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PERSPECTIVES

ARE WE ON THE CUSP OF A
MEDIATION EXPLOSION?BY **LAURA A. KASTER**

> APPROPRIATE DISPUTE SOLUTIONS

On two bitterly cold days in February 2015, on the island of Manhattan but outside the territory of the City of New York, the United Nations Commission on International Trade Law (UNCITRAL) met in a hearing room at the UN to decide whether the US proposal for a convention on the enforcement of settlements reached in conciliating or mediating cross-border commercial disputes should be further explored. The proposal asks Working Group II (Conciliation and Mediation) to consider a convention analogous to the New York Convention on arbitral awards. The New York Convention is codified in the US in the Federal Arbitration Act. 9 U.S.C. § 201 et seq. That convention, first adopted in June 1958, has now been signed by over 145 countries.

The significance of the proposal can only be understood in the context of the impact that the

New York Convention has had in the arbitration world. Because court judgments in foreign jurisdictions do not enjoy ease of enforcement comparable to the expedition of the convention, arbitration has become the preferred mechanism for resolving international disputes. The result has been the creation of an entire international economy involving facilities, arbitral institutions, arbitrators and arbitration practitioners. Countries and cities vie to create the most favourable seats and rules for this business of dispute resolution. New York has participated in this economy, Miami has a centre and there are others around the country. London, Paris, Singapore, and other foreign venues compete for this business.

In most domestic disputes, mediation, conciliation and settlement play a very significant role and provide a less costly alternative to completing the

entire process. However, because mediated or conciliated settlements of international disputes have no special status and are treated as contracts subject to contractual defences when enforcement is sought, mediation and conciliation are seen to be seriously underutilised in international disputes. Indeed, the EU has issued a directive, directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters, in an effort to increase the use of mediation in cross-border disputes.

But the directive leaves the means of enforcement to the member states.

Multinational corporations and businesses with a heavy international component want something more certain and clear. Professor S I Strong of the University of Missouri School of Law has conducted

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a survey in which 74 percent of the respondents said they believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation, while a further 18 percent of respondents believed that it could possibly do so.

Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93 percent of respondents would be more likely – either ‘much more likely’ or ‘probably’ – to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements. Over 87 percent of those surveyed thought a widely ratified convention could ‘definitely’ or ‘possibly’ make it easier for commercial parties to come to mediation in the first place, and over 90 percent thought that the absence of an international enforcement mechanism presents an impediment to the growth of mediation for resolving cross-border disputes. Additionally, the US Council for International Business, the US branch of the International Chamber of Commerce (ICC), expressed the view that a convention would be useful.

Although there were significant concerns expressed by Germany and some other countries at the February meeting about the need for a convention, the need for due process and fairness protections, and the scope of its provisions, Working Group II will move forward to determine whether a convention is the best mechanism and whether the expressed concerns can be dissipated or addressed.

If a new international convention on mediation and conciliation can be fashioned, there will be a worldwide increase in the use of mediation. The explosion in use will bring changes and additional demands for credentialing and process definition, at least for international mediation. Anyone interested in the world of ADR should keep their eye on this process as there may be a revolution in the making.

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Laura A. Kaster

Arbitrator/Mediator

Appropriate Dispute Solutions

T: +1 (609) 921 0095

E: lkaster@appropriatedisputesolutions.

com