

The Proposed Mediation Convention: UNCITRAL at a Crossroads in Vienna

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Vienna can be a confounding place for an outsider. In one moment, the city projects itself confidently into an innovative, international future and yet in the next moment can appear irrevocably bound to traditions.

Being forward-minded in dispute resolution, Vienna is host this week to the IBA-VIAC International Mediation and Negotiation Competition, a four-day event in which 16 teams will seek to use consensual dispute resolution to resolve the problems of the 2015 Vis Moot Competition, which is itself hosted in Vienna. And, lest anyone forget, the Vienna International Arbitration Centre (VIAC), a regional and global leader in dispute resolution, will celebrate its 40th birthday this coming September.

Also this week in Vienna, the UNCITRAL Commission will discuss whether its Working Group II should start work on an international convention for the enforcement of mediated settlement agreements.

Among the countries that will be deciding the fate of the proposed convention, some have raised concerns that appear rooted in the past or that do not appreciate how modern mediation practice has developed.

For example, one country lamented in its comments to the proposal that, “there seem to exist no standards for mediation/conciliation proceedings (both on the national and on the international level) that warrant sufficient trust in the proceeding itself, its independence from either party and from negative influence from outside, the quality of mediators/conciliators... Such trust, however, seems indispensable if one considers rendering the result of such a proceeding directly enforceable.”

Concern over trustworthiness of the process is reasonable and it is not without precedent. Take, for example, this statement by one country’s delegate at a previous meeting on the subject of an international enforcement regime:

Some of the proposals tended to minimize judicial supervision.... In the view of his delegation, judicial supervision was of the utmost importance, for it alone could ensure that justice was done.

The above objection, however, was not made in reference to the proposed mediation convention. It comes from the May 1958 travaux préparatoires for the New York Convention on foreign arbitral awards.

And the delegation expressing this concern? The United States.

As everyone today knows, the New York Convention went on to become the primary motor behind the growth of international arbitration, and the USA itself today has a robust international arbitration practice.

Objections to the New York Convention in 1958 were based on how dispute resolution was perceived and practiced at the time. Since then, decades of practice and legislative adaptation have shown them to be largely unfounded.

If concern over standards were equally applicable to both mediation and arbitration, it would put mediation in a good light. Mediation today is ahead of arbitration in developing national and international standards, and it should be undisputed that modern mediation practice is leaps and bounds beyond where arbitration was in 1958.

In many countries, mediators are regularly subjected to certification and continuing legal education requirements, while arbitrators are not. In fact, the UNCITRAL commissioners need not leave Vienna to find sound examples of

mediation's deep roots domestically and the introduction of modern safeguards. In 1869, Austria established a legal basis for enforcing settlement agreements reached before municipal conciliation offices (Gemeindevermittlungsamts), and in 2004 was one of the first countries in the EU to enact a law that sets out quality standards for mediators and proceedings.

Internationally, arbitration still cannot boast an equivalent of the International Mediation Institute (IMI), a body whose sole purpose is to set quality standards and whose governing board includes users and the representatives of leading mediation and international arbitration institutions.

Fortunately, concern over the trustworthiness of mediation has been raised by only a few countries, and the chances for work to proceed on the proposed convention seem relatively good. Other countries have raised questions more about the practicalities of how a new mediation convention would operate, one mistakenly casts mediation as a threat to international arbitration, many have expressed no preferences at all, and then there are those who are unequivocally positive.

In the positive camp, not surprisingly, is Singapore, a global center of international dispute resolution with an undisguised desire to grow its market share. In its comments to the proposed mediation convention, Singapore stated that the country is, "generally supportive of mediation/conciliation processes, and the enhanced enforceability of international mediated/conciliated settlement agreements will be useful for mediation users."

With consensual forms of dispute resolution increasingly being adopted for resolving 21st century conflicts, it will be interesting to see which direction UNCITRAL takes at this crossroads in Vienna, towards ideas for the future or concerns from the past.