Kluwer Mediation Blog

Vienna said “I do!” Why A New York Convention for Mediation Might Be Brewing

Laila El Shentenawi (Al Tamimi & Company) · Friday, September 4th, 2015

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:

a) What a settlement agreement will need to contain to be recognized under the Convention.
b) Whether the Convention will apply to settlement agreements reached through direct negotiations between the parties.
c) 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.
d) Whether the Convention will apply to all settlement agreements or only those that involve international parties (i.e. parties from two different states).
e) Whether it should cover disputes involving a governmental body or administrative authority.
f) 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.

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