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The Role of Conciliation, Contract Modification and Expert Appraisal in Settling International Commercial Disputes

by
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This Article deals with the experience of the International Chamber of Commerce (hereinafter the ICC), which has long demonstrated the utility of arbitration as a means to resolve disputes arising in international commerce. This Article does not examine the experience of arbitration per se, but rather the experience of three other methods to avoid or resolve disputes:

- 1) conciliation;
- 2) contract modification; and
- 3) technical expert appraisal.

The latter two methods are relatively recent. None of the three methods is binding; they are all flexible and less formal than arbitration and judicial proceedings. As executive decisions or recommendations, they are non-binding methods because their execution depends largely on the will of the parties. Though these three methods of settling disputes seem to have much in common, they differ from each other in many ways. The following examines each method in turn.

I. CONCILIATION

When a dispute arises between the parties to a contract, they usually first try to negotiate some kind of an arrangement between themselves. Failure to reach an agreement usually influences them to look towards outside elements of pressure, enabling them to reach a solution. This initial step involves conciliation. Conciliation can be seen as an alternative to arbitration, or the groundwork towards arbitration in the event that conciliation fails. ICC conciliation is optional. It cannot be used without the agreement of the parties even where a conciliation clause is provided in the contract.

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Agreements reached by conciliation are generally recognized by the parties. Though not immediately enforceable against the will of one of the parties, as are court judgments and arbitral decisions, conciliation agreements may be upheld in a court or in a summary judgment for execution against the defaulting party.

Conciliation can prove to be the ideal way to settle disputes when it appears that the parties would respect the outcome of conciliation. Moreover, conciliation is perfect for parties who, like certain sovereign states, do not accept to submit to jurisdiction, whether it is the jurisdiction of another state or of an arbitral tribunal. Because of the non-binding nature of conciliation, a party does not compromise its position because it agrees to the transaction; the party is not judged by anyone. It is more comforting to perform the transacted agreement without being forced by the menace of a writ of execution which would be the case with an arbitral sentence. Conciliation clearly benefits from the same level of confidentiality as arbitration—which is an important element of its attractiveness.

In commencing conciliation proceedings in a given dispute, the President of the ICC appoints a conciliation committee composed of three members. Two members must have the same nationalities as the interested parties; the third, who presides over the committee, is a national of another country. The conciliators are personalities well known in the business community. They receive no remuneration for their services as conciliators.

The proceedings may be either written or oral according to the parties' choice. If written, the parties commence by exchanging notes. The conciliators then meet to discuss the affair and invite the parties to assist at this meeting. If the proceedings are oral, the parties may appear in person or by representation. Each party presents his case and answers the conciliators' questions. The conciliators try to create an atmosphere favorable to reaching an agreement.

An essential factor for success in the conciliation proceedings is the personal appearance of the parties, or their representation by someone having full power to reach agreement. The parties' representative may be of any nationality or profession. The parties may also be assisted by counsel of their choice, without any restrictions.

Conciliation may bring about one of the three following results:

- (1) Settlement of the dispute: The committee notes in its minutes the agreement reached, which is signed by both the conciliators and the parties.
- (2) Basis for an agreement: The committee gives recommendations to the parties, on which they are asked to settle the dispute within a certain time period.
- (3) Failure of the attempt at conciliation: If the dispute is not settled, the parties remain free to submit it either to arbitration or to any competent court if they are neither bound by a contractual arbitration clause nor have made an agreement to arbitrate after the dispute has arisen ("Compromis").

In the event conciliation fails, nothing said or written during conciliation proceedings may in any way jeopardize the rights of the parties in future arbitral or judicial proceedings. In addition, a conciliator may not be appointed as arbitrator for the same dispute by the Court of Arbitration of the ICC.

The costs of the conciliation proceedings are calculated in each case on the basis of the amount of controversy. Each party bears half of the costs, which are much less than would be incurred in arbitration proceedings because the members of the conciliation committee do not receive any fees. When a dispute is not settled by conciliation, half of the amount paid for conciliation is deducted from the costs of a future ICC arbitral proceeding.

The most recent practice shows that the requests for conciliation are few and insignificant in comparison with the requests for arbitration, which continue to increase.

To examine the reasons for the decline in conciliation and to suggest ways to render this method of dispute resolution more popular, the International Arbitration Commission of the ICC, presided over by Dr. Otto Arndt Glossner, formed a working group this year. The group's working thesis is that conciliation is a method of dispute resolution worthy of more widespread use. It is therefore necessary to create a climate more favorable to conciliation, and to avail parties of a clear and simple settlement requiring no further resort to judicial or arbitral bodies.

Similarly, the group hypothesizes that it is exactly the conciliation services of an independent organization, offered to the parties at the opportune moment, that would be favorable to the parties. An initiative from an outside organization does not make the parties feel they are compromising their positions. The tendency, at least in Western countries, seems to be that a party who suggests conciliation has ulterior motives. Even though this attitude is difficult to overcome, the ICC must take it into consideration. The choice of the right moment is therefore essential because an ill-timed intervention could destroy any chances of reaching an agreement. The decisive moment may be when the parties to an arbitration proceeding have defined their respective positions in the first submissions to the Secretariat of the ICC Court of Arbitration, when they become aware of the opposing party's main argument, as well as the weak points in their own position.

Recently, the Secretariat of the Court took this kind of initiative, with surprising results. Two parties, one Asian and one European, came to the ICC Secretariat in Paris and arrived at an amicable agreement within one and a half days in a dispute over large sums of money in relation to the performance of a public works project in the Middle East.

We feel that the ICC's offer to the parties of conciliation, the use of its offices and a secretary, and the calm and neutral atmosphere of our organization contributed to the satisfactory resolution of the dispute. Nor was the satisfaction of the parties tarnished by the ICC's low administrative fees, or

by our concluding statements that we hoped not to meet again before the Arbitral Tribunal.

This experience is encouraging. The ICC should more frequently attempt to promote conciliation than it has up to now. This is the challenge for the years to come.

II. CONTRACT MODIFICATION

The duration of certain contracts suggests the possibility that their performance will become increasingly difficult the more time passes from the date of execution.¹ Long-term contracts for the construction of factories or installations, periodic delivery of goods or the regular fulfillment of services may give rise to a problem that is unlikely to occur in ordinary transactions requiring the performance of one contract (one-shot deals). In the course of performance of long-term contracts, however, economic, political and social circumstances can completely change in an unforeseeable manner.

Such a fundamental change may allow one of the parties the right to claim impossibility of performing the contract or to invoke a *force majeure* clause permitting the party to demand the suspension or rescission of the contract. But this is not the intention of the parties; they want to continue their contractual relations and perform the contract by modifying it to the changed circumstances.² A rupture would have too many undesirable consequences for the parties who wish to maintain their contractual ties, and strive to do so.

The following examples illustrate the kind of events that can disrupt the performance of contracts:

- 1) the closing of the Suez Canal in 1956;
- 2) the sudden increase in the price of oil in 1972; and
- 3) the fluctuation of exchange rates in the last few years.

Often, parties encounter difficulties in agreeing upon all the points of a contract. Rather than prolong the mutually hoped for agreement, the parties may agree to prolong the resolution of one or more questions to a later date. They thus anticipate a later negotiation to append additional clauses to the original contract. When the proposed negotiation occurs, however, the parties may fail to reach an agreement. Here again, the parties do not wish to break their contractual relationship, and seek a solution that will enable the performance of their agreement.

A third category where modification is useful is in disputes between two parties having equal shares in a joint venture. A sole difference between the parties may be only temporary, while their mutual interest in pursuing their

1. Oppetit, *L'adaptation des contrats internationaux aux changements de circonstances: la clause de hardship*, 1974 JOURNAL DE DROIT INTERNATIONAL 794.

2. Schmitthoff, *Hardship and Intervener Clauses*, 1980 J. BUS. L. 82.

common goal is too important to risk a breach in their contractual relationship. A notable example is a subsidiary where there are two holders of an equal fraction of the registered capital (50/50) who disagree on a management policy, which blocks the operation of the subsidiary.³

The ICC Rule of Contract Modification is designed to be used in the kind of situations described above. It permits the parties to agree mutually to seek the help of an independent third party to modify their original contract or to fill its lacunae. This procedure facilitates continuing the performance of the contract and avoids disputes between the parties that would result in subsequent judicial or arbitral proceedings.

There are many possible permutations of ICC contract modifications. These include the following:

- 1) During the negotiations leading up to a contract, the parties insert a clause stipulating in what circumstances they will resort to modification proceedings provided by the Rule.
- 2) One or both of the parties, when such a contractual clause was inserted, or the two parties by joint agreement when no previous clause existed, may request the ICC Permanent Committee for the Regulation of Contractual Relationships to nominate a neutral third party under the terms set forth by the Rule.
- 3) The request must include an explanation of the problem in question and must be accompanied by a copy of the contract and any other necessary documents.
- 4) If the request is not presented jointly, the other party to the contract is asked to present its observations within 30 days.
- 5) The third party (or a group of three persons) is appointed by the parties, or if not, by the Permanent Committee.
- 6) The party or parties making the request must pay the ICC a sum that the Permanent Committee deems sufficient to cover the costs of the proceedings—including a US\$300 administrative fee, the third party's fees and additional costs. (At the end of the proceedings, a final calculation of the third party's fees and costs is made and the difference is divided equally between the parties.)
- 7) The third party receives the file and handles the affair. After obtaining the opinions of the parties, the third party gives its recommendations or its decision within 90 days. The Permanent Committee examines the findings and transmits them to the parties.
- 8) If the parties have agreed to be bound by the third party's decision, the latter makes a decision that the parties are legally obligated to respect as if it were a clause in their contract. If not, the third party issues a recommendation that the parties may study but need not adhere to.

The intervention of a third party is not legally the same as arbitration or conciliation. The latter two both imply a dispute, whereas third-party intervention under the Rule of Contract Modification does not. The two parties request the third party's help to perform their contract. The Contract Modification Rule being relatively recent (1978), the Center does not as yet have

3. INTERNATIONAL CHAMBER OF COMMERCE, L'ADAPTATION DES CONTRATS (Pub. No. 326 1980).

the experience to define any trends in its application. The number of requests for information, however, shows that there seems to be an interest in it.

III. TECHNICAL EXPERT APPRAISAL

Judges are trained to resolve differences of a legal nature, whereas contemporary litigation often also concerns problems of a commercial, industrial, financial and technical nature. Through arbitration, the parties have great influence on the choice of the arbitrator or arbitrators and can appoint the person they deem most appropriate, because of education or experience, to resolve a particular case. In the practice of the ICC, the majority of arbitrators designated by the parties are attorneys.

Many disputes submitted to arbitration are nothing more than the consequences of technical difficulties which were not resolved in a timely fashion. In such minor disputes, legal questions should not deprive the parties of a rapid and satisfactory settlement. The ICC Rule of Technical Appraisal offers the means of rapidly determining the cause or causes of such problems before the progress of the project could destroy or conceal the evidence, and to provide the parties with the relevant facts for an amicable agreement, or to establish the evidentiary basis for future judicial or arbitral proceedings.

Requests to the ICC for the nomination of experts result from a variety of difficulties arising in the performance of international contracts. Some recent examples illustrate this fact:

- 1) In the course of constructing and furnishing a hotel in Iraq, a German company encountered payment problems. Because of a disagreement between the supplier and the client in regard to supplemental payments for electrical work, plumbing and air-conditioning, the two parties agreed to seek the opinion of a technical expert.
- 2) A French company constructing railroads in Egypt had difficulties in completing the work on the construction sites. Not wanting at this point to commence arbitration proceedings, the French company found it necessary to obtain work progress reports as soon as possible. This report included a review of the plans which, because they had not been approved, prevented the material performance of the work, as well as a review of the personnel and material at the disposition of the contractor. The applicant pointed out in his petition the importance of the report for preserving the evidence necessary to protect his interest.
- 3) An Israeli company demanded payment of US\$200,000 from an Italian bank, alleging that the Italian supplier of machines for the manufacture of sheet-iron did not fulfill the contract terms concerning the testing period. According to the conditions of the guaranty issued by the bank, the bank was required to pay US\$200,000 to the Israeli purchaser upon a demand accompanied by a certified statement of an expert verifying that the supplier had not completed the testing within the prescribed time period.
- 4) A European contractor in charge of construction in a Middle Eastern country was ejected from the construction site by the owner, who completed the work himself. The contractor requested the appointment of an expert to

verify the state of progress of the work at time of ejection from the construction site to have evidence in the arbitration proceeding against the owner.

5) A French company and an Italian company reached an agreement for the supply of plastic motorcycle helmets. Although no dispute occurred between the parties, they jointly requested the International Center of Technical Expert Appraisal of the ICC to appoint an expert to supervise the deliveries throughout the duration of the contracts to ensure that the helmets conformed to French standards.

6) A Soviet factory owner complained that factory valves obtained from a Polish supplier failed to conform to the contract. In an arbitration proceeding brought by the Polish supplier against the Italian manufacturer, the arbitral tribunal requested the International Center of Technical Expert Appraisal to appoint an expert to evaluate the engineering standards of the valves.

7) An African company that bought from a European company a turn-key freezer system for fish requested an expert's appraisal as to whether the seller fulfilled all the conditions of the contract. Allegedly, production capacity was below that contracted for, some of the machines were secondhand, and the seller had not performed his obligation to train the buyer's personnel.

These examples show how an expert appraisal proceeding is used to determine the conformity of contract goods and their performance, or in comparing actual manufacturing productivity with the contractual specifications. In the majority of the cases, the parties turn to expert appraisers when differences have already arisen. Examples include the time of delivery or receipt, or during the operational guarantee period. In these cases, the decision or recommendation of the expert enables the parties to avoid immediate recourse to arbitration or judicial proceedings. The opinion of the expert serves as a basis for negotiation between the parties, who in the majority of cases reach an amicable agreement.

The advantages are obvious: The parties save time and avoid the constraints of judicial or arbitral proceedings which most often hinder contractual relations. In other cases the expert opinion is requested before a dispute arises. In such cases the expert supervises the proper delivery of contract goods or the progress of construction so that he may intervene before any technical difficulties create a dispute between the parties. When a dispute arises, the parties may authorize the expert to recommend appropriate measures to fulfill the purposes of the contract.

IV. THE OPERATION OF THE INTERNATIONAL CENTER OF TECHNICAL EXPERT APPRAISAL

An ICC expert appraisal proceeding may be requested where the parties have agreed, preferably in the contract, that recourse to expert appraisal is available.

The request may be made jointly by all the parties to the contract, or where the parties agreed to the availability of such recourse in the contract, by any one of the parties. The request must set forth the facts and the subject of the appraisal requested. The expert is chosen mutually by the parties or by

the ICC. In the latter case the President of the ICC chooses the expert based on the expert's neutrality with respect to the nationality or domicile of the parties.

After hearing the parties, the expert renders his conclusions under the authority granted him by the parties. If the parties have so agreed, the expert may also give recommendations and supervise the contract performance. The parties must then decide whether they will be bound by the findings of the expert.

Before the appraisal is begun, the ICC Secretariat requires the requesting party to deposit sufficient funds to cover the administrative fees of US\$300 and the fees of the expert.

In case the preservation of evidence is crucial, it is important to appoint the expert immediately. If the role of the expert is well defined in the petition, the ICC can normally appoint the expert within a few weeks.

The Center does not itself employ experts. They are appointed on an ad hoc basis and are remunerated according to the nature of their expertise and the services required. Thanks to the worldwide organization of the ICC, experts are readily available in many countries. This helps reduce delays resulting from selection and reduces travel expenses.

It is important to distinguish expert appraisal from arbitration. The determinations of the expert are not legally binding on the parties but may be helpful as predetermined evidence or even as presumptions of law in certain legal systems.

Having acquired several years of experience, the Center should soon be ready to determine how it wishes to grow in the future. As is often the case with other institutions, theory is one thing and practice is another. The following elements may be decisive in the Center's development.

First, while the Center's Rule presupposes contractual agreement by the parties to resort to expert appraisal, the majority of requests are submitted by one party to a contract without such a clause. This is usually the case where the parties to a contract were unaware of the existence of the services of the Center at the time they executed the contract, or knew of the Center's existence, but only agreed upon the use of arbitration in cases of serious disputes. When disputes arise, however, the parties realize that arbitration is not the ideal solution. Instead, the party asks the Center for a list of names of eligible experts.

The Center agrees to help in these cases even though they are not covered by the Center's Rule, and appoints an expert at the request of one of the parties. The precise role of the expert is determined by the requesting party and the expert himself. The ICC is not involved in these cases, which technically take place outside the scope of the Rule. Thus, the current trend is to use the Center as a source of information, whereby parties seek a directory of experts from which to choose. More seldom do parties make joint requests for expert appraisal as envisioned by the Rule.

In addition to this trend, the Center is increasingly cooperating with other organizations. The ICC frequently cooperates with the International Expert's Organization (ORDINEX) and INTEREXPERT, which help to find experts and, more generally, discuss with the Center the developing role of the international expert. In the area of public works the Center works with the International Federation of Consulting Engineers (FIDIC) to find qualified experts in the area. Cooperation may also prove possible with national organizations, such as Tüv RHEINLAND, which has recently established a French subsidiary for the supervision and control of technical installations and apparatuses.

The Center also offers experts to propose solutions to technical problems. Practitioners of international trade have suggested that the Center expand its scope to issues of a contractual, financial or accounting nature, since small and medium-sized companies often lack the resources and familiarity with lawyers to afford costly dispute resolution devices. They prefer to seek more rapid and economical means of resolving difficulties before they become serious. To such enterprises, the potential costs and delays of arbitration or judicial proceedings are a frightening prospect. Instead, the advice and authority of a neutral third party are appropriate for resolving their contractual disputes. Though the Center has to date received no requests for involvement in this kind of dispute, the Center would be happy to extend its competence to such an area.