

ADR Tools

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simply agree to mediate and, if necessary, to arbitrate, after the mediation step has been exhausted.

- Second, one of the reasons given for *Thione's* bright-line rule requiring a binding award is that an enforceable award relieves congestion in court. Nevertheless, an exclusive arbitration clause, which the *Thione* court would uphold, can lead to one of two outcomes: a decision by binding award or a negotiated settlement. A med-arb agreement likewise involves the same two

possible outcomes: either an agreement is reached in the mediation phase or an award is imposed in the arbitration phase. Whether by agreement or award, the med-arb process meets the FAA's objectives. Therefore, there is no legitimate reason for courts to refuse to uphold a med-arb agreement on the formalistic basis that it deviates from "classic arbitration."

- Third, as a practical matter, while mediation and arbitration are separate procedures, they are often used as complementary tools to resolve disputes. In recognition of that fact, the rules of the three major providers of domestic arbitration services—*Alternatives'* publisher,

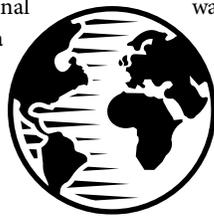
the International Institute for Conflict Prevention & Resolution (CPR rules available at <http://ow.ly/Qfruf>); the American Arbitration Association (available at <http://ow.ly/QfrMs>), and JAMS (available at <http://ow.ly/Qfs7K>)—each provide for mediation as an adjunct to arbitration. In their respective model rules, all three include provisions permitting parties to request mediation at any point during the arbitration process. See, respectively, CPR Administered Arbitration Rules Rule 21; AAA Commercial Arbitration Rules and Mediation Procedures Rule R-9, and JAMS Comprehensive Arbitration Rules & Procedures Rule 28. 

ADR Growth

Will There Be a Vast Worldwide Expansion Of Mediation for International Disputes?

BY LAURA A. KASTER

From February at Turtle Bay in Manhattan, the site of the United Nations, to July in Vienna, Austria, the United Nations Commission on International Trade Law has been considering a tectonic shift in the treatment of mediated and conciliated settlements for international or cross-border commercial disputes.



This year, UNCITRAL's Working Group II (Arbitration and Conciliation) held a winter session at the United Nations in New York, which was set to be followed by this summer's Vienna meeting, of the full commission, to consider how it could move forward on a proposal for a convention on the enforceability of settlement agreements resulting from international commercial conciliation and mediation.

The goal, proposed by the United States, is a treaty similar to the New York Convention that propelled the advancement of international arbitration. The U.S. explained that

solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

UNCITRAL A/CN.9/WG.II/ WP.188, Settlement of commercial disputes: enforceabil-

ity of settlement agreements resulting from international commercial conciliation/mediation—Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings—Comments received from States, at p. 8 (Dec. 23, 2014) (available with the Working Group II papers at <http://ow.ly/PY6O5>) (referred to below as "UNCITRAL Comments by States").

In the international arbitration world, the New York Convention has been a seminal force for development of arbitral institutions, centers of international dispute resolution, and law. This has resulted in significant, vibrant economic activity.

For example, arbitral institutions compete around the world for business by trying to make themselves effective seats for arbitrations.

Codified in the United States in the Federal Arbitration Act, 9 U.S.C. § 201, et seq., and first adopted in June 1958, the New York Convention has now been signed by at least 149 countries. See <http://ow.ly/PY7TF>. It permits enforcement of arbitration awards as judgments subject only to limited challenge around the world. International arbitral awards are far

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more readily enforceable than the judgments of foreign courts.

For that reason, multinational corporations and businesses increasingly engaged in international commerce routinely include arbitration in their business-to-business agreements as the method of choice for resolving international business disputes.

Most businesses recognize, however, that, as with both court and arbitrated disputes, early settlement before the full brunt of preparation and hearing costs is felt can be a more efficient solution. Multinationals are therefore looking for resolution earlier in the dispute to control costs and to salvage relationships.

Despite the rise of mediation in domestic disputes, international mediation and conciliation are underutilized at least in part because it is not clear that the product of these processes can result in an enforceable instrument. When all that results is a contract subject to further court process if parties do not cooperate, it may be more efficient to complete the arbitration process.

ENFORCEMENT SURVEY

University of Missouri-Columbia School of Law Prof. S. I. Strong has conducted a survey in which 74% of the respondents believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation, with another 18% believing that it could possibly do so. S.I. Strong, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation," at 44 (abstract and paper available at <http://ow.ly/MMhBs>.) See also "Research Preview Provides Rare Mediation User Data in the International Arena," 22 *Alternatives* 92 (June 2015).

Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute, a nonprofit that advocates for improved neutrals' accreditation and wider mediation use, found that more than 93% 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.

More than 87% of respondents thought a widely ratified convention could "definitely" or "possibly" make it easier for commercial parties to come to mediation in the first place. More than 90% thought that the absence of an international enforcement mechanism presents an impediment to the growth of mediation for resolving cross-border disputes. See the IMI survey at <http://ow.ly/PY91R>.

For these reasons and others, the United States has proposed that the working group consider the feasibility and possible terms of a convention that would look to the New

A Potential ADR 'Explosion'

The subject: The United Nations tackles enforcement of mediation agreements, exploring a treaty, which could be a boon to the business.

The challenge: Reconciling the differing status of national mediation environments across borders.

The prospects: UNCITRAL has agreed to move forward on improving international enforcement.

York Convention for a model. If a convention for mediated and conciliated settlements could succeed, the change in the mediation landscape would be enormous. Mediation would gain traction and significance beyond the domestic sphere.

There would truly be an explosion of mediation rather than the underutilization that has even caused the European Union to issue a directive in an effort to increase the use of mediation in commercial cross-border disputes. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 (available at <http://ow.ly/PY9pg>). But the directive leaves the means of enforcement to the member states.

The UNCITRAL Model Law on International Commercial Conciliation (2002)(available at <http://ow.ly/PY9D6>) also leaves the

enforcement mechanism to the local jurisdiction, providing a lacuna that has been criticized.

TWO SUBMISSIONS

In advance of February's Working Group II meeting, there were only two written submissions in addition to the U.S. proposal, one by Germany and one by Canada.

The Canadian comment sought to limit any convention enforcement to monetary terms. Because the core of mediation is its ability to go beyond mere monetary resolutions—that is, attempting to expand the pie, rather than just split it—this would be a blow to the concept of mediation itself.

Canada seemed to rethink its position at the meeting, recognizing that many nonmonetary provisions can be enforced even when arbitral awards are concerned. The concern and concept of limiting enforcement to monetary terms, however, had not entirely evaporated from the discussion.

The German comments were more fundamental. They worried about the need for any such convention. The comments suggested that the difference between a mediated or conciliated agreement and a purely negotiated agreement—in other words, any ordinary contract—was not sufficient to justify a particular enforcement mechanism different than one for ordinary contracts. But treating settlements as contracts would subject them to the extreme variety of defenses available under each country's law and deprive the parties of any means to expedite enforcement.

Germany expressed due process concerns that seemed to be based on the fact that there is no neutral decision maker in mediation, as opposed to arbitration, and no one to determine that the agreement is "fair." Some of these concerns seemed to argue for a standard of training and process in mediation, and some seemed to be a fundamental misunderstanding of mediation itself, calling for a decision-maker rather than a facilitator.

The U.S. comments were directed specifically to this point: "[G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the

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process of resolving the dispute, but the result itself is usually imposed on them).” UNCITRAL Comments by States, *supra* at p. 7.

Moreover, as GE Oil & Gas counsel Michael McIlwrath noted in a recent column on *Kluwer Arbitration Blog*, the mediation world already has a standard-making body in the International Mediation Institute, which puts international mediation a step ahead of international arbitration. (Available at <http://ow.ly/PYhLU>.) Process parameters could also be established.

Nevertheless, the German concerns were echoed at the meeting and there was some discussion about whether a convention, rather than guidelines, were the proper outcome for the working group. In February, it was determined that the working group would continue its efforts to determine whether a convention would be possible and whether the concerns expressed could be met.

For this summer’s Vienna meeting of the full commission, UNCITRAL appears to have concluded that Working Group II will continue its efforts, although whether a convention will be recommended, or some other format will be the result, is still unclear.

If a convention/treaty for mediated and conciliated settlements could succeed, the change in the international mediation landscape would be enormous. Mediation would gain traction and significance beyond the domestic sphere.

There had been considerable opposition from EU countries partly on the basis that they believe there is an overlap with work being done at the Hague, and possibly because it represents a loss of national control over the enforcement process. In addition to France and Germany, the skeptics included Austria and Poland.

Some countries were positive on work going forward but expressed the view that a guidance or model law would be preferable to a convention. These included China and possibly Japan.

Other countries believed there was a commercial imperative for the proposed convention, including Ecuador, Argentina, Brazil, Columbia, Israel, Algeria, Egypt, India, the U.S. (specifically stating the Hague conference work was not incompatible), Belarus (subject to controls over quality), Korea, Russia (which said that it is premature to address format), the Philippines, Singapore, Kenya, and Canada,

which had criticized the effort initially and wanted to impose limitations in New York in February.

At the end of the summer Vienna session, the UNCITRAL Secretariat summarized that there seemed to be broad support for Working Group II to continue work on mediation enforcement even if there was no consensus on the instrument to be pursued.

Working Group II will reconvene this month, from Sept. 7-11, in Vienna, to consider its next moves. For agenda details, see <http://ow.ly/PY6O5>.

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Practitioners should keep these developments on their radar because they may presage a great explosion of mediation in the world. We may be on the cusp of much wider use of mediation in cross-border commercial disputes. A new convention could be the engine of transformative change. ■

Court ADR

Take Two: Delaware Tries Again on a New State-Facilitated Arbitration Program

BY COLIN MCGEOUGH

Delaware has launched a new arbitration process with a long and somewhat troubled history. This article will summarize Delaware’s latest attempt at a court-annexed arbitration program via the Delaware Rapid Arbitration

Act (10 Del. C. § 5801 et seq.), referred to in this article as the DRAA.

The summary will be followed by brief historical background on the Delaware Court of Chancery’s arbitration program—which had been established in 2009 and was struck down by the Third U.S. Circuit Court of Appeals two years ago as unconstitutional—and how it relates to the DRAA.

The article concludes with analysis including comments from Vice Chancellor Donald F. Parsons Jr., of Delaware’s Court of Chancery—a non-jury trial court that is the state’s court of original and exclusive equity jurisdiction, and which adjudicates cases involving trusts, real property, guardianships, civil rights, and commercial litigation—to gain insights into the DRAA and what its future may hold.



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