

MEDIATION AND THE PRINCIPLES OF UNIDROIT

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SUMMARY: I. *Introduction*. II. *Mediation and Conciliation in Multilateral and Regional Trade Dispute Settlement Procedures*. III. *Mediation of International Commercial Disputes*. IV. *Cultural Differences and Mediation*. V. *The Principles of UNIDROIT and Mediation*. VI. *Conclusion*.

I. INTRODUCTION

1. *Mediation and Conciliation*

Mediation (or conciliation) is of increasing importance as a means of resolving international commercial disputes. This article addresses the potential significance of the Principles of UNIDROIT in such mediation. However, before doing so it is essential to define and distinguish certain critical terms, namely mediation, conciliation and arbitration.

The term conciliation is frequently used as a synonym for mediation. Indeed in practice there may be little if any difference between the two.¹ However, because there are some important historical distinctions between conciliation and mediation, especially in international public law, it is important to identify those differences in order to avoid misunderstandings about what is meant by these terms. In his seminal work, Jean-Pierre Cot characterizes the historical origins of mediation and conciliation as growing out of the need for mechanisms to resolve disputes between states or heads of state when diplomacy fails. In such instances he writes, “[T]he parties may then lay their case before either the Prince

¹ While recognizing these differences, Christian Bühring-Uhle has suggested that the terms be used synonymously in that “mediation (or conciliation) is the non-binding intervention by a neutral third party who helps the disputants negotiate an agreement”. Bühring-Uhle, Christian, *Arbitration and Mediation in International Business* (1996), p. 273.

or Wise man".² Because the tradition and the procedures of international mediation and conciliation have evolved from their public international law origins it is appropriate to begin with them.

a) *Mediation*

The Hague Convention defines mediation as "reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance".³ One author distinguishes a mediator's assistance from that of a conciliator by noting that "a mediator generally makes his proposals informally and on the basis of information supplied by the parties, rather than his own investigation [...]".⁴

b) *Conciliation*

In public international law, conciliation "implies a group of individuals will hear the viewpoints of both sides, inquire into the facts underlying the dispute, and, possibly after discussion with the parties, issue a formal but not binding proposal for consideration by the parties as a solution for the dispute".⁵

Jean-Pierre Cot has noted that there "is no general agreement about the origins of the idea of conciliation" but "Latin American States claim

2 Cot, Jean-Pierre, *International Conciliation*, p. 1, Cot writes although "a Prince may be neutral because he wields political authority" settlement of disputes may be speeded. Selection of a Wise Man avoids political pressure and suggests a solution based on equity alone. Before World War I mediation usually implied the use of the Prince meaning the coercive element of political pressure. Following the war statesmen saw conciliation as overcoming the weakness of mediation but alas the appeal to reason alone seldom resolved disputes between states. *Op. cit.* at pp. 1, 3.

3 Article 4 of the Hague Convention on the Pacific Settlements of Disputes, cited by Darwin, H. G., in *International Disputes: the legal aspects* (Report of a Study Group of the David Davies Memorial Institute of International Studies), p. 83.

4 Merrill, J. G., *International Dispute Settlement*, second edition, p. 27.

5 Darwin, H. G., *op. cit.*, p. 83. The Regulations on the Procedure of International Conciliation adopted by the Institute of International Law defines "conciliation" as "A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they have requested". Cited in Merrill, J. G., *op. cit.*, p. 58, num. 1.

that it was invented by Bolivar".⁶ By the Nineteenth Century conciliation was frequently mentioned in international public law as a means of peacefully settling disputes within the structure of a permanent international organization.⁷ In the aftermath of World War I former warring parties signed a series of conciliation agreements known as the "Locarno agreements".⁸ Although these agreements were largely unused in public international law they provided an important model for the resolution of private commercial disputes involving nationals of two or more states.

2. *Mediation*⁹ and Arbitration

Arbitration and mediation are alike in that they each provide a private confidential process of dispute resolution as an alternative to litigation. However, mediation is unlike arbitration in that in mediation the parties, not a third party, retain control over the terms of any dispute resolution. Although some court systems require mediation, the term is generally used to describe a process which is voluntary. As such, any party may withdraw at any time. This is not the case in binding arbitration (or litigation). In arbitration, like litigation, a third party, an arbitrator, a panel of judges, or a panel of arbitrators, applies the law. If the parties

6 Cot, Jean-Pierre, *International Conciliation*, p. 29. The author cites the Treaty of 6 July 1822 between Colombia and Peru which "provided for the creation of an American General Assembly which would act as a 'super-Arbitrator and Conciliator'". In fact the term can be traced to Spain. For example the liberal Spanish Constitution of Cádiz of 1812 provided that "Law suits shall not be filed without proof of having attempted to conciliate the matter". (Constitution of Cádiz, Article 284). México first Constitution had a similar provision. Constitución Federal de los Estados Unidos Mexicanos (1824), Artículo 155, Tena Ramírez, Felipe, *Derecho constitucional mexicano*, p. 190.

Argentina adopted a mandatory mediation law in October, 1994 which, entitled ley de Mediación y Conciliación but which refers exclusively to "mediation" throughout its text. Argentinean publications use the same term. Perhaps the new terminology was chosen in order to differentiate the process from the Latin American understanding of conciliation. See for example Highton, Elena I. y Alvarez, Gladys S., *Mediación para resolver conflictos* (Buenos Aires) which again almost exclusively refers in mediation.

7 Cox cites the Arbitration Treaty between Denmark and Sweden of 1552 as a treaty "often quoted in refutation of the American claim to have invented conciliation", *id.*

8 Cox, *op. cit.*, pp. 82-83. In this public law context Jean-Pierre Cox has defined "conciliation" as: "The settlement of an international dispute, of all parties to the dispute, with a mandate to examine all aspects of dispute and propose a solution which will not be binding on either party". Cot, *op. cit.*, at p. 242.

9 Whith these definitions in mind the term mediation will be used in this article. (In Spanish use conciliation).

have previously chosen the law, the arbitrator may or may not apply the law chosen. However, if no law has been chosen, the arbitrator, not the parties, chooses the law, perhaps pursuant to conflict of law doctrines, perhaps by selecting the law he or she feels is appropriate, or perhaps by selecting according to legal criteria including the principles of UNIDROIT. The choice of law may be contrary to the law anticipated by the parties and may in fact seem arbitrary or anomalous to the parties.

The arbitrators then hear the evidence presented by the parties pursuant to the institutional arbitration rules selected by the parties. If the arbitrators are not affiliated with a dispute resolution institution, or if the parties have failed to designate such rules, the arbitrator may then choose them.¹⁰ Again, the rules chosen may seem arbitrary to the parties. If the arbitration is binding it is not reviewable by any other body, nor is it subject to judicial review except on specified grounds. International arbitration awards are enforceable through the New York Convention, while there is no international enforcement convention for judicial judgments.¹¹ While the grounds for declining to enforce an arbitral award under the Convention are ostensibly narrow, enforcement litigation is not uncommon.¹²

Mediation has become an important alternative to both arbitration and litigation in the United States. Its advantages are undeniable: it is both less costly and less time consuming than arbitration. In a recent study the International Chamber of Commerce found that mediation costs were

¹⁰ These rules would include the Commercial and International Arbitration Rules of the American Association, the International Chamber of Commerce Arbitration Rules, Rules of the London Court of International Arbitration, the UNCITRAL Arbitration Rules.

¹¹ Both the U. S. and México have ratified the Inter-American Convention on Letters Rogatory (*Convención Interamericana sobre Exhortos o Cartas Rogatorias*), and the Additional Protocol to the Inter-American Convention of Letters Rogatory (*Protocolo Adicional a la Convención Interamericana sobre Exhortos o Cartas Rogatorias*) which does provide for recognition of foreign judgments. The European Economic Community Convention on the Jurisdiction and Enforcement of Judgements provides for such enforcement for members of the European Union.

¹² For example, the issue of whether the parties submitted a given issue to arbitration may be litigated in an enforcement proceeding. The court may decide that question *de novo*. *First Options of Chicago v. Kaplan*, 115 S.Ct. 1910 (1995) Also the prerogative of the arbitrators to award punitive damages is a question of interpretation of the arbitration clause or agreement which may be challenged in the enforcement proceeding and therefore ultimately decided by the court. *Mastrobuono v. Shearson Lehman Hutton*, 63 U. S. L. W. 4195, (1995).

one-quarter of arbitration fees and that mediation led to more rapid resolutions than arbitration.¹³ By focusing on communication problems (which in the international context may be caused or compounded by cultural differences) an experienced mediator can maximize the parties' abilities to resolve their own disputes in a manner that makes business sense. Mediation is particularly useful if the parties have a long term or profitable relationship which they wish to protect despite their current dispute. The informality and consensual nature of mediation creates a climate for seeking a reasonable and practical solution that is forward looking rather than mired in the arbitration process of accusation and counter accusation inherent in such traditional dispute resolution systems.

Given the advantages of mediation when it is appropriate, it must be recognized that not all cases are suitable for mediation.¹⁴ Sometimes a decision by a third party is essential because the parties are unwilling or unable to engage in a negotiation or mediation process. For true mediation to take place the parties must be willing to talk and be able to articulate their own positions in this regard (lawyers can play a critical role in the mediation).

Mediation is less likely to be successful if there is a marked power imbalance or if the facts and the law leave no doubt which party would prevail. A party whose position is without merit might well be more interested in delay than a rapid solution. Thus the importance of the parties committing themselves to an alternative dispute resolution (ADR) process, which may include both mediation and arbitration, *before* the dispute arises.¹⁵

13 Schwartz, Eric A., "International Conciliation and the ICC", *Eleventh Joint ICS/ICC/AAA Colloquium on International Arbitration*, San Francisco, California (Oct. 17, 1994) (unpublished).

14 George W. Coombe, Jr. has written that international commercial mediation may be more useful in disputes involving: ongoing relations, a willingness to compromise, poor communication as a major source of the problem, where privacy is a major consideration or if there are multiple parties. On the other hand he suggests that disputes where there is no will to settle, distrust, a need for independent fact finding, widely differing views as to the merits, a substantial power imbalance between the parties or the parties lack sufficient information to evaluate the dispute, mediation is not likely to be useful. Coombe, George W. Jr., "International Dispute Resolution", *Transnational Litigation*, December 1992, pp. 7-12 to 7-14.

15 Such clauses should set forth three stages for dispute resolution:

1. An agreement to first attempt to *negotiate* the dispute. In the case of large corporations, the negotiation may be in hierarchical stages beginning at the managerial or department chief level before reaching the CEOs.

However, parties who are willing to mediate their disputes retain the power to craft their own resolutions in the process. Mediation is more flexible than litigation or arbitration in that parties can reach agreements which may include provisions which no third party could order or award. Both arbitration and litigation are usually limited to more traditional legal remedies such as damages or an order to take, or refrain from taking certain action.

If the parties reach an agreement through the mediation process the agreement should be reduced to writing. If the parties agree to do so, the written resolution may then become legally binding on the parties by having it incorporated into a judicial decree. Such agreements usually ensure cooperation by and avoid enforcement problems voluntarily precisely because the parties have engaged in the process and agreed to the resolution. In contrast, the losing party in an arbitration may resist enforcement of the arbitral award in the courts.

Mediation as well as arbitration are so commonly used in the United States today that it is probably legal malpractice for a lawyer to fail to advise clients of the availability of both processes. Argentina recently enacted a mandatory mediation law for most civil and commercial cases; five years ago mediation was practically unheard of there. In 1994 the World Intellectual Property Organization in Geneva (WIPO) adopted mediation rules which are attracting more attention than its arbitration services.

II. MEDIATION AND CONCILIATION IN MULTILATERAL AND REGIONAL TRADE DISPUTE SETTLEMENT PROCEDURES

Mediation and Conciliation are available but infrequently used in disputes between the nationals of one state who are private parties and the government of other states. For example, in trade disputes conflicts often rise between exporters and the importing country's government. The

2. If negotiations fail, the ADR clause should provide for mediation. Parties usually (and wisely) limit the mediation period to no longer than 60 days unless otherwise agreed.

3. Once the above-described time limits leave either party may commence the arbitration process.

The parties should specify the applicable law or legal principles such as the principles of UNIDROIT that will govern the resolution of their dispute.

Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) authorize the use of conciliation and mediation to settle such trade disputes. Specifically it provides for the use of “good offices, conciliation and mediation” as “procedures that are undertaken voluntarily if the parties to the dispute so agree”. Consistent with established custom, such proceedings are confidential. Such proceedings may be requested, begun and terminated at any time, and the proceedings may continue while the formal panel process proceeds such proceedings may take place outside of the institutional framework of the WTO.¹⁶

Similarly the North American Free Trade Agreement (NAFTA) established a Free Trade Commission, comprising cabinet level representatives with authority to “resolve disputes that may arise regarding [the NAFTA’s] interpretation or application”. The Commission may “have recourse to good offices, conciliation, mediation or such other dispute resolution procedures...”¹⁷

III. MEDIATION OF INTERNATIONAL COMMERCIAL DISPUTES

The influence of public international law on dispute resolution can be traced through the experience of international dispute resolution centers. Between the two world wars 80 percent of the disputes administered by the International Chamber of Commerce (ICC) were resolved through conciliation.¹⁸ The International Center for Settlement of Investment Disputes (ICSID), which offers dispute resolution services to foreign investors who have disputes with their host government, adopted conciliation rules in 1967. Both the original ICC rules and the current ICSID rules reflect the conciliation model of public international law in that

¹⁶ Article 5 of the “Understanding on Rules and Procedures Governing the Settlement of Disputes”, Annex 2 to the Charter of the World Trade Organization, reprinted in Jackson, John H., William J. Davey, Alan O. Sykes, *1995 Documents Supplement to the Legal Problems of International Economic Relations* (third edition), p. 318.

¹⁷ North American Free Trade Agreement, art. 2007(5) reprinted in Jackson, *op. cit.*, p. 693. NAFTA further encourages to “the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area”. NAFTA, *id.* art. 2022.

¹⁸ Schwartz, Eric A., “International Conciliation and the ICC”, *Eleventh Joint ICSID/ICC/AAA Colloquium on International Arbitration*, San Francisco, California (Oct. 17, 1994) (unpublished).

they provided for independent investigation and formal recommendation. This process, while less coercive than binding arbitration, cedes considerable authority to the conciliator to resolve the dispute. By the 1980s it became increasingly clear that for some disputants this type of formal conciliation was more adversarial and formal than desired. Parties wanted additional alternatives.

This demand was addressed in the 1980s and 1990s when four important centers of private international dispute resolution adopted rules for international commercial mediation.¹⁹ These are the United Nations Commission on International Trade (UNCITRAL) (1981),²⁰ the American Arbitration Association (AAA) (1987),²¹ the International Chamber of Commerce (ICC) (1988)²² and the World Intellectual Property Organization (WIPO) (1994).²³ Because of the flexibility of mediation such rules may be modified by the parties.²⁴ However, they provide a useful and internationally acceptable guide for the parties.

All of the rules contemplate proceedings which are entirely voluntarily. The ICC “conciliator shall conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and justice”. (Article 5) All of the institutions have provisions for the mediator to:

1. Request additional information from a party;
2. Conduct joint meetings with all parties or meet with the parties separately;
3. Fix the time and place of the meetings; and

¹⁹ All of these institutions have arbitration rules as well. More recently established international ADR centers, such as the United States México Conflict Resolution Center in Las Cruces New México and the Asociación Mexicana de Mediación y Arbitraje Comercial (AMMAC) in Guadalajara, which provides cross border ADR services, have adopted arbitration and mediation rules.

²⁰ UNCITRAL Conciliation Rules. The UNCITRAL is not an institution that provides ADR services but rather promulgates model rules and provides a forum for study and reports on such processes. Similarly the Center for Public Resources, Inc. has published a Model ADR Procedures for the Settlement of International Business Disputes.

²¹ Commercial Mediation Rules of the American Arbitration Association.

²² Rules of Optional Conciliation. These ICC Rules amended their previous rules by eliminating the traditional components of conciliation that were borrowed from public international law, namely an independent investigation and formal recommendation.

²³ WIPO Mediation Rules (Geneva 1995).

²⁴ The UNCITRAL rules allow the parties to agree to exclude or vary any of the rules at any time (Article 1). However, neither the AAA nor the ICC rules have such an open-ended clause.

4. Respect the privacy of the parties.

Under the UNCITRAL conciliation rules the conciliator will disclose all factual information a party gives him or her to the other side unless it is given subject to a specific condition that it be kept confidential. Such conciliators are like negotiation facilitators in that the parties maintain control of the terms of any resolution of their dispute while the conciliator directs the process.

All of the mediation/conciliation rules allow the parties to be assisted by counsel and state that the confidential nature of the proceedings must be respected by all. Similarly, all of the rules provide that the parties agree not to divulge or otherwise use proposals of the mediator or conciliator, the indications of a party's readiness to settle, or the views expressed regarding a possible settlement in any subsequent judicial or arbitration proceeding. The AAA and UNCITRAL rules also forbid admissions of a party during a mediation or conciliation being used in another proceeding; however, the ICC rules specifically permit evidence provided by any party to be used in another proceeding if otherwise admissible.

Under all of the rules, the proceedings terminate when one of three things happen:

1. The parties sign a binding agreement; or
2. The mediator determines that the attempt to mediate or conciliate cannot succeed; or
3. At any time, any party notifies the mediator or the other party of an intention to no longer pursue mediation.

IV. CULTURAL DIFFERENCES AND MEDIATION

Asian cultures have used "mediation" for centuries. Mediation is rapidly expanding in Northern Europe and the United States, and is now obligatory in Argentina. But people from different cultures may envision mediation differently from each other. For example, the relationship of the disputants to the mediator may vary. The parties may choose mediators by different criteria. For example the parties may seek.

1. on the basis of social relations; or
2. because she or he is a benevolent and highly respected person; or

3. because the chosen person is a person of authority in a public or private hierarchy; or

4. because she or he is independent and professional.²⁵

Each of the criteria chosen involves a distinct set of relations between the mediator and the parties. In the social network model there is a prior and expected future relationship between the parties and the mediator. A benevolent mediator may or may not have a current or ongoing relationship with the parties. An authoritative mediator may be an administrator or in a managerial position, or may be a politically powerful person who has an ongoing authoritative relationship with the parties. Parties might select an independent professional mediator for their facilitating skills and not on the basis of their personal or authoritative relationship with the parties.²⁶

Beyond these relationship differences there are other cultural values about conflict that may be highly significant. Several North American cultural assumptions about mediation²⁷ may not be shared by other cultures. The following is a list of some of those cultural assumptions.

1. Mediation is a “*formal*” process with specialist roles. This provides a sense of security and purpose for disputants.

2. *Direct communication* between conflicting parties is desirable for an acceptable outcome and is the mode of interaction preferred by the disputants.

3. A task-oriented, linear, “one-thing-at-a-time” approach is the most ideal manner of resolving problems.

4. The primary goal of mediation is “reaching agreement” on the issues. This assumes a criteria of *autonomy and individualism in decision-making*, rather than one of responsibility to a wider social network.

5. The mediator is presented as a *technical specialist*.

6. A written agreement is preferred.²⁸

25 Moore, Christopher, *The Mediation Process* (cite).

26 *Id.*, Christian Bühring-Uhle, *op. cit.*, pp. 276-277.

27 Lederack, John Paul, “The Mediator’s Cultural Assumptions”, *MCS Mediation Training Manual, Mediation Conciliation Quarterly*, Summer 1986.

28 Christian Bühring-Uhle has written that “modern mediation—particularly in the field of business disputes, and even more so on an international level—emphasizes the individual interest of the parties and relies on conflict and negotiation theory as a basis for ‘dispute systems design’ and a modern ‘technology’ of conflict management”.

However, it seems unlikely that setting aside North American and Europe, that most of the rest of the world, namely Asia, would agree. M. Scott Donahey has written, “Asian

Cultural differences about the role of the mediator and indeed the goal of the mediation can produce important misunderstandings between parties from distinct cultures. It is of critical importance that international mediators explore with the parties what differing cultural assumptions or other pertinent communication differences of the parties might be involved. With this understanding the mediator and the parties can more effectively address these issues by designing mutually acceptable ground rules for the mediation which take cultural factors into account. By addressing these issues at the outset of a mediation, or as soon as such an issue arises, the potential pitfalls of misunderstandings may be avoided and the likelihood of a successful mediation is enhanced.

V. THE PRINCIPLES OF UNIDROIT AND MEDIATION

The International Institute for the Unification of Private Law has published "An International Restatement of Contract Law" (Principles of UNIDROIT).²⁹ These Principles provide criteria to apply in international disputes arising from questions of interpretation of contractual terms involving services, intellectual property, transfer of technology or investment, distributorship or franchise agreements, and the like.³⁰ While the principles may prove less than satisfactory for common law lawyers engaged in litigation or arbitration because of the somewhat unfamiliar European accent on good faith,³¹ it is *precisely* those features of the UNIDROIT that may lend themselves to mediation.

cultures frequently seek a 'harmonious' solution, one which tends to preserve the relationship, rather than one which, arguably factually and legally correct may severely damage the relationship of the parties". Donahey, M. Scott, "The Asian Concept of Conciliator/Arbitrator: Is it Translatable to the Western World?" *ICSID/ICC/AAA Colloquium on International Arbitration*, San Francisco, California (Oct. 17, 1994) (unpublished).

29 If the contract is for a sale of goods, the Vienna Convention on the International Sales of Goods would be the more likely frame of reference for such a mediation. But even then the Principles of UNIDROIT could be quite helpful as a supplemental source of law.

30 Sales of goods would be governed by the Vienna Sales Convention (Final Act of the United Nations Conference on Contracts for International Sales U.N. Doc. A/Conf 97/18. Annex I (1981).

31 The references to good faith are an underlying theme of the Principles. The parties are to act in accordance with good faith (art. 1.5.); which duty they may not exclude (art. 1.7); a party is required to call a mistake to the attention of the order if it

The Principles of UNIDROIT could be used by parties seeking to resolve a contractual dispute in two fundamentally differing settings. The first, which would be by referencing the Principles in the ADR clause of the contract. If such a reference were incorporated into the contract the parties will have consented in advance to the use of the Principles. In more common experience no such prior referencing will have occurred.

The preamble of the UNIDROIT invites the use of its principles in litigation or arbitration even if it is not chosen by the parties.³² In no sense can be said that such use would further the often slated principle of Arbitration of the “autonomy of the parties”³³ On the contrary, in such a case the dispute might be resolved by legal principles that the parties never mentioned or considered. Furthermore, such principles may be more familiar and acceptable to civil law lawyers than to common law lawyers. This is particularly troublesome in arbitration where the focus tends to be on assessing legal culpability for past actions which were committed without the slightest notion that the Principles of UNIDROIT would be the criteria for judging such acts. Thus use of UNIDROIT principles might not only violate the “autonomy of the parties” but might result in an arbitral award that may have been wholly unpredictable and even anomalous to the parties.

However, if the parties decide to mediate, which is a voluntary process, the parties may choose to reference the Principles of UNIDROIT as an acceptable norm for resolution of their dispute.³⁴ Such reference would have the advantages of *lex mercatoria*, of providing an international norm, but of far more utility because the Principles incorporate *lex mer-*

would be “contrary to reasonable standards of fair dealing” not to do so (art. 3.5.); and in the case of gross disparity between the parties the court or arbitrator may modify the contract to make it “accord with reasonable standards of fair dealing” (art. 3.10 (2)); and nonperformance may be excused where it would otherwise it would be “grossly unfair”. (art. 7.1(6)).

32 Such use is suggested “when the parties have agreed that their contract may be governed by ‘general principles of law’, the *lex mercatoria*, ...”, or when it “may provide a solution” where the applicable law does not, or “may be used to interpret or supplement uniform law instruments”. Preamble, UNIDROIT.

33 The arbitrator’s search for the applicable law via choice of law principles may also have a little to do with the parties’ expectations.

34 The WIPO Mediation Rules provide that “The mediation shall be conducted in the manner agreed by the parties”. (Art. 9.)

catoria in a codified form.³⁵ Certainly a mediator could suggest use of the Principles.³⁶ And the parties, acting autonomously, could agree to any portion of the Principles which by Agreement they believed were appropriate in the particular dispute.

The entire thrust of the Principles of UNIDROIT assumes that the parties are engaged in a good faith effort to resolve their dispute. They are to “act in accordance with good faith and fair dealing in international trade”. (Art. 1.7.) This precept is legally enforceable in the context of negotiations. Article 2.15 provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiation in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Mediation is in part facilitated negotiations. Perhaps (always) by implication, but certainly when agreed to by the parties, if the parties stipulated in their mediation agreement that the mediation is to be governed by the Principles of UNIDROIT, it might then follow that legal liability could attach to the failure to mediate in good faith.³⁷ As Alan Farnsworth has observed, the notion that a party negotiating in bad faith would bear the loss of the failed negotiation is not a common law concept, but one that civil law systems have been more willing to embrace.³⁸

While purists might object that such a consequence would subvert the voluntary nature of mediation it would address the frequently expressed

35 As Alejandro Garro has observed, “the Principles offer an international glossary of contractual terms, and they may be used to unify legal concepts which are not utilized consistently or in a uniform manner throughout the world”. Garro, Alejandro M., “The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration”, 3 *Tul. J. Int’l L.* 93, 107 (1994).

36 The UNCITRAL Rules of Conciliation provide that “The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practice between the parties”. (Art. 7: (2))

37 Principles of UNIDROIT, Article 2.16.

38 Farnsworth, E. Allan, “Duties of Good Faith and Fair Dealing under the UNIDROIT principles, Relevant International Conventions and National Law”, 3 *Tul. J. Int’l. L.*, 47 (1994), 57-58.

concern that mediation is either a waste of time or, worse, simply an avenue (in bad faith) for a party to learn more about the other party's case. The Principles also address another frequent concern about mediation, namely confidentiality, by providing that the remedy for breach of the duty to respect confidentiality in the negotiation process "may include compensation based on the benefit received by the other party".³⁹

Where the parties are in disagreement over the meaning of contractual terms but maintain an interest in preserving their relationship, and therefore agree to mediate their dispute, the Principles of UNIDROIT offer some attractive features. Primarily, the parties may modify the Principles except as otherwise provided.⁴⁰ Specifically, the parties may *not* limit the duty to act in good faith and fair dealing.⁴¹ However, in the mediation the parties could choose to focus on their future relationship, and by so doing, in effect renegotiate the contract.⁴² Similarly, implied or omitted terms may be given meaning based on "(a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; and (d) reasonableness".⁴³

The Principles further offer a solution to what would otherwise tend to preclude mediation, namely an unequal bargaining position, by providing that a party who enters into a contract creating a gross disparity has a right to avoid it or eliminate its terms.⁴⁴

VI. CONCLUSION

Consensual mediation and the Principles of UNIDROIT share a common philosophy of encouraging good faith both with respect to negotiations and to dispute resolution. While many authors have cited UNIDROIT'S utility in international arbitration, such use may substan-

³⁹ Article 2.16, Principles of UNIDROIT.

⁴⁰ Principles of UNIDROIT, Article 1.5.

⁴¹ Principles of UNIDROIT, Article 1.7.

⁴² "A contract is concluded, modifies or terminated by the mere agreement of the parties, without any further requirement". Also, a "contract is to be interpreted according to the common intention of the parties". Principles of UNIDROIT, Articles 3.2, 4.1.

⁴³ Principles of UNIDROIT, Articles 4.8. and 5.1.

⁴⁴ The parties to a mediation, using the Principles, just as in the case of a court or arbitral panel, may modify or avoid such a contract of the Principles of UNIDROIT. See Bonell, Michael Joachim, "Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles", 3 *Tul. J. Int'l L.* 73, 90 (1994).

tially infringe on the “autonomy of the parties”, particularly in a dispute between parties from common law and civil law countries. A mediator’s suggestion, or the parties’ choice, to use the principles as a frame of reference would enhance the prospect of a consensual, good facts and future oriented resolution of their conflict.