

The Final Step: Issues in Enforcing the Mediation

Settlement Agreement

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It is with great pleasure that I address you at this Fordham Law School conference to talk about mediation in the international arena and how its utilization and efficacy can be fostered. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85-90% and are achieved long before the traditional “court house steps” at a significant saving of cost and time for the parties. User satisfaction is high as parties retain control and tailor their own solution in a more confidential, less confrontational setting that preserves relationships and results in a win/win instead of a win/lose.

Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court sponsored mediation programs around the country in the United States and the EU Mediation Directive issued in 2008 is likely to foster the development of many such

programs in Europe and otherwise encourage the growth of mediation on the European continent. Business lawyers are increasingly inserting step clauses in contracts which require an attempt at mediation before an arbitration or litigation can be commenced. State ethical obligations requiring that attorneys advise their clients about the availability of resolution through ADR are on the rise in the United States, a requirement which may gain acceptance elsewhere. Corporations are increasingly trying ADR as is exemplified by the signature by 4,000 corporations of the CPR pledge which commits signatories to trying ADR before filing suit in a dispute with another signatory. Deal mediation and other innovative uses of expert facilitation are emerging. The long traditions of harmony and conciliation in the far east will inevitably influence the resolution of disputes in our global economy and advance the use of mediation.

Perhaps most importantly, as litigants complain about how costly and slow litigation is and arbitration seems to have become, they seek a cheaper and faster dispute resolution process. Mediation offers a solution and is growing exponentially. The increased interest in mediation is reflected in the mediation case loads of the dispute resolution institutions. For example, CEDR found that the number of mediation matters it handled increased sevenfold from 1997 to 2004, an increase to 700 cases from 100 cases.¹

Litigation over mediation settlement agreements

It is said that settlements reached in mediation have a higher rate of compliance than court decisions. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling

¹ *CEDR Solve mediation statistics 2004*, available at http://www.cedr.co.uk/index.php?location=/library/articles/Statistics_2004.htm

obligations of the settlement are reduced. For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court money judgment which leaves the prevailing party with the unhappy task of moving forward with collection actions as the loser simply cannot make the payment.

However, as the number of mediations increases, there is an inevitable increase in the litigation that arises out of mediation. Professor Coben conducted a review of cases involving mediation in the United States in an article published in 2006.² He found over 1,200 cases in which substantive issues related to mediation were litigated and resulted in a reported decision. Many of those cases dealt with the enforcement of a settlement agreement achieved through mediation ("an MSA").

While an MSA is the outcome of a voluntary agreement between the parties, there are many reasons that might cause a party to retreat from an agreement reached. These reasons might include, for example :

- a change of heart after the mediation is over.
- a new boss or new ownership in the company.
- there actually wasn't an agreement with respect to a material term or

there was a lack of agreement on the interpretation of a term.

- external factors intervene, such as currency fluctuations, that suddenly

² James Coben and Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*," 11 Harvard Negotiation Law Review 43 (2006). Hamline University School of Law maintains a date base of U.S. court decisions relating to mediation. It is available at <http://law.hamline.edu/adr/mediation-case-law-project.html>

turn a good deal into a bad deal.

- impossibility of performance for a variety of reasons such as government action, business reverses, natural events
- public consequences; for example there may be a great deal of negative publicity or public reaction that's not favorable.

When enforcement action must be taken on a settlement agreement some of the primary goals of mediation are defeated - speed, economy, and the maintenance of relationships. The degree to which these goals are undermined can be impacted by the enforcement mechanisms available.

Mechanisms for Enforcement

The basis on which MSA's should be enforced has been the subject of much debate but no single mechanism for the enforcement of MSA's has emerged. There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation³ to develop a uniform enforcement mechanism. However, notwithstanding the effort made, that goal was not achieved. Article 14 provides: "If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement]" The comments to Article 14 recognized that "many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would

³ UNCITRAL Model Law on International Commercial Conciliation, (2004). Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>

enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.” Notwithstanding, because of the differences between domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus the UNCITRAL provision leaves the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The EU Mediation Directive⁴ recognizes the importance of enforcement and states in paragraph 19 that “mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties.” However, while the EU Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be “made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state.”

The same result was reached by the drafters of the U.S. Uniform Mediation Act⁵. A concerted effort was made to develop a uniform enforcement

⁴ DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters; *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML>

⁵ Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001. Available at <http://www.pon.harvard.edu/guests/uma/>. A 2003 amendment to the UMA incorporated the UNCITRAL Model Law on International Commercial Conciliation Model Law into the

mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the MSA but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

This conclusion as to enforcement under the UMA highlights the issue raised as to any summary enforcement mechanism for mediation settlements. While mediation is seen as benefit to the parties, there is concern that a summary enforcement mechanism would undercut mediation's value of voluntariness and self determination. Accordingly some commentators argue that care should be taken not to introduce an enforcement mechanism that eliminates the ability of the parties to raise such issues as coercion to defeat enforcement.

As a result of the procedural and theoretical issues surrounding the establishment of an overarching enforcement mechanism for MSA's, no such mechanism has been developed to govern international mediations.⁶ We will review the three approaches employed in different jurisdictions to enforce an MSA: enforcement as a contract, enforcement as a judgment, or enforcement as an arbitral award. We will then

UMA and provides that unless there is an agreement otherwise, the Model Law applies to any mediation that is "international commercial mediation."

⁶ For a review of the scholarly discussions relating to enforcement of mediation settlement agreements, see Ellen E. Deason, *Procedural Rules for Complimentary Systems of Litigation and Mediation- Worldwide*, 80 *Notre Dame L. Rev.* 553 (2005)

consider whether an arbitration award issued by an arbitrator who is appointed after the MSA is achieved can be enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or the “Convention”),⁷ and offer some suggestions as to how such enforcement could be realized.

Enforcement as a contract

In many jurisdictions, including the United States, England and many other jurisdictions around the world, the principal method for enforcing an MSA is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce.

In the United States, there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the MSA. However, the MSA is a contract, and contract defenses are available to the parties and are litigated in the courts. We review some of the standard contract defenses as discussed in the United States courts:

Binding contract

The question of whether the facts support mutual consent to all material terms as is necessary to form an enforceable contract is the area of potential attack that has been most successful in defeating efforts to enforce mediation agreements. It is also the claim most likely to arise in an international dispute context as in such cases the parties are

⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38, implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201. Text available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

generally sophisticated, represented by counsel and accordingly less likely to find applicable other commonly raised issues such as duress, lack of competence, and lack of authority.

Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a shorthand recording of the terms agreed to, are frequently argued to be only agreements to make an agreement which are not binding.⁸ The courts recognize the difficulty of generating a final settlement document in complex cases at the mediation conference. Thus the courts have enforced settlement agreements where all of the material terms had been the subject of mutual consent,⁹ and the mere fact that a later more complete document is contemplated will not defeat enforcement.¹⁰ The language used in the agreement can be critical in this determination. Where the parties made the settlement “subject to” a formal agreement, as contrasted with “to be followed” by a formal agreement implementing the terms agreed to, enforcement was denied.¹¹ Where the courts find that material terms in an agreement are not sufficiently definite to constitute a basis for finding mutual consent they have, of course, refused to enforce a settlement agreement.¹² But the fact that a few ancillary issues remain to be resolved will not generally defeat enforcement of a settlement agreement.

⁸ *Certainfeed Corp. v. Celotex*, 2005 WL 217032, p. 14 (Del.Ch. 2005)

⁹ *Harkader v. Farrar Oil Co.*, 2005 WL 1252379 (Ky. App. 2005)

¹⁰ *Claridge House One Condominium Ass’n. v. Beach Plum Properties*, 2006 WL 290439 (N.J. Super. A.D. 2006); *Chesney v. Hypertension Diagnostics*, 2006 WL 2256590 (Minn. App. August 8, 2006); *Snyder-Falkinham*, *supra*, 457 S.E. 2d 36

¹¹ *Golding v. Floyd*, 539 S.E.2d 735 (Va. 2001); *Quinlan v. Ross Stores*, 932 So.2d 428 (Ct App. Fla. 1st Dist. 2006)

¹² *M. Martin*, *supra*, 2005 WL 2994424; *Weddington Productions Inc. v. Flick*, 71 Cal Rptr. 2d 265 (Cal. App. 2 Dist. 1998); *Lindsay v. Lewandowski*, 139 Cal App. 4th 1618 (Cal. App. 4th Dist 2006)

Oral Agreements

Consistent with the standard contract law principle which recognizes the validity of oral contracts (with the exception of contracts governed by the statute of frauds which requires a writing in limited circumstances e.g. contracts concerning transfers of land, or where performance is not to be completed within one year), courts in the United States enforce a mediation settlement agreement in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound.¹³

An exception to the enforcement of oral settlement agreements achieved in mediation is found when governing law or applicable court rules governing the mediation require a writing. The UMA is in the process of being passed by states across the United States and at the time of this writing has been adopted in ten states. The UMA exempts the written settlement agreements from the privilege which protects mediation communications but does not exempt oral settlement agreements thus making oral agreements inadmissible in court. This approach is consistent with the current trend in mediation policy and is likely to be passed in most, if not all, U.S. jurisdictions. Similarly the EU Mediation Directive, speaks of enforcement only of a written agreement, and thus requires a writing for enforcement.

Duress and coercion

The courts adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced. Notwithstanding the fact that some of the facts alleged in the cases are quite egregious, only in rare cases have the courts believed the claims to

¹³ *White v. Fleet Bank of Maine*, 875 A.2d 680 (Me. 680); *Standard Steel, LLC v. Buckeye Energy, Inc.*, 2005 WL 2403636 (W.D. Pa. 2005); *Harkader, supra*, 2005 WL 1252379; *Ford, supra*, 68 P.3d 1258

be persuasive in establishing such duress or coercion as to defeat enforcement of an MSA. After reviewing the facts before them, the courts have enforced settlement agreements reached in mediation in the face of a party's testimony that he was not permitted to leave the room throughout a lengthy mediation and had been sapped of his free will¹⁴, a party's testimony that he was threatened with prosecution in bankruptcy court¹⁵, the testimony of a 65 year old woman claiming duress at a mediation which started at 10 AM and was concluded at 1 AM the next morning, while she suffered from high blood pressure, intestinal pain and headaches and was told by both the mediator and her lawyer that if she went to trial she would lose her house¹⁶ and a party's testimony that he was diabetic and his blood sugar went up, was in severe pain, was prevented from leaving the building when he wanted to terminate the negotiations and his attorney would not let him leave without signing the agreement.¹⁷

Factors illustrative of excessive pressure have been stated to include (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisers to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys.¹⁸ Where the party seeking to back out is represented by counsel at

¹⁴ *DeVile v. United States of America*, 2006 WL 373491 (W. D. La. 2006)

¹⁵ *Chantey Music Publishing Inc., supra*, 915 So. 2d 1052

¹⁶ *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110 (N.D. Ca. 1999)

¹⁷ *Peacock v. Spivey*, 629 S.E.2d 48 (Ct. App. Ga.2006)

¹⁸ *Id.* 68 F.Supp.2d at 1142

the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion will not succeed.¹⁹

An increasing number of cases are directed at contentions that the mediator himself or herself was the cause of duress and coercion. These cases are troubling and perhaps suggest a need for more training and oversight over mediator methodologies; however, the courts have for the most part rejected such attempts to defeat settlement agreements. Where a party contended that she was warned by the mediator of claims of insurance fraud against her, that the mediator bullied her, that she cried for an hour and no consideration was given to her distress, the agreement was enforced.²⁰ Statements by the mediator as to the substantial legal fees that would be incurred that were claimed to make the party feel financially threatened and under duress were held not to be a basis to set aside a settlement agreement.²¹ Where the mediator was alleged to have said “you have no case” because the case belongs to the bankruptcy trustee and the only way the plaintiff “would ever see a dime” would be if he “agreed to the mediated settlement then and there” the court upheld enforcement of the settlement agreement stating that a mediator’s statement as to the value of a claim where the value is based on fact that can be verified, cannot be relied on by a counseled litigant whose counsel was present when the statement was made.²²

¹⁹ *Advantage Properties, Inc. v. Commerce Bank N.A.*, 242 F.3d 387 (10th Cir. 2000)

²⁰ *Vela v. Hope Lumber & Supply Company*, 966 P.2d 1196 (Okla. Civ. App. Div. 1 1998)

²¹ *Marriage of Banks*, 887 S.W.2d 160 (Tex. App. - Texarkana 1994)

²² *Chitkara v. New York Telephone Company*, 45 Fed. Appx. 53 (2d Cir. 2002)

However, the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact on duress or coercion. Thus where it was alleged that the mediator imposed extreme time pressure and told the party that the court would have the embryos in issue destroyed rather than give them to her, that the property value in issue was grossly disproportionate to the cost of litigating further and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the court held that if the mediator in fact engaged in such conduct the agreement would not be enforceable and set it down for a hearing.²³

The issue of duress and coercion can, of course, arise even in direct negotiation without a mediator facilitating the settlement. In the 2008 ICSID decision in *Desert Line Projects v. Yemen*²⁴, the Tribunal set aside a settlement agreement reached between the parties on grounds of coercion and duress. Desert Line had contracted with Yemen to execute a major road-working project and had been lulled into continuing work by continuous assurances of payment. After a failure by Yemen to pay for a year and a half, Desert Line filed an arbitration demand and an award in its favor was rendered. Following the award, settlement discussions commenced and Desert Line agreed to accept half the amount awarded.

Desert Line commenced a second arbitration in which the tribunal set aside the settlement agreement and reinstated the original award, finding economic

²³ *Vitakes-Valchine v. Valchine*, 793 So.2d 1094 (Dist. Ct App. Fla. 2001)

²⁴ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID 2008 available at <http://ita.law.uvic.ca/documents/DesertLine.pdf>

duress, based on actions during the negotiation period which included armed interference and preemptory advice that “you better take this deal.” The tribunal noted that “economic duress is present in many settlements and cannot be a basis for setting aside an agreement. But the judicial decision must draw the line between economic compulsion exercised by the other party and the normal operation of economic forces.” A similar distinction could be drawn into the mediation analysis.

Incompetence or incapacity

The law presumes adult persons to be mentally competent and places the burden of proving incompetence on the person claiming it. In the face of this burden, claims of incompetence, even based on facts that sound quite striking, have not met with much success in court where they have been raised to defeat enforcement of a settlement agreement. The courts have rejected claims that a party was incompetent when suffering from side effects of medication that included severe depression, memory loss, brain fog, that she was crying during the mediation and continually stated that she was confused and did not understand²⁵, where a party claimed that she suffered physical pain during the mediation from a recent surgery, had taken higher than prescribed narcotic pain and antidepressant medication and developed a migraine headache that required her to administer a medicinal injection during the mediation.²⁶ The court rejected a claim of mental incapacity where the party claimed to be disassociating and had no understanding

²⁵ *Domangue v. Domangue*, 2005 WL 1828553 (Tex. App.- Tyler 2005)

²⁶ *Mc Mahon v. Mc Mahon*, 2005 WL 3287475 (Tenn. Ct. App. 2005)

of the nature and terms of the contract, finding that expert testimony was required to support such a claim.²⁷

Lack of Authority

Claims by a party that it had not signed the settlement agreement and that the signature by its attorney was not authorized have also not been viewed with favor. A party's counsel is presumed to have authority when counsel is present at a mediation session intended to settle a lawsuit, a presumption that has to be overcome by affirmative proof that the attorney had no right to consent.²⁸ A settlement agreement signed by counsel can also be upheld on the basis that apparent authority existed where the opposing counsel had no reason to doubt that authority.²⁹ Even where the governing state statute required the party's own signature, the courts have upheld a settlement agreement in the absence of such a signature where the party's absence from the mediation was unexcused.³⁰ But where there was a question as to the grant of authority by the client to the attorney, which must be clear and unequivocal, the courts have required an evidentiary hearing.³¹

Fraud

The courts have applied the contract rules quite strictly and required a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied even in the mediation context with its unique negotiating framework and relationships.³² Absent a duty to disclose, mere failure to disclose a fact that might be

²⁷ *Alexander v. Naden*, 2005 WL 3150323 (Wa. App. Div. 1 2005)

²⁸ *Inwood International Co. v. Wal-Mart Stores*, 243 F.3d 567 (C.A. Fed. 2000)

²⁹ *Little v. Greyhound Lines, Inc.* 2005 WL 2429437 (S.D.N.Y. 2005); *Takuanyi v. Allstate Insurance Company*, 2006 WL 696329 (Ct. App. Minn. June 20, 2006)

³⁰ *Georgos v. Jackson*, 790 N.E.2d 448 (Ind. 2003)

³¹ *Fivecoat v. Publix Super Markets, Inc.*, 928 So.2d 402 (Ct. App. Fla 1st Dist 2006)

³² *JMJ Inc. v. Whitmore's BBQ Restaurant*, 2005 WL 1792817 (Ohio App. 8 Dist. 2005)

material to the opposing party is not a basis for defeating a settlement agreement. Where a plaintiff thought the defendant's insurance limit was \$100,000 rather \$1.1 million, the court held that defendant was in an adversarial position and not in a position of special trust or confidence such that would create a duty to disclose to plaintiff; however an evidentiary hearing was required to determine if defendant had made an affirmative misrepresentation which could be a basis for defeating the settlement.³³

In jurisdictions in which strict confidentiality of mediation communications applies, the court have refused to accept any evidence of a claimed fraud based on what transpired at the mediation session holding that such evidence is blocked by the confidentiality of the proceeding.³⁴ The Delaware Chancery Court suggested that if parties to a mediation know that they are basing their decision to settle on a representation of fact they must extract that representation in a form that is not confidential, for example as a representation in the settlement agreement itself.³⁵

Mistake

While mistake is frequently raised as a defense to enforcement of a settlement agreement, it too is a ground that is rarely accepted by the court. The courts have rejected claims of mutual mistake and the more difficult claim of unilateral mistake where a party claimed that the amount to be paid was to be offset by an amount previously paid;³⁶ where a plaintiff had failed to read the agreement to understand its terms;³⁷ but remanded

³³ *Brinkerhoff v. Campbell*, 994 P.2d 911 (Wa. App. Div. 1 2000)

³⁴ *Princeton Insurance Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005)

³⁵ *Id.*

³⁶ *Feldman v. Kritch*, 824 So.2d 274 (Fla. App. 4 Dist. 2002)

³⁷ *Stewart v. Preston Pipeline*, 36 Cal Rptr. 3d 901 (Cal. App. 6 Dist. 2005)

for a hearing where a claim of mutual mistake leading to a clerical error of \$600,000 was asserted.³⁸

As is apparent from this discussion, enforcement as a contract can lead to considerable additional expense and significantly prolong the dispute resolution process. It also raises serious questions as to the confidentiality of the mediation process: to what extent should confidentiality be preserved if the mediation proceedings are relevant to the issues raised on enforcement of the MSA in a court proceeding? The difficulties with enforcement as a contract requires that review of the other options for enforcement be conducted.

Enforcement as a judgment

If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. The EU Mediation Directive expressly contemplates such court action in providing “shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable... by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state where the request is made.”

Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the MSA. For example, in the United States the

³⁸*DR Lakes Inc. v. Brandsmart, U.S.A.*, 819 So.2d 971, 974-75 (Fla. Dist. Ct. App. 2002) .

Colorado International Dispute Resolution Act was enacted to further the policy of encouraging parties to international transactions to resolve disputes, when appropriate, through arbitration, mediation, or conciliation. To foster that goal the statute provides:

“[i]f the parties involved in a dispute reach a full or partial agreement...If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.”³⁹

However, even if a judgment can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This difficulty could be obviated if the MSA could be entered as an arbitral award and thus gain the benefit of the established enforcement mechanisms of the New York Convention.

Entry of an Arbitration Award Based on the Mediation Settlement Agreement

Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the Arbitration Rules of Korean Commercial Arbitration Board Article 18 (3) provides:

“If the conciliation succeeds in settling the dispute, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as an award.”

Similarly the Rules of the Mediation Institute of the Stockholm Chamber of Commerce, Article 12 Confirmation of a Settlement Agreement in an Arbitral Award provide:

“Upon reaching a settlement agreement the parties may, subject to the approval of

³⁹ Colorado R.S.A. § 13-22-308

the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.”

Some states in the United States have made similar remedies available for international disputes. For example, the California Code of Civil Proc. Title 9.3. Arbitration and Conciliation of International Commercial Disputes, § 1297.401 states:

“If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.”

While the enactment of such provisions would seem to be a useful avenue for MSA enforcement, such an appointment after the dispute is settled cannot be effected in many jurisdictions because under local law there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 clearly sets out this requirement in its definition of an arbitration agreement in Section 6(1):

""In Part 1 of the Act, an "arbitration agreement" means “an agreement to submit to arbitration present or future disputes (whether they are contractual or not).”

As there is no “present or future dispute” once the dispute is settled in mediation, there cannot be an arbitrator appointed to record the settlement in an award. Any consent award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement.

It would be easy to avoid this problem by appointing the arbitrator before the mediation is commenced and having the mediation conducted as an “arb-med” either by the appointed arbitrator with a carefully worded document executed by the parties

consenting to such a process⁴⁰ or by a separately appointed mediator. While this may be satisfactory to some, there are many cases in which the party is willing to go to mediation but prefers a court solution to an arbitration if the mediation does not result in resolution.

It would also be relatively easy to circumvent this problem by specifying that the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved govern the agreement providing the arbitrator with authority to act. Such a provision should circumvent any attack on the award based on the appointment of the arbitrator.⁴¹

However, the question of whether such an award would be enforceable under the New York Convention remains. Can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, the arbitration award will frequently be of much lesser utility.

In analyzing this question, one must first recognize that that it is widely accepted that an arbitrator may enter an “agreed award” if the parties reach an agreement during the arbitration; such an award is generally just a reflection of the agreement of the

⁴⁰ Whether a court would recognize such a consent to overcome issues of due process has not been determined in many jurisdictions. See e.g. *Glencot Development v. Son Contractors* U.K. in which the High Court in 2001 dealt with an adjudicator was appointed by the parties. The parties subsequently settled but one point proved to be outstanding. The adjudicator mediated without success and then rendered decision over the objection of one party. The Court held that there was apparent bias and the decision could not stand because the adjudicator may have been privy to information gathered in ex parte discussions that influenced the result. The court left open the question of whether the parties could contract to have the adjudicator mediate and then resume the adjudicator role.

⁴¹ For example, the U.S. Supreme Court decision in *Volt Information Service v. Leland Stanford Junior University*, 489 U.S. 468 (1989) has been construed to mean that parties can agree to abide by state rules of arbitration even if at variance with Federal Arbitration Act rules and so should be able to contract for the appointment of an arbitrator after the MSA under the laws of a jurisdiction that permit it.

parties and does not reflect the arbitrator's own analysis and conclusions as to the dispute. The UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985 expressly sanctions such awards and their recognition:

“[i]f during the arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral tribunal, record the settlement in the form of an Arbitral Award on agreed terms.”

Article 31 provides that “...such an award has the same status and effect as any other award on the merits of the case.” Similar provisions giving full deference to “agreed awards” are found in the rules governing ICC and ICSID arbitration.

Moreover, there are jurisdictions which empower and on some cases, require, encourage the arbitrator to try mediation first. The arbitration rules of Brazil, China and Hong Kong specifically authorize the arbitrator to attempt mediation or conciliation in the course of the arbitration proceeding. The Brazilian Arbitration Law provides in Article 21 (4) that:

“the arbitrator or the arbitral tribunal shall, at the beginning of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this Law.”

Article 28 provides:

“if the parties settle the dispute by joint agreement, in the course of the arbitral proceedings, the arbitrator or the arbitral tribunal, at the parties' request, may make an arbitral award declaring such fact, containing the requirements provided for in Article 26 of this Law.”

The Arbitration Law of the People's Republic of China, Article 51 states:

“Before giving an award, an arbitration tribunal may first attempt to conciliate. If the parties apply for conciliation voluntarily, the arbitration tribunal shall

conciliate. If conciliation is unsuccessful, an award shall be made promptly. When a settlement agreement is reached by conciliation, the arbitration tribunal shall prepare the conciliation statement or the award on the basis of the results of the settlement agreement. A conciliation statement shall have the same legal force as that of an award.”

The Hong Kong Arbitration Ordinance, Section 2 B, provides that an arbitrator may act as a mediator and may meet separately with the parties but if no settlement is reached he or she shall not disclose whatever he or she thinks is material to the arbitration; the ordinance further provides that no objection to the conduct of the arbitration by the umpire shall be taken solely on the ground that the arbitrator served previously as the conciliator.

Most would agree that such agreed awards rendered by an arbitrator appointed before the settlement of the dispute are governed by the New York Convention and enforceable under the Convention. Whether the same result obtains if the arbitrator is appointed after the settlement of the dispute as a result of mediation, such as can be achieved in Korea, California and under the Stockholm rules, is less certain. The commentators that have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable.⁴² Others have concluded that it is.⁴³ While yet others conclude that the result is not clear.⁴⁴

⁴² Christopher Newmark and Richard Hill, *Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?* Vol.16 *Arbitration International*, No 1 at 81 (2000); James T Peter, *Med-Arb in International Arbitration*, 8 *Am. Rev. Int'l Arb.* 83,88 (1997)

⁴³ Harold I. Abramson, *Mining Mediation Rules for representation Opportunities and Obstacles*, 15 *Am. Rev. Int'l Arb.* 103 (2004).

⁴⁴ See, Ellen E. Deason, *Procedural Rules for Complimentary Systems of Litigation and Mediation- Worldwide* 80 *Notre Dame L. Rev.* 553, fn. 173 (2005);

The relevant New York Convention Articles provide:

- Article 1 (1) This Convention shall apply to the recognition and enforcement of arbitral awards...arising out of differences between persons...”
- Article 2 (1) “Each contracting state shall recognize an agreement in writing under which the parties undertake to submit all or any differences which may have arisen ..between them...concerning a subject capable of settlement by arbitration.”
- Article 5(2) can refuse recognition and enforcement “where the subject matter of the difference” is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought or would be “contrary to the public policy of that country.”

The language of the New York Convention does not have the precise temporal element of such local arbitration rules as the English Arbitration Act, that require a “present or future” dispute. The references to a “difference” do not specify when that “difference” had to exist in time in relation to the time of the appointment of the arbitrator.⁴⁵ An extensive discussion of the meaning of the Convention as it relates to the issuance of an arbitration award based on an MSA is just beginning. The disparity of the opinions rendered by scholars as to the meaning of the language of the Convention suggests that there is an ambiguity. It is time to delve into the issue and consider

⁴⁵ While some might argue that such an expansion would raise issues as to the use of an arbitration award to record unassisted direct negotiations that lead to resolution, a subject for another discussion, it would not be difficult to limit any interpretation of the Convention to cover only mediated resolutions.

providing interpretive guidance to the courts, with due consideration of the many ancillary issues that must be considered in reaching a conclusion as to interpretation.⁴⁶

UNCITRAL recommendations as to interpretations of the New York Convention are an available mechanism for clarifying the meaning to be given to the Convention's language.⁴⁷ A UNCITRAL recommendation as to the interpretation of the New York Convention could clarify the applicability of the Convention to international arbitration awards entered into with the consent of both parties as a result of a mediation.

CONCLUSION

With the 50th anniversary of the New York Convention in 2008, there has been a great deal of discussion and controversy over whether and how the Convention should be amended to cure problems that have arisen with respect to certain provisions of the Convention. The New York Convention is a powerful instrument of enormous value in promoting international trade. To maximize the utility of the New York Convention, those reviewing it should not only look backward but also forward in assessing how and whether it should be reshaped. Mediation has been demonstrated to be on the rise throughout the world and is an increasingly important mechanism in the menu of options

⁴⁶ For a comprehensive discussion of enforcement of an MSA under the New York Convention, see Brette L. Steele, *Enforcing International Commercial Mediation Agreements Arbitral Awards Under the New York Convention*, 54 UCLA L. Rev. 1385 (2007).

⁴⁷ For example UNCITRAL adopted a recommendation in July 2006 that Article II(2) be applied "recognizing that the circumstances described therein are not exhaustive" in recognition of the fact that the writing requirement in the New York Convention might be too limiting in light of the development of modern technology. Text available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html

for dispute resolution.

The Convention was drafted in the 1950's long before mediation's emergence. It can and should be reviewed on this 50th anniversary with an eye towards keeping it current and enhancing its relevance to the realities of today's dispute resolution world. Consideration should be given to recommending an interpretation under the New York Convention clarifying its applicability to an award issued by an arbitrator appointed after the resolution of a dispute in mediation which embodies that resolution.

The discussion of the U.S. case law applying contract law principles to the enforcement of settlement agreements resulting from mediation is adapted from an article written by Edna Sussman entitled Enforcing Mediation Settlement Agreements In the United States And Implications for Mediator Confidentiality which first appeared in the April 2006 issue of the Newsletter of the Mediation Committee of the International Bar Association (Vol. 2, No 1).