

# The Future of Legal Harmonization New Horizons for International Commerce

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**“INTERNATIONAL ENFORCEABILITY OF  
SETTLEMENT AGREEMENTS:  
WHAT TO EXCLUDE FOR ITS SCOPE?”**

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# Mediation for International or Cross border Disputes

- **Globalization and growth of international trade and commerce has brought in significant interest to resolution of cross border conflicts**
- **There is intensified focus on mediation, which not only resolves conflict efficiently, informally and consensually, but also addresses the relationship of the parties**



# Mediation for International or Cross border Disputes

**Mediation is regarded as an effective dispute resolution process, where the conflicting parties have the opportunity to express their wishes, needs, aspirations, expectations and interests, and thereby helping to make the best decision for themselves**



# Mediation for International or Cross border Disputes

- In 2002 the United Nations recognized that the use of mediation “results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States
- In the same year UNCITRAL adopted a Model Law on International Commercial Conciliation



# What stops Parties to Adopt Cross-border Mediation?

- **Despite the apparent advantages of mediation, cross-border commercial mediation practice has been slow to develop**
- **2010 survey of European Union (EU) corporations and lawyers indicates:**
  - **75% of mediations in relation to filed cases are successful, however, only 0.5% of filed cases go to mediation**



# What stops Parties to Adopt Cross-border Mediation?

- **2014 study, suggestively titled "Rebooting" the Mediation Directive, concludes:**
  - **The 2008 European Union Directive on Mediation has not achieved its objective of ... promoting the amicable settlement of disputes by encouraging the use of mediation**

# What stops Parties to Adopt Cross-border Mediation?

- **International arbitration remains the process of choice!**
- **In spite of the widespread recognition of the benefits of mediation, why is it that it is so dramatically underutilized?**
- **Diversity of enforcement mechanisms for cross-border MSAs is seen as a major obstacle to the development of global mediation practice**



# What stops Parties to Adopt Cross-border Mediation?

## IMI-inspired international Convention on Shaping the Future of International Dispute Resolution in London conducted in 2014

- Over three-quarters of business users attending the Convention registered support for early resort to mediation, while less than half (44 per cent) of legal advisors agreed





# What stops Parties to Adopt Cross-border Mediation?

- **Lawyers are not supporting the use of mediation in international disputes, primarily because the MSAs are more difficult to enforce across borders than arbitral awards**

## Another School of thought!

- **Mediation is a consensual dispute resolution method, which allows the parties to come to a resolution based on their free will and which they find to be sustainable and perceived as mutually beneficial, why should there be an enforcement mechanism at all?**
- **Why should the parties back out from their resolution commitment?**



# Complexity of Cross-border Mediations

- **Mediation in the field of cross-border disputes shows a high complexity element due to different legislations in different national jurisdictions**
- **Moreover different cultures and legal systems will have contrasting views about mediation and its outcomes**
- **There are no standard rules for international mediation. It depends on what the parties want, and that is partly determined by what is customary in their own countries**



## Complexity of Cross-border Mediations

- **In fact in the IAM/Straus Institute Survey, a vast majority (84.2 per cent) of respondents indicated that attorneys at least sometimes use mediation as a means of continuing the litigation process with no intent to settle**
- **So mediation could be used or conceived differently in different jurisdictions and in cross border disputes unless enforceability is made possible, the credibility of the outcome is not assured**



## Various Views on Enforceability of MSAs

Survey conducted by the International Bar Association's  
Mediation Committee in 2007:

- **“The enforceability of a settlement agreement is utmost important and in international mediation ...reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement”**

## Various Views on Enforceability of MSAs

Survey conducted by S. I. Strong in order to assist the Working Group II in 2014:

- An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation akin to the UN convention would encourage mediation and 18% saying maybe



## Various Views on Enforceability of MSAs

Survey conducted by S. I. Strong in order to assist the Working Group II in 2014:

- **93% said they would be more likely to use mediation and 87% thought it would be easier to come to mediation in the first place if such a mechanism were in place**



## Various Views on Enforceability of MSAs

Survey conducted by the International Mediation Institute (IMI) of internal counsel and business managers to assist the Working Group's deliberations in 2014:

- As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of MSA and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so





# Various Views on Enforceability of MSAs

Survey conducted by the International Mediation Institute (IMI) of internal counsel and business managers to assist the Working Group's deliberations in 2014:

- With respect to whether the absence of any kind of international enforcement mechanism for MSA presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said YES!



## Enforceability Options

- In many jurisdictions, including the United States, the principal method for enforcing MSAs is as a contract
- In some jurisdictions, MSAs can be entered as a judgment
- Even if a court judgment on the MSA is available, in cross border enforcement Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 156 countries that are signatories to the New York Convention



## Enforceability Options

- **This difficulty could be obviated if the MSAs could be given the same status of an arbitral award or can be entered as an arbitral award and be recognized under the established enforcement mechanisms of the New York Convention**
- **But in some jurisdictions appointment of an arbitrator after the dispute is settled may not be possible, because there must be a dispute at the time the arbitrator is appointed**
- **Arbitral award issued by an arbitrator appointed after the settlement would be a nullity**



## Enforceability Options

- **To overcome this , SIMC jointly with SIAC has developed the Arb-Med-Arb Protocol**
- **But again this could be considered as arbitration-centric, as a party will not be able to just invoke mediation. In the Arb-Med-Arb protocol the parties have to mandatorily go for arbitration, if the mediation fails**



## Requirement of an International Convention

- **Diversity of enforcement mechanisms for cross-border MSAs is seen as a major obstacle to the development of global mediation practice**
- **International Convention will enhance the reputation and attractiveness of mediation, especially in jurisdictions where it is less popular and where the perceived unenforceability of outcomes is regarded as a problem**



## Requirement of an International Convention

- **UNCITRAL Working Group is already working to explore the creation of a Convention on the Enforcement of MSAs**
- **It would reinforce the status of mediation as a method of dispute resolution coequal to arbitration and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration**



## Concerns of Uniform Enforceability

**Having seen the contrasting views about mediation and its outcomes and the divergent cultures and legal systems and the varied standards of mediation processes and mediator standards, how do we actually create uniform enforceability?**



## Concerns of Uniform Enforceability

**What are the minimum safeguards that we should have in MSA enforceability?**

- **There has to be an accepted international practice of mediation**

**It should ensure that the participation of the parties are voluntary, the mediator is a neutral and accredited professional mediator who is bound by certain accepted norms of ethical standards. (Like the IMI Certification and IMI Code of Conduct)**





## Concerns of Uniform Enforceability

**What are the minimum safeguards that we should have in MSA enforceability?**

- **There has to be an accepted norm of disputes that could be mediated**

**For example, mediation being used as a cover for transactions intended to launder the proceeds of a crime or to finance terrorist organisations – concerns that are very real in the realm of international commerce**



## Concerns of Uniform Enforceability

**What are the minimum safeguards that we should have in MSA enforceability?**

- **There has to be an accepted legal requirement of the MSA**

**MSA should ensure that the fundamental legal requirements to a contract are complied with, giving broad legal recognition to the legal system and rule of law**



## Concerns of Uniform Enforceability

**What are the minimum safeguards that we should have in MSA enforceability?**

- **There has to be an opt-in or opt-out feature allowing parties to choose if the convention would apply**

**The parties signing the MSA, have to specifically state that they have understood the terms of the settlement and wish to have enforceability under the convention or not**



*Thank You*



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