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UNCITRAL and the enforceability of iMSAs: the debate heats up – Part 2

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The 65th session of the UNCITRAL Working Group II on arbitration and conciliation in Vienna has commenced. Many mediators have been keenly monitoring the Working Group's deliberations and discussions concerning the enforcement of international commercial settlement agreements resulting from conciliations (iMSAs).

An unresolved but crucial question is the exact form that the final instrument should take. One option is a multilateral convention, analogous to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for arbitral awards (New York Convention). Dispute resolution practitioners are rather divided on this move. The tendency, as in all conflicts, has been to be positional on either view on this matter.

Yet, all mediators will be aware of the need to dig deeper to understand the concerns underlying the debate. In this four-part series of posts – jointly written with Nadja Alexander and Anna Howard – we seek to crystallise the key concerns about the move towards a multilateral convention. We have grouped the concerns under four clusters:

1. the legitimacy of such a convention;
2. the impact of such a convention on the objectives of, and values underpinning, the mediation process;
3. the justifications for a convention; and
4. the application of an arbitration enforcement framework to iMSAs, particularly in light of recent trends in arbitration.

In this second post, we now focus on the impact of a convention on the objectives of mediation, a subject which will undoubtedly be close to many mediators' hearts.

A convention which is meant to support the use of mediation ought to be consistent with the nature, underlying values and objectives of the mediation process. But challenges inevitably arise because of the confidential, consensual, flexible and informal nature of mediation, as well as its strong philosophical underpinnings of party autonomy and mediator neutrality. Can such a unique process ever be subject to strict rules of enforcement without losing its essential qualities? This is probably the most fundamental question that the Working Group and other dispute resolution

practitioners have to address in order to arrive at a satisfactory outcome. Let us unpack the issue further.

(A) Concerns about mediation confidentiality

Confidentiality can be said to be a hallmark of the mediation process, one which distinguishes it from adjudicatory dispute resolution processes. Mediation confidentiality provides a safe space for disputants to candidly share their thoughts, with the assurance that all their discussions will be shielded from public scrutiny. Confidentiality is one of the key characteristics of mediation that makes it an attractive dispute resolution process.

A convention to enforce iMSAs is likely to introduce enforcement mechanisms, together with grounds to challenge enforcement. Once these grounds are raised, the mediation process will inevitably be scrutinised by the courts, resulting in an erosion of confidentiality.

The Working Group in its latest note for the current meeting acknowledged that disclosure during the enforcement process may be at odds with the confidential nature of the mediation process. For instance, one of the defences to enforcement in the proposed draft provision 8(e) states: "The conciliator failed to maintain fair treatment of the parties, or did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence." An argument premised on this defence will certainly entail the disclosure of communications made during the mediation.

Nevertheless, this tension between enforcement and mediation confidentiality is not new. Many countries' domestic jurisprudence have wrestled with these clashing needs and sought to strike a balance. Mediation confidentiality has never been upheld absolutely; various jurisdictions have carefully calibrated exceptions to mediation confidentiality.

For example, the UK common law allows for admissibility of "without prejudice" communications to determine whether a settlement was reached (for the purpose of enforcing the settlement), or to show that an apparent agreement should be set aside on the ground of misrepresentation, fraud or undue influence (Unilever Plc v The Procter & Gamble Co. [2000] 1 WLR 2536). "Without prejudice" communications are generally understood to refer to discussions between parties aimed at negotiating a resolution to their conflict, and include communications made in a mediation setting. Section 4 of the USA Uniform Mediation Act also contains a balancing test for the court to decide if the need for the evidence in advancing a defence substantially outweighs the interest in protecting mediation confidentiality.

The challenge in balancing these opposing needs lies in ensuring that mediation confidentiality is not undermined greatly in a wide range of situations. Drawing from some of these approaches, the Working Group could perhaps frame the defences to enforcements narrowly and allow exceptions to mediation confidentiality in very limited circumstances.

(B) Concerns about self-determination, mediator neutrality and "fairness"

Party autonomy and mediator neutrality are two other tenets of the mediation process. The final outcome within a mediation hinges on the disputants' joint decision, and not the mediator's determination of the underlying issues. The disputants decide on whether to settle, and how to settle. Party autonomy or self-determination is one of the significant philosophical underpinnings of the mediation process. Mediator neutrality – a related concept – means that the mediator should remain impartial throughout the mediation and not side with any one disputant. Because the

mediator respects the parties' autonomy, he or she refrains from imposing personal views on them, as long as they have freely consented to the outcome.

Because mediation is a consensual process, the concept of "fairness" has been generally understood to be vastly different from "fairness" in an adjudicative process. Some commentators have pointed out, in this regard, that procedural fairness in mediation is associated with the parties' perceptions on whether they were treated fairly by the mediator, rather than procedural rules. Similarly, the substantive fairness of a mediated settlement is linked to the disputants' views on whether the mediation outcome met all their concerns, instead of being determined by existing law.

We can see how difficulties will abound once we apply the adjudicative meaning of "fairness" within the New York Convention to mediation. Such an understanding of fairness is simply incongruous with the mediation process. Art. V of the New York Convention allows for a review of the arbitral award based on the lack of due process or procedural fairness. Likewise, Art V (1)(b) contains a due process defence of the party being unable to present his case. Is such a defence applicable to mediation, which is not premised on the adversarial process of presenting arguments and obtaining a decision? This is yet another defence in the New York Convention that sits awkwardly with the mediation process.

It is evident that the New York Convention cannot be easily transposed to the mediation context (and we will elaborate more on this in our fourth and final post). At a fundamental level, we may have to question whether "fairness" and "due process" are suitable concepts for the mediation process, or whether they have to be replaced with more appropriate standards. And if the concept of procedural fairness is to be used as a defence to enforcement of iMSAs, we have to articulate what this concept entails in a mediation setting. Several commentators, who have provided guidance on determining procedural fairness within mediation, have been careful to steer clear from notions associated with adjudication. As an illustration, researchers have referred to standards such as the opportunity to express one's views and even-handedness in the mediator's dealing with the parties.

(C) Concerns about creativity and flexibility within the mediation process

Mediation, being an informal and interest-based approach, can often bring about creative and future-oriented solutions, such as an apology or the fulfilment of a future condition. It has been noted that such solutions may not necessarily be "legally" enforceable as court orders or arbitral awards. How can a multilateral instrument accommodate the creative outcomes of mediation?

If enforcement is only allowed in very limited circumstances, disputants may craft their iMSAs narrowly to suit these restrictions. Some commentators have warned that iMSAs will then be deprived of the depth and creativity that could have been possible absent the convention. The convention may end up stifling, instead of accommodating, the creativity that is inherent in the mediation process.

The flexible nature of mediation is also at risk of being undermined. Many common law jurisdictions have been reluctant to regulate aspects of mediation, probably because of the belief that mediation as a flexible and informal process is not amenable to excessive regulation. Indeed, as observed by Nadja Alexander in *International and Comparative Mediation* (Kluwer Law International, 2009) "an enforceability regime could reproduce the very legalities which parties have eschewed in the mediation." Too many rules about what kind of mediation is enforceable and

defences to enforcement may well frustrate the malleable nature of mediation.

It appears that these issues have not been fully resolved at the Working Group level. In an earlier 2015 meeting, these concerns were alluded to in the following two passages:

(i) “It was said that the type of obligations stipulated in a settlement agreement might be broad. Elements of complexities pertaining to settlement agreements were mentioned, such as reciprocal obligations, or conditions for the implementation of obligations that would render enforcement more complex. It was also stated that settlement agreements usually contained dispute settlement clauses to resolve disputes arising from the agreement.” (para 34)

(ii) “It was mentioned that the introduction of an enforcement mechanism for settlement agreements could blur the distinction that currently existed between arbitration and conciliation by adding more formal requirements to conciliation.” (para 30)

The existing legal challenges in enforcing unusual iMSAs may well be an issue that cannot be resolved at this juncture. Even the current domestic laws are unable to accommodate enforcement of unusual MSA terms such as an apology. Disputants have already been crafting their settlement agreements to suit the present legal challenges relating to enforcement. Member states are unlikely to agree to create new enforcement methods that their own domestic laws do not provide for.

Nonetheless, the difficulty may not necessarily be as insurmountable as it seems. Mediators would be familiar with research showing high compliance rates for iMSAs, probably because of the parties voluntarily crafting and agreeing to the terms of settlement. In my personal experience as a mediator, the disputants arrived at creative and novel settlements usually when there is a high degree of trust and confidence in each other’s commitment to compliance. In such circumstances, breaches of the unconventional terms of settlement seldom arises after the mediation. Is this the same situation for international iMSAs, and can it be concluded that there is no pressing need to create specific enforcement mechanisms for creative iMSAs? This is where more detailed empirical research may inform and assist the Working Group.

We have highlighted but a few potential effects of a multilateral convention on the mediation process, in the hope of conveying the importance of maintaining the essence of the mediation process. Difficult but significant questions have to be explored concerning the nature of mediation, the current enforcement processes and how enforcement can be tailored to fit the exact contours of the mediation process. The UNCITRAL Working Group has no easy task of facilitating these discussions and mediating between the opposing perspectives. But we trust that such conversations on the deep-seated concerns underlying the debate will eventually bear fruit and result in workable solutions for all.

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