

The New York Convention Through a Mediation Prism

By Edna Sussman

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time.

—Abraham Lincoln

In these words, Abraham Lincoln summed up one of the key benefits of mediation: saving time and money. Indeed, mediation does serve that purpose in the great majority of cases. But what if a party fails to comply with the mediated settlement agreement? Should the opposing party be forced to pursue a contract claim to enforce that agreement in a court proceeding, precisely the process the parties sought to avoid through the mediation? Or should a mediated settlement agreement be capable of entry as an arbitration award by an arbitrator appointed after agreement is reached and be enforceable under the New York Convention? As the use of mediation grows, these questions merit serious attention, particularly in international disputes.

The Need for an Enforcement Mechanism

Mediation has been increasing exponentially with multiple drivers at work to further its growth. The “Americanization” of international arbitration, with its increased discovery burden, costs, and delays, caused some in the field to call arbitration the “new litigation.”¹ Just as arbitration has developed in part to avoid expensive and protracted court proceedings, mediation is now viewed as a useful additional tool to counter the perceived increase in cost and delay in arbitration.

A question that requires further exploration if the growth of this powerful tool is to be fostered is whether and how an agreement reached in mediation can be enforced. A mediated resolution is typically achieved much more quickly and cheaply than one in arbitration or litigation, but mediation does require an effort by the parties, with preparation, attendance by counsel and principals at the mediation (which often in international cases requires a

significant travel commitment), and sometimes continued discussions over a period of months. Thus, though typically there is an expenditure of significantly less time and money in a mediation than in a litigation or arbitration, mediation is not cost-free. If the settlement agreement reached is not complied with, a great deal of time and money can be lost.

There was a strong effort by those working on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation² to develop a uniform enforcement mechanism. Notwithstanding the effort made, that goal was not achieved. Instead, article 14 provides that a settlement agreement reached in mediation is enforceable but leaves the enforcement mechanism to the enacting states. 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 enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.”³

The desirability of an enforcement mechanism for mediated settlement agreements was confirmed in a survey conducted recently by the International Bar Association’s Mediation Committee. The survey results on this issue were summarized by the committee: “(T)he enforceability of a settlement agreement is generally of the utmost importance” and “in international mediation . . . reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.”⁴

Avenues for Enforcement

The avenues for enforcement of mediation settlement agreements (MSAs) are not as robust as they should be if we are to maximize the utility of this dispute resolution tool. Parties can, of course, attempt to enforce the MSA under contract law principles subject to the usual contract defenses.⁵ But typically a contract is what the parties started out with, and litigating a contract again in another posture was not what the parties contemplated when they entered into the mediation.

MSAs can be entered as a judgment in some jurisdictions. For example, the EU Mediation Directive expressly contemplates such court action in providing that member states:



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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.⁶

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.

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 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 that a settlement agreement reduced to writing and signed by the parties may be presented to the court as a stipulation and, if approved, shall be enforceable as an order of the court.⁷

However, such court action is not available in all jurisdictions, and historically court judgments and decrees have not been accorded the deference shown to arbitral awards, which are recognized and enforced in the more than 140 countries that are signatories to the New York Convention.⁸ Thus, even if a judgment or court decree 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 be recognized under the established enforcement mechanisms of the New York Convention.

Entry of an Arbitration Award Based on Mediation Settlement Agreements

Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, article 18(3) of the Arbitration Rules of the Korean Commercial Arbitration Board 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, article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce provides:

Upon reaching a settlement agreement the parties may, subject to the approval of 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 Procedure provides:

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.⁹

Although the enactment of such provisions would seem to be a useful avenue for MSA enforcement, such an appointment after the dispute is settled may not be possible to effect 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 provides in its definition of an arbitration agreement in section 6(1) that an “arbitration agreement” means “an agreement to submit to arbitration present or future disputes.” Similarly, New York state law provides that an “agreement to submit any controversy thereafter arising or any existing controversy to arbitration” is enforceable.¹⁰ As there is no “present or future dispute” or “controversy thereafter arising or . . . existing” once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

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-arb,” either by the appointed arbitrator with a carefully worded document executed by the parties consenting to such a process¹¹ or by a separately appointed mediator. Although 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 should be relatively easy to circumvent this problem by specifying in the MSA that it is governed by the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved. Such a provision should circumvent any attack on the award based on the appointment of the arbitrator after the settlement when there is no longer a controversy.¹²

Thus it appears that, if the MSA is carefully drafted, parties can mediate and then (upon successful resolution) appoint the mediator as an arbitrator to record the settlement as an arbitral award. 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, such an arbitration award in an international dispute would be less than sufficient to meet the parties' needs.

Arbitral Awards Based on Party Agreement Under the New York Convention

In analyzing the question of whether an arbitral award entered by an arbitrator appointed after the parties have resolved their differences based on the resolution achieved in mediation can be enforced under the New York Convention, one must first recognize that it is widely accepted that an arbitrator may enter an "agreed award." If the parties reach an agreement during the arbitration, an agreed award is generally just a reflection of the agreement of the 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 permits 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 and the arbitration laws of many countries.

Many jurisdictions around the world expressly empower the arbitrator to try mediation first and empower the arbitrator to enter an award on the agreed terms. For example, article 30 of the Arbitration and Conciliation Act 1996 of India provides:

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

The provision further states that if settlement is achieved, the tribunal may record the settlement in the form of an arbitral award on agreed terms that shall have the same status and effect as any other arbitral award on the substance of the dispute.

Similarly, article 51 of the Arbitration Law of the People's Republic of China authorizes the arbitrator to act as a conciliator and, if a settlement agreement is reached, the arbitrator shall prepare a conciliation statement, which is to have the same legal force as an award, or prepare an award based on the settlement. Some jurisdictions go even further and specifically require the arbitrator to attempt mediation or conciliation in the course of the arbitration proceeding. Articles 21(4) and 28 of the Brazilian Arbitration Law provide that the arbitrator "shall" at the beginning of the procedure try to conciliate

the parties and, if a settlement is achieved, at the parties' request may make an arbitral award.

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. Whether the same result holds 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. Commentators who have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable.¹³ Others have concluded that it is.¹⁴ Yet others conclude that the result is not clear.¹⁵

The relevant New York Convention provides in article 1(1) that the Convention applies to the recognition and enforcement of awards "arising out of differences between persons." The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a "present or future" dispute or a "controversy thereafter arising or . . . existing." The reference to a "difference" in article 1(1) of the New York Convention does not specify when that "difference" had to exist in time in relation to the time of the appointment of the arbitrator. Thus, the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the Convention. It would seem that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such a fundamental public policy of any country as would preclude enforcement of such an award under the public policy exception of article 5(2) of the Convention.¹⁶

Increasing attention is being directed to the meaning of the New York Convention as it relates to the issuance of an arbitration award based on an MSA.¹⁷ The differences of opinion as to the applicability of the Convention to MSAs suggest that the Convention is at least ambiguous. It is time to review the issue and consider providing interpretive guidance to the courts. An analysis of the underlying policy issues would inform a conclusion as to the optimal interpretation of the Convention. Questions such as whether there is a principled basis on which to distinguish between an agreed award, which is widely accepted as enforceable, and an award rendered by an arbitrator appointed following a mediated settlement must be explored. Whether there is a need to preserve contract defenses to ensure self-determination in agreements between parties of unequal bargaining power should be reviewed. The importance of providing an effective enforcement mechanism in the international context should be weighed.¹⁸

UNCITRAL recommendations are one available

mechanism for clarifying the meaning to be given to the New York Convention's language.¹⁹ A UNCITRAL recommendation 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 by an arbitrator appointed after the conclusion of the mediation.

The New York Convention: Looking Forward

With the 50th anniversary of the New York Convention in 2008, many scholars and practitioners have discussed whether and how the Convention should be amended to address issues that have arisen with respect to certain articles of the Convention. The New York Convention has proven to be of tremendous value in achieving its purpose of fostering international trade. To capitalize on the enforcement mechanisms available under the New York Convention, those reviewing it should not only look backward for past problems but also forward in assessing how and whether the Convention should be reshaped in the context of mediation settlement agreements.

The Convention was drafted long before mediation's current acceptability and usage. It can and should be reviewed with an eye toward keeping it current and enhancing its relevance to the realities of today's dispute resolution world. Consideration should be given to recommending an interpretation clarifying the applicability of the New York Convention to an award issued by an arbitrator appointed after a mediated settlement agreement is reached that reflects such an agreement. ♦

Endnotes

1. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (forthcoming Jan. 2010), <http://ssrn.com/abstract=1297526>.
2. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION (2004), www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.
3. *Id.* at 55.
4. MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION (International Bar Association, Mediation Committee, Subcommittee on the UNCITRAL), Singapore, Oct. 2007, available at www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx.
5. See Edna Sussman, *Enforcing Mediation Settlement Agreements in the United States*, International Bar Association, 2 MEDIATION COMMITTEE NEWSLETTER 1 (2006).
6. 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), article 6, available at <http://eur-lex.europa.eu/>

LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

7. Colorado R.S.A. §§ 13-22-308, 13-22-505.
8. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38.
9. Arbitration and Conciliation of International Commercial Disputes, CAL. CODE OF CIVIL PROC. tit. 9.3., § 1297.401.
10. New York Civil Practice Law and Rules § 7501.
11. For a discussion of the nature of the consent that would be required for such a process, see Edna Sussman, *Developing an Effective Med-arb/ Arb-med Process*, 2 N.Y. DISP. RESOL. LAW. 1 (Spring 2009).
12. 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. Accordingly, parties should be able to agree to the appointment of an arbitrator in an MSA that is to be governed by the laws of a jurisdiction that permits it. Thus, in California such a process should be possible. Although California, like New York, defines an arbitration agreement as one governing "an existing controversy or a controversy thereafter arising" (Arbitration and Conciliation of International Commercial Disputes, CAL. CODE OF CIVIL PROC. tit. 9.3, § 1281), the specific grant by statute in California of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes should be construed to override any objection based on the general definition of the arbitration agreement. See *Bulova Watch Company v. United States*, 365 U.S. 753, 758 (1961) ("a specific statute governs over a general one").
13. Christopher Newmark and Richard Hill, *Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?* 16 ARB. INT'L 1 at 81 (2000); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 88 (1997).
14. Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 AM. REV. INT'L ARB. 103 (2004).
15. See Ellen E. Deason, *Procedural Rules for Complimentary Systems of Litigation and Mediation-Worldwide*, 80 NOTRE DAME L. REV. 553, fn. 173 (2005).
16. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 629, 639 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context" (emphasis added)).
17. 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).
18. For a discussion of these issues, see Deason, *supra* n.15, 80 NOTRE DAME L. REV. at 580-92.
19. 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 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html.