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The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements – An Idea Whose Time Has Come?

Ema Vidak-Gojkovic (Baker & McKenzie) · Wednesday, October 21st, 2015

"Nothing is more powerful than an idea whose time has come." (V. Hugo)

Slightly over a year ago, the United Nations Commission on International Trade Law (UNCITRAL) started working on an instrument to address enforcement of conciliated settlement agreements. Conceived as a mediation equivalent of the 1958 New York Convention, the proposed instrument would put conciliated settlement agreements on the same footing as arbitral awards, and provide business users with legal certainty they so much require.

At this point in time, the international framework for conciliation includes two UNCITRAL instruments: the Conciliation Rules (1980), and the Model Law on International Commercial Conciliation (2002). It does not include a convention that would assure a uniform approach to enforcement of the settlement agreements.

Last month, UNCITRAL Working Group II's sixty-third session in Vienna witnessed the organization's most substantial discussion on this topic to date. Mediation and arbitration institutions welcomed the initiative with great enthusiasm.

In five days of dialogue, delegates focused on four major topics:
• the form the instrument should take;
• its scope of application;
• the form of requirement for the settlement agreements; and
• the recognition and enforcement mechanism.

Although a number of delegations expressed a preference for the future instrument to be in the form of a convention, this decision has not yet been made.

As to scope, Working Group II concluded that it is premature at this stage to define "conciliation" or "mediation", terms which are being used interchangeably in the present discussion. The group did indicate that whatever definition is adopted should be broad and yet have objective criteria.

Article 1(3) of the Model Law was seen as a good starting point. It applies to international commercial disputes, and defines "conciliation" by two elements only: (1) a presence of a parties-requested conciliator, who assists the parties in reaching a solution; and (2) the lack of conciliator's authority to impose any solution upon the parties. The consensus of the group was that any settlement agreement covered by the instrument must arise from a conciliation process, and not be

ordinary contracts negotiated by the parties. The group also felt that, like the Model Law, the instrument should focus on international commercial settlement agreements only, and not attempt to address the effect of settlements reached in domestic mediations or include consumer, family, and labour law matters.

One hotly debated point was whether, in light of developments in recent years in investment arbitration, the instrument should also cover settlement agreements reached with government entities. The consensus of the group was that the instrument should not exclude settlement agreements involving government entities from the outset. The individual states can choose to exclude them through separate reservations/declarations.

As to the form requirements necessary to be enforceable, the group's consensus was that, at a minimum, a settlement agreement reached in mediation should be in writing, and signed by the parties.

Interestingly, the delegates preferred a direct enforcement mechanism, without any review procedure in the originating state, but reached no clear decision as to whether the instrument should invoke recognition as well as enforcement procedures.

The most heated discussion centered on the topic of defenses to enforcement. Delegates recognized the grounds stated in Article V(1)(e) of the New York Convention could be used as a possible model, and agreed that grounds for refusing enforcement should be limited, exhaustive, and stated in general terms.

Some of the following defenses are being considered by the Working Group II:

• the capacity of the parties (their consent, existence of duress, unconscionability, undue influence, misrepresentation, mistake or fraud);
• the purpose of the agreement (its cause, validity, formalities, public policy and non-compliance with mandatory provisions); and
• issues of whether the subject matter of the dispute may be resolved by conciliation.

While some delegates also suggested absence of due process, there was no agreement on whether it should apply in the case of mediated settlements. General support has been expressed so far only for defenses of fraud, public policy and the subject matter not capable of being conciliated.

Overall, Working Group II made substantial progress that will be further progressed at its February session in New York.

As an observer at the session in Vienna, I would like to share two thoughts I believe could guide UNCITRAL discussion as it moves forward.

Firstly, we should not demand more from mediation today, than we demanded from arbitration in 1958. The New York Convention (Article V) uses a very limited, exhaustive list of grounds for denying enforcement: a party's incapacity, inability to present one's case, arbitration agreement validity, arbitrability, and public policy. The drafters chose not to engage in a speculative exercise of enumerating, from the outset, all the potential dangers of arbitration. So if such a simple system worked for arbitration (and the NY Convention is widely seen not only as a success but the motor behind the growth of international arbitration), why would mediation – in which the parties themselves agree on the final outcome – require even more robust and enumerated enforcement

defenses?

Indeed, there seems to be no good reason the delegates should feel that parties to mediation are in greater need of legal protection than the parties to arbitration.

Arbitration is a consensual process only when the parties initiate it. After that, it is adjudicative. Mediation, by contrast, is consensual both in the procedure and in the outcome.

The very nature of the mediation process makes it even less likely that parties would be suffering duress, undue influence, misrepresentation, unconscionability, mistake or fraud, than if they were simply reaching a settlement agreement in the absence of a mediator.

Secondly, UNCITRAL's mandate is to further, and not to restrain, the development of international trade. In a recent comment on Kluwer Mediation Blog, Charlie Irvine said that *"our most radical contribution to the justice system is developing an approach, both philosophy and technique; not necessarily creating a new profession determined to capture a slice of the market."*

I wish to push Charlie's idea further, and say that the business community already has the approach, philosophy and technique. What it lacks is a reliable international framework.

In his Singapore Mediation Lecture of 2014, Brad Berenson (the Vice President and Senior Counsel for Litigation and Legal Policy of General Electric) explained why mediation will play an essential role in the future for resolving business disputes: every dollar that goes to the cost of disputes is a dollar less for business, or a dollar more for its customers. As a commercial proposition, litigation/arbitration may provide needed predictability in some cases, but imposing this cumbersome and expensive process is not the ideal solution for a large share of international commercial disputes.

For mediation to be as equally viable as arbitration, however, it should be put on the same footing in terms of uniform enforceability. A convention harmonizing the enforcement mechanisms would represent a significant leap forward in this direction.

In 1958, UNCITRAL gave the international commercial world one of the most successful conventions in the history of the UN – the New York Convention.

Today, almost 60 years later, UNCITRAL is again invited to give the international business community what it needs – an even faster, cheaper and reliable mechanism to resolve disputes. The eyes of the business community are on UNCITRAL, as we wait for it to be in 2016 what it was in 1958 – the agent of reality.

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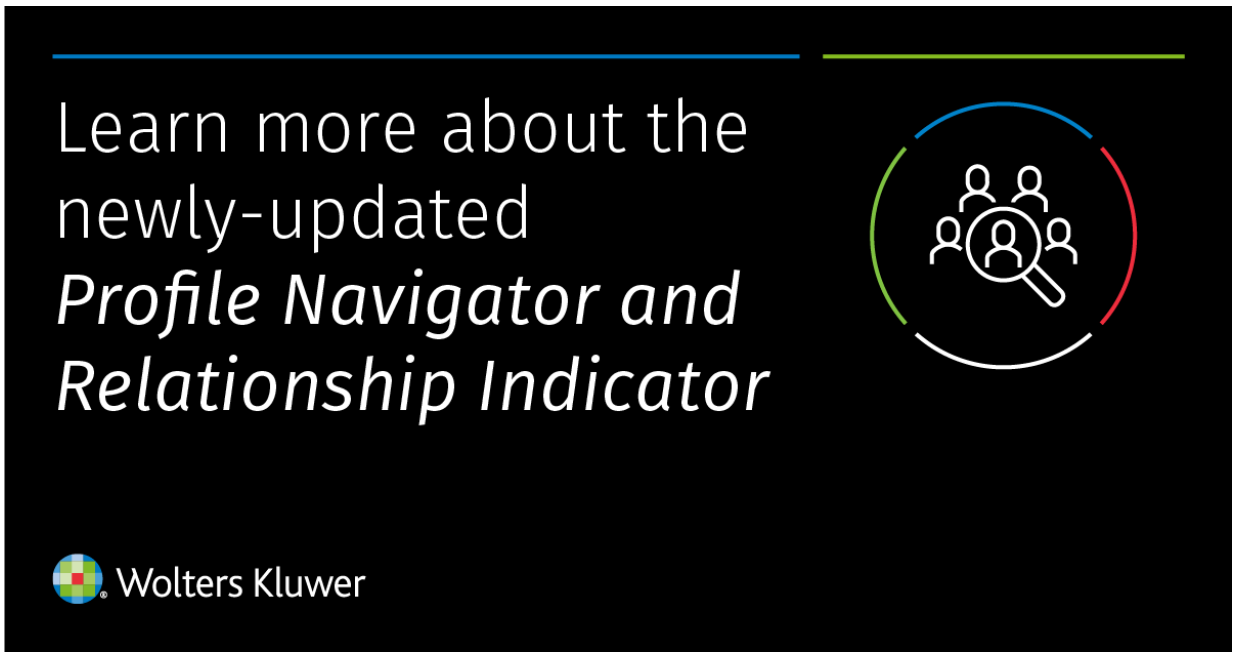

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