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A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements
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A Path Forward:
A Convention for the Enforcement of Mediated Settlement Agreements

> *"One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards," U.S. delegation to UNCITRAL*
>
> *"The diversity of approaches toward the objective of enforcing settlement agreement might militate in favour of considering whether harmonization of the field would be timely." UN Secretariat*

By Edna Sussman

In 2002 the United Nations recognized that the use of conciliation and mediation[1] "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[2] The use of conciliation and mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, increasing court mandated mediation and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized. Many reasons are offered to explain this reality but it has repeatedly been stated that one of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting international conciliation of international commercial disputes, the United States proposed that UNCITRAL Working Group II[3] develop a multilateral convention for enforcement. The U.S. recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through conciliation, that conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization just as under the New York

[1] Conciliation and mediation are used interchangeably to refer to a process where a third person or persons assists the parties in achieving an amicable resolution.

[2] UNCITRAL Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, A/Res/57/18 (2004).

[3] United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL's business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.

Convention, they have their own procedures governing arbitration**.** [4] The U.S. requested that this initiative be given high priority. The U.S. explained that 'solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation."[5] Thus the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Prior Efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements has emerged. There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation[6] 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 enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award." [7] The Commission supported "the general policy that easy and fast enforcement of settlement agreements should be promoted."[8] Notwithstanding, because of the differences among 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.

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[4] UNCITRAL A/CN.9/822, Proposal by the Government of the United States of America: June 2, 2014.

[5] UNCITRAL A/CN.9/WG.II/WP.188, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation-Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings-Comments received from States, at p. 8, Dec. 23, 2014. ("UNCITRAL Comments by States")

[6] UNCITRAL Model Law on International Commercial Conciliation, *supra* n.2.

[7] Guide to Enactment of the Model Law on International Commercial Conciliation ("Guide to Enactment"), para. 87.

[8] *Id.* para. 88.

The EU Mediation Directive[9] 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 Act[10]. A concerted effort was made to develop a uniform enforcement 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 mediated settlement agreement 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.

Recent Calls for Action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNICTRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. It is now 2015. The inability of the UNCITRAL delegates to arrive at a vehicle for cross border enforcement are now years in the past and the need for the development of an international enforcement mechanism has become more compelling.

The European Parliament's study assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study "suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector."[11]

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[9] 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.

[10] Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the UNCITRAL Model Law on International Commercial Conciliation Model Law into the UMA and provides that unless there is an agreement otherwise, the Model Law applies to any mediation that is "international commercial mediation."

[11] European Parliament, Directorate General for Internal Affairs, 'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU, at p.160 (2014) ("Rebooting the Mediation Directive)

A survey conducted by the International Bar Association's Mediation Committee in 2007 emphasized the importance of enforcement. The results of the survey were summarized by the committee: "(T)he enforceability of a settlement agreement is generally of the utmost important" 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."[12]

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the United States that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and would be a significant factor in encouraging and increasing the use of mediation.

In order to assist the Working Group II delegates in their consideration of the U.S. proposal, a survey was conducted in the fall of 2014 by S. I. Strong to ascertain the need for and level of interest in such a mechanism.[13] The survey responses are compelling. An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the UN convention would encourage mediation and conciliation and 18 percent saying maybe. Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country, considerably more difficult than the survey reported for the enforcement of a mediated settlement agreement in a domestic dispute. 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place.

In October and November 2014 the International Mediation Institute (IMI) conducted a short survey of internal counsel and business managers to assist the Working Group's deliberations. The survey sought to assess the extent to which a mediation enforcement Convention is desired. As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so ("much more likely" or "

[12] International Bar Association, Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, Singapore, October 2007, *available at* http://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx

[13] Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302 For a discussion of the methodology employed in the survey. See S.I. Strong, Large-Scale Empirical Study of International Commercial Mediation and Conciliation Provides Support to UNCITRAL Process, New York Dispute Resolution Lawyer, Spring 2015

probably”). In response to whether the existence of a widely-ratified Enforcement Convention would make it easier for commercial parties to come to mediation in the first place, 87% said yes (“definitely” or “probably”). With respect to whether the absence of any kind of international enforcement mechanism for mediated settlements presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said yes (“major impediment” or “a deterring factor’).[14] IMI also put a proposition to 150 delegates, comprised of users, educators, providers and advisors, at its conference in October 2014: “An international Convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries.” 73% of all delegates voted in favor. A sorting of the votes by delegate affiliations showed that not one user disagreed.

Roland Schroeder, speaking on behalf of the Corporate Council International Arbitration Group[15] at the UNCITRAL Working Group II session held on February 3, 2015, echoed the clear message delivered to IMI by users and strongly supported the U.S. effort. He reported that it is often a challenge to convince counterparties to engage in a mediation process and many decline both because the process does not have a sufficiently international imprimatur and because the result is not easily enforceable cross-border. He was of the view that a convention like the New York Convention would be a catalyst that would drive an increased use of mediation. He noted that the benefits of mediation are generally recognized, but once one is already in a dispute, there is considerable concern about enforceability, suggesting a clear need for a cross-border enforcement mechanism. Mr. Schroeder reported that he personally had experiences where he tried to enforce a settlement agreement but was ultimately required to re-litigate the merits of the underlying dispute.

Enforcement mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat has circulated a questionnaire to all member states on the legislative framework and enforcement of international settlement agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. While the final results have not yet been published, the Secretariat has reported that many replies were submitted and there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that “the diversity of approaches toward the objective of enforcing settlement agreements might

[14] Survey results available at https://imimediation.org/un-convention-on-mediation

[15] The Corporate Council International Arbitration Group (CCIAG) is an association of corporate counsels from approximately one hundred multinational companies focused on international arbitration and dispute resolution.

militate in favor of considering whether harmonization of the field would be timely."[16]

In many jurisdictions, including the United States, the principal method for enforcing a mediated settlement agreement 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, while 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 mediated settlement agreements, nonetheless the mediated settlement agreements remains a contract, and contract defenses are available to the parties.[17]

Mediated settlement agreements can be entered as a judgment in some jurisdictions. 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 mediated settlement agreement. In yet other jurisdictions acts by a notary are required to make a mediated settlement agreement enforceable. [18]

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 145 countries that are signatories to the New York Convention.[19] 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 leads to an anomalous result. As the U.S. stated, "[G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them."[20]

Entry of an Arbitration Award Based on Mediation Settlement Agreements

This difficulty could be obviated if the mediated settlement agreements could be entered as an arbitral award and be recognized under the established enforcement mechanisms of the

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[16] UNCITRAL A/CN.9/WG.II/WP.187 Note by the Secretariat, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation November 27, 2014.

[17] Edna Sussman, Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements, International Bar Association, Mediation Law Committee Newsletter, April 2006.

[18] For a report of a survey on enforcement in the states of the EU see Rebooting the Mediation Directive, *supra* n. 11 (reporting a wide variety of enforcement processes).

[19] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38.

[20] UNCITRAL Comments by States, *supra* n. 5 at p. 7.

New York Convention. The arbitration rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.[21] Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides with respect to international conciliations:

> "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."[22]

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement,[23] 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.[24] 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 could, of course, also be argued that the specific grant by statute, as in California, of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes overrides any objection based on the general definition of the arbitration agreement.[25] California, like New York, also defines an arbitration agreement as one governing "an existing controversy or a controversy thereafter arising."[26] No case has been found on this issue leaving the question open.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention

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[21] See e.g. Article 18(3) of the Arbitration Rules of the Korean Commercial Arbitration Board; Article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce,

[22] California Code of Civil Proc. Title 9.3. Arbitration and Conciliation of International Commercial Disputes, § 1297.401.

[23] See, David Weiss and Brian Hodgkinson, *Adaptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, American Review of International Arbitration, Vol. 25 No. 2 (2014) (urging the enactment of such legislation).

[24] New York Civil Practice Law and Rules § 7501.

[25] *See, Bulova Watch Company v. United States,* 365 U.S. 753, 758 (1961) ("a specific statute governs over a general one").

[26] California Code of Civil Proc. Title 9.3. § 1281.

remains. Consent awards are generally regarded as enforceable and institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration. But 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 not suffice to meet the parties' needs.
Commentators that have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable.[27] Others have concluded that it is.[28] While yet others conclude that the result is not clear.[29]

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.

The differences of opinion as to the applicability of the Convention to mediated settlement agreements suggest that the Convention is at least ambiguous.[30] It has been suggested

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[27] 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)

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

[29] See, Ellen E. Deason, *Procedural Rules for Complimentary Systems of Litigation and Mediation- Worldwide* 80 Notre Dame L. Rev. 553, fn. 173 (2005). For a comprehensive discussion of enforcement of a mediated settlement agreement 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).

[30] Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wishes to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. The Protocol is available at http://simc.com.sg/siac-simc-arb-med-arb-protocol/. This should be a very useful process if the parties are amenable to arbitration as opposed to a court

that an interpretation of the New York Convention might suffice to resolve this issue.[31] However, an interpretation would require the same thorough review in Working Group II as the proposed new convention and many would say that developing a regime tailored to the specific concerns raised in the mediation context would better serve users.

Issues for consideration

There will be many issues for Working Group II delegates to grapple with. But keeping the great importance of the goal in mind should enable the identification of solutions to all obstacles. Issues to consider may include:

- Is the New York Convention the appropriate model on which to base a new convention, and set forth a broad obligation to recognize and enforce and provide a limited set of exceptions to that obligation thus a permitting the development of a relatively short and simple document?
- Should the convention cover the agreement to mediate or only the settlement agreement? The U.S. proposal only applies to the mediated settlement agreement but surveys have shown a strong interest in having the convention cover both just as the New York Convention also applies to the agreement to arbitrate.
- How should terms be defined? Mediation? Conciliation? International? Commercial? Settlement Agreement?
- What formalities need to be observed in the documentation of the settlement? In writing? What constitutes a writing? Is an e-mail exchange sufficient? A dictated transcript? Signed by the parties? Signed by the mediator? Other form requirements?
- How will one distinguish between settlement agreements achieved by the parties, and those achieved with the assistance of a third-party intermediary?
- Should there be an opt-in or opt-out feature allowing parties to choose if the convention would apply?
- What limited exceptions would be applicable to enforceability?
- Should certain claims be excluded from the application of the convention?
- Should the convention address settlement terms other than purely monetary payments just as the New York Convention requires enforcement of non-monetary terms? Should this be a decision for the states that can be dealt with by a reservation?

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proceeding since arbitration rules generally authorize the arbitrators to enter a consent award and such awards are generally viewed as enforceable awards.

[31] Edna Sussman, The New York Convention Through a Mediation Prism, Dispute Resolution Magazine, Vol. 15 No. 4 (2009).

- How should enforcement of settlement agreements that are conditional on future events or conditions being met be addressed?
- Should there be an allowance for rectification if unforeseen circumstances arise in the course of performance?
- Should the convention apply if the mediator utilizes caucus sessions? If so, how are due process concerns to be addressed? Does an opt-in or opt-out option resolve this issue?
- Should all requirements as to the mediation itself, including the qualifications of the mediator and how the mediation is conducted, be left to the states just as the New York Convention leaves arbitration procedures to the law of the seat?
- When enforcement is sought, what law or process should the enforcing court look to, keeping in mind, as was the case with the New York Convention, of the desire to avoid a requirement for a double exequatur?
- Should the convention's application be limited to conciliated settlements signed after the convention's entry into force?
- Should the convention apply to agreements made by states?

These and other questions will require thoughtful analysis.

Conclusion

Given the many variations across the globe for the enforcement of mediated settlement agreements, some have expressed skepticism as to whether it will be possible to develop a convention that meets all concerns. They note that prior efforts to resolve the issues have failed. Development of the convention would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business oriented solutions, facilitate international transactions and produce savings in the administration of justice. These goals warrant a consistent and determined effort to find the path forward to the solutions. Sometimes finding solutions to difficult problems is not easy and considerable effort is required. As Victor Hugo said "perseverance is the secret to all triumphs."

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