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Index to Briefs (see p 85,011)
Mediation and Conciliation in the Asia/Pacific
Region: Sites, Centers, and Practices
(by M. Scott Donahey, Partner, Holtzmann,
Wise & Shepard) ........................................... 85-000
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This "Index to ADR Briefs" provides detailed entries outlining the subject matter dealt with by the papers and articles reproduced in this tab (§85-000 et seq). A general index to the Reporter appears in the red "Index" tab. References are to paragraph (¶) numbers.

<table>
<thead>
<tr>
<th>Paragraph (¶)</th>
<th>Paragraph (¶)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitrators</td>
<td>Donahey, M Scott</td>
</tr>
<tr>
<td>acting as conciliators prior to arbitration</td>
<td>Mediation and Conciliation in the Asia/Pacific Region: Sites, Centers and Practices</td>
</tr>
<tr>
<td>Asia/Pacific centres</td>
<td>85-000</td>
</tr>
<tr>
<td>Conciliation/mediation rules comparisons</td>
<td>85-000</td>
</tr>
<tr>
<td>Conciliator role</td>
<td>Mediation/conciliation, distinction</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Regional legislation</td>
</tr>
<tr>
<td></td>
<td>Rules and procedures</td>
</tr>
</tbody>
</table>

85-000

[Next page is 85,101]
ADR BRIEFS — NORTH AMERICA

[¶85-000] Mediation and Conciliation in the Asia/Pacific Region: Sites, Centers and Practices

(Contributed by M. Scott Donahey, Partner, Holtzmann, Wise & Shepard, 3030 Hansen Way, Suite 100, Palo Alto, California. 94304. (Telephone: (415) 856-1200))

Distinction between mediation and conciliation — Conciliation/mediation rules and procedures — International organizations — Asia/Pacific centers — Regional conciliation/mediation legislation — Similarities and differences in conciliation/mediation rules examined — Degree of confidentiality afforded in conciliation proceedings — Extent to which arbitrators selected by the parties can act as conciliators prior to the commencement of arbitration — Role of conciliator in later proceedings.

While the terms “conciliation” and “mediation” are often used interchangeably, the terms are in fact distinct. In mediation, the mediator’s role is to assist the parties in reaching their own solution to their dispute. A conciliator acts more as an advisor, evaluating a dispute and then proposing the terms of an agreement based on the evaluation.

Conciliation is frequently used in Asia/Pacific nations to resolve domestic civil disputes as it is a model of dispute resolution which conforms with social and cultural norms. Conciliation also lends itself naturally to the resolution of international commercial disputes. International commercial entities who trade on a regular basis can employ conciliation as a means of minimizing differences and encouraging a continuing amicable commercial relationship.

In the Asia/Pacific region, conciliation rules and procedures are available in a number of countries such as Australia, Japan, Korea, People’s Republic of China, Thailand and Taiwan (Republic of China). As well, a number of international dispute resolution centers have also developed conciliation rules.

While many similarities exist in the procedure and practice of conciliation and mediation in the Asia/Pacific region, there are also striking differences. Of particular interest is the degree of confidentiality afforded by various conciliation rules. A great variation also occurs in the approach to the role of the conciliator in later proceedings. Finally, differences have arisen concerning the question of whether an arbitrator selected by the parties can act as a conciliator prior to the commencement of the arbitration.

[Digest by the CCH INTERNATIONAL LEGAL EDITORS]

I. Introduction

The terms “mediation” and “conciliation” are often used as if they were interchangeable. However, classically there is a distinction between them. In mediation, the mediator’s role is to assist the parties in reaching their own solution to their disputes.
The mediator will meet with the parties, either together or separately, and listen to their respective viewpoints. The mediator’s primary goal is to make sure that each party understands the other party’s point of view. He or she will try to bring the parties together in an environment conducive to settlement.

While a conciliator often plays a very similar role to a mediator, a conciliator will evaluate the dispute and reach his or her own conclusion as to what is a fair compromise of the controversy. The conciliator then proposes the terms of an agreement to the parties based on that understanding. A mediator will avoid this type of personal expression of what constitutes a reasonable settlement. Thus, in the classical view, a mediator is a “facilitator”, while a conciliator is an “advisor”.

The conciliation rules and statutes of various nations and centers provide that a settlement reached in conciliation and reduced to writing is to have the same effect as an arbitral award on agreed terms. The law of the situs will often determine the procedures which will govern the enforceability of the conciliation settlement agreement as well as the grounds for challenging that agreement. Thus, the situs selected for the conciliation hearing is one of the most important aspects of any conciliation agreement in an international business transaction.

In the Asia/Pacific nations, conciliation is frequently of long-standing importance in the resolution of domestic civil disputes. In many of the Asia/Pacific cultures it is traditional to use conciliation as a mechanism to resolve domestic relations matters, labor matters, and civil disputes of all types (including the Anglo-American concept of torts). More recently, countries have adapted conciliation to environmental civil actions. Conciliation is harmonious with Confucian philosophy, which recognizes and preserves a social hierarchy. In such a social system, it would be an affront to have a son challenge his father in litigation and allege that his father had committed a wrong, just as it would be unseemly for a person of a relatively young age to allege that the motives of an elder were less than honorable. In Western-style litigation, such direct confrontations are commonplace and indeed fundamental. In the classic Western model of dispute resolution, thesis collides with antithesis. This rude encounter results in synthesis, sometimes referred to as “truth”. In the Eastern model the concept of “truth” is the handmaiden of order.

Mediation and conciliation provide a means by which disputes can be resolved without challenging the established social hierarchy. The conciliator, who is most often a respected member of the community with high social standing, serves to present the views of the competing interests in a light which will not offend traditional cultural values. Because of his relative social standing, the conciliator may recommend a solution which carries the weight of his social position. In such a situation, it would be very difficult for either of the disputants to reject the settlement proposed by the conciliator without offending the sense of social order. Since the conciliator himself naturally commands respect, so must his recommendations.

However, this Eastern idea of conciliation lends itself naturally to the resolution of disputes between international commercial entities who carry on trade on a regular basis. While it is not unusual for commercial enterprises to disagree as to a particular transaction, that disagreement should not serve as an impairment to continuing economic
relations between the two companies. Too often, the adversary system embodied in Anglo-American litigation creates an atmosphere in which ongoing business relations are damaged, or even destroyed. Where two commercial partners have an honest disagreement as to a particular transaction, conciliation is an especially appropriate means to minimize the parties’ differences and to maximize their potential for continuing amicable commercial relationships.

This paper provides a brief outline of the conciliation rules and procedures available on an international level, and more particularly in the Asia/Pacific region. In no way is this paper intended to be a comprehensive digest of all the information available on this subject. It is merely an outline of information which the author has been able to accumulate with the aid of many practitioners in the Asia/Pacific region. While there are many similarities in procedures and practices of mediation and conciliation in the Asia/Pacific region, there are often striking differences. Of particular interest to the practitioner is the degree of confidentiality afforded conciliation proceedings in the various countries. In this regard, it is not only important to observe what the various conciliation rules provide regarding confidentiality, but also to study the degree to which the courts of any nation will respect the confidentiality provided by the rules. In a paper of this nature, it is impossible to analyze how any nation’s laws will protect the confidentiality provided by rules of conciliation. However, case law in the United States indicates that the confidentiality provided by arbitration rules is often not respected by courts of law where information is sought by a third party. Thus, the California statutes regarding international conciliation outlined in this paper are extremely noteworthy for their unqualified respect of the confidentiality of the procedure.

Finally, there is a great variation in whether and to what degree a conciliator can act in later proceedings as an arbitrator or otherwise and to what degree an arbitrator selected by the parties will be able to act as a conciliator prior to the commencement of the arbitration. The traditional Western point of view is that the conciliator should not be permitted to act as an arbitrator after having heard a frank exchange of the parties in their attempt to reach a settlement. In light of the propensity of federal court judges to perform a similar function in attempting to achieve a settlement of a dispute prior to trial, one wonders whether this reluctance is entirely well-founded.

The correspondents who have contributed their thoughts and suggestions to this paper are too numerous to mention. However, I would like to pay particular thanks to David L. Sandborg of Dewey, Ballantine, Bushby, Palmer & Wood, who suggested the idea for this paper and whose previous Survey of Dispute Settlement and Arbitration Facilities in the Asia/Pacific Region; Sites, Centers, and Practices served as an organizational guideline.

II. International Organizations and Rules for Mediation and Conciliation

1. The International Chamber of Commerce

The International Chamber of Commerce (ICC), headquartered in Paris, France, provides Rules for Optional Conciliation ("ICC Conciliation Rules"). Under the ICC Conciliation Rules, where both parties agree to conciliation, the ICC will appoint a sole
conciliator. The procedure is commenced by one party requesting conciliation. The Secretariat of the Court of the ICC will notify the other party of the request for conciliation. If the non-requesting party notifies the ICC within 15 days thereafter of its consent to conciliation, the conciliator will be appointed. The conciliator will inform the parties of his appointment and set a timetable for the parties to submit their arguments. The conciliator has discretion to establish a conciliation procedure, but may not fix a place for conciliation without the parties’ consent. The conciliator may request additional information from the parties. The parties can be represented by legal counsel. The entire conciliation process is to be confidential.

If the parties are able to reach an agreement, it is reduced to writing and signed. The agreement is to remain confidential except to the extent that its execution or application requires disclosure.

If the conciliator determines that the conciliation has not been successful, or at the request of either party, the conciliation process shall terminate. Unless the parties otherwise agree, a conciliator shall not act in any capacity in any judicial proceeding or arbitration relating to the dispute, and the parties shall not call the conciliator as a witness unless the parties agree otherwise. The parties are bound by agreement not to introduce as evidence in any subsequent proceedings the views expressed by, or suggestions of, any party with regard to possible settlement, any proposals advanced by the conciliator, or any party’s readiness to accept a settlement proposal advanced by the conciliator.

2. **UNCITRAL Conciliation Rules**

The United Nations Commission on International Trade Law (UNCITRAL) promulgated conciliation rules which were adopted by the General Assembly of the United Nations on December 4, 1980. The primary rule is that the parties are free to exclude or vary any of the rules at any time by their agreement. No conciliation will go forward without the express consent of both parties.

An UNCITRAL conciliation is to be conducted by one conciliator, unless the parties agree that there should be two or more. The parties first seek to reach agreement as to the conciliator involved. If they are unable to do so, they may enlist the assistance of an appropriate institution to appoint the conciliator. Where the two parties are of different nationalities, a sole conciliator or third conciliator should, where possible, be of a nationality other than the nationality of the parties involved. Upon appointment, the conciliator requests a brief written statement from each of the parties describing the general nature of the dispute and the points at issue. Copies of the statements are also exchanged by the parties. The parties are entitled to be represented if they so desire.

It is up to the conciliator to conduct the conciliation proceedings as he or she sees fit. The conciliator may, but is not required to, make proposals for settlement of the dispute. The conciliator may meet with the parties or may communicate with them orally or in writing. Such meetings and communications may be with the parties together or separately. Any information received by the conciliator must be disclosed to the other party, unless the party who imparted the information specifically requests that the information be kept confidential.
If the conciliator believes that he or she has achieved the terms of a possible settlement, he or she formulates the terms and submits them to the parties for their review. If the parties agree, a written settlement agreement is prepared.

The conciliator and the parties are required to keep confidential all matters relating to the conciliation proceedings. This confidentiality extends to the settlement agreement as well, except where disclosure is necessary for enforcement purposes.

The conciliation is terminated by the signing of a settlement agreement, by written declaration of the conciliator that further efforts at conciliation are not justified, by written declaration of the parties to the same effect, or by a written declaration of one party to the other party and the conciliator to that effect. A conciliator to a dispute will not act as an arbitrator in respect to that dispute. The parties undertake that they will not call the conciliator as a witness in any further proceedings, nor will they introduce as evidence in a further proceeding any views expressed during conciliation, any admissions by any party in the conciliation, any proposals made by the conciliator, or the fact that any party had expressed a willingness to accept a proposal for settlement made by the conciliator.

3. International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID) provides conciliation rules for disputes between contracting states and nationals of states who are also parties to the Convention on the Settlement of Investment Disputes ("Washington Convention"). Conciliation is initiated by a request from a contracting state or from a national of a contracting state to the Secretary General of the ICSID. A request identifies the issues in dispute, the parties, and their consent to conciliation in accordance with the rules. If the Secretary General finds the dispute is within the jurisdiction of the Center, it registers the request and notifies the parties of such registration.

A Conciliation Commission is then constituted, which consists of a sole conciliator or any uneven number of conciliators appointed as the parties agree. Where the parties cannot agree, the Commission shall consist of three conciliators, one appointed by each party and a third, who shall be the president of the Commission, appointed by agreement of the parties. If after 90 days the Commission has not been constituted, the Chairman of ICSID shall appoint the conciliator or conciliators not yet appointed.

The Commission is empowered to be the judge of its own competence and to determine whether or not the dispute is within the jurisdiction of the Center. The Commission is charged with clarifying the issues in dispute and endeavoring to bring about agreement on mutually acceptable terms. The Commission may, at any time during the conciliation proceedings, recommend terms of settlement to the parties. The parties in turn are obligated to cooperate with the Commission in order to enable it to carry out its functions. Should the parties reach agreement, the Commission will draw up a report recording the parties' agreement. If at any time it appears to the Commission that there is no likelihood of agreement between the parties, it shall terminate the proceedings and draw up a report recording the failure. If one party fails to appear or participate in the proceedings, the Commission shall terminate the proceedings and draw up a report noting the party's failure to appear and to participate.
Unless the parties otherwise agree, neither party to a conciliation shall invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party during the proceedings, or on any report or recommendation made by the Commission during such proceedings, in any other arbitral or judicial proceeding.

4. Conciliation of international commercial disputes under California State law

The California Legislature has recently declared that “[i]t is the policy of the State of California to encourage parties to an international commercial agreement or transaction which qualifies for arbitration or conciliation pursuant to [California statute], to resolve disputes arising from such agreements or transactions through conciliation”.

The California statutory conciliation procedures are set forth beginning at Section 1297.341 of the Code of Civil Procedure. The parties may select or permit a third party to select one or more persons to serve as conciliators in the dispute. A conciliator shall be free to conduct the conciliation proceedings in such a manner as he or she considers appropriate, taking into account the circumstances of the case, the wishes of the parties, and the need for speedy resolution. The California Evidence Code and California Rules of Court are not to apply to conciliation proceedings, unless otherwise specified.

Parties to a conciliation may be represented at conciliation by legal counsel or by a non-legal representative. Legal counsel is not required to be licensed to practise law in California.

During the course of conciliation and until conciliation terminates, all judicial and arbitral proceedings shall be deemed stayed. During the stay which is in place, the statute of limitations shall be tolled.

At any time during the conciliation proceedings, the conciliator may draft a conciliation settlement specifying a time within which the parties may consent thereto. No party may be required to accept any settlement proposed by a conciliator, but if a party decides to accept a settlement proposal, he or she is required to sign the conciliation settlement statement.

Nothing said or disclosed during the conciliation proceedings shall be admissible in evidence in court proceedings and disclosure of any such evidence may not be compelled in any civil action, unless the parties otherwise agree.

The conciliation proceedings are terminated by a written declaration of the conciliator that further efforts at conciliation are no longer justified, by a written declaration of the parties to that effect, or by the signing of a settlement agreement by all parties concerned. The conciliation proceedings may be terminated as to a particular party by written declaration of that party that the conciliation proceedings are terminated as to it. Following termination, no person who has served as a conciliator may be appointed as an arbitrator or take part in any arbitral or judicial proceedings in the same dispute unless all parties agree or the rules adopted for conciliation or arbitration otherwise provide.

A conciliation settlement reduced to writing and signed by the parties will be treated the same as an arbitral award on agreed terms.

Neither the conciliator, the parties, nor the representatives shall be subject to service of process in any civil matter while they are present in California for the purpose of

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arranging or participating in conciliation pursuant to the statute. No conciliator shall be
held liable for any damages resulting from any act or omission in the performance of his
or her role as a conciliator pursuant to the statute.

5. Asia/Pacific Center for the Resolution of International Business Disputes

A project of the American Arbitration Association, the Asia/Pacific Center for the
Resolution of International Business Disputes (the “Asia/Pacific Center”) provides
arbitration, mediation and conciliation services to resolve international business disputes.
The Asia/Pacific Center’s primary focus is on California, Hawaii and the Asia/Pacific
region. Headquartered in San Francisco, California, the Asia/Pacific Center provides
qualified commercial arbitrators, mediators and conciliators, all versed in international
commercial disputes, as well as the necessary administrative and support structure and
facilities.

Mediation practices

The Asia/Pacific Center generally mediates disputes pursuant to the Commercial
Mediation is initiated by a party or parties filing a submission to mediation or a request
for mediation with the Asia/Pacific Center. If the mediation request is from less than all
of the parties involved, the AAA will contact the other parties and attempt to obtain an
agreement to mediate. Where an arbitration between the parties has been agreed to, the
arbitration process will go forward concurrently, so that no time is lost by resorting to
mediation. In such a case, the AAA recommends that the mediator and arbitrator be
different individuals, but the ultimate decision on this question rests with the parties.

A request for mediation shall contain a brief statement of the nature of the dispute
and identify the parties to the dispute. Absent an agreement by the parties, a sole
mediator will be appointed. The mediator shall be completely disinterested in the
controversy. Parties are entitled to be represented during the mediation.

The mediator will fix the time of the mediation and, absent a contrary agreement of
the parties, the mediation shall be held at a convenient regional office of the American
Arbitration Association.

At least ten days prior to the first scheduled mediation session, each party is to
provide the mediator with a brief memorandum setting forth his position regarding the
dispute. The mediator may require that the statements be mutually exchanged by the
parties. At the opening mediation session, the parties will be expected to provide the
information necessary for the mediator to understand the issues presented. The mediator
may require additional submissions.

The mediator has no authority to impose a settlement on the parties. The mediator
may conduct joint or separate meetings with the parties. According to the AAA
Mediation Rules, the mediator may make oral and written recommendations for
settlement, but in practice the mediator does not generally give such advice. With the
parties’ agreement, the mediator may obtain expert advice concerning technical aspects
of the dispute.

Mediation sessions are private. No persons other than the parties and their
representatives may attend mediation sessions without the permission of the other parties.
and the consent of the mediators. Confidential information disclosed to a mediator shall not be divulged by him or her. All documents received by a mediator shall be treated as confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any judicial or arbitral proceeding. The parties are pledged to maintain the confidentiality of the mediation and not to rely on or to introduce as evidence in any other judicial or arbitral proceeding:

(a) the views expressed or suggestions made by another party with respect to possible settlement;
(b) admissions made by any other party;
(c) proposals made or views expressed by the mediator; or
(d) the fact that any party had indicated willingness to accept a proposal for settlement.

No stenographic record is to be maintained of the mediation process.

The mediation is terminated:

(a) when the parties execute a settlement agreement;
(b) whenever in the judgment of the mediator further efforts at mediation would not be productive; or
(c) when a party (or parties) declares in writing that the proceedings are terminated.

Conciliation practices

The Asia/Pacific Center provides conciliation services under rules agreed to by the parties. The Asia/Pacific Center is currently considering the adoption of conciliation rules for use at the Center in the absence of party agreement to specific conciliation rules.

6. Asia Pacific Organization for Mediation

The Asia Pacific Organization for Mediation (APOM) was organized in Manila in 1985, and has its permanent seat and secretariat in Metro Manila, Philippines. APOM has as an executive counsel, a representative from each of the following nations: Bangladesh, Indonesia, Malaysia, Papua New Guinea, the Philippines, Singapore, South Korea, Sri Lanka, Thailand, and the United States. Its primary services are educational and promotional in nature, but it also serves as a consulting body to groups interested in mediation and conciliation.

7. Pacific Industrial Property Association (PIPA) Conciliation Rules

The Pacific Industrial Property Association (PIPA) was formed in 1970 by 86 leading Japanese and United States corporations. Its membership numbers more than 147 companies. The purposes of the association are to foster rights and interests in industrial properties such as inventions, patents, licenses, trademarks, confidential technology and know-how, and to support institutions favoring the recognition of rights and interests in industrial property, as such concern the industry and commerce of the United States and Japan as well as other industrialized nations bordering the Pacific Ocean. PIPA has adopted conciliation rules and regulations for use in conciliating disputes which might arise in the industrial property field.
In order to come within the rules, one of the parties must be a resident or national of either Japan or the United States. PIPA maintains a panel of at least ten experts in industrial property from the United States and Japan and from other non-member states. At the request of the parties, a conciliator for a dispute may not be selected from this panel, but rather he or she may be any expert in intellectual property matters who is approved by the Board of Governors of PIPA. Either party to a dispute may make application in writing to either the American or the Japanese group of PIPA. It is up to the Secretary of that group to determine whether the subject and character of the dispute fall within the rules and regulations regarding conciliation and, if so, to notify the applicant. If the dispute does come within the rules and regulations, the Secretary promptly notifies the other party, requesting that the other party agree or refuse to agree to conciliation within 30 days thereafter. If within 30 days the non-requesting party agrees to conciliation, the Secretary will assist the parties in selecting an acceptable conciliator from a list of possible conciliators. If the parties are unable to agree to a conciliator within 45 days (or longer if agreed to by the parties), the conciliation is terminated.

Unless the parties agree otherwise, they will select one conciliator. Following his or her selection, the Secretary shall, in consultation with the parties and the conciliator, set a date and location for the commencement of the conciliation proceedings. The parties' representatives shall thereafter meet with the conciliator, provide and exchange appropriate information and documents to facilitate settlement of the dispute, and be prepared to openly and fully discuss the issues. The parties may agree on confidentiality restrictions which govern the proceedings.

The PIPA Rules provide that the conciliation procedure shall be private and all documentation and records of the proceedings shall be maintained in confidence. The conciliator is required to destroy or return all documentation and materials related to the conciliation to the appropriate parties promptly following the conclusion of conciliation.

Once the parties reach a settlement, it must be reduced to writing and signed by the parties. On termination of the conciliation, whether by agreement or otherwise, the Secretary must remove from his or her file all correspondence involving the participants and immediately destroy the same. Unless the parties otherwise agree, failure to reach an agreement within 30 days after the commencement of meetings with the conciliator will be deemed a failure of conciliation. Where conciliation has failed, the parties will be free to act in accordance with other available procedures. However, no statements, proposals, or offers of compromise, nor any other aspect of the failed conciliation shall be introduced in evidence in any further proceedings.

8. The Center for International Commercial Arbitration

The Center for International Commercial Arbitration was established in 1986 by members of the Los Angeles legal community. The Center has adopted a modified version of the UNCITRAL arbitration rules governing arbitration. The Center has also adopted conciliation rules in conjunction therewith. The conciliation rules provide that at any time prior to the commencement of arbitration proceedings, or within 30 days thereafter, any party may request a conciliation of the dispute. After that time, conciliation proceedings may be initiated only upon agreement of all the parties to the dispute. The party who initiates conciliation sends a concise statement of the facts and contentions, identifies the parties involved, including their nationality, and sets forth a
brief summary of the damages or other relief claimed by any of the parties to the dispute, and furnishes a copy of the contract related to the dispute. Thereafter, the Center shall invite the other party to agree to conciliation. If the non-requesting party within 15 days notifies the Center of his or her acceptance of conciliation, he or she shall have an additional 15 days to file a written statement responding to the statement of the initiating party. The non-requesting party may also raise additional issues and contentions for conciliation. If such additional issues and contentions are raised, the requesting party shall have an additional 30 days to respond.

The primary rule of conciliation of the Center for International Commercial Arbitration is that the parties are free to modify, vary, or amend the rules by agreement in writing at any time. Unless the parties otherwise agree, the number of conciliators shall be equal to the number of arbitrators in the arbitration pursuant to the parties’ agreement. Where the parties cannot agree, there shall be a single conciliator. No person shall be appointed as a conciliator who is a national of any country of which a party is a national, unless both parties agree in writing to the appointment of such a conciliator. Conciliators have a duty to disclose any present or past relationships they have with any of the parties or their attorneys or representatives, or any other facts which they believe may create the appearance of bias on behalf of the conciliator.

The conciliators are free to conduct the conciliation proceedings as they consider appropriate, taking into account the parties’ wishes, the circumstances of the case, and the need for a speedy resolution. Conciliators may make proposals for settlement of the disputes, either orally or in writing. The parties are free to be assisted by legal counsel or other representatives during the course of the proceedings. The conciliators shall, after consultation with the parties, select the place for the conciliation, invite the parties and their representatives to meet with the conciliators or to communicate with them orally or in writing. The conciliators may meet with the parties separately or together. The conciliators may, but are not required to, disclose to the other parties the information communicated to them by one party, unless the disclosing party specifies that the information is to be kept confidential.

If the parties agree, they may submit additional statements or documents concerning the subject matter of the conciliation. Unless the parties specifically agree, no evidence in the form of written witness statements or oral testimony is to be presented to the conciliators.

If the conciliators consider it possible to reach an agreement, a written conciliation report embodying the proposed settlement terms shall be prepared and signed by the conciliators. Thereafter the conciliation report is circulated to the parties for their approval. The parties shall not be bound to accept the settlement proposed, but if they do accept it, the parties are required to sign the settlement agreement signifying their acceptance.

The proceedings and the information disclosed therein are to be kept confidential by the conciliators from all non-parties. No reference to the conciliation procedure is permitted in any subsequent arbitration or court proceeding. Where the conciliation fails, the conciliators and each party are required to return the originals or any copies of documents in their possession or custody to the party who has submitted them in connection with the conciliation.
During the course of the conciliation, both parties undertake not to initiate any arbitral or judicial proceedings in respect to any dispute that is the subject of conciliation. Upon the agreement of the parties to undertake conciliation, all arbitration proceedings shall be stayed 90 days, or until the conciliation proceedings terminate. Conciliators have the power to extend the time for an additional 30 days if they believe that there is a likelihood that the dispute can be resolved by conciliation.

Conciliation proceedings are terminated by the signing of a settlement agreement, by a written declaration of the conciliator that further efforts at conciliation are not justified, by written declaration of the parties agreeing to terminate conciliation proceedings, or by written declaration of any party terminating the conciliation proceedings. Upon termination of the proceedings, no person who served as conciliator may be appointed as an arbitrator or take part in any arbitral or judicial proceedings in the same dispute without the consent of all parties. If the conciliators do serve as arbitrators, they are required to reveal to all other parties any material fact initially made known to them in confidence prior to proceeding with the arbitration.

The settlement arrived at in conciliation may be given the same force and effect as an arbitral award on agreed terms.

III. National sites, centers, and practices

Australia

Statutes

Australia has no legislation governing conciliation or mediation except in the industrial relations area.

Centers

There are two centers for international dispute resolution in Australia: the Australian Centre for International Commercial Arbitration ("ACICA") in Melbourne, and the Australian Commercial Dispute Centre ("ACDC") in Sydney. Both centers provide for both mediation and conciliation.

The ACICA provides for conciliation under the Institute of Arbitrators -- Australia Rules for the Conduct of Commercial Conciliation ("IAA Conciliation Rules"). These rules were established in October 1987 by the Executive Committee of the Institute of Arbitrators -- Australia. Edition One of the IAA Conciliation Rules dated February 1988 also contains Explanatory Notes for the Rules which are reproduced in this Service.

The ACDC, created at the initiative of Sir Laurence Street, formerly Chief Justice of the Supreme Court of the State of New South Wales (amongst others), is a non profit company currently funded by the New South Wales and Queensland state governments. The ACDC advises that it expects to be funded by two additional state governments within the next few months. In that event, it will be receiving funds from all but two of Australia's states.

The ACDC conducts conciliation pursuant to the Australian Commercial Dispute Centre Limited Conciliation Rules. The ACDC Conciliation Rules are also accompanied by procedural notes.
Mediation and conciliation practices

While the ACDC does not provide rules for mediation, its newsletter, *Resolution of Commercial Disputes*, describes the process as one for helping parties trying to resolve their disputes themselves. The ACDC regards mediation as an extension of and aid to the negotiation process.

"The mediator, unlike a conciliator, will not even make a recommendation for resolution of the issues in dispute, although the mediator may raise and help the parties explore options for settlement." Vol. 1, No. 3, *Resolution of Commercial Disputes* at 4, 1988.

Conciliation procedures

Under the IAA Conciliation Rules, conciliation is conducted with strict confidentiality. The parties are required to cooperate in good faith with the conciliator, to comply with reasonable directions to attend meetings and provide information, and to provide relevant documents to the conciliator. It is generally up to the conciliator to conduct the proceedings in a manner he or she considers appropriate. After hearing the parties, the conciliator forms an assessment on the matters in dispute, and gives the reasons for his or her assessment to both parties. The conciliator is also empowered to make a recommendation to the parties at his or her discretion. Each party may be represented by a person with legal qualifications at the conciliation proceedings unless otherwise agreed by the parties.

Under the ACDC Conciliation Rules, the parties are empowered to vary, modify, or supplement the rules by agreement. The parties are required to submit to the other parties a statement of their case, other materials considered by them to be relevant to the dispute, and any other additional information and materials required by the conciliator. The conciliator is free to conduct the proceedings as he or she deems fit, so long as he or she takes into account the parties’ wishes and conducts the proceedings as expeditiously as possible. Either the conciliator or a party may make proposals for settlement of the dispute during the conduct of the conciliation. The information received by the conciliator from one party must be communicated to the other if, in the conciliator’s opinion, disclosure is relevant to the settlement of the dispute, unless the party disclosing such information has designated that it be kept confidential. Conciliation proceedings terminate upon settlement, upon written notice from the conciliator that further efforts at conciliation are no longer justified, or upon the request of either party. Conciliators are required to observe strict confidentiality in all matters relating to the dispute. The ACDC rules specifically prohibit the introduction in evidence in arbitral or judicial proceedings the views expressed by the parties, admissions of the parties, proposals for settlement of the dispute, willingness of any of the parties to accept a proposal for settlement made by the conciliator, or any notes or statements made by the conciliator, all during the course of the conciliation proceedings.

Canada

Centers

The British Columbia International Commercial Arbitration Centre ("BCICAC") in Vancouver was established in 1986 by the Province of British Columbia with additional funding from the government of Canada. The BCICAC provides for either the mediation or conciliation of international commercial disputes.
Mediation and Conciliation Practices

The BCICAC has adopted its own Commercial Mediation Rules of Procedure (see ¶26-120). Mediation is conducted by a sole mediator appointed by the BCICAC. Parties submit a two to three page summary of the issues in dispute prior to the first mediation conference. At the conference, each party presents an oral statement and is expected to produce any documents which may be required for effective negotiation. Such documents will be kept confidential, including from the other party, at the request of the party bringing the documents. No transcript is kept of the proceedings, and the mediator, the parties, their counsel, and the BCICAC are required to maintain confidentiality, except where disclosure may be required for implementation or enforcement of a settlement agreement.

The BCICAC conducts conciliation under the UNCITRAL conciliation rules, discussed above. When the BCICAC is called upon to act as an appointing authority under these rules, the BCICAC will submit the names of three possible conciliators to the parties. Each party may delete one of the names and then rank those remaining in order of preference. In appointing a conciliator, the BCICAC will consider:
- the parties’ preference ranking of conciliators;
- whether the qualifications specified by the parties’ agreement have been satisfied by the nominated conciliator; and
- whether a conciliator of different nationality from the parties should be appointed.

Hong Kong

Statutes

The Hong Kong Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) provides legislative support to conciliation and arbitration. The Ordinance also contains a special legislative regime for international disputes. With regards to conciliation the Ordinance provides that parties are free to agree that an arbitrator act as a conciliator.

The full text of the Hong Kong Arbitration Ordinance appears in the companion volume to this Service — Doyle's Dispute Resolution Practice Asia • Pacific.

Centers

The Hong Kong International Arbitration Center ("HKIAC") was established in 1985 as an independent institution, although it does receive funding from both the business community and the Hong Kong government.

Mediation Practices and Procedures

In 1991, the HKIAC adopted its own Mediation rules (the "HKIAC Rules") based on the Hong Kong Government Mediation Rules, which are also administered by HKIAC. Under the HKIAC Rules, the party initiating mediation nominates to the other party a mediator or mediators. The second party then notifies the first whether any of the nominated mediators are acceptable. If the parties should fail to agree on an acceptable mediator, a sole mediator will be appointed by the HKIAC. The mediator has broad discretion in the conduct of the mediation. The mediator is free to express his views on the matter, and can suggest various compromise solutions to the parties. If requested by either party, the mediator shall submit to the parties a report, setting out the facts as he or

Doyles Dispute Resolution Practice — North America ¶85-000
she determines them, their bearing on the matters in dispute, and the proposed terms of a settlement. The parties then have 28 days to accept the proposed terms in whole or in part.

The mediation is a confidential procedure, and any settlement reached is made in the form of a supplemental agreement to the existing contract between the parties. The HKIAC is not informed as to the terms of the settlement. Nothing which occurs during the course of the mediation shall be used in any subsequent proceedings, and no written record is to be made. The mediator may not act as arbitrator in any subsequent arbitration between the parties.

The Hong Kong Government Mediation Rules ("Government Rules") differ from the HKIAC Rules in that the Government Rules are designed primarily for construction disputes, but otherwise are in all material respects similar to the HKIAC Rules.

Indonesia

Mediation and conciliation practices

As a traditional practice in Indonesia, an arbitrator is given the opportunity to act as a mediator in an attempt to secure the parties' agreement to an amicable resolution of their commercial dispute before arbitration begins. Moreover, the Arbitral Procedure Rules of the Indonesian National Board of Arbitration (BANI) requires that the arbitral tribunal first try to bring about a settlement. Only when settlement cannot be reached will the arbitral tribunal continue arbitration proceedings.

Japan

Mediation and conciliation practices

Conciliation of international commercial disputes is available under the auspices of the Japan Commercial Arbitration Association (JCAA) which has adopted Conciliation Rules. However, its use is quite rare. Mediation is frequently practiced informally by JCAA when international commercial disputes are brought to its attention. Operating without formal rules, JCAA estimated that mediation results in settlement of 60 percent of the matters referred to the JCAA.

Domestic conciliation, or chotei, is defined as the settlement of a dispute by means of a compromise reached through the intervention of a third party that promotes negotiation and agreement between the disputants. In Japan, the number of civil conciliation cases filed each year is about one-third of that of the civil lawsuits. More than 50 percent of the civil conciliation cases filed each year are successfully settled by conciliation. All types of civil disputes, including traffic accidents and environmental offenses, are subject to conciliation under the Civil Conciliation Act, Law No. 222, 1951. Under the Civil Conciliation Act, the parties are required to personally be present throughout the conciliation. They may be represented by an advocate, who may or may not be a lawyer. If the party selects a non-lawyer, he or she must obtain the permission of the conciliation committee in charge of his or her conciliation. The conciliation committee may require any person having an interest in the result to participate in the conciliation procedure.

The conciliation committee is made up of a chief in conciliation, who is a judge designated by the district court, and two or more conciliation commissioners. The conciliation commissioners are appointed annually by the Supreme Court and are public
servants. In order to serve as a conciliation commissioner, a person must be a lawyer, have expert knowledge and experience useful for settling civil disputes, and be between the ages of 40 and 70.

Conciliation procedure

The typical conciliation lasts for a few months. On the first day, the conciliation committee hears statements from the parties concerning the dispute. The conciliation committee has the discretion to order the other party to the dispute out of the hearing room while hearing the statement of the other disputant. Conciliation procedure is private and not open to the public, and the conciliation committee may investigate facts and take evidence from the parties or from experts and administrative agencies at its discretion. The conciliation committee's goal is to identify the true nature of the dispute in order to make clear to the parties the real points at issue. Thereafter, the conciliation committee attempts to get both sides to compromise their positions. When an agreement is reached, it is drawn up in writing and recorded by a court clerk.

Conciliation terminates once an agreement has been reached. It may also terminate by the withdrawal of the application by the applicant, or where the conciliation committee determines that the dispute is not suitable for conciliation or that a party has made an application for conciliation for an unsuitable purpose (e.g., delay).

Korea

Conventions, treaties, and statutes

Conciliation and mediation are the preferred methods of dispute resolution in Korea. Conciliation procedures are provided for by legislation in many social spheres, including landlord/tenant, environmental protection, small claims adjudication, domestic relations, government claims, labor disputes, insurance claims, copyright, and consumer protection.

Centers

The Korean Commercial Arbitration Board ("KCAB") is the only body authorized to provide institutional arbitration in Korea. Under the arbitration law, the KCAB is given authority to resolve both domestic and international commercial disputes. In practice, the KCAB often requires mediation and conciliation as a first step. The vast majority of disputes submitted to the KCAB are settled by mediation and conciliation rather than by arbitration.

Mediation and conciliation practices

Any party may request that the KCAB furnish mediation services. Additionally, any party to an arbitration governed by the commercial arbitration rules of the KCAB, following its request for arbitration, may request conciliation. On receipt of such request, the arbitration proceedings shall be suspended while the KCAB appoints one or more conciliators from the panel of arbitrators. Should the conciliator(s) succeed in settling the dispute, the settlement will be treated in the same manner as an award entered upon settlement by compromise under the commercial arbitration rules. Should the conciliation fail to settle the dispute within 30 days, the procedure shall be abandoned and arbitration will commence, unless the parties agree to continue conciliation.
New Zealand

Conventions, treaties and statutes

New Zealand has enacted the Arbitration Act of 1908, which governs arbitration. By the New Zealand Arbitration Act of 1982, New Zealand has ratified the New York Convention. New Zealand is also a party to the Washington Convention regarding international investment disputes. Although legislation concerning mediation and conciliation is presently under review, no legislation dealing with that subject matter has yet been adopted. The Arbitrator’s Institute of New Zealand currently serves as a clearing house for international arbitration.

People’s Republic of China

Conventions, treaties and statutes

Historically, conciliation has been the preferred method of resolving disputes in China. Article VIII of the U.S.-Chinese Agreement on Trade Relations provides that:
‘‘[t]he Contracting Parties encourage the prompt and equitable settlement of any dispute arising from or in relation to contracts between their respective firms, companies and corporations, and trading organizations, through friendly consultations, conciliation, or other mutually acceptable means.’’

Centers

The China Council for the Promotion of International Trade (“CCPIT”) has established two separate bodies dealing with conciliation and arbitration of disputes. The larger body, which handles disputes arising from foreign investment contracts and joint ventures and other commercial disputes, is the Foreign Economic and Trade Arbitration Commission (“FETAC”). FETAC has established two centers for conciliation and arbitration; the primary center is in Beijing and the branch arbitration center is in the Shenzhen Special Economic Zone. The smaller arbitral body, established in 1958, is the Maritime Arbitration Commission (“MAC”), which exercises jurisdiction over maritime and other disputes.

Mediation and conciliation practices

Mediation. No mention is made of mediation. The emphasis is on consultation and conciliation.

Conciliation procedure. FETAC’s recommended arbitration clause provides that “any dispute arising from the execution or in connection with this contract should be first settled amicably through friendly consultation”. While conciliation is always conducted only on a voluntary basis, FETAC and other Chinese arbitrators consider it their duty to attempt conciliation wherever possible. Conciliation may be conducted by FETAC before the arbitral tribunal is constituted or by the tribunal itself thereafter. In the event that conciliation succeeds, conciliatory statements are prepared summarizing the results.

The actual conciliation may be conducted through informal discussions or through correspondence. In the international area, joint conciliation is encouraged. Where joint conciliation is elected, the Chinese party applies to the Chinese arbitral institution. The foreign party applies to the corresponding arbitral institution in the latter’s country for joint conciliation. Upon such application, the Chinese arbitral institution and the
corresponding cultural institution appoint one or more conciliators on an equal basis to conciliate the case jointly. If conciliation succeeds, a conciliatory statement will be prepared. If conciliation fails, the case will proceed to arbitration if such is provided for in the contract.

**Philippines**

*Conventions, treaties and statutes*

The Philippines is a signatory to the Washington Convention and has acceded to the New York Convention. The Philippines has several laws concerning arbitration and conciliation. Republic Act No. 876 governs arbitration in international disputes. In addition, Presidential Decree No. 1508 establishes a system for conciliation of small civil disputes. Presidential Decree No. 442 provides for the conciliation, mediation, and arbitration of labor and industrial disputes.

**Centers**

The Philippine Academy of Professional Arbitrators is headquartered in Quezon City. The Arbitration Association of the Philippines is located in Manila, as is the Construction Industry Arbitration Commission, which was established by Executive Order No. 1088 in 1985.

**Mediation practice and procedures**

Title XIV, Book IV of the Civil Code deals with compromises and arbitrations. It provides that every civil action or proceeding shall be suspended where one or both parties express a willingness to discuss compromise or where it appears that, prior the commencement of the proceeding, one of the parties made an offer to discuss compromise which the other party refused. The Supreme Court is to promulgate rules concerning the duration and terms of the suspension and to provide for the appointment and duties of any conciliators (“amiable compounders”). The courts have the power to mitigate the damages to be paid by a losing party who has shown a sincere desire to settle the dispute amicably.

**Republic of China (Taiwan)**

**Mediation practice and procedures**

The *Commercial Arbitration Act* of the Republic of China, as amended on 26 December 1986, provides that “associations of arbitration may, on the application made by a party to a foreign trade dispute and agreed by the other contending party choose an arbitrator for each of the contending parties”. After an arbitrator has been so chosen, he may “conduct the conciliation proceedings even though no agreement of arbitration has been entered into ...”. This appears to be a reaction to the Joint Conciliation Procedures established by the People’s Republic of China applicable to foreign trade disputes. Where parties to such conciliations reach agreement, the conciliators are instructed to formulate the terms of the settlement. Any such settlement has the same status as an arbitral award on agreed terms.
Singapore

Conventions, treaties, and statutes

Singapore has only recently become a party to the Washington and New York Conventions. There is apparently no legislation on conciliation and mediation in Singapore.

Mediation and conciliation practices

While there is no formalized conciliation or mediation process in Singapore, I understand that these mechanisms are commonly resorted to in the settlement of internal civil disputes. This is in keeping with the local, particularly Chinese, philosophy. Arbitration in Singapore is generally a disfavored mechanism to resolve disputes.

Thailand

Mediation and conciliation practices

Under the Thai Commercial Arbitration Rules promulgated by the Board of Trade of Thailand, prior to submitting a dispute to arbitration under the rules, the parties should first attempt to resolve their differences by jointly appointing a conciliator. However, where one party objects to proceeding with the conciliation procedure, the parties may immediately go to arbitration.

Where the parties opt for conciliation, the two party-appointed conciliators are charged with the joint appointment of the third conciliator. The three conciliators will hear the statements of the parties and examine all the facts bearing on the case, and then submit the conditions of the conciliation to the parties. The summary and conditions must be submitted within 30 days of the acceptance of the case for hearing. If both parties consider the conciliatory conditions acceptable, the parties shall proceed to conciliation pursuant to the conditions established by the conciliators.