Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?

By Ellen E. Deason

Domestically, arbitration has shown signs of falling into disfavor for business-to-business disputes, and scholars have labeled mediation the “new arbitration.” Transnationally, arbitration is still the favored method of dispute resolution, but some users complain that the cost can be high, the proceedings lengthy, and the process legalistic.

Mediation provides an alternative, but it also lacks the international enforcement mechanisms that support arbitral awards under the widely adopted 1958 UN Convention on Recognition and Enforcement of Arbitral Awards (the New York Convention). Some evidence suggests that parties would find cross-border mediation more attractive if their settlements were subject to a legal regime providing for expedited enforcement.

Reaching agreement on the issue of enforcement of mediated settlement agreements has proved difficult in the past. The Uniform Law Commission’s Uniform Mediation Act, which has now been enacted in 12 US jurisdictions, does not contain an enforcement provision despite a serious effort to draft one. Similarly, harmonization of enforcement procedures proved impossible in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Conciliation, which leaves the choice of enforcement mechanisms to each nation.

UNCITRAL Working Group II (Arbitration and Conciliation) is now considering ways to improve the enforcement of mediated settlements reached in cross-border commercial mediation. The United States delegation to the Working Group has proposed that UNCITRAL develop a convention — modeled on the New York Convention — to provide for the enforcement of settlement agreements resulting from international commercial conciliation, which UNCITRAL defines as equivalent to mediation. I attended a Working Group meeting held in New York in 2015 as an observer credentialed by the American Society of International Law.
This article reports on the US proposal and examines several of the issues that will need to be resolved in developing an instrument on the international enforcement of mediated settlements.9

Do We Need a Convention?

The motivation for proposing a convention to enforce mediated settlement agreements is straightforward: to encourage parties to use mediation for cross-border disputes because it can save time and money and help preserve ongoing commercial relationships. By signaling the importance of mediation internationally and by creating a clear and uniform framework, a convention could generate greater certainty that settlements can be relied upon and readily enforced. This would promote the resolution of international commercial disputes through mediation.

At the 2015 New York Working Group meeting, several business representatives and groups noted the burden and uncertainty of current cross-border enforcement mechanisms that rely on contract law and articulated a need for a more effective international legal framework. Many were from the United States, but they also represented multinational perspectives. In contrast, some countries’ delegates, perhaps reflecting variations in the degree to which different legal cultures have embraced mediation for cross-border disputes, questioned the need for an enforcement framework for mediated settlements.

This may be a “chicken-or-egg” problem: those who favor a convention hope to stimulate cross-border use of mediation, but perhaps one of the best ways to appreciate the benefits of a convention is through experience with the use of mediation internationally.

Other countries’ representatives maintained that current enforcement mechanisms are sufficient. Indeed, in many countries, settlements can be entered and enforced as court judgments. This procedure is, however, often limited to court-sponsored mediation or cases filed in court, and enforcing such court judgments across borders can be notoriously difficult. Alternatively, some national laws allow arbitral tribunals to convert mediated settlement agreements into awards on agreed terms, thus enabling the agreements to be enforced as arbitral awards. But again, this procedure is not always available for freestanding mediations, as some countries limit it to settlements reached during ongoing arbitrations.

Furthermore, the international vitality of an agreed award rendered by an arbitrator appointed after a settlement is uncertain. By its terms, the New York Convention governs arbitrations arising out of “differences,” yet it is ambiguous on whether those differences must exist at the start of an arbitration. With a prior mediated settlement, there are arguably no differences to be arbitrated because they have already been settled, which could cast doubt on enforcement as an award.10

Even more significantly, creating an arbitral award is not a practical solution for many parties in mediation. Unless they were already engaged in arbitration, they would need to initiate it – with the associated expense and delay – merely to rubber-stamp their settlement. This need to resort to arbitration would undermine the goal of promoting mediation as an independent, co-equal dispute resolution process.

There are also questions about what form a new legal framework should take. Some countries are concerned that a convention defining criteria for enforcement would add legal complexity or standardize procedures, limiting the flexibility that is one of mediation’s defining characteristics. There is thus some sentiment in favor of a model national law or a document providing official guidance, options the Working Group will consider. Many believe, however, these alternatives would be weaker solutions. A convention would carry far greater weight in endorsing mediation as an international dispute resolution mechanism equal in stature to arbitration and litigation.

What Scope is Desirable?

The United States proposes a convention that would govern enforcement of settlements resulting from conciliation of international commercial disputes. This restriction to commercial settings would exclude disputes arising out of consumer and employment
contracts with non-business parties. This is, in my view, wise because crafting desirable protections for relatively unsophisticated parties subject to adhesion agreements would overly complicate a convention. Furthermore, absent this exclusion, a convention would run afoul of mandatory laws protecting such parties, which frequently are stronger outside the United States.

There is, however, a more fundamental scope question: the United States proposes limiting the convention to settlements resulting from mediation, which raises thorny philosophical issues. Many legal systems make no distinction between agreements reached with third-party assistance and those resulting from unassisted negotiation; both are subject to rules of contract law. So some countries object to differentiating between them for purposes of enforcement. Even more broadly, some nations are concerned about the effect on contract law of treating enforcement of settlement agreements differently from that of ordinary contracts, such as sales agreements.

Limiting a convention to mediation is a pragmatic approach. If a country is hesitant to enact enforcement mechanisms for settlement agreements, ratifying a convention limited to mediation would be a narrower, less dramatic step than approving one that concerns all settlements. Furthermore, the distinction between mediated and negotiated settlements is familiar to many because confidentiality protections typically differ along that fault line. Hence instruments such as the Conciliation Model Law, which sets forth provisions on confidentiality, could serve as a precedent for singling out mediation as a settlement process.

The proposed convention is also limited to enforcement of settlement agreements. Although some scholars calling for a convention regard enforcement of parties’ agreements to mediate as a high priority, the current focus, sensibly, I believe, is on enforcement of settlement agreements that result from mediation. Again, as a practical matter, garnering support for a less ambitious legal instrument would probably be easier. Moreover, it is not clear that enforcement is needed at the initiation of mediation. Data from the United States suggests that enforcement of settlements, not of agreements to mediate, generates the largest amount of mediation-related litigation.

**How to Deal with the Diversity of Practices?**

One of the challenges of crafting an effective convention is the wide variety of enforcement frameworks in use around the world. Current practices will influence nations’ attitudes toward acceptable criteria for enforcement, and the procedures ultimately adopted in a convention will have to coexist with the full range of domestic mechanisms.

**Existing diversity.** The UNCITRAL Secretariat has compiled a valuable set of information on current national enforcement regimes for mediated settlements. Many nations treat such settlements as an ordinary contract, which often means that a party must file a suit claiming breach of contract to obtain enforcement. In other nations, a party can apply to a court to convert a settlement agreement into an enforceable legal instrument, but that often requires the court to approve the settlement or confirm its validity. Grounds for denying enforcement of the agreement include (depending on the country) lack of capacity, duress, undue influence, misrepresentation, mistake, fraud, unconscionability, or illegality.

Some countries have special summary or expedited procedures for enforcement. In addition to the procedures for turning a settlement into an arbitral award mentioned earlier, other mechanisms provide for expedited treatment in court. In Ontario and Nova Scotia, Canada, for example, a party to a commercial conciliation settlement can convert it into an enforceable court judgment merely by registering or filing the agreement with a court. In some civil-law countries, parties can use procedures that involve notaries: if they declare in their agreement that they consent to compulsory execution and record the agreement in a public document drawn up by a notary, they can obtain expedited enforcement. In other countries, mediated settlement agreements are directly enforceable if they meet certain criteria. In Ecuador, for instance, a mediated settlement agreement is an enforceable instrument if it is signed by the parties and the mediator and the mediation was conducted in compliance with Ecuadorian law.
These are, however, domestic procedures, and in the absence of treaties or the special framework of the European Union for recognition of court judgments, their application to international settlements is at best uncertain. Only a few countries have a specific legal framework for cross-border enforcement of settlement agreements.

Relationship of a convention to domestic enforcement. In determining which mediated settlements to enforce, one approach would be to rely on domestic frameworks to produce an instrument that could then be enforceable internationally. Under this approach, if a settlement has already passed muster by meeting the requirements for enforcement in the country where the mediation occurred, the enforcing jurisdiction could use an expedited procedure. But given the current range of enforcement procedures, this would seem to require either a herculean harmonization effort among jurisdictions or acceptance of a diverse set of enforceable instruments. More significantly, by requiring a domestic procedure as a prerequisite to international enforcement, this approach would impose a two-step approval process that would create undesirable burdens for parties seeking enforcement.

Alternatively, a convention could provide for direct enforcement of settlement agreements under specified criteria, with the enforcing jurisdiction evaluating compliance with those criteria. The New York Convention uses this general approach for enforcement of arbitral awards. In the context of mediation, such a system would eliminate the need to decide which of the many domestic mechanisms would be acceptable as a basis for enforcement in other countries. It would also open the possibility for a legal regime that is less tied to the forum where the mediation occurred, perhaps allowing enforceability to be judged on law chosen by the parties or the law of the enforcing nation. Given the increase in electronic proceedings that are not localized and the freedom parties have in mediation to design solutions that are not directly tied to remedies in a particular legal system, this might be appropriate.

Is the New York Convention a Useful Model?

The widespread adoption, pro-enforcement philosophy, and simple structure of the New York Convention have all greatly encouraged the growth of arbitration, making it the primary method for resolving commercial disputes internationally. Comments at the Working Group meeting seemed to indicate a general view that any conciliation convention should likewise avoid complexity. Moreover, a structure similar to the New York Convention’s would be familiar, and nations might find it easier to adopt a sister convention than one based on an entirely different approach.

Questions remain as to how best to modify the New York Convention to adapt it to the very different context of mediation. In my view, a conciliation convention should not merely transform settlement agreements into arbitral awards. While such a conversion might be an expedient way to piggyback on the New York Convention, arbitration and mediation are very distinct processes that raise different enforcement issues. Rather, as the US proposal envisions, I believe that the heart of a convention could parallel the structure of the New York Convention by establishing a general obligation for party-states to recognize and enforce mediated settlements (as in Article III) with a limited list of grounds to refuse enforcement (as in Article V).

Appropriate defenses to enforcement. Some of the New York Convention’s grounds to refuse enforcement are simply not relevant to mediation, such as those that concern the composition of the arbitral tribunal and the scope of its authority. These should be dropped. Others are directly applicable to settlements and require little modification. For example, under the proposal offered by the US delegation, a nation’s courts should be able to decline to enforce a mediated settlement if in that country the subject matter of the parties’ agreement is not capable of being settled (Art. V(2)(a)) or if enforcement would be contrary to its public policy, as that term has been narrowly interpreted under the New York Convention (Art. V(2)(b)).

Other grounds to refuse enforcement of arbitral awards under the New York Convention will be appropriate for mediation only if they are modified, which further illustrates why merely converting settlement
agreements into arbitral awards would be unsatisfactory. For example, in arbitration, the agreement to arbitrate signifies the parties’ consent to a process that resolves their dispute when a tribunal imposes an award, and enforcement can be refused if that agreement is invalid (Art. V(1)(a)). For mediation, this protection for consent needs to apply to the final agreement. As in arbitration, the parties consent to the process, but they further consent to the substantive terms that resolve the dispute. The enforceability of a mediated settlement stems from that direct acceptance of the resolution, so it is the process of exercising self-determination in agreeing to the outcome that needs protection.

Given this importance of self-determination to mediation, nations should be able to refuse to enforce a mediated settlement if it is invoked against a party that lacked legal capacity during the mediation. It also seems important to authorize countries to refuse enforcement under contract law doctrines such as coercion and fraud, which implicate flaws in consent. This issue is complicated, however, and needs careful consideration: the full panoply of contract defenses could create a procedure just as onerous as ordinary contract enforcement actions and invite delaying litigation. Moreover, presenting evidence of contract defenses often spawns tensions with confidentiality protections. Protecting the process of consent to settlement while avoiding opportunities for disruptive litigation will require the Working Group to strike a delicate balance.

The emphasis on party self-determination in the mediation context also means that an enforcement process should respect parties’ ability to place limits on the scope of their agreement, including its enforcement. Parties could, for example, use a forum selection clause to specify that enforcement will be limited to particular jurisdictions or agree that they must return to mediation if they have a dispute about enforcement. A convention should include provisions allowing nations to refuse enforcement that would conflict with such terms.

The mechanism to trigger enforcement. When parties agree to arbitration, they subject their arbitral award to enforcement under the New York Convention. In contrast, under the US proposal’s principle of respect for limitations agreed by the parties, parties could specify that the mediation convention would not apply at all to their agreement. This opt-out structure, with its emphasis on party autonomy, would be an important modification of the approach of the New York Convention.

An opt-out framework makes sense from the perspective of maximizing use of the convention’s enforcement mechanisms. Research has shown that default rules are “sticky,” meaning that parties tend not to alter them. As a result, an opt-out structure would be more likely to increase the use of mediation in cross-border disputes than one that requires parties to affirmatively decide to use the convention’s procedures (“opt-in”).

Under an opt-out system, however, in the absence of an agreement by the parties, the convention’s enforcement mechanism would apply to all conciliated settlement agreements that fall within its purview. For this to be fully consistent with self-determination, parties must know enough to evaluate whether they want expedited enforcement of their agreement. While many parties to international commercial transactions are likely to be represented by relatively sophisticated legal counsel, some may be small businesses with attorneys who are not schooled in the details of international dispute resolution. One can argue that such parties should be protected from unfair surprise by using an opt-in system that would
not subject them to expedited enforcement unless they had explicitly considered its benefits. On the other hand, an opt-in system could also be a source of unfair surprise if a party assumed it would obtain a convention’s benefits without taking positive steps to invoke expedited enforcement.

Widespread acceptance of a convention might also be at stake: nations might be more willing to sign on if they see enforcement as voluntary. A voluntary system would be analogous to familiar enforcement procedures in some countries, such as obtaining a public deed or instrument title, that similarly require the request of all the parties. It could also reduce the need for preliminary scrutiny of enforcement in the forum where the parties conducted their mediation.

Furthermore, I propose that using an opt-in system could help solve the dilemma (discussed above) of what contract defenses an enforcing jurisdiction should recognize as reasons to deny enforcement. One possibility is that a convention could specify that the parties’ agreement to use its expedited procedures would operate as a waiver of some of the contract defenses that they might otherwise be able to raise in ordinary enforcement proceedings.

Tailoring the Scope of Application

If UNCITRAL decides to formulate a convention, that type of instrument would allow nations to tailor their participation by using declarations or reservations. This would avoid the need for all contracting states to agree on a uniform approach to all issues and make it easier to accommodate differences among national legal regimes. The United States has suggested several areas where this approach might create options and provide flexibility:

- Limitations on the types of obligations that can be enforced (perhaps excluding, for example, non-monetary or complex settlements);
- Application of the convention when a governmental body is a party to a settlement;
- Determining whether the convention would apply by default (an opt-out regime) or only when parties to a settlement agreement affirmatively invoke its enforcement mechanisms.

What’s ahead for UNCITRAL?

Use of mediation has grown in many parts of the world since UNCITRAL adopted its Conciliation

Additional Issues

This article covers only highlights of the issues UNCITRAL faces as it formulates a framework for enforcing mediated settlement agreements. Additional topics it may need to consider include:

- Form requirements for settlement agreements to qualify for enforcement (such as the signature of the mediator);
- A possible exception to enforcement for agreements that are incapable of being performed, or a mechanism for revision if circumstances change unforeseeably during the course of performance;
- Potential ways to protect mediation confidentiality when defenses implicate protected communications, perhaps through initial in camera examination of evidence to ensure that a challenge is credible; and
- The effect on enforcement of a determination in another jurisdiction that a settlement agreement is invalid or unenforceable.
Model Law in 2002. Court-sponsored mediation programs, business contracts with dispute resolution step clauses, and mediation legislation have all fostered mediation’s growth and acceptance, with numerous countries adopting enforcement regimes. Trying to create an efficient international framework for enforcing mediation agreements will be challenging, but these developments make having such a framework both more important and more acceptable. UNCITRAL has given Working Group II a broad mandate to tackle the topic of enforcement of settlement agreements. This mandate is not limited to preparing a convention, but considerable support and enthusiasm have been expressed for that idea.

This article is intended to stimulate interest and involvement in the UNCITRAL deliberation process. By the time it is published, Working Group II will have met in Vienna. You can follow its progress on the important question of enforcement of mediated agreements for international commercial disputes at www.unictral.org. □

Endnotes


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