



CONCILIATION ISSUES IN THE FIELD OF INTERNATIONAL INVESTMENT ARBITRATION

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Received: 24 th January 2024 Accepted: 20 th March 2024	This article covers the issues of conciliation in the field of International Investment Arbitration, its definition and peaceful resolution of disputes of an international scope through the participation of the parties and a third party
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INTRODUCTION

Conciliation is a process in which the participants - with the help of a neutral person or persons - systematically separate the disputed issues in order to develop options, consider alternatives and reach a consensual settlement that meets their needs. Conciliation means "resolving disputes without going to court." It is the process of appointing an independent person or persons as mutually agreed upon by the parties to resolve their dispute by consensus or by using credible similar methods. This article consists of two parts, in which the importance of the conciliation process in the field of tariff and international arbitration is highlighted.

DEFINITION OF CONCILIATION IN THE FIELD OF ARBITRATION

The forms of dispute resolution used in the transnational system, that is, in the international sphere, include methods such as negotiation, mediation, conciliation, arbitration and judicial settlement. Conciliation is defined as an alternative dispute resolution mechanism designed to resolve disputes between parties in a non-judicial and non-adversarial manner. It involves a neutral third party who forces the disputing parties to come to a conclusion and resolve the dispute satisfactorily. ADR is a traditional mechanism of dispute resolution, i.e. a decisive process in overcoming the shortcomings of litigation.

Conciliation is a voluntary mechanism and a conciliator who compels the parties to resolve the dispute cannot compel the parties to resolve the dispute. The parties are not obliged to follow the solutions and advice given by the conciliator. The creator's decision cannot put pressure on the parties to the dispute. Conciliation is a less formal and relatively easier process than the old

traditional methods and other alternative dispute resolution processes. The contractor shall provide the parties with an appropriate solution to resolve the dispute efficiently and profitably. A neutral third party to a dispute always keeps in mind that the solutions offered are best suited to the interests and priorities of the disputing parties. Generally, all matters of a civil nature are suitable for conciliation, and this is a convenient mechanism under alternative dispute resolution mechanisms other than traditional courtroom proceedings.¹ It follows that the method of conciliation in dispute resolution is carried out through the free participation of the parties.

In addition, historically, international conciliation is a diplomatic method of dispute resolution in which a third-party conciliator or conciliation commission has the most obvious influence on the process. It is defined by the famous scholar Cote as follows: The intervention of a body that does not have its own political authority in the settlement of an international dispute, but enjoys the confidence of the parties to the dispute and the task of examining each aspect of the dispute and proposing a solution that is not binding on the parties loaded.²

Conciliation is used to resolve disputes over questions of law, relevant facts, or a combination of the two. It can be used to resolve disputes involving "non-arbitrable" or "non-equitable" issues and is generally not hindered by jurisdictional issues.³ Conciliation is used even when there are applicable sources of relevant law, as disputants may wish to mitigate the impact of relevant legal principles by adopting a conciliation approach aimed at achieving a just solution. Conciliators are given flexibility in reaching an equitable outcome and although some sources of law and obligation cannot be ignored, the existing conciliation rules reflect this

¹ <https://viamediationcentre.org/readnews/NjM2/CONCEPT-OF-CONCILIATION-AND-ROLE-OF-CONCILIATOR;>

² <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1280&context=ilj;>

³ I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS 7-8 (1986);



relative freedom.⁴ The above information reflects that the third party acting as a mediator will freely communicate with the parties to the agreement to achieve a fair outcome.

THE IMPORTANCE OF CONCILIATION IN THE FIELD OF ARBITRATION

Conciliation processes can be completed in a much shorter time and at much lower cost than litigation or arbitration. A neutral third party can objectively inform both parties of the weaknesses of their case and the benefits of an upfront financial settlement that avoids litigation uncertainties.

As with other ADR methods, conciliation offers confidentiality and privacy relative to litigation. The reconciliation process is not open to the public. Any settlement reached will not be made public unless the parties agree otherwise, and the process will be conducted "without prejudice" to further litigation. International instruments continue to prohibit the use of views and information obtained during a conciliation process in subsequent arbitration or litigation on the subject, unless the disputants agree otherwise or disclosure is required by law or to implement a conciliation agreement.

If the disputing parties wish to maintain a long-term business relationship, conciliation may be an appropriate means of dispute resolution. Litigation and arbitration damage business relationships because of the polarization they create, while soft conciliation allows for conciliation to resolve disputes.⁵ Therefore, one of the most convenient aspects of the conciliation process is that it is considered a low-cost process for the parties. Also, this process is conducted on the basis of confidentiality, and the conciliator and the contracting parties are responsible for confidential information.

PROBLEMS IN THE RECONCILIATION PROCESS

Although conciliation can be an effective method of resolving disputes outside of formal court proceedings, there are some potential difficulties and problems that may arise in the arbitration process: In some cases, there may be an imbalance of power between the interested parties, which may affect the negotiation process. If one party has significantly more resources,

influence or bargaining power than the other, this can affect the fairness and effectiveness of the settlement process.⁶

Conciliators are usually neutral third parties who facilitate disputes and negotiations between disputing parties. However, they may not always have the necessary legal experience or knowledge to fully understand the complex legal issues involved in an arbitration case, leading to potential misunderstandings or misinterpretations. Effective communication is essential in mediation, and breakdowns in communication between the parties or with the mediator can hinder the resolution process. Language barriers, cultural differences, or misinterpretation of intentions can complicate communication and hinder progress.⁷ Confidentiality is critical in mediation to encourage open and honest communication between the parties. However, concerns about breaches of confidentiality, leakage of information or misuse of confidential information may arise, affecting trust and cooperation in the reconciliation process.

The Agreement may contain limitations on the remedies or outcomes that may be obtained with respect to arbitration or litigation. Parties may feel that the range of potential solutions available through conciliation is limited, which affects their willingness to participate in the process.⁸

Addressing these challenges and issues in the mediation process in arbitration requires careful consideration of the specific circumstances, effective communication strategies, skilled conciliators, and the commitment of all parties to negotiate in good faith to reach a mutually acceptable resolution. By recognizing and addressing these issues, parties can improve the effectiveness and success of the conciliation process in resolving disputes through arbitration.

CONCLUSION

In the field of international investment arbitration, conciliation is a diplomatic method of dispute resolution in which a third-party conciliator or conciliation commission has the most obvious influence on the process. Also, one of the most convenient aspects of the conciliation process is that it is considered a low-cost process for the parties. Also, this process is conducted on the basis of confidentiality, and the conciliator and

⁴ Reif, L. C. (1990). Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes. *Fordham Int'l LJ*, 14, 578;

⁵ Reif, L. C. (2007). The use of conciliation or mediation for the resolution of international commercial disputes. *Can. Bus. LJ*, 45, 20;

⁶ Arbitration Practice in Construction Contracts" by Douglas W. Jones and Derek Bevan;

⁷ Handbook on International Commercial Arbitration" by Christian Campbell;

⁸ The Law and Practice of International Commercial Arbitration" by Alan Redfern and Martin Hunter;



the contracting parties are responsible for confidential information. Similarly, in the mediation process, there may be an imbalance of power between the interested parties, which affects the settlement process. Also, language barriers, cultural differences or misinterpretation of intentions can complicate communication and hinder progress.

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