Kluwer Mediation Blog

UNCITRAL and the enforceability of iMSAs: the debate heats up – Part 4

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"*…the mounting global hubbub surrounding mediation, and highly varied perceptions regarding the nature and value of mediation, underscore the need for thoughtful conversation and deliberate reflection on present trends and tendencies. The failure to periodically step back and take stock of where we are and where we are going increases the likelihood of behavioural 'drift' – that is, action that becomes increasingly reflexive as opposed to deliberate*." Thomas J. Stipanowich, 'The International Evolution of Mediation: a call for dialogue and deliberation'

As the 65th session of the UNCITRAL Working Group II on arbitration and conciliation draws to a close today, so too does our series of posts which has reflected on the issues likely to have been discussed and debated in Vienna. In this fourth and final post we consider the application of an arbitration enforcement framework to international mediated settlement agreements (iMSAs) particularly in light of recent trends in international arbitration.

Stipanowich's appeal above to reflective, rather than reflexive, action has broad resonance. In this post, we focus on the potential relevance of these words to the current reliance on international arbitration to offer up a solution for the allegedly low levels of international mediation.

At the risk of over-simplification, the argument goes that it was the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1957 (the New York Convention) that established, and sustains, international arbitration as a popular dispute resolution process for international disputes. So, if this worked – and works – for international arbitration, why not adopt something similar for international mediation which, it seems, is not enjoying such popularity? It has been argued that until international mediation enjoys an equivalent enforcement mechanism, international mediation will remain less attractive than arbitration.

Some questions

There is, of course, the threshold question of whether we can attribute international arbitration's rise to prominence and popularity solely to the New York Convention: what else might have led to, and sustains, arbitration as a popular choice for international dispute resolution?

There is then the question of whether it is appropriate to look to international arbitration for a way in which to increase the uptake of international mediation given the fundamental differences

between these two dispute resolution processes. Put simply, what worked for arbitration might not work for the very different process of mediation. As noted in our second post, the consensual and voluntary nature of mediation – in contrast to the adjudicatory nature of arbitration – calls into question the need for an enforcement mechanism. Given that the parties themselves determine whether or not they reach a settlement, and the terms of any such settlement, there may well be a likelihood of compliance with the settlement. Indeed, this point has recently been noted by the European Commission in its report on the EC Directive on mediation in civil and commercial matters: "*Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. It is more likely that parties voluntarily comply with agreements resulting from mediation. These benefits are even more pronounced in cross-border situations*."

And finally, there is the question – which, it seems, has not received much attention – of what are the present trends and tendencies in international arbitration which might inform UNCITRAL Working Group II's continuing discussions on a proposed convention on the enforceability of iMSAs. It is this issue which will be the focus of the remainder of this post.

Present trends and tendencies

So, what is happening in the international arbitration arena which may be of relevance?

Recent research by the School of International Arbitration of Queen Mary University of London identified that: "*A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ('due process paranoia').*" (page 2)

Queen Mary's study adds that "*Many interviewees described situations where deadlines were extended, fresh evidence was admitted late in the process, or other disruptive behaviour by counsel was condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge. Notably, even arbitrators identified this phenomenon as both problematic and commonplace. Indeed, many revealed in interviews that this concern has influenced decisions they have made when sitting as arbitrator. Interviewees were generally sympathetic to the reasons behind the tribunals' caution. However, they often expressed the view that some of arbitration's more prevalent problems, such as lack of speed and increased cost, are partly rooted in this due process paranoia*." (page 10)

Why is this recent trend in international arbitration relevant to our discussions on a convention on the enforceability of iMSAs?

First, it reminds us that an enforcement convention cannot guarantee direct enforcement: there will be limited grounds, as there are under the New York Convention, under which the enforcement of an iMSA could be challenged. So, if parties to iMSAs tend not to comply with their agreements – as seems to be suggested by the push towards a convention on the enforceability of iMSAs, though there appears to be no empirical data to support this – a convention may not necessarily bring an end to any such problems of compliance. Put simply, and perhaps cynically, there will still be wriggle room even with such a convention. If the parties wish to renege on their agreement, an enforcement mechanism may not prevent them from doing so.

Secondly, as the research has identified, grounds for challenge can affect – or we might say infect – the process, in the case of international arbitration resulting in what has been termed "due

process paranoia." One of the draft grounds of challenge to direct enforcement which UNCITRAL is currently considering for iMSAs certainly has a "due process" flavour to it. Article 8(1)(e) of UNCITRAL's draft instrument 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*."

Can we sense a collective concern? How will "fair treatment of the parties" be determined? Could a mediator spending more time with one party in caucus sessions (where the mediator meets separately with each party) be unfair treatment of the other party? And what about a perception that a mediator reality tests one party's view more than another's? Is that unfair – or fair – treatment? And who will determine "fair"? How will the requirement to treat parties fairly – whatever that might mean – alter the way in which mediators mediate? What might fall within "circumstances likely to give rise to justifiable doubts as to the mediator's impartiality or independence?" At what point does a doubt become "justifiable"? And there are more questions…

As noted in our second post, there are characteristics of the mediation process which raise significant challenges for any basis of challenge to direct enforcement which touches upon the way in which mediation is conducted. These characteristics include the confidential nature of mediation, its flexibility, its voluntary nature, the focus on party self-determination and, of course, the use of caucus sessions. As UNCITRAL Working Group II continues to review the draft instrument on direct enforceability of iMSAs, the current trend of "due process paranoia" in international arbitration encourages us to continue to ask how the various grounds of challenge might sit with the unique characteristics, and opportunities, of the mediation process.

Reflexive or reflective action?

If there is a tendency for parties to not comply with iMSAs – though there does not seem to be empirical data which suggests that this is the case – is a convention on the enforceability of iMSAs the only, or the best, way in which to address this tendency? Might we be being "reflexive" in borrowing one element (an enforcement mechanism) from international arbitration to address a supposed problem with international mediation? If there is an issue with compliance, in addition to considering a convention on the enforceability of iMSAs, might we also try to establish why parties choose to not comply with their agreements? Could we look more broadly to the various stages and elements of the mediation process, for example, how the parties entered into the process, how it was conducted and how it was concluded, for insights into the reasons why parties renege on their agreements? We could then seek to address these reasons. Adopting an external enforcement mechanism might not be the only – or most effective – way to reduce the likelihood that parties will walk way from their agreements. And, if we think of the broader purpose of a convention on the enforceability of iMSAs, such a convention might not be the only – or best – way to promote cross-border mediation.

There has been much for UNCITRAL's Working Group II to consider in Vienna. We will eagerly await the outcome of these discussions.

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