles concludes that the non-fulfilment of pre-arbitration tiers should be considered a procedural prerequisite for arbitration.[102] Jolles states two requirements that should be met in order for a tribunal to consider a request for arbitration as inadmissible when an agreement to conciliate has not been fulfilled.[103] First, the parties should have agreed in a "binding and unequivocal manner" to pursue conciliation before arbitration. Second, "the commitment should be limited in time and the tier mechanism should be defined to precisely determine the stage at which the efforts will be considered exhausted and the pre-arbitral requirements satisfied". These requirements are, according to Jolles, necessary so that a party is not precluded from access to court for an indeterminate amount of time. Jolles' requirements are identical to the items mentioned by the UNCITRAL Conciliation Model Law as requirements for delaying litigation in face of conciliation. Jolles also cites the UNCITRAL Conciliation Model Law when evaluating whether or not the failure to satisfy a conciliation requirement affects an arbitral tribunal's jurisdiction and thus it seems that Jolles' argument is based on a conception of conciliation stemming from the UNCITRAL Conciliation Model Law.[104]

In his monograph on arbitration, Born examines the same situation as Jolles but with a more extensive discussion of caselaw.[105] His discussion spans cases in support of both situations in which contractual procedural requirements have been found to constitute a jurisdictional prerequisite for arbitration and situations in which they have not. Born argues for example that courts and tribunals not only have been but continue to be "reluctant to conclude that compliance with contractual procedural requirements is a jurisdictional condition for commencing an arbitration" for example in situations where a "party resisting jurisdiction was partially or entirely responsible for the failure or non-exhaustion of a negotiation process" and where "dispute resolution provisions do *not* state that negotiation or mediation is a condition

[101] Jolles 2006.

[102] Jolles does mention the possible exception of "non-determinative" procedures such as negotiation and mediation under English law, however, this position has changed; after the *Cable & Wireless Plc v IBM United Kingdom Ltd* decision, non-determinative ADR procedures are typically seen as procedural obstacles for litigation; see Lye (2004).

[103] Jolles 2006 p. 336.

[104] Jolles 2006 p. 335. On a similar point see Boog (2007 p. 105, fn. 6) who cites Jolles' article.

[105] Born 2009 p. 840 ff.

precedent to arbitration".[106] However, "*if* dispute resolution clauses expressly provide that negotiations or other procedural steps are a condition precedent to arbitration, courts *sometimes* require compliance with those provisions".[107] With regard to the last situation, Born emphasizes that a claimant's failure to comply with procedural requirements for arbitration may constitute a jurisdictional defect precluding arbitration and that this:[108]

> …is particularly true where the provision in question is drafted in a mandatory fashion ("the parties *shall* meet and negotiate") and the right to arbitrate is arguably conditioned on compliance with this requirement ("*only if* the parties are unable to resolve their dispute through good faith negotiations after 30 days, *then* either party may refer the dispute to arbitration …"

According to Born, both a provision in mandatory language and a requirement that arbitration is conditioned on compliance with that provision are required for precluding arbitration. However, there is no mention of a time limit or specific event for the expiration of the prerequisite even when the example clause he uses contains a 30-day time limit. With regard to requirements to negotiate or conciliate in particular, Born notes that these have often been seen as "unenforceably vague or indefinite" and, according to Born, courts have generally upheld such agreements only when there are reasonably clear substantive and procedural guidelines for the relevant conciliation or negotiation procedure to be upheld.[109] The definiteness of an agreement to negotiate or conciliate would arise, for example, from the limited duration of negotiation or conciliation, a specified number of negotiation sessions, specified participants for negotiations, or conciliation under specified rules or a specified dispute resolution institute.[110]

Berger specifically aims at systematizing the possible "points of failure" of non-judicial dispute resolution such as conciliation.[111] Berger examines what he sees as the possible points at which conciliation can be seen to have failed so that parties may proceed with other dispute resolution mechanisms. On the basis of the UNCITRAL and ICC instruments and German scholarly literature, Berger recommends that parties should include in their conciliation agreement objectively definable criteria on exactly when conciliation can be terminated. These criteria could for example be similar to those in Articles 11 and 13 of the UNCITRAL Conciliation Model Law discussed above. Where the parties have not agreed on any clear guidelines on how the point of failure of conciliation should be identified, Berger maintains that the lack of any

[106] Born 2009 p. 841, my emphasis.

[107] Born 2009 p. 842, my emphasis.

[108] Born 2009 p. 841, emphasis in original.

[109] Born 2009 p. 846–7.

[110] Born 2009 p. 847.

[111] Berger 2006 p. 10 ff.

overt criteria or reference to a dispute resolution institute means that the power to define whether an agreement to conciliate has been adequately fulfilled is in the hands of the tribunal or court that rules on the admissibility of the dispute. In such cases, Berger argues that the criteria for fulfilling an agreement to conciliate should be that of a reasonable attempt to conciliate. As an example Berger uses ICC Award 6276, where the parties had agreed to attempt amicable settlement before other forms of dispute resolution under the following dispute resolution clause:[112]

> Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract [first through an engineer's decision and, that failing, arbitration].

The tribunal, seated in Switzerland, found that there existed enough grounds to show that the requirement to attempt amicable settlement had in fact been satisfied. However, instead of providing any specific general criteria through which to judge this, the tribunal argued that:[113]

> With regard to prior resort to amicable settlement, ... there are no objective criteria making it possible to declare that the means of amicable settlement have been actually exhausted. These means cannot be identified in absolute terms and do not obey any pre-established and stereotyped rules. Everything depends on the circumstances and chiefly on the good faith of the parties. What matters is that they should have shown their good will by seizing every opportunity to try to settle their dispute in an amicable manner. They will only be discharged of this duty when they arrive in good faith at the conviction that they have reached a persistent deadlock.

The tribunal came to the conclusion that the requirement to attempt an amicable settlement as having been fulfilled. It drew this conclusion on the grounds that one party had made genuine efforts at negotiating a solution based on the length of the elapsed time, that "a variety of contacts" were undertaken during that time, and that the contacts aimed at finding a solution to the dispute between the parties.

While emphasising that parties should try to objectively identify when any requirement to conciliate has been fulfilled, Berger concludes that, lacking any clearly expressed criteria for the exhaustion of conciliation, courts and tribunals can require from parties an "honest, reasonable and conscientious effort" at solving their dispute.[114] The only concrete requirements that can be imposed on a party would be the initiation of dispute resolution and a reasonable attempt at reaching an amicable solution. This could be done for example in the manner of the arbitral

[112] ICC Award 6276.

[113] ICC Award 6276.

[114] Berger 2006 p. 12.

tribunal in ICC 6276 that based its evaluation on factual circumstances regarding how the parties had attempted to pursue amicable dispute resolution.

Thus, it seems that a continuum somewhat similar to that presented in relation to conciliation regulation can also be formed between Jolles, Born and Berger. Jolles and Born stress both the mandatory language of any prerequisite to arbitration and procedural clarity in the form of a clearly defined point of time at which the prerequisite expires. Born adds to this other possible options for satisfactory definitiveness, such as and in particular definitions of successful conciliation under particular institutional rules. As seen in Section 3.1 above, some institutional rules acknowledge conciliation agreements as having independent meaning even when the rules (or the conciliation agreement) do not provide an absolutely defined time limit for the conclusion of conciliation. Finally, while arguing that parties should aim at a clear agreement on when any requirement to conciliate has been fulfilled, Berger emphasises that when such an agreement does not exist it should be up to a court or tribunal to assess, on the basis of the circumstances of the case, whether an agreement to conciliate has been fulfilled. In the next section, I examine New South Wales caselaw to highlight these positions in practice.

3.2.2 Progression of national caselaw: the New South Wales continuum

In their respective articles, Pryles and Chapman concentrate on the legal situation of multi-tiered dispute resolution clauses in a single common law jurisdiction, that of New South Wales in Australia.[115] This discussion is particularly interesting for this thesis as it concentrates on how notions of what it means to conciliate have gradually evolved from a result-oriented perspective towards an increasingly process-oriented perspective. It also serves to highlight problems of the position that conciliation agreements should clearly define the limits of unsuccessful conciliation.

3.2.2.1 Conciliation

For a major part of his article, Pryles concentrates on the question of whether all stages of dispute resolution agreements, and in particular negotiation and conciliation agreements, are enforceable.[116] His starting point is the 20th century English notion that because negotiation and conciliation are essentially reliant on the volition of parties they are in effect "agreements to agree" and as such cannot be subjected to judicial enforcement. This starting point, which essentially denies conciliation agreements any legal meaning, has been changed and elaborated on in three cases of the New South Wales Supreme Court.

[115] Pryles 2001, Chapman 2010.

[116] Pryles 2001.

In the first of these cases, the 1992 *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd*, Giles J extensively reviewed English and Australian authorities and came to the conclusion that "[w]hat is enforced [in conciliation agreements] is not co-operation and consent but participation in a process from which co-operation and consent might come" and that "[i]f the terms of the conciliation agreement were sufficiently certain the court could require the parties to participate in the process". In the case at hand, the court found the terms of the conciliation agreement to be sufficiently certain and therefore enforced the agreement to conciliate.

Giles J returned to the same subject matter in the 1995 *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* case. Here, however, the outcome was different as the judge concluded that the conciliation agreement in question was not enforceable. While restating the value of conciliation, Giles J noted that "agreements to mediate should be recognised and given effect in *appropriate* cases". It seems that in *Elizabeth Bay* the enforcement of the conciliation agreement would, according to Giles J, have led to considerable uncertainty on behalf of the parties regarding their contractual obligations and therefore be contrary to the certainty doctrine of common law.[117] The multi-tiered dispute resolution clause in the case had required the parties to "endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC)". Giles first contended that this clause did not expressly incorporate the ACDC mediation guidelines. However, both parties made the concession that the ACDC mediation guidelines had indeed been intended. It seems that if that had not been the case, Giles J would have come to the conclusion that only naming a conciliation institute in a conciliation agreement does not constitute sufficient certainty for enforcing that agreement as required by *Hooper Bailie*; instead, the rules under which conciliation would be administered would have to be explicitly referred to:

> The concession [that the parties in fact intended to use the ACDC mediation guidelines] ... makes it unnecessary to express any view upon whether a mediation clause having no greater content than an agreement to settle the dispute by mediation administered by a named person or body would require of the parties participation in a process of mediation of sufficient certainty for legal recognition of their agreement. It may be that a conclusion favourable to incorporation or sufficient certainty would not be warranted, and that ACDC should give further consideration to its suggested mediation clause.

Giles J now had to manoeuvre around the ACDC mediation guidelines, and did so by noting that the ACDC mediation guidelines required the parties to sign a mediation agreement, but *not* necessarily an ACDC mediation agreement, thus making the obligation too broad and vague to be enforceable. The certainty requirement was further pickled by Giles J by noting that even if the agreement were to be construed as meaning precisely the ACDC mediation

[117] For which see e.g. McKendrick 2000 p. 57 ff.

agreement, that agreement in itself had intrinsic uncertainty. Clause 11 of the ACDC mediation agreement charged the parties with a "commitment to attempt in good faith to negotiate toward achieving a settlement of the dispute". This clause contained for Giles J too much compound uncertainty when analysing it from the perspective that the parties had, long before any dispute, agreed that in case of a dispute they would sign a mediation agreement that required them to "commit" to an "attempt" to "negotiate" in "good faith". Thus, in any case the effects of the clause would not have been certain enough to fulfil the certainty requirement established in *Hooper Bailie* and therefore the mediation clause could not be enforced.

In the 1999 judgment *Aiton v. Transfield*, Einstein J took his turn at interpreting a conciliation agreement in the New South Wales Supreme Court. This time around, the key problem in the dispute resolution clause was seen to be twofold. Despite noting that it "is trite to observe that parties ought be bound by their freely negotiated contracts" (para 25), Giles J's view on certainty in *Hooper Bailie* was again taken up. Quoting authority on dispute resolution, Einstein J ends up arguing that any stage of a dispute resolution clause should satisfy the following set of requirements (para 69):

> - It must be in the form described in *Scott v Avery* [a case from 1856 acknowledging arbitration agreements under the common law]. That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.
>
> - The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.
>
> - The administrative processes for selecting a mediator and in determining the mediator's remuneration should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary
>
> - The clause should also set out in detail the process of mediation to be followed—or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.

On the basis of these requirements, Einstein J argued that the dispute resolution clause in the case at hand lacked necessary certainty with regard to conciliation because the clause (which is extremely extensive and elaborate, taking up over two pages of the tightly formatted judgment and thus implying the parties' careful drafting of their intent to conciliate—author's note) does not contain any agreement on how the costs of conciliation should be apportioned. Einstein J argues that it cannot be implied, for example, that the costs of conciliation should be split between the parties, as is often the case, or that the conciliator could decide on the apportionment, as is the case with the expert mentioned later on in the same dispute resolution clause. This is because neither implication would be "so obvious as to go without saying", Einstein J claims, precisely because both of these two different implications exist, one from the

outside world and one from another part of the dispute resolution clause that concentrates on a different dispute resolution method (paras 66–67). Einstein's stance seems curious with regard to costs of voluntary procedures typically being split even.[118] Following this, Einstein J acknowledges that in part because of the parties' ability to determine when the procedure provided by the agreement has concluded (para 78) and in part because even the notion of good faith in the dispute resolution clause is sufficiently certain (para 153), the rest of the dispute resolution clause is worthy of legal recognition. Thus, because there is no agreement on the apportionment of conciliation costs in an over two-page long dispute resolution clause, almost a half of that clause loses its enforceability and any legal meaning and effect it may have (para 78). The result has raised eyebrows.[119]

In sum, the progression of the three cases outlined by Pryles seems logical on the one hand. There are differences in the facts of the cases, which, little by little, discuss and elaborate what exactly is a conciliation agreement that courts are willing to grant legal meaning to. But one can nevertheless not help but feel slightly bothered. Why cannot the dispute resolution clause in *Elizabeth Bay* be interpreted as a valid agreement to conciliate, especially since both parties confirmed that they indeed had had a common intention to refer to the ACDC mediation guidelines? Why did the extremely extensive and elaborately crafted dispute resolution clause in *Aiton v. Transfield* lose all meaning with regard to its section on conciliation just because the judge in question felt that the parties should have explicitly apportioned (but not quantified) their costs beforehand? Einstein J himself noted that the parties' agreement should bind them. What is at work here that undoes the bounds of parties' intentions to conciliate?

As always, one can speculate on the circumstances of the cases. In *Hooper Bailie*, the only one of these cases in which conciliation was actually enforced, arbitration had already been initiated when the parties, on mutual agreement, decided to adjourn the proceedings and instead opt for conciliation. Thus, the issue in that case was not about the interpretation of a multi-tiered dispute resolution clause entered into by parties *ex-ante*, but instead an *ex-post* subsumption to change the method of dispute resolution into conciliation. Further, in that conciliation certain determinations by the conciliator were to be binding on the parties; this is emphasised by Giles J as showing that there was a clear, agreed upon structure to the proceedings. The conciliation was only cut short when a provisional liquidator was appointed to the defendant. It was the provisional liquidator who required continuation of the arbitration proceedings, which motion was then denied by Giles J who instead enforced the agreement to conciliate. Thus, the parties

[118] E.g. AAA 2007 p. 14.

[119] E.g. Boulle et al. (2000 p. 70), who note that:

> *Interestingly, there was no problem with the lack of reference to the quantum of the mediator's fees, presumably on the basis that this would be determined by the mediator. With the apportionment of the mediator's fees, however, the parties would have to reach their own agreement, thus rendering this an unenforceable agreement to agree.*

had agreed to adjourn arbitration and enter into conciliation and only afterwards did the provisional liquidator of the plaintiff try, unsuccessfully, to force a return to arbitration.

Elizabeth Bay and *Aiton*, on the other hand, both concern intricate multi-tiered dispute resolution clauses attempting to make, *ex-ante*, a binding commitment to conciliate. In *Elizabeth Bay*, it seems from his argumentation that Giles J is deliberately looking for a reason not to enforce the conciliation clause, even when the parties in that case acknowledged that they had common intentions with regard to that clause. In *Aiton*, it seems clear that the defendants tried to use the enforcement of conciliation as a delaying tactic.[120] In both cases, the argument with which conciliation is denied enforceability seems trifling, especially when it has to be weighed against the parties' express (and elaborate) intentions of conciliation. Pryles does not explicitly state it, but he does seem to refer to Einstein's argument of extreme formality with some bewilderment.[121] There seems to be at least some indication that the formality argument is used in *Elizabeth Bay* and *Aiton* as a pragmatic detour for arriving at an equitable solution for individual cases instead of a systematic and consistent stance on dispute resolution.

3.2.2.2 Good faith negotiations

Almost ten years after Pryles, Chapman discusses the readiness of Australian courts to enforce an obligation to negotiate in good faith.[122] Chapman writes from the opposite perspectives adopted by English and Australian courts, the first according to Pryles rejecting such obligations, the latter now binding parties to such agreements. The key issue he discusses, however, is universal. How should an obligation to negotiate in good faith be defined if such an obligation cannot be defined through a successful end product such as a judgment?

From this point of view and the similarities between defining the failure of negotiation and conciliation[123], Chapman's discussion of the Supreme Court of New South Wales' Court of Appeals' 2009 decision in *United Group Rail Services Limited v Rail Corporation New South Wales* is of interest to the discussion on conciliation agreements in the previous subsection. In that decision, the court presided by Allsop P upheld the validity of a dispute resolution clause that contained a requirement for "senior representatives" to "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference" as a prerequisite for arbitration (para 15, clause 35.11). In upholding the enforceability of this clause, the court overruled the view that good faith negotiations are akin to agreements to agree and therefore

[120] E.g. *Aiton v. Transfield* para 22.

[121] Pryles 2001 p. 165.

[122] Chapman 2010.

[123] E.g. Born 2009 p. 847, discussed in Section 3.2.1.

generally unenforceable.[124] This viewpoint will not be further discussed here. Instead, of interest are the arguments used by the court to overrule the previous blanket unenforceability of good faith negotiation agreements.

These reasons are similar to those already used with regard to conciliation clauses in the previous subsection. First, agreements to negotiate in good faith are not seen by Allsop P as agreements to agree but instead as agreements to negotiate in a particular manner (paras 71–74). Whatever this manner is depends on the circumstances: "What the phrase "good faith" signifies in any particular context and contract will depend on that context and that contract" (para 70). The difficulty of proving whether or not negotiations have been undertaken in a particular manner "does not mean that this is not a real obligation with real content" (para 74). Second, effect should be given on the parties' express intentions (para 74):

> If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which have sensible and ascribable meaning, the task of the court is to give effect to, and not to impede, such solemn express contractual provisions.

Chapman analyzes how exactly an obligation to good faith should be defined.[125] He first notes that the *United Group* judgment denounced any overriding definition of good faith. In that case, Allsop P noted that even self-interested activities may be conducted with an air of honesty and genuineness and gives some examples of what this might mean under particular circumstances:[126]

> A party, for instance, may well not be entitled to threaten a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognises as due. That would not, in all likelihood, reflect a fidelity to the bargain. A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford. If a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment. That, however, is only to say that a party should perform what it knows, without qualification, to be its obligations under a contract. Nothing in cl 35.11 prevents a party, not under such a clear appreciation of its position, from vindicating its position by self-interested discussion as long as it is proceeding by reference to an honest and genuine assessment of its rights and obligations.

[124] Chapman 2010 pp. 91–92.

[125] Chapman 2010 p. 95.

[126] *United Group* para 72.

In order to further concretise what this obligation boils down to, Chapman refers to other authorities for a variety of examples. One of these is Alan Berg, who suggests that an undertaking to negotiate in good faith might mean:[127]

> "an obligation to commence negotiations and to have some minimum participation in them" as well as "an obligation to have an open mind in the sense of: (i) a willingness to consider such options for the resolution of the dispute as may be proposed by the other party [and] (ii) a willingness to give consideration to putting forward options for the resolution of the dispute… [and] "not to take advantage, in the course of negotiations, of the known ignorance of the other side" and "not to withdraw giving a reason which is untrue".

In the end, Chapman emphasises the difficulty of identifying any clear overriding meaning for good faith negotiations as opposed to Allsop P's general idea of a context-based understanding. However, the notion of good faith is always sensitive to its context. The key point in *United Group* seems to be that the parties have agreed on the use of a particular clause, and this clause must be understood and given effect through the particular context of the case. The meaning of good faith in negotiations does not arise from some overriding, universal meaning of good faith, but rather, as seen in Section 2.1, from its application into the particular factual circumstances of a case. Thus, the Supreme Court of New South Wales has come a long way from the decisions mentioned with regard to conciliation in the previous subsection. The court has confessed that it may be possible to find enforceable meaning in all agreements made by reasonable businessmen, even apparently uncertain ones. Thus, courts can give meaning to negotiation clauses even when such clauses have little procedural description on how negotiations should be undertaken. The same reasoning should also apply to conciliation, as there clearly are reasonable meanings that can be given to the concept.

3.2.3 International commercial conciliation and the Swiss Federal Supreme Court

In its decision 4A_18/2007, the Swiss Federal Supreme Court dismissed a complaint claiming that the conciliation requirement of a dispute resolution agreement had been skipped in favour of arbitration. The reasoning provided by the court is worth discussion here. In that case, a French company, "Y", holding a number of patents related to coffee machines, licensed these patents to the Hong Kong subsidiary, "X", of a Germany based group of companies engaged in the manufacture and import of electric machinery. The agreement contained as Article 10 a

[127] Chapman 2010 p. 97, quoting Berg.

dispute resolution clause.[128] According to the judgment, the parties' relationship deteriorated for diverse reasons. This was followed by various attempts to resolve their disputes, but as these failed Y's counsel proposed arbitration. Following this, X immediately terminated the licensing agreements for which it also requested partial damages from Y. Y then requested arbitration from the WIPO Arbitration Centre. X replied that conciliation, as required by their contract, had not been undertaken and that therefore the arbitration tribunal lacked jurisdiction. The tribunal nevertheless declared itself competent and ruled over the case, finding primarily in benefit of Y, but holding that each party bear their own costs and half the arbitration costs. X appealed the award in the Swiss Federal Supreme Court, which, as already noted, found that conciliation had not been required in the particular case.

The court presented two key arguments for its decision denying the appeal and for awarding costs relating to the appeal to Y. The first had to do with the interpretation of the dispute resolution clause and the second with the conduct of the parties.

In interpreting provision 10.2 in light of "general principles of contract law" the court found it to be "sibylline" (section 4.3.2 of the judgment, third paragraph). Nonetheless, in the end the court interpreted the clause as not requiring mandatory conciliation. This was first of all due to the court finding the statement "on-going negotiations in no case constitute an impediment to commencing arbitration"[129] difficult to understand if the conciliation requirement also included in provision 10.2 would be construed as mandatory. The court refused to accept the appellant's statement that this clause, identically to Article 65 of the WIPO Arbitration Rules, only referred to negotiations initiated after arbitration had commenced. Instead, the court noted that the parties seemed to want to emphasise that all disputes not resolved amicably would go to arbitration even when they favoured amicable dispute resolution "with or without a mediator". Second, the court accepted the arbitral tribunal's notion that because there was no time limit in the dispute resolution clause barring arbitration for a specified time, which is

[128] Titled *Droit applicable et arbitrage*, the relevant content of the clause according to the Swiss Federal Supreme Court was:

> *10.1 Le présent contrat et tous les rapports de droit qui en découlent sont soumis exclusivement au droit suisse.*
>
> *10.2 Toute controverse et tout différend en rapport avec le présent contrat et qui ne pourront être résolus à l'amiable (y compris la conciliation selon les règles de l'OMPI) devront être soumis à un tribunal arbitral qui sera seul compétent pour décider définitivement, à l'exclusion des tribunaux ordinaires. Au surplus, le tribunal arbitral sera seul compétent pour statuer sur tout différend concernant l'applicabilité de cette clause d'arbitrage. Des négociations en cours ne constitueront en aucun cas un empêchement à l'engagement de la procédure arbitrale.*
>
> *10.3 L'arbitrage sera tenu sous les règles de conciliation et d'arbitrage de l'OMPI et le Chapitre 12 de la loi suisse sur le droit international privé. Les Parties désignent expressément Genève (Suisse) comme siège du tribunal arbitral…*
>
> *10.5 Les Parties demandent expressément au tribunal arbitral d'accomplir sa tâche avec la plus grande diligence et de statuer dans les plus brefs délais. …*

[129] My translation of "*[d]es négociations en cours ne constitueront en aucun cas un empêchement à l'engagement de la procédure arbitrale*".

"usual practice internationally", the parties had not intended conciliation as a mandatory condition precedent. The court further noted that the model clauses of the WIPO Mediation Rules do contain such time limits. Thus, the court could not establish that the reference to conciliation in provision 10.2 indeed was intended as an obligatory precondition to arbitration.

Following this, the court in its second key argument took up the notion of abuse of law (section 4.3.3 of the judgment). The court first noted the conduct of the parties and especially the attempts made at settlement prior to the arbitration proceedings. The court came to the conclusion that it was doubtful whether the parties could be reconciled, even under a neutral third party, as was alleged by the appellant. More importantly, however, if the appellant really wished amicable settlement, they should also have acted thus according to the court. The court noted that under WIPO Rules conciliation is possible also during arbitration. While the appellant did inform the arbitral tribunal that it felt that the tribunal lacked jurisdiction, the appellant did not request the tribunal to suspend proceedings in favour of conciliation. Instead, the appellant participated actively in the arbitration proceedings and then, after the arbitral award had been issued, invoked the lack of conciliation as a procedural deficiency. Further, the court did not accept the appellant's view that initiating conciliation would have been the duty of the plaintiff. Ultimately, the court found that such behaviour on part of the appellant cannot constitute good faith and therefore cannot be awarded legal protection.

Thus, the Swiss Federal Supreme Court provides two reasons for why the conciliation agreement was not upheld. Because of there being two reasons, it is frustrating to follow the reasoning of the court; what tipped the scale against the appellant? How much did the "sibylline" drafting of the dispute resolution clause weigh? Or was the tipping of the scales primarily due to appellant's bad faith, only that there conveniently happened to be available additional material on which to ground the judgment so that bad faith would not have to be relied upon alone? The decision seems to help little with regard to giving a meaning to conciliation, even when Latour would probably argue that the vagueness of the decision is an important value object in itself by allowing for multiple interpretations.

In the end, the court need not stress the requirements of conciliation clauses. In the above-mentioned *Elizabeth Bay* and *Aiton* judgments, courts stressed a rigid interpretation of the certainty doctrine with regard to what appeared as inconsequential details, apparently in order to perform an equity-based evaluation. Here, however, the Swiss court had abundant additional material at its use. But this material is not used convincingly. Definite time limits were seen by the Swiss court to be typical, but not necessarily obligatory, elements of mandatory conciliation clauses and the court did not stress that they *need* be present. Further, the last sentence in clause 10.2 discusses negotiation, not conciliation. Besides, the parties had agreed to a dispute resolution clause that contained a clear reference to conciliation. It seems probable that had the parties, when agreeing on this clause, really intended conciliation to be voluntary, they would have taken care to mention such a fact. Finally, there is no escaping that the court itself pointed out that conciliation could have been possible even during arbitration by suspending the arbitration proceedings. By doing this, the court itself seems to accept that conciliation really was intended by the parties.

Thus, it seems that the court primarily wished to stress the appellant's conduct under the particular circumstances of the case as the primary reason on why conciliation was not required in this particular case even when it might be required in general. The German BGH explicitly stated in its November 18, 1998 decision VIII ZR 344/97 that a *Treuwidrigkeitseinwand* might override agreed conciliation procedure. According to Boog, the Swiss Federal Supreme Court's decision similarly shows that bad faith may override normal conciliation procedure. It would thus be the parties' conduct in fulfilling an agreement to conciliate that counts.[130]

On the other hand, it also seems curious that the arbitral tribunal itself did not stay the proceedings and revert the parties to conciliation, which would easily have cured any procedural deficiency. Here, the Swiss court would have had a perfect possibility to reprimand the tribunal. Of course, such a reprimand would have seemed excessive with regard to the substance of the case at hand and the decision already made by the arbitral tribunal. As a policy consideration it might nevertheless have served a purpose. Then again, probably even the present judgment has enough pedagogic effect so that any arbitral tribunal should be careful enough to propose a stay for conciliation in order to ensure that its eventual award would not appealed on similar grounds.

3.2.4 Caselaw–a summary

In analysing caselaw on international commercial conciliation, Jolles and Born propose drafters a careful and conservative perspective similar to that of the UNCITRAL Model Law; parties should, in addition to a conciliation agreement, include in their dispute resolution clause another mechanism that bars access to litigation for a limited period of time. Thus, there would be no need for parties to rely on an agreement to conciliate that is possibly meaningless for a court that does not accept a more liberal interpretation of conciliation.

Such a point of view does have its practical benefits, as is clear from the series of cases on conciliation from the New South Wales Supreme Court. While claiming to be acceptant of conciliation in general, that court nevertheless adopted in the *Elisabeth Bay* and *Aiton* judgments a restrictive interpretation of conciliation that overrode clear mutual intentions to conciliate. Instead of having a fixed policy on interpreting conciliation agreements, it seems that in those judgments the courts were primarily looking for pragmatic solutions to individual cases.

Despite its apparent benefits, the safety-first method of drafting proposed by Jolles and Born altogether skips the relevant question of whether conciliation can be attributed independent legal meaning. Berger answers this question in the affirmative, arguing that courts should give

[130] Boog et al. 2008 p. 109.

meaning to dispute resolution agreements even when they do not exactly fit into traditional models. Berger's argument receives further support from the English *Cable and Wireless* decision referred to in Section 2.3.2, where the court noted that "[i]n principle… where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find".[131] Berger's approach is also consistent with the New South Wales Supreme Court's reasoning in the *United Group* case with regard to negotiation. In all these cases, the reasoning used follows the lines of argument in Section 2.1 by stressing that the factual circumstances in light of the context of a case should weigh more than an abstract interpretive paradigm that may not fit into the same circumstances. This position also has its likeness in the ICDR International Mediation Procedure.

There is thus precedent for not only a denial of independent meaning to conciliation, but also for a restrictive interpretation of conciliation agreements based solely on the parties agreement and a more liberal interpretation requiring courts to locate the relevant legal meaning to the parties' agreement not from within the contract itself but from the greater context of which the contract is an indicator. None of these interpretations is useful, however, if the reasoning behind them is not clear. In the Swiss Federal Supreme Court decision 4A_18/2007, it seems clear that the factual circumstances of the case were thoroughly balanced by the court. Unfortunately, due to the vagueness of the decision and the multiple possible objectives of the court in making it, the relation of the different factors of the decision is unclear. One cannot be sure whether or not the court embraced a restrictive or liberal interpretation of conciliation, both of which could be supported by the text of the decision.

3.3 Summary—the three meanings of conciliation

Underlying the 1980 UNCITRAL Conciliation Rules is the premise that conciliation must rely on the parties' volition to such an extent as to be wholly noncommittal, even if "agreed to" in advance. This premise is somewhat moderated under the 2002 UNCITRAL Model Law which provides for the possibility of a time limit or event that can be used to define the extent of conciliation. Further, the 2001 ICC ADR Rules tie conciliation to the attendance of a meeting on conciliation procedure. Still, none of these instruments as such provides much substance to conciliation itself. The 2009 ICDR International Mediation Rules, on the other hand, are much more demanding on the parties, imposing upon them a requirement of best efforts conciliation before the agreement to conciliate is fulfilled. Unlike the time limits and the mere attendance of an event, an adequate attempt at the substantive best practice conciliation required by the ICDR International Mediation Rules can only be defined by courts on the basis of an evaluation of relevant factual circumstances.

[131] *Cable & Wireless v. IBM* para 34.

Similar ideas are traceable also in discussions of caselaw. The approach to drafting conciliation agreements proposed by Jolles and Born is a careful and conservative one similar to that of the UNCITRAL Model Law; parties should, in addition to a conciliation agreement, include in their dispute resolution clause another agreement that bars access to further dispute resolution mechanisms for example for a limited period of time. Thus, there would be no need for the parties to rely on any agreement to conciliate possibly being meaningless for a court disinclined to the more liberal interpretations of conciliation. Berger, on the other hand, argues that when the parties have not defined when an attempt to conciliate is fulfilled, courts should, based on the factual circumstances of each case, identify whether or not adequate attempts at conciliation have been undertaken.

Broadly speaking, three different kinds of meaning attributable to conciliation can be distilled from the above. The first is a blanket denial of legal meaning to agreements to conciliate, represented by the unmodified UNCITRAL instruments that give either party the possibility to walk away from an agreement to conciliate without further ado. Jolles' and Born's recommendations for drafting enforceable conciliation agreements also take into account the possibility of such a blanket denial interpretation. Second, there is a restrictive interpretation of the parties' agreement, which position in principle allows legal meaning to conciliation agreements but only to the extent to which this is precisely defined in the parties' agreement. This interpretation is represented by the recommendations of Jolles and Born and the three New South Wales Supreme Court decisions on conciliation, all of which emphasise a drafter's liability for creating a meaningful conciliation agreement. This second interpretation is also reflected in the strict requirements of conciliation agreements that bar litigation in the UNCITRAL instruments. Third and finally, there is a liberal pro-conciliation interpretation under which courts try to enforce any express intention to conciliate by giving that intention meaning in light of the factual circumstances of the case. This is done even when the agreement to conciliate might be seen to be lacking in the regard that it does not provide what is seen as a full and certain agreement covering all aspects of conciliation, as may be required under the restrictive interpretation. Thus, under this interpretation courts fill out any missing details in the conciliation agreement in light of the factual context of the case. This viewpoint is reflected in the *Cable & Wireless*, ICC Award 6276 and *United Group* decisions. It is also reflected to an extent in the Swiss Federal Supreme Court decision 4A_18/2007 that does not explicitly deny meaning to what is claimed to be an unclear conciliation clause. It also finds expression in the ICDR International Mediation Rules, which stress the actual process of conciliation over rigid formalities.

As is clear from the different international instruments and caselaw on conciliation, there are numerous different ways to understand the content of a single conciliation agreement. This is problematic. Boog notes that:[132]

> In summary, an analysis of the rather scarce case law [on the enforceability of conciliation clauses] shows that the focus has often been less on issues of doctrine and strict legal concepts than on finding pragmatic solutions to individual situations. Insofar as a general rule can be established, a procedural approach [i.e. seeing unfulfilled conciliation clauses as a bar to arbitration] would seem to be the preferable solution, since it is likely to better meet the parties' expectations than a substantive approach.

The confusion caused by such a pragmatic viewpoint on the interpretation of conciliation clauses is evident in the three New South Wales Supreme Court judgments on conciliation above and also in the Swiss Federal Supreme Court decision 4A_18/2007.

4 Towards a conclusion—interpretive alternatives for conciliation agreements

As seen in Section 3 above, at least three legal meanings are identifiable for conciliation agreements:

- a blanket denial of any legal meaning to conciliation;
- a legal meaning of conciliation defined through a restrictive interpretation of the parties' agreement; and
- a legal meaning of conciliation defined through a liberal interpretation of the parties agreement, where, if necessary, a clear intention to conciliate is given meaning through the greater context of international commercial dispute resolution as discussed in Section 2 above.

The effect of these different legal meanings of conciliation on contracting is discussed in this section.

The interpretation of conciliation agreements is closely related to two questions. The first is whether or not conciliation has a legal meaning of its own and what the exact scope of this legal meaning is. The second is whether and how any deficiencies in a conciliation agreement should be filled in. This section concentrates on the first of these two questions. With regard to the latter question, it is argued in Section 2 above that the interpretation of conciliation agreements should not be seen as separate from other forms of international commercial dispute resolution. Instead, conciliation should be seen as an integral part of the entire dispute resolution agreement, thus bridging any contextual or interpretive gap between different forms of dispute resolution, such as conciliation and arbitration.

[132] Boog 2008 p. 107.

4.1 Blanket denial of legal meaning to conciliation agreements

The position of blanket denial categorically denies any legal meaning to and thus also the legal effect or enforceability of conciliation clauses. This idea seems radical in light of the benefits of conciliation identified in Section 2.2 above. Nonetheless, as seen in Section 3.1.1 above, such a viewpoint is reflected for example in the unmodified UNCITRAL Conciliation Rules and UNCITRAL Conciliation Model Law. These two instruments stress the volition of the parties as the key feature of conciliation to such an extent as to allow parties to walk out of conciliation before it begins or anytime after it has begun. Thus, under such a viewpoint there exists no real obligation to conciliate, not even where the parties have seemingly agreed to conciliate under their contract.

One view of the blanket denial position stresses volition at the moment of conciliation as something that overrides any *ex ante* agreement of the parties to submit their disputes to conciliation. In light of present understandings of conciliation this position is not sustainable. First of all, the idea of a contract that is outright denied legal meaning is against the principle of *pacta sunt servanda*, according to which party autonomy in the form of contracts should be recognised and enforced by courts. Even when contracts that are denied legal effect do exist, these should be limited to cases that are clearly against the ideals of a particular legal system. It is difficult to see conciliation agreements as contrary to the ideals of any legal system. Conciliation is a procedure that helps bring disputing parties closer to each other and reach a mutual understanding of the nature of their dispute, potentially also solving it. This is something not readily available under other kinds of legal proceedings such as arbitration and litigation. Because of the nature of conciliation as an aid to litigation, it is difficult to imagine situations in which conciliation would be a complete waste of resources for parties. These would primarily seem to be limited to cases where an abuse of law doctrine should suffice to protect relevant interests.

A blanket denial of legal meaning to conciliation could clarify the legal situation in the sense that dispute resolution mechanisms such as arbitration and court proceedings would receive more attention. Conciliation would remain as something that the parties might undertake alongside or in addition to such mechanisms but without any overt support from courts. In such a situation, courts would not need to bother with interpreting conciliation agreements and could right away dismiss them in favour of litigation. But as seen in Section 2.2 above, all the ills of litigation, such as time and cost related constraints and the argumentative difficulties and boundaries caused by the limits of law, cannot be easily corrected. This is visible also in the support given to conciliation by the business community, as noted in Section 2.2.3. Business clearly wants to provide conciliation a recognised status. Not recognising such input would be a violation of *pacta sunt servanda*, as noted among others by Allsop P in *United Group*: the task of courts is to give effect to express contractual provisions that reflect the exercise of commercial judgment and which have a sensible and ascribable meaning. Conciliation has such a sensible and ascribable meaning and should thus be given legal effect.

Finally, under the blanket denial ideology, additional agreements are required in order to give a conciliation agreement a chance of any practical legal effect. For example under the UNCITRAL instruments discussed in Section 3.1.1, an agreement not to initiate litigation for a set period of time or until a particular event is required in addition to the actual agreement to conciliate, giving rise to a type of hybrid agreement combining these two different elements. This confusion of different kinds of agreements cannot be seen as helpful for contract law. For example in light of the reasoning of the Swiss Federal Supreme Court in decision 4A_18/2007, the confusion of ideologies on what it actually means to conciliate muddles the idea of *pacta sunt servanda* in relation to conciliation agreements and also offers a poor example for the interpretation of other kinds of agreements novel to legislation by moving focus away from the process of conciliation to events, such as arbitrary time limits, that have little to do with conciliation itself. As seen in Section 2.1 and as exemplified in the progression of cases in New South Wales discussed in Section 3.2.2, I argue that in order to avoid such contractual confusion courts should adopt a more flexible understanding of contracting in general. In relation to conciliation agreements, this understanding is reflected in the liberal interpretation of conciliation agreements as contrasted with a more restrictive interpretation in the following two subsections.

4.2 The problems with a restrictive interpretation of conciliation clauses

What I see as a tendency towards a restrictive interpretation of conciliation agreements is closely related to the notion of a blanket denial of any legal meaning to conciliation agreements. As seen in Section 4.1 above, the blanket denial of legal meaning to conciliation agreements creates a category of subpar agreements that require another agreement to give them any legal effect. The restrictive interpretation of conciliation agreements seems like an outgrowth of these subpar agreements. Because conciliation agreements are in general denied legal meaning under the blanket denial position, business actors have tried to create conciliation agreements that overcome this deficiency through better drafting for example by modifying arbitration agreements in order to delay their onset once a dispute arose in order to provide an incentive to conciliate.

Similar techniques seem to have become an integral part of conciliation agreements. All the rules governing conciliation discussed in this article, save for the ICDR International Mediation Rules, contain remnants of such a blanket denial ideology. The model clauses accompanying these instruments recommend the use of set time limits in order to ascertain that any conciliation agreement effectively bars litigation at least for the set period of time, apparently in case the agreement to conciliate is not otherwise given legal effect. The same line of thought is also evident in caselaw. As seen in Section 3.2.1, Jolles and Born recommend the use of clearly defined transitions from conciliation to other forms of dispute resolution, such as set time periods. The blanket denial position has merged conciliation agreements with agreements barring access to litigation to such an extent that the two seem inseparable. Because the barring of litigation is seen as an integral part of conciliation agreements, the two different notions have

also become confused in legal argument. This is visible for example in the Swiss Federal Supreme Court decision 4A_18/2007 discussed in Section 3.2.3 above, where the court noted the lack of any time limit for conciliation as possible indication of the non-binding nature of the conciliation agreement, even when in the end the court seemed to argue that it was the conduct of the plaintiff that led to the unenforceability of the conciliation agreement.

In light of Section 3, a restrictive interpretation of conciliation agreements seems typical at present. This results in a restrictive construction of conciliation agreements under which conciliation agreements are given legal effect only to the extent that their meaning can be construed through the conciliation agreement. In order for conciliation to have legal meaning, conciliation agreements must therefore be as self-sufficient as possible; parties should explicitly agree on all open issues for example by stating that the appointed conciliator may rule over any issues not agreed upon by the parties. In other words, courts cannot fill out the meaning of international commercial conciliation with regard to individual conciliation agreements. Most importantly, courts cannot decide whether or not conciliation has been fulfilled unless clear criteria are provided for this examination. As long as courts do not recognise any general meaning for conciliation, this would come down to setting an objectively definable moment at which any requirement to conciliate is fulfilled. This moment of fulfilment could be for example a unilateral or bilateral proclamation, the elapsing of a set period of time, or the accomplishment of an action such as a meeting between the parties.

Problems with such a restrictive interpretation are obvious. Trying to establish an explicit meaning for conciliation in a manner that would be easily applicable to all possible cases necessarily far removes conciliation from an in-context assessment of whether or not parties to a conciliation agreement have in fact tried to conciliate. Such an assessment of conciliation relies on events that may have nothing at all to do with the process of conciliation itself. These events, such as proclamations, time periods, or individual meetings, are not tied to the process of conciliation itself but instead to acts that are traditionally regarded as relatively easy to verify from an objective standing point. In a sense, a claimed efficiency of interpretation overrides any independent legal meaning that could be attributed to conciliation. It could of course be argued that as long as there is no standard legal meaning for conciliation, courts cannot apply any particular legal meaning to conciliation agreements. Instead, under the principle of party autonomy they would be reliant on any legal meaning of conciliation provided to them by the parties' agreement. This, however, may lead either to unequitable demands on the drafting of conciliation agreements, as seen in Section 3.2, or to a notion of conciliation that fails to see conciliation as the useful pre-litigation process described in Section 2.2. Most importantly, such a restrictive interpretation based on the parties' agreement overrides the principle of *pacta sunt servanda*. If the parties have undertaken to conciliate their dispute, they should try to do so instead of just waiting for a set time limit to elapse.

Moving towards a contextual assessment of whether or not conciliation has taken place might *prima facie* seem to increase litigation due to the problems of attributing when exactly a requirement to conciliate has been fulfilled. However, the problems of such an attribution of

meaning must be weighed against the parties' intent in agreeing to conciliate in the first place. Under the principle of party autonomy, the task of courts is to enforce parties' agreements. As argued in Section 2.2, there is no reason not to enforce conciliation agreements, as these are a useful means for making the overall dispute resolution process smoother and more effective. Further, in Section 2.2.2 a brief framework of the inner workings of conciliation procedure was outlined from two different points of view; the more theoretical perspective of Hill and the "plain talk" version of the American Arbitration Association. Courts have no excuse for not knowing how conciliation works and what could be seen as reasonable steps for trying to conciliate. There is thus no reason for courts not to emphasise the particular circumstances of each case in relation to their understanding of conciliation. In doing so courts could also take into account other factors, such as the fundamental freedom of access to court or also to apply the extensive international and national frameworks created for the interpretation of dispute resolution agreements in general, as argued in Section 2.3. Finally, neither is litigation over conciliation agreements out of the question under a restrictive interpretation of conciliation. Even under a restrictive interpretation of conciliation agreements, parties would have to argue over whether or not their conciliation agreements can be attributed a legal meaning, as happened in *Elizabeth Bay, Aiton* and the Swiss Federal Supreme Court judgments discussed in Section 3.2.

A restrictive interpretation of conciliation agreements cannot in general be said to make courts more effective by easing their task of interpretation. However, what can be said is that a restrictive interpretation of conciliation agreements is undesirable for legal argumentation in general. Arguing whether or not an agreement to conciliate is valid distracts discussion from what could be considered equitable conduct under particular circumstances in relation to conciliation. This seems to have also confused the reasoning of the Swiss Federal Supreme Court in its decision 4A_18/2007. Instead of concentrating solely on the behaviour of the parties in light of a potentially valid conciliation agreement, the court in that case also discussed the matter of whether or not the conciliation agreement itself was valid. With regard to this, the court seemed to reach no clear conclusion. A simpler and more elegant approach would certainly have been to uphold the validity of the conciliation agreement and instead argue the case only based on the parties' conduct in relation to a tentatively enforceable agreement to conciliate.

Argumentation over the validity of conciliation agreements has a tendency of hiding the real arguments used by courts to solve cases as noted in Section 2.1 and as is visible for example in the *Transfield*, *Aiton* and the Swiss Federal Supreme Court judgments. Contractual interpretation should not and cannot be used as a fix-it for all kinds of problems. If the courts in these three cases really had, as it seems, primarily equity-based motives for their resolutions, the contractual reasoning nevertheless used by them twists the law in the wrong direction. Arguments may be hidden behind the veil of contractual interpretation, giving little chance for any viewpoint that the intention of the parties as understood for example by a reasonable businessman under similar circumstances should instead bear weight. Thus, under the

restrictive interpretation, conciliation agreements risk being used for what courts perceive as *in casu* equity, thus confusing any doctrinal viewpoints on contractual interpretation in general.

Finally, the restrictive interpretation point of view places the risk of the enforceability of a conciliation agreement heavily on the drafter. The agreement to conciliate would have to be foolproof so that courts would not be susceptible of misinterpreting it for whatever cause. On the one hand businesses seem ready for such endeavours; for example, following the *Aiton* judgment drafting guidelines for conciliation clauses were duly updated.[133] On the other, such extensive requirements on drafting constitute considerable transaction costs on business, especially when coupled with the potential for ensuing litigation on the interpretation of the same agreements. Instead of encouraging parties to dispute their dispute resolution agreements, courts should encourage parties to conciliate.

4.3 Towards a liberal interpretation of conciliation clauses

Above in Section 4.2 it was argued that courts should adopt a liberal interpretation of conciliation agreements. This would not only be more respective of the parties' intention in drafting an agreement to conciliate, but would also alleviate the need to litigate on whether or not a valid agreement to conciliate actually exists. Attention could be directed towards the more important issue of what kind of efforts at conciliating are appropriate in particular circumstances. Courts could thus concentrate on clarifying any equity-based arguments in particular cases without having to hide them behind the veil of contractual interpretation.

Thus, the third possible legal meaning of conciliation discussed here is such that courts themselves are able to provide the basic meaning of conciliation in relation to the context of the dispute at hand. Instead of full reliance on the parties' agreement to conciliate, that agreement is only to supplement the core meaning of conciliation. Instead of a case by case assessment based solely on the parties' agreement, conciliation receives a general legal meaning of its own that is only adjusted in light of the particular circumstances of the case at hand, such as the parties' conduct and case-specific contractual stipulations. The meaning of conciliation is not reliant on such representations but instead has an intrinsic core of its own that is recognised and accepted by the judiciary. This meaning is defined by the ongoing discussion on what it means to conciliate, including the article of Hill, AAA's list of the objectives of conciliation, and the other opinions discussed in Section 2.2.2. This meaning is further defined by the framework provided by the evolving regulation of international dispute resolution and regulations and caselaw specific to conciliation. However, the primary value of conciliation agreements should be their interpretation through application into the particular circumstances

[133] Boulle et al. 2000 p. 70. See also Boog (2007 p. 110) discussing the effect of the Swiss Federal Supreme Court decision 4A_18/2007 on the drafting of conciliation clauses.

of a case, as emphasised in Section 2.1. The meaning of conciliation is malleable and changes with the circumstances of each case. Nonetheless, this meaning is simultaneously concrete in that courts should use and spread the meaning of conciliation as reliant on the liberal interpretation proposed here.

The key question then is how to define the limits of such a liberal interpretation. Certainly conciliation must not become an insurmountable obstacle for a binding decision. One key starting point that must be taken into account is the safeguarding of parties' access to court, especially with regard to possible limitation periods and interim measures. Otherwise, the parties' own conduct in trying to resolve their dispute is crucial, as for example in the Swiss Supreme Court decision 4A_18/2007, ICC Award 6276, and the Australian *United Group* decision. Such malleable contextuality could be given form on a more general level for example under the attempt to systematize context proposed by Pöyhönen.[134] On a more practical level, these general principles must be compared to expectations of conciliation such as those found in the AAA conciliation objectives mentioned in Section 2. These, and other relevant soft law and regulations, together form a general starting point for deciphering the extent of conciliation in a particular case. The key agenda of this article is that such an attribution of legal meaning to conciliation agreements is not only more equitable than the other interpretive options both from an *in casu* and overall systemic perspective, but also realistically achievable.

4.4 Postscript or the ongoing negotiation of the legal meaning of conciliation

Businesses include conciliation mechanisms in their dispute resolution agreements in order to make the resolution of disputes more effective. Dispute resolution centres vie to create and update more efficient concepts of conciliation. Conciliation has rightfully caught the eye of the judiciary through these legal impulses. But what meaning should courts give to these impulses? Are they worthy of recognition under *pacta sunt servanda*?

Legislators and courts have at first rejected the idea of giving binding legal effect to conciliation as a procedure with an end result, the resolution of a dispute, that is reliant on the volition of participants. Thus, conciliation agreements were almost categorically denied legal effect. Focus then shifted away from the aspect of volition towards the principle of *pacta sunt servanda* in the sense that caselaw emphasised the parties' will not to litigate until some attempt at conciliation is made. This led courts to accept that the process of conciliation might be allowed some legal recognition if the conciliation procedure is sufficiently certainly defined in relation to the rest of the dispute resolution procedure, for example with regard to the point of time after which litigation could commence. Finally, recent scholarly writing highlights the positive effects of the

[134] Pöyhönen 2000, especially p. 140ff. and p. 159ff. for contextual assessment.

process of conciliation even when no direct settlement is reached. Thus, the next step to be taken is to provide an independent meaning for conciliation that is not reliant on the rest of the parties' dispute resolution agreement for its enforceability but is instead independently definable. To this end, conciliation should be defined by courts in light of the circumstances of particular cases in relation to a common understanding of what it means to conciliate. This common understanding is defined through scholarly writings, business practice and caselaw and ensures that conciliation agreements can be given appropriate legal effect in all conditions.

The process of development of legal meaning over time through an interplay of legislative, judicial and business practise related arguments continues to redefine not only what it means to conciliate but also the paradigm of *pacta sunt servanda* in relation to conciliation agreements and agreements in general. From a *de lege lata* point of view, it seems that the risk of successfully defining the meaning of conciliation still lies in the hands of the drafter of a conciliation agreement. The drafter should ensure the viability of a conciliation clause by clearly stating that litigation is barred until an objectively definable event or time limit is reached. Despite this, increasingly less emphasis is put on the details of the conciliation agreement and instead more on the conduct of the parties in fulfilling an agreement to conciliate. It seems that conciliation agreements are about to mature from agreements related to something else than conciliation, such as agreements barring litigation for a set period of time, into true agreements that reflect the parties' actual intention to undertake a process of conciliation prior to engaging in litigation. This is a reasonable goal and should therefore be embraced by courts to the full; by the courts, precisely, as the question relates more to the interpretation under general contractual principles of the parties' intentions in agreeing to conciliate rather than the interpretation of any existing law. As seen above, these intentions can be given meaning through evolving conceptions of conciliation visible in business practice and institutional rules and increasingly also in regulation and caselaw.

As shown for example by the recent Swiss Federal Supreme Court decision 4A_18/2007, the maturation of conciliation into a type of agreement recognised as such as bearing legal meaning and effect is by no means complete. For example in Finland the different interpretations of conciliation agreements presented in this thesis live on and thus potentially remain at the use of courts of law. It could be argued that Hemmo's general commentary on Finnish contract law represents the blanket denial approach. On the basis that parties are not obliged to accept a settlement proposed in conciliation, Hemmo argues that conciliation probably could not form a procedural prerequisite to arbitration or court proceedings, thus echoing the volition-based position of the UNCITRAL instruments referred to in Section 3.1.1 above.[135] This is in contrast with Savola, who primarily on the basis of party autonomy argues that a different point of view is merited under Finnish law.[136] Nonetheless, on the basis of international caselaw Savola

[135] Hemmo 2005 p. 367.

[136] Savola 2006.

stresses the requirements imposed by a clearly restrictive interpretation of conciliation agreements by claiming that drafters should pay particular attention to how they define the point at which conciliation can be ceased and arbitration or litigation begun.[137] Both Hemmo and Savola can be contrasted with the perspective of this article, that is, a fluid understanding of conciliation based on the conciliatory intent of the parties and reflecting that intent in light of both the conduct of parties within a particular dispute resolution context and scholarly writing and legal practice on accepted standards of conciliation. I argue that the latter view best reflects the principles of *pacta sunt servanda* and party autonomy by allowing courts to give meaning to conciliation agreements and also best allows courts to concentrate on arguing the substantive issue of what it actually means to conciliate under particular circumstances. Thus, instead of concentrating on issues of contract construction, courts should direct parties to utilise the beneficial process of conciliation to the best possible extent as must be in line with the intentions behind any agreement to conciliate.

According to Savola there is no clear Finnish precedent for a particular type of interpretation of conciliation agreements. On the basis of Section 3 above, it seems that the same applies on an international scale. However, in order to avoid unnecessary litigation on whether or not conciliation should have been undertaken, it should be advisable for all parties to use their best efforts to conciliate a dispute when an agreement to conciliate is involved. This opinion is backed by the beneficial nature of conciliation for the resolution of disputes even in cases where no settlement is ultimately reached.

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[137] Savola 2006 p. 265.

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Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
BGer	Schweizerisches Bundesgericht (Swiss Federal Supreme Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Court of Justice)
CEDR	Centre for Effective Dispute Resolution (UK)
CISG	United Nations Convention on the International Sale of Goods (1980)
ECJ	Court of Justice of the European Union ("European Court of Justice")
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OGH	Oberster Gerichsthof (Austrian Supreme Court of Justice)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006)
UNCITRAL Conciliation Model Law	UNCITRAL Model Law on International Commercial Conciliation (2002)
UNCITRAL Conciliation Rules	UNCITRAL Conciliation Rules (1980)
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2004)
WIPO	World Intellectual Property Organization