Rome Wasn't Built in a Day: Progress Report on the Creation of a UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements

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Over the past few decades, alternative dispute resolution ("ADR") has become the preferred method of conflict management in the commercial world. Contemporary trends in dispute resolution aim at consolidating ADR in this position by finding an appropriate way to enforce settlement agreements resulting from mediation/conciliation or in the course of judicial or arbitral proceedings.

A topic at the heart of this discussion is whether a legal framework for enforcement of international settlement agreements harmonised at the international level should be established. Many scholars, researchers and practitioners have participated in the discourse of the international professional community (see, for example, in 2015 in The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements – An Idea Whose Time Has Come?)

The door to establish an enforcement mechanism for settlement agreements reached through international commercial conciliation is not only open, but in fact the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (Dispute Settlement) has already taken the first steps through it. In July 2014, the UNCITRAL agreed that Working Group II would put the issue of enforcement of settlement agreements resulting from international commercial conciliation on its agenda. Since then, it has been gathering twice a year to draw up the provisions of the legal framework for such an instrument. Of course, Rome wasn't built in a day, and neither will this legal framework for enforcement of settlement agreements.

At the Vienna Arbitration Days this past February, Natalie Yu-Lin Morris-Sharma, Chairperson of Working Group II shared her insights on the development of a conciliation convention and/or model provisions as a legal framework for the enforcement of settlement agreements. The aim of these tools is to bolster the general application of mediation and to provide for a proper enforcement regime of settlement agreements resulting from it. In fact, an effective enforcement mechanism would allay one of the parties' biggest fears about tedious settlement negotiations: the prospect of a costly case and lengthy litigation or arbitration if one party fails to abide by the settlement terms. Moreover, according to Ms Morris-Sharma, the scope of application of the conciliation convention would not be confined to settlement agreements with mere monetary implications (ie settlement payments), but would also apply to other forms of settlement agreed between the parties (eg return of goods

exchanged under the preceding contract).

It was also explored in Vienna whether with the prospect of enforcing settlement agreements resulting from mediation or ADR in general, consent awards might become obsolete. Having an enforcement regime for settlement agreements at one's disposal would mean that a settlement agreement does not necessarily have to be in the form of a consent award to be enforceable. Accordingly, there might be no demand to "shape" settlement agreements as consent awards. Given this, the new legal framework could further strengthen the importance of ADR in international dispute settlement.

In the course of its latest session held in New York from 6–10 February 2017, Working Group II presented its "compromised proposal" with "a uniform text on enforcement of international commercial settlement agreements resulting from conciliation" (the latest Report of Working Group II (Dispute Settlement) is available here), and resumed its deliberations on the preparation of an instrument for enforcing international settlement agreements resulting from conciliation (the "instrument"). In this context, Working Group II also touched upon settlement agreements concluded in the course of judicial or arbitral proceedings.

Working Group II reiterated its common understanding that settlement agreements resulting from judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards (consent awards) should certainly fall within the scope of the instrument. The same holds true for settlement agreements reached with the mere involvement of a judge or an arbitrator in the conciliation process.

It was also proposed and examined whether to exclude settlement agreements approved by a court, or which have been concluded before a court in the course of proceedings, and which are enforceable in the same manner as a judgment, or recorded as an arbitral award.[fn]Draft provision 1(3): this instrument does not apply to settlement agreements: (a) approved by a court, or (b) that have been concluded before a court in the proceedings, either of which are enforceable in the same manner as a judgment, or (c) recorded and enforceable as an arbitral award.[/fn] In this way, possible gaps or overlaps with existing and future conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the Convention on Choice of Court Agreements (2005), and the 2016 Preliminary Draft Convention on Judgments, under preparation by the Hague Conference on Private International Law could be avoided.

Some members of Working Group II raised concerns that this proposal might create another gap, if it did not provide that a settlement agreement recorded as an arbitral award but not enforceable as an arbitral award would fall under the scope of the instrument: for example, the denial of enforcement of a consent award refused under the New York Convention due to the lack of an underlying dispute. Another question was whether the assessment of enforceability should be subject to (i) the law of the state where the settlement agreement was recorded as a judgment (the originating state) or (ii) in accordance with the law of the state where enforcement was sought. Working Group II affirmed that it should be the law of the originating state, since it would be in accordance with the approach adopted in the 2016 Preliminary Draft Convention on Judgments under preparation.

As a consequence, however, parties might be deprived of the opportunity to enforce a settlement agreement in cases where it was recorded as a judgment or an arbitral award, but the state where enforcement is sought does not permit enforcement under those regimes. Therefore, settlement agreements recorded as a judgment or an arbitral award should be expressly included in the text of the final instrument so as to fall within its scope of application, all the more so as it is common in many jurisdictions for parties to request the court to record a settlement agreement.

Working Group II also expressed a need to clarify in the instrument that settlement agreements

concluded before a court in the course of proceedings but not recorded as judgments would fall under the scope of the instrument to the extent that they were not enforceable in the same manner as a judgment. According to the reasoning of Working Group II, the instrument should not apply to settlement agreements approved by a court, or which have been concluded before a court in the course of proceedings, and which are enforceable in the same manner as a judgment, or recorded as an arbitral award (since they would already be subject to other conventions – see above).

From the above it is clear that (i) mediated settlement agreements resulting from freestanding mediations, (ii) settlement agreements resulting from judicial or arbitral proceedings but not recorded as judgments or arbitral awards, and (iii) settlement agreements reached with the involvement of a judge or an arbitrator would be within the scope of a conciliation convention.

Apparently, only settlement agreements reached with third-party assistance should be subject to a convention on the enforcement of settlement agreements resulting from international commercial disputes. But why should only these settlement agreements be privileged and benefit from an internationally available enforcement process? In fact, both mediated settlement agreements and those resulting from unassisted (private settlement) negotiation are subject to the rules of contract law. Accordingly, some jurisdictions understandably object to the different treatment of these settlement agreements for the purpose of enforcement. Perhaps there is still room for discussion about the inclusion of settlement agreements resulting from unassisted negotiations, ie negotiations that have been conducted exclusively between the parties involved.

With its “compromise proposal” Working Group II has created a sound basis for an effective enforcement regime for settlement agreements. Although many details still require further consideration by the working group members, considerable progress has already been made. It is only a matter of time before settlement agreements resulting from international commercial conciliation are enforceable under a uniform regime. Irrespective of whether this will come in the form of a convention or supplementary model law provisions, it will further bolster mediation and ADR in general and thus lead to a global trend in dispute resolution.