Kluwer Mediation Blog

UNCITRAL and the enforceability of iMSAs: the debate heats up – Part 3

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If you have been following this four-part series, you will be aware that Nadja Alexander, Anna Howard and I have been reflecting on a very current subject for the dispute resolution community: the enforceability of international commercial settlement agreements resulting from mediation. This week, the UNCITRAL Working Group II on arbitration and conciliation has been discussing this very topic in Vienna. The Working Group has been exploring the creation of an instrument for the enforcement of international mediated settlement agreements (iMSAs). The Working Group has prepared draft provisions for an instrument, which could take the form of a convention, a set of model provisions or guidance text.

Our first post discussed the legitimacy of a proposed multilateral convention for the recognition and enforcement of iMSAs, addressing the question of why iMSAs should be accorded higher status than other contracts, as well as the view that a convention may infringe the right of access to justice.

We then examined the implications of a convention on the objectives and values of mediation, raising some questions on how mediation confidentiality, mediator neutrality, party autonomy and creativity could potentially be affected by a convention that is not carefully tailored to fit the mediation process.

In this penultimate post, we shift our attention to the threshold issue of whether a convention is actually necessary. We consider some of the doubts that have been cast on the justifications for such a convention.

(A) Is enforcement a problem presently?

First, some have questioned whether iMSAs are seldom complied with and whether a convention is really necessary. Several commentators have pointed out that there are in fact high compliance rates for iMSAs. As the parties in mediation have themselves developed a resolution which they feel is fair and workable, the likelihood of non-fulfilment of their obligations is reduced. Also, in recent empirical research on

international commercial mediation conducted by S.I. Strong, it is notable that the respondents were asked whether they thought it would be difficult to enforce an iMSA and not whether they had had experience of needing to do so.

Could the efforts to strengthen the enforcement regime for iMSAs be much ado about nothing?
These doubts could be easily put to rest by undertaking more comprehensive research across jurisdictions to gather more conclusive evidence on the rate of compliance with iMSAs as well as the existing reasons for non-compliance.

Notwithstanding the current uncertainty about compliance rates, it is important to recognise the more significant need of promoting cross-border mediation. Regardless of the actual level of compliance with iMSAs, there is an overarching goal of encouraging greater usage of international mediation. Strengthening the international enforcement regime is a means to achieving this overall aim. As Laurence Boulle has highlighted in a recent article, "While voluntary compliance is the reality of many mediated settlements in many jurisdictions, the fact should not be overlooked that the very existence of an enforcement regime might be a significant inducement for parties to perform in terms of their agreement, in what might be labelled a quasi-compulsory arrangement."

(B) Do we need a convention to promote the use of international mediation?

We turn then to examine the goal of promoting the use of cross-border mediation. One major question is whether a convention will indeed encourage greater use of international mediation. If we consider the existing empirical evidence, there are mixed conclusions:

(i) A report on a 2007 survey conducted by the International Bar Association (IBA) summarised that "the enforceability of a settlement is generally of the utmost importance" and "in international mediation…reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement".

(ii) In a 2014 survey conducted by the International Mediation Institute (IMI), 90% of respondents agreed that the absence of any kind of international enforcement mechanism for MSAs presented an impediment to the growth of mediation in resolving cross-border disputes; and 93% indicated they would be likely to mediate a dispute with a party from a country that ratified a UN convention on enforcement of mediated settlements.

(iii) S.I. Strong's survey in assistance of Working Group II indicated that 74% of respondents thought that an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the UN convention would encourage mediation and conciliation.

(iv) A recent study by Queen Mary University of London presented a less enthusiastic response from respondents – only 54% answered "yes" to the question on whether a convention on the enforcement of settlement agreements resulting from a mediation

would encourage them to use mediation more often.

The majority of these studies indicate a preference for greater certainty of enforcement of iMSAs. In comparison to arbitration, the enforcement options for cross-border mediation seem to lack certainty and uniformity across jurisdictions. It is highly likely that such "weaknesses" in the enforcement regime have affected the users' perceptions of mediation in comparison to arbitration. A convention could then be instrumental in reinforcing the users' confidence in the mediation process, marketing international mediation and sending a symbolic message about the global importance of mediation. Elevating mediation to a similar status as arbitration and litigation could have a huge impact on its future development.

Notwithstanding the benefits of strengthening the enforcement regime, we have suggested in our previous post that it is much more crucial to ensure that the resulting instrument is consistent with the underlying values of the mediation process. We note, in this regard, that the respondents in the above surveys were not informed about the potential substance of the convention or how it may alter the mediation process. We can thus only conclude that the respondents welcome greater certainty of enforcement of an iMSA, but without any consideration of the content and consequences of such a convention.

We would therefore argue that increasing the level of certainty in cross-border enforcement of iMSAs is secondary to, and conditional upon, crafting an instrument that is in tune with the mediation process. A more rigorous enforcement regime which results in undermining the essential qualities of mediation is far from desirable.

If we were to adopt such an approach, there is perhaps a need to shift our attention to research examining whether an international legal instrument will increase the use of cross-border mediation, enhance client satisfaction of the mediation process and be suitable for the type of mediated outcomes being achieved in cross-border settings.

(C) Are we placing too much reliance on a convention to promote cross-border mediation?

As the ADR community considers how to promote the use of international mediation, there is the danger of focusing narrowly on one option – the multilateral instrument for cross-border enforcement – and neglecting other varied and multi-pronged ways of promoting mediation. The conversation should be opened up to consider how international mediation might be encouraged through other means, such as raising the awareness of mediation and increasing the usage of multi-tiered ADR clauses in contracts. It is also worth examining the ways in which parties enter the mediation process, rather than confining our discussion to how they conclude the mediation process.

The race towards drafting a "NY Convention" for iMSAs may also cause policy-makers to overlook the existing mechanisms and cross-border legal instruments that can support the enforcements of iMSAs. Examples include the arb-med-arb process, the Brussels I Regulation and the Hague Convention on Choice of Court 2005. These options deserve further study as to the extent they address the call for harmonisation

of enforceability of MSAs.

In sum, a convention for enforcement of iMSAs certainly raises the status of international mediation, putting it on par with other well-used dispute resolution processes. Nevertheless, we hope that the dispute resolution community and policy-makers would look further than a convention, and that researchers provide greater clarity on the existing factors that affect the development of international mediation.

Keep posted for our final post on the application of an arbitration enforcement framework to iMSAs particularly in light of recent trends in arbitration.

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