UNCITRAL to Consider Proposal for Convention on Enforcement of Mediated Settlements

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UNCITRAL's Working Group II (Arbitration and Conciliation) will begin its 47th session today, July 7 , in New York. Among the items to be discussed is a proposal for a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation. (See also this link.)

The proposal, which has been put forth by the United States, aptly notes that "settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply…. In deciding whether to invest their time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly."

The convention would address these concerns by putting mediated settlement agreements on the same footing as arbitral awards.

This idea is not without precedent. Europe's Mediation Directive already attempts to ensure that mediated settlements are entitled to enforceability across member states. Article 20 of the Directive requires that, "the content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States".

An effective enforcement mechanism would address one of the most common reasons parties are often reluctant to mediate an international commercial dispute: a concern that, in the event a settlement is not upheld, they will be required to start an entirely new litigation in one or more countries. This can be a very serious impediment to settling.

I recall one recent case where my company was involved in a sizeable dispute and the proposed convention would have been valuable. We found ourselves in mediation, but remained stuck over the risk of a future breach by the potential debtor party. The only way to quickly address the risk of default in this particular case was to obtain a consent arbitral award.

This solution was not as straightforward as it may sound. Like many international commercial transactions, the parties' contract stipulated arbitration under the rules of a leading arbitration

institution. Not surprisingly, the rules did not contemplate that the parties might want to draft their own award. To the contrary, they required the institution's court to review any award before being issued to the parties, and only after having confirmed the appointment of the arbitrator (together with the payment of the institution's fees and the arbitrator).

And while an arbitrator appointed by the institution would likely have agreed to the text of an award proposed by the parties, there was certainly no guaranty of this.

To avoid the cost and loss of precious time of complying with these required but unnecessary steps, the parties were forced to amend the underlying contract to provide for ad hoc arbitration (taking it away from the institution), and then appoint an arbitrator who had already accepted to issue the consent award. This required a fair amount of additional work and a high degree of cooperation between the litigants.

Of course, none of this would have been necessary if the proposed convention had already been in force. We were in mediation and had reached a settlement. Under the proposed convention, this would have been enough to obtain cross-border enforceability.

An enforcement convention would make it easier to settle, and would provide parties with a strong incentive to attempt to resolve their international commercial disputes through mediation. Anyone who questions that a convention could affect party behavior this way need only look to the growth of international arbitration after UNCITRAL adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It is not unreasonable to presume an UNCITRAL convention for the enforcement of settlements reached in mediation could similarly propel the growth of international mediation.

At a minimum, the proposal is worthy of consideration.