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Settlement of commercial disputes

Enforcement of settlement agreements resulting from international commercial conciliation/mediation

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Addendum

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III. Compilation of comments

25. Australia

[Original: English]
[Date: 13 April 2015]

Question 1: Information regarding the legislative framework

There is no statutory basis for the enforcement of international commercial settlement agreements out of mediation in Australian legislation. Further, there are no provisions regarding the enforcement of mediation settlement agreements (or mediation at all) in the International Arbitration Act 1973 (Cth) or in the Civil Dispute Resolution Act 2011 (Cth), which imposes requirements for litigants to take genuine steps to resolve disputes before initiating court proceedings.

(i) There are no provisions in Australian legislation that specifically govern the enforcement of international or domestic mediation settlement agreements. Common law principles apply to the enforcement of domestic settlement agreements, in two specific scenarios:

A. Where the parties have not yet initiated court proceedings, the mediated outcome is classified as a contract. Therefore, in ascertaining the validity of the mediation settlement agreement, the court will apply the ordinary principles of contract law.

These require that the agreement results from an intention to create legal relations, that the document contains the terms of the agreement and that the agreement involves consideration, or is in the form of a deed.[1] Consequently, the remedies available to the creditor, if the other party does not fulfil its obligations under the settlement agreement are the same remedies available as to any contractor. The creditor can commence a legal proceeding alleging breach of contract and ask for specific performance or other available remedies. In order to enforce the settlement agreement, a court must hold a hearing where the onus is on the creditor to prove the existence of the agreement and its validity. Therefore, the court has to consider the merit of the dispute mediated, and not just the enforcement of the solution that has been reached in the mediation process.[2]

B. Where the parties choose to mediate after court proceedings have been initiated, theoretically the mediated outcome will be decided by the court as a consensual judgement or settlement, or as it is expressed in many Australian laws as

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[1] J Hambrook, C Wappett and B Whittaker, Australian Encyclopaedia of Forms and Precedents, Lexis Nexis (online, accessible here: www.lexisnexis.com/au/legal/docview/getDocForCuiReq?lni=4DMK-W3X0-TWN4-60HD&csi=267952&oc=00240&perma=true) at [30-225].

[2] *EL SIDDIK Abbas*, Enforceability of the mediation outcome, in: eLaw Journal: Murdoch University Electronic Journal of Law (2010) 17(2), p. 17 f.

a "consent order".[3] Therefore, any subsequent proceedings relating to the order before the court will be enforcement proceedings.[4]

In practice, however, where proceedings have been commenced and parties negotiate/mediate a settlement, they will typically enter into a contract (by agreement or deed) whereby: (a) monetary compensation (or some other remedy) will be agreed upon; (b) releases (either unilateral or mutual) will be given; (c) the parties will agree to the steps to be taken to finalize the proceedings (whether by discontinuance, dismissal or entry of judgement).

The parties to the dispute/litigation are then in a situation where they can, if necessary: (a) bring proceedings against each other for breach of the settlement agreement; (b) have consent orders set aside and continue the litigation.

The industry practice of ADR practitioners may be a relevant factor in determining whether there was an intention for the agreement to be binding. The courts are more likely to presume that an agreement made between parties involved in a commercial dispute was created with an intention to create legal relations.[5]

(ii) There are no procedures for expedited enforcement of international commercial settlement agreements.

(iii) There are no provisions to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

This issue only arises if the settlement agreement was reached before court proceedings were initiated (in which case the agreement is classified as a contract, criteria for validity see above 1A).

Question 3: Validity of international commercial settlement agreements

See above 1A and B.

With regard to the validity of an agreement to refer a dispute to mediation/conciliation:[6]

There is no legislative basis for the enforcement of an agreement to mediate. Under the common law,[7] there is a list of minimum requirements for a mediation clause to be enforceable:

- The mediation clause must be in a form that operates to make mediation a condition precedent to litigation (rather than a replacement of litigation);
- The clause must be sufficiently certain. If agreement is subsequently needed on some other aspect of the process before mediation can proceed then, should

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[3] See for example Federal Court Rules 2011 (Cth) — Rule 28.25; Civil Procedure Act 2005 (NSW) — Sect 29 (1); Supreme Court Act 1935 (SA) — Sect 65 (7).

[4] *EL SIDDIK Abbas*, Enforceability of the mediation outcome, in: eLaw Journal: Murdoch University Electronic Journal of Law (2010) 17(2), p. 18 f.

[5] Hambrook, above n 1.

[6] See also Hambrook above n 1.

[7] Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236.

the parties fail to reach agreement, the mediation clause will only amount to an agreement to agree and will not be enforceable.

- The mediation clause should set out the rules for selecting a mediator and determining the mediator's remuneration. The clause should also specify a mechanism for a third party to select the mediator where the parties cannot reach agreement.
- The clause should also set out in detail the mediation procedure to be followed or incorporate these rules by reference to the rules of a particular institution. These rules will also need to state with particularity the mediation model that will be used.

With regard to the validity of a mediated/conciliated settlement agreement arising from an agreement to refer a dispute to mediation/conciliation:

It was held in the New South Wales Supreme Court that dispute resolution clauses, in the correct form, merely postpone a party's right to commence proceedings, and therefore generally do not offend the rule against ousting the jurisdiction of the court.[8] By extension, a mediated or conciliated agreement arising from an agreement to refer a dispute to mediation/conciliation is enforceable at common law.

Question 4: Any other comment

While Australia lacks a statutory regime for the enforcement of mediated settlements, the flexibility of the common law allows parties to tailor their dispute resolution process to their individual needs. We question whether a Convention will be useful in light of the aim of mediation to be a more flexible and informal method of dispute resolution.

There may also be some practical barriers to implementing a New York Convention style of enforcement for mediation in Australia, given that there must be a clear constitutional basis for parliament to implement this treaty and the obligations under the Convention must not impose non-judicial functions on the courts.

However, establishing an international framework for the enforcement of settlement agreements may go toward increasing the popularity and utility of a mediation and conciliation.

[8] *Aiton*, above n 7.

26. China

[Original: English/Chinese]
[Date: 10 April 2015]

I. The basis of legislative framework for cross-border enforcement of foreign settlement agreements in three cases

1. Arbitration procedure

Article 283: If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.

2. Judicial procedure

Article 281: If a legally effective judgement or written order made by a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people's court of the People's Republic of China which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by a people's court.

3. Currently, there is no legislative framework providing for cross-border enforcement of settlement agreement reached only by the parties abroad.

II. The confirmed procedures of Chinese law on settlement agreements reached in domestic proceedings

1. Judicial procedure

Civil Procedure Law of the People's Republic of China

Article 93: In the trial of civil cases, the people's court shall distinguish between right and wrong on the basis of the facts being clear and conduct conciliation between the parties on a voluntary basis.

Article 97: When a settlement agreement through conciliation is reached, the people's court shall draw up a conciliation statement. The conciliation statement shall clearly set forth the claims, the facts of the case, and the result of the conciliation.

The conciliation statement shall be signed by the judges and the court clerk, sealed by the people's court, and served on both parties.

Once it is signed for receipt by the two parties concerned, the conciliation statement shall become legally effective.

2. Arbitration procedure

Arbitration Law of the People's Republic of China

Article 51: The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.

If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect.

Article 52: A written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and then served on both parties.

The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof.

If the written conciliation statement is repudiated by a party before he signs for receipt thereof, the arbitration tribunal shall promptly make an arbitration award.

III. The situations that Chinese court does not confirm the domestic commercial settlement agreements

In 2011 Supreme People's Court — "The certain Provisions on the judicial confirmation process of people's mediation agreement"

Article 7: In one of the following circumstances, the court shall refuse to enforce a commercial settlement agreement:

(1) In violation of the provisions of laws, administrative regulations and mandatory;

(2) Infringe on the interests of the state, social and public interests;

(3) Against the legitimate rights and interests of the third parties;

(4) Damage to public order and good morals;

(5) The content is not clear, can not be confirmed;

(6) Another situation that is not a judicial confirmation.

27. Georgia

[Original: English]
[Date: 14 April 2015]

Question 1: Information regarding the legislative framework

In Georgia, there exists no special enforcement regime for those international commercial settlement agreements that are concluded as a result of mediation/conciliation proceedings. Therefore, there is no procedure for expedited enforcement of such agreements either. All settlement agreements are treated as ordinary agreements between the parties. Georgian arbitration law, however, provides a possibility for a settlement agreement concluded by the parties to arbitration proceedings to be adopted as an award by the arbitral tribunal. Georgia has implemented the UNCITRAL Model Law on International Commercial Arbitration in its arbitration legislation and according to Article 38(1) of the Law of Georgia "on Arbitration", "if requested by the parties, the arbitral tribunal has a right to approve the settlement of the parties in accordance with the agreed terms by way of rendering an arbitral award." It can be seen from the wording that these agreements are not automatically approved through arbitral awards. The tribunal has a right to refuse to record the parties' settlement in the form of an arbitral award and, in that case, the agreement will operate just like an ordinary contract between the parties.

According to Article 38(3), "an arbitral award on settlement shall be rendered in accordance with the provisions of Article 39 of th[e] Law." Article 39 sets the requirements for an arbitral award. However, there is no provision in Georgian legislation that would stipulate any specific conditions for the settlement agreement subject to the adoption in the form of the award.

As Article 38(3) indicates, an arbitral award on agreed terms "has the same legal force as any other arbitral award rendered as a result of examination of the merits of the case." Hence, such arbitral awards will fall under the recognition and enforcement regime of the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As noted above, a special regime for the enforcement of international commercial settlement agreements does not exist in Georgia. Every commercial settlement agreement is treated as a regular contract and its fulfilment is a matter of contract law, regulated by the Civil Code of Georgia. In case of those settlement agreements which are approved through the arbitral awards, the New York Convention applies mutatis mutandis, due to the reason that those settlement agreements become awards and fall under the recognition and enforcement regime of the arbitral awards.

Question 3: Validity of international commercial settlement agreements

There are no different or additional criteria that international commercial settlement agreements need to meet. Criteria for the validity of commercial agreements, regardless of their subject matter, are stipulated in the Civil Code of Georgia.

28. Paraguay

[Original: Spanish]
[Date: 30 March 2015]

Question 1: Information regarding the legislative framework

The Paraguayan legal system recognizes the enforcement of foreign judgements, arbitral awards and judicial decisions, but not international commercial settlement agreements, whether arising out of negotiations or mediation/conciliation proceedings, that have not been judicially approved.

Rules are prioritized simply according to the hierarchy that exists within the legal system, with the aim of ensuring that they are correctly applied. Kelsen outlined his theory in a pyramid, in which each higher rule is the basis of the validity of the lower rule. Thus, it is stated in our National Constitution — the Basic Law of the Republic — at article 137 on the Supremacy of the Constitution: "The supreme law of the Republic is the Constitution. The Constitution, the approved and ratified international treaties, conventions and agreements, the laws adopted by Congress and other lower-ranking legal provisions constitute Paraguay's positive law in the stated order of priority." Likewise, it is stated at article 145 on the Supranational Legal Order: "The Republic of Paraguay, on an equal footing with other States, recognizes a supranational legal order which guarantees the validity of human rights, peace, justice, cooperation and development in the political, economic, social and cultural fields." […]

International commercial settlement agreements arising out of non-judicially approved mediation or conciliation proceedings would be treated as private agreements between parties, which should be submitted to a court for judicial approval, as is the case with all commercial settlement agreements arising out of mediation proceedings whether conducted at a private mediation centre or by the Judiciary's Mediation Directorate.

(i) The Montevideo Treaties of 1888 and 1940 respectively establish the aforementioned requirements […]. Where no treaty exists, procedures are governed by article 532 of the Civil Procedure Code. Similarly, agreements that are not judicially approved in the country where they were drafted may not be enforced, unless judicial approval is sought before our courts.

(ii) The Paraguayan legal system does not provide for procedures for the expedited enforcement of international commercial settlement agreements.

(iii) Act No. 1879/02 Art. 10.- Form of the arbitration agreement. The arbitration agreement shall be in writing. The agreement shall be deemed to be in writing when it is contained in a document signed by the parties or in an exchange of letters or telegrams in which said agreement is established; or in an exchange of written statements of claim and defence in which the existence of an agreement and its terms is affirmed by one party without being denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference implies that the clause forms part of the contract.

The Arbitration and Mediation Act is very clear concerning the form of the arbitral agreement or award, and, on the basis of the aforementioned, for such an agreement to be enforceable in Paraguay it must meet all the requirements of the Montevideo Treaties and Acts Nos. 889/91 and No. 1879/02. […]

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

No further conditions are required other than those established in laws for the recognition and enforcement of international commercial settlement agreements.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was approved and ratified by Paraguay, in accordance with Act No. 948/96, article 1 of which reads: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York, United States of America, on 10 June 1958, is hereby adopted." As it is an Act, the courts are obliged to implement the provisions contained therein.

If a commercial settlement agreement was judicially approved in its place of origin, and if it complies with all the legal provisions established for its enforcement, under no circumstances may its enforcement be refused; however, if the agreement was not judicially approved in its place of origin, naturally the judge will refuse enforcement of that agreement.

Question 3: Validity of international commercial settlement agreements

The criteria indicating whether an international commercial settlement agreement is valid are those that have been established in the treaties and laws, and national judges and courts may only rule in accordance with current provisions and rules, therefore the criteria for the validity or invalidity of an agreement are established by the treaties and laws.

Question 4: Any other comment

While the terms "mediation" and "conciliation" are used interchangeably in the questionnaire, Paraguayan legislation makes a clear distinction between them. Article 53 of Arbitration and Mediation Act No. 1879/02 establishes the definition of mediation, and article 55 of that Act clearly establishes that mediation and conciliation are different from one another.

Further, article 170 of the Civil Procedure Code states that conciliation shall be conducted solely and exclusively by judges.

[Article 53.- Definition. Mediation is a voluntary mechanism aimed at conflict resolution, by which two or more persons seek for themselves an amicable settlement of their differences, with the assistance of a qualified and neutral third party known as a mediator.

Article 55.- Effects of the mediation hearing. If, prior to conducting a conciliation hearing as provided for in the procedural rules, the parties decide to resort to mediation, the written report prepared by the mediator or the Mediation Centre stating that the parties have attended at least one mediation hearing, shall have the same legal effect as the conciliation hearing provided for in the said procedural rules.

Article 170.- EFFECTS. Conciliation agreements concluded by the parties before a judge and approved by the judge shall have the authority of res judicata. They shall be prepared in the form required for judgement enforcement procedures. If the agreement is only partial, it shall be enforced in respect of the relevant part, the process continuing as and when pending claims are settled].

29. Poland

[Original: English]
[Date: 15 April 2015]

Question 1: Information regarding the legislative framework

(i) The conciliation/mediation agreements, with the exception of agreements concluded before the court or validated by it, are considered private agreements. With regard to agreements in the form of notary deed there is a possibility to include into it the statement of voluntary submission to enforcement — in such a case an agreement is an enforcement title under article 777, paragraph 1, points 4, 5 and 6 of the Civil Procedure Code.

(ii) The above mentioned procedure (voluntary submission to enforcement in the notary deed) can be considered as the expedited procedure. Such a notary deed constitutes the enforcement title: after having been appended by the court with the so called enforcement clause (klauzula wykonalności) and it can be basis for enforcement by the bailiff.

(iii) There are no rules which provide for the same treatment of international commercial agreements as the ones applicable to final arbitral awards under New York Convention on the Recognition and Enforcement of Arbitral Awards (1958).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As regards sub question 2, the Civil Procedure Code provides for mediation as voluntary procedure (art. 1831, para. 1). The mediation starts following the agreement on mediation between the parties or as a result of the common court's decision referring the parties to mediation. The mediation can start also when the other party agrees to it following the request for the mediation filed with the mediator by the first party. Art. 1831, para. 3 provides that agreement on mediation should stipulate the subject of mediation and designate the mediator (or define the way for its selection). There are no specific rules on the form of the agreement on mediation.

As regards question (2) the commercial settlement can be treated as the civil law agreement, and specifically as a mutual obligation agreement in the meaning of article 487, paragraph 2, of the Civil Code. The usual procedure for the enforcement of civil claims applies to such agreements. The request should be submitted to the competent court.

Question 3: Validity of international commercial settlement agreements

As regards question (3), in order to answer this question it is necessary to determine the law applicable to the international (foreign) settlement. Such law allows to establish the validity of the agreement.

30. Portugal

[Original: English]
[Date: 15 April 2015]

Question 1: Information regarding the legislative framework

(i) In Portugal, the Law 29/2013 of 19 April establishes in article 15 that the provisions of the present section (Civil and Commercial Mediation) are applicable, with the necessary adaptations, to the mediation procedures carried out in another Member State of the European Union, insofar as these respect the principles and standards of the legal system of this State.

According to article 14 (1): "In those cases in which the law does not determine its obligation, the parties have the option to request the judicial homologation of the settlement agreement obtained through pre-court mediation".

According to article 9 (4) the mediation settlement agreement obtained through mediation carried out in another Member State of the European Union that respects the provisions of subparagraphs (a) and (d) of paragraph 1 (that concerns a dispute that may be subjected to mediation and for which the law does not demand judicial homologation; for which the parties had capacity to agree hereon; that is obtained through mediation carried out pursuant to the terms legally foreseen; and the content of which does not violate public policy) are enforceable, without the need for judicial homologation, if the legal system of this State also attributes it enforceability.

(ii) There are no procedures for expedited enforcement of international commercial settlement agreements. All the enforcement procedures have the same rules.

(iii) There are no provisions to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of international commercial settlement agreements are the following:

- The dispute can't be the subject of mediation;
- Parties incapacity to agree hereon;
- The agreement does not respect the general principles of law or the good faith;
- It constitutes an abuse of law;
- Its content violates public policy.

Question 3: Validity of international commercial settlement agreements

It can be deemed valid an international commercial settlement agreement that concerns a dispute that may be the subject of mediation, for which the parties had capacity to agree hereon, if it respects the general principles of law, if it respects good faith, if it does not constitute an abuse of law and if its content does not violate public policy.