

A New York Convention for mediation may be coming soon

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The process is flexible, confidential and the parties are in ultimate control of the decision to settle. Mediation is sometimes referred to as conciliation, but in some jurisdictions conciliation is a slightly different process in which the role of the neutral person is to put forward terms of settlement or an opinion and recommendations to the parties. For the purpose of this article, mediation and conciliation will be used interchangeably referring to resorting to a neutral person who facilitates reaching an agreement between the parties.

Mediation is a cost-effective and fast ADR mechanism when compared to litigation or arbitration. It is a consensual process whereby the parties are not forced to settle. Therefore, unlike in litigation and arbitration, a final resolution of the dispute is not guaranteed. Should the parties reach a settlement during the mediation process, this settlement is documented in the form of a settlement agreement that is signed by the parties. The settlement agreement, like any other contract, is binding on the parties in accordance with the law applicable to that agreement. However, such agreements are not enforced in the same way an arbitral award or a court judgement would be. Accordingly, if a party fails to comply with the terms and conditions of the settlement agreement, this would be considered a breach of contract and the other party would need to file a claim at court or arbitration as the case may be.

The lack of framework for the enforcement of settlement agreements is one of the main reasons why parties are often reluctant to resort to mediation notwithstanding its effectiveness as a method of ADR. Fortunately, in order to promote mediation and solidify the enforceability of settlement agreements, efforts by the United Nations Commission on International Trade Law (UNCITRAL) are currently taking place to find a solution.

The Proposal in New York

In July 2014, during a session of UNCITRAL that took place in New York, a Proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through mediation/conciliation was put forward to UNCITRAL by the government of the United States of America. Accordingly, Working Group II ("WGII") – which is one of the six working groups established by UNCITRAL to perform the substantive preparatory work on topics within the commission's programme of work and which specifically relates to arbitration and conciliation – was requested to consider the Proposal, during its following meeting, and report back to UNCITRAL on the feasibility and possible form of work in that area.

The Approval in Vienna

In July 2015, during a session of UNCITRAL that took place in Vienna, WGII reported to UNCITRAL a summary of its findings, its concerns and recommendations. UNCITRAL approved giving WGII a mandate to work on the topic of enforcement of settlement agreements resulting from international commercial conciliation.

The Mandate – A Convention?

The mandate given by UNCITRAL to the WGII is broad enough to include different possible forms of work, namely, (i) a guidance text, (ii) a model legislative provisions, and most importantly (iii) a convention.

As regards the guidance text and model legislative provisions, this can be done through, among other things, expanding on the existing UNCITRAL Model Law on Conciliation 2002 and the accompanying 'Guide to Enactment of the UNCITRAL Model Law on Conciliation 2002'. These are important instruments by UNCITRAL that, in addition to the UNCITRAL Conciliation Rules 1980, assisted the promotion and harmonization of conciliation internationally.

However most importantly. WGII has a mandate to prepare a convention on the enforceability of international commercial settlement agreements resulting from mediation/conciliation ("Convention"). This is the core of the aforementioned Proposal and is supported by the international community including the International Mediation Institute ('IMI'). The idea of the Proposal is based on the successful role played by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") in the development, promotion and use of international arbitration worldwide. A total of 156 countries are signatories to the NY Convention of which 14 are countries in the Middle East, including Bahrain, Egypt, Jordan, Oman and the United Arab Emirates.

The IMI conducted research regarding how users view the creation of a convention for mediation and whether it was needed. According to the IMI's website (<https://imimediation.org>) 73% voted in favour, 14% disagreed, and 13% were neutral or had no opinion. The IMI concluded that there is "a strong interest among corporate disputants for the contemplated convention on the enforcement of mediated agreements."

There is no doubt that the WGII will have many challenges to cover when preparing the Convention and the other aspects of its work. These include, amongst others:

- What a settlement agreement will need to contain to be recognized under the Convention.
- Whether the Convention will apply to settlement agreements reached through direct negotiations between the parties.
- Whether the Convention will apply to any settlement agreement reached through a process that includes a neutral third-party, regardless of being mediation, conciliation, neutral-evaluation or another form of ADR.
- Whether the Convention will apply to all settlement agreements or only those that involve international parties (i.e. parties from two different states).
- Whether it should cover disputes involving a governmental body or administrative authority.
- The grounds for refusing enforcement of a settlement agreement.

It is too early to predict what the WGII efforts will lead to given the complex set of concerns that need to be addressed by the group. There should however be confidence that these concerns will be resolved and that a solution will be produced in the near future. The creation of the NY Convention faced similar challenges, including initial opposition from the delegation of the United States of America, but these challenges were overcome and the NY Convention has become possibly one of the most successful instruments created by the United Nations.

If the Convention is created and taken up with the same enthusiasm as the NY Convention, it will (i) create a strong international legal framework for mediation, that will (ii) encourage more parties to use this mechanism and (iii) result in many more disputes being settled without the time and expenses of litigation and arbitration, leading to (iv) greater and more effective access to justice. This article was first published in Kluwer Mediation Blog, August 2015.