DO WE NEED A NEW YORK CONVENTION FOR MEDIATION/CONCILIATION?

By Lorraine M. Brennan, Esq.

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is viewed by many as one of the most (if not the most) successful commercial treaties to which the United States has become a party. To date, 154 countries have signed the New York Convention (most recently Bhutan, Burundi, Guyana and the State of Palestine), and the treaty is truly global in its scope. While the United States did not accede to the New York Convention until 1970, it has since been one of the leaders in promulgating jurisprudence, which is favorable to international arbitration and played a major role in advancing its use to resolve commercial disputes worldwide. The New York Convention consists of only 16 articles, and the goal of the Convention is two-fold: to enforce the parties' agreement to arbitrate on the front end and to enforce any resulting award on the back end.

With this backdrop in mind, in July 2014 the United States submitted a proposal to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II that it develop a convention on the enforcement of conciliated settlement agreements for international commercial disputes. In February 2015, UNCITRAL Working Group II held meetings in New York, where it considered this proposal with the goal of reporting to UNCITRAL on whether such a project was feasible.

Some of the challenges involved in this undertaking have been reported by observers at the February 2015 meetings. To begin with, do we need such a convention? If we do, what should it look like? Should it model the New York Convention and allow for enforcement at both ends; i.e., enforcement of the agreement to mediate/conciliate and enforcement of the ultimate settlement (if any) reached by the parties? Or should it focus primarily on the settlement agreement itself, bearing in mind that parties do not necessarily come to mediation via a contractual provision to mediate/conciliate. Would such a convention give the parties more confidence in agreeing to use mediation/conciliation? What difficulties would need to be overcome from a procedural standpoint? For example, Article V(1) of the New York Convention provides grounds on which a court can refuse to enforce an arbitral award, including procedural grounds such as lack of notice or the arbitrators overstepping their authority. Article V(2) also provides public policy safeguards for the parties and allows an enforcing court to refuse recognition and enforcement if these grounds are violated. Would these same procedural safeguards need to be included in a convention on mediation/conciliation?

Some of the attendees at the February 2015 Working Group II session put forward the view that mediated/conciliated settlement agreements could be reduced to "consent awards," thereby reducing the settlement to an arbitral award, which would be enforceable under the New York Convention. The obvious downside of that approach is the cost and the delay—parties would have to commence an arbitration, appoint an arbitrator and have that arbitrator sign off on the settlement agreement as a consent award, not to mention that arbitrators may not want to be viewed as a "rubber stamp" for an agreement the parties entered into without the assistance of the arbitrator.

The goal of the proposal by the United States is not to turn mediated/conciliated settlement agreements into arbitral awards, but rather to elevate these settlement agreements via a convention to a status similar to that of an arbitral award under the New York Convention. The belief is that such a convention would encourage the use of cross-border mediation/conciliation by giving theparties confidence that any resulting settlement would be enforceable without the necessity of a breach of contract action in the court at the place where the settlement has not been honored. Hence, there would be significant opportunity for cross-border mediation to continue to grow and provide the parties with the confidence that any agreement reached would be enforceable in signatory countries.

While admittedly there are many issues that remain to be resolved before such a convention might become a reality, Working Group II is scheduled to take up this issue again at its next session in Vienna in the fall. There is no doubt that a lively debate will continue as to the feasibility and desirability of concluding such an undertaking, and those of us who serve as cross-border mediators will await with considerable interest the outcome of these discussions.

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