

# CHAPTER 4

## ENFORCING INTERNATIONAL MEDIATED SETTLEMENT AGREEMENTS

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### **I INTRODUCTION**

Unlike adjudicatory dispute resolution processes, mediation does not result in a binding outcome. Mediation parties exercise the right of self-determination to formulate settlement terms that they can live with, which are, in turn, conducive to compliance. Compliance of a mediated settlement agreement depends on the good will of the parties. Reported judgments on domestic mediation indicated that there is no bar from re-negotiation after settlement agreement has been reached.<sup>1</sup> Even clearly drafted settlement terms may require further interpretation by the mediator or the court.<sup>2</sup> In the United States (the "US"), enforceability of mediated settlement agreements constitutes the most frequent source of litigation about the process.<sup>3</sup> The uncertainties over the effect of mediated settlement agreements could create an impediment to promoting mediation in resolving civil and commercial disputes at domestic, regional and international levels.

The European Union was the first and the only to achieve certainty in this area. It pioneered harmonisation of mediation regulation in its Member States through the Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (the "Mediation Directive" or the "Directive"). All States implemented the

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1 *Lange v Marshall* 622 S.W.2d 237 (Mo App 1981).

2 *Tapoohi v Lewenberg* (No 2) [2003] VSC 410; *McCosh v Williams* [2003] NZCA 192.

3 James R Coben and Peter N Thompson "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 *Harvard Negotiation Law Review* 43 at 73-77.

Mediation Directive, with the exception of Denmark which opted out of it. The Directive obliges Member States to render a written settlement agreement resulting from cross-border mediation enforceable if all parties so request.<sup>4</sup> The choice of enforcement mechanism is left to individual States.<sup>5</sup> A Member State can resist enforcement only if the content of a mediated settlement agreement is contrary to its law or if its law does not provide for the enforceability of that content.<sup>6</sup> A mediated settlement agreement which has been made enforceable in a State should be recognised and declared enforceable in other States in accordance with applicable Community or national law.<sup>7</sup> Outside of this economic and political union, enforceability of settlement agreements resulting from international mediation remains a matter of domestic law.

Recently, this topic has gained renewed interest in the UNCITRAL. At the forty-seventh session in July 2014, a US proposal was tabled which suggested to develop a multilateral convention on conciliation modelled on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), on the grounds that the lack of easy enforceability of international commercial settlement agreements may impede greater use of the process and lead to duplicative litigation.<sup>8</sup> The UNCITRAL took the US proposal seriously. At the forty-eighth session in June/July 2015, it mandated its Working Group II (the "Working Group") to identify relevant issues on the topic of enforcement of settlement agreements resulting from international commercial conciliation and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts.<sup>9</sup> In September 2015 and February 2016, the Working Group elaborated on six issues that the intended instrument would need to address: (i) the nature, content,

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4 Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136/3 recital 19; art 6(1).

5 At art 6(2).

6 At recital 19; art 6(1).

7 At recital 20; art 6(4).

8 United Nations Commission on International Trade Law *Planned and Possible Future Work - Part III, Proposal by the Government of the United States of America: Future Work for Working Group II* (Secretariat, A/CN.9/822, July 2014); see also United Nations Commission on International Trade Law Working Group II *Settlement of Commercial Disputes: International Commercial Conciliation - Enforceability of Settlement Agreements* (Secretariat, A/CN.9/WG.II/WP.190, Sept 2015) at para 2.

9 United Nations *Report of the UNCITRAL on the Work of its Forty-Eighth Session* (General Assembly Official Records, A/70/17, July 2015) at para 142; see at A/CN.9/WG.II/WP.190, above n 8, para 7.

formalities and other requirements of settlement agreements; (ii) agreement to submit a dispute to conciliation; (iii) recognition of settlement agreements; (iv) direct enforcement or review mechanism as a prerequisite for enforcement; (v) defences to enforcement of settlement agreements; and (vi) possible form that the instrument could take.<sup>10</sup> This chapter explores the bases for favouring mediated settlement agreements over ordinary contracts. It then scrutinises the justifications for establishing an international legal framework for enforcement of mediated settlement agreements and the Working Group's views on the critical issues to be addressed in the proposed instrument. It concludes by considering how such an instrument would perform better than existing domestic regimes in terms of form and content.

## **II BASES FOR DIFFERENTIAL TREATMENT**

Mediated settlement agreements are by nature private contracts. From a micro-level perspective, they are different from ordinary contracts in three ways. First, parties to a mediated settlement agreement were embroiled in a dispute. They engaged in a consensual dispute resolution process, negotiated in good faith and reached a voluntary settlement. The settlement agreement typically represents full and final settlement of the dispute that was the subject matter of mediation. If desired, it may also bring all disputes between the parties to an end. In effect, mediated settlement agreements extinguish the right to pursue legal remedies to which the parties would otherwise be entitled.<sup>11</sup> They therefore deserve a special procedure for enforcement over and above ordinary contracts.

Secondly, mediation is a structured process governed by procedural rules. Mediation rules set out, among other things, voluntary participation of the parties, neutrality of the mediator and confidentiality of mediation communications. Neutrality requires mediators to treat parties without bias, act independently and show no interest as to the outcome of the dispute. The presence of mediators is not only essential for facilitating negotiation and drafting settlement terms, but also preventing abuse and possible irregularities in the process.<sup>12</sup> If mediation parties perceive that the dis-

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10 United Nations *Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Third Session* (General Assembly, A/CN.9/861, July 2014) at pt IV; United Nations *Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Fourth Session* (General Assembly, A/CN.9/867, July 2016) at pt V.

11 Ellen E Deason "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001) 35 *University of California at Davis Law Review* 33 at 75.

12 Chang-Fa Lo "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7 *Contemporary Asia Arbitration Journal* 119 at 123-124.

pute resolution process is fair, they tend to be satisfied with the negotiation experience and accept the outcome. Hence, procedural justice lends support to an exclusive enforcement mechanism for mediated settlement agreements.

Thirdly, non-compliance of a mediated settlement agreement constitutes a breach of contract. It could prompt the innocent party to ask the court or appoint an arbitrator to implement or enforce the settlement terms. Such kind of conduct reinforces the underlying preference for adjudicatory processes which generate binding outcomes. An enforcement mechanism for mediated settlement agreements would enhance finality of a successful mediation, which in turn respects party autonomy as to the choice of dispute resolution process and determination of the outcome of their case.

From the macro viewpoint, there have been growing enthusiasm in mediation in various parts of the globe. A common application is to supplement court adjudication as part of the civil justice reform or dispute system design in government bureaux. The UNCITRAL has also been supporting the increased use of mediation, which could yield benefits such as maintaining commercial relationships, administering international transactions by commercial parties and producing savings in the administration of justice by States.<sup>13</sup> Bringing certainty to the enforcement procedure would make mediation a more efficient means for resolving civil and commercial disputes.<sup>14</sup> It would also encourage disputants to use mediation and consider investing resources in the process.<sup>15</sup>

### **III JUSTIFICATIONS FOR AN INTERNATIONAL FRAMEWORK**

Current domestic legislative frameworks demonstrate four common means of enforcing mediated settlement agreements. Where there is no specific legislation on enforcement, mediated settlement agreements are treated as private commercial agreements and enforced under contract law.<sup>16</sup> In jurisdictions that have legislative

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13 United Nations *Report of the UNCITRAL on International Trade Law on the Work of its Thirty-Fifth Session* (General Assembly, A/57/562, November 2002) 57/18.

14 United Nations Commission on International Trade Law *Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Second Session* (General Assembly, A/CN.9/832, February 2015) at paras 17-18.

15 *Ibid.*

16 UNCITRAL, 'Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)' para 89; United Nations Commission on International Trade Law Working Group II (Arbitration and Conciliation) *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation* (General Assembly, A/CN.9/WG.II/WP.187, February 2015) at para 21; United Nations Commission on International Trade Law, see above n 8 at para 13.

provisions on enforcement, three approaches to expedited mechanism emerge.<sup>17</sup> First, mediated settlement agreements can be enforced as court judgments. Generally, certain formalities are to be satisfied. For instance, a mediated settlement agreement can be enforced summarily if signed by the mediator or legal representatives of the parties and contained a statement expressing the parties' intent to seek summary enforcement. Deposition or registration of a mediated settlement agreement before the competent court provides another good example. Secondly, mediated settlement agreements can be enforced once notarised according to the regime applicable to notarised documents. Thirdly, mediated settlement agreements can be transformed into arbitral awards for the purpose of enforcement. At the conclusion of a successful mediation, the parties may establish an ad hoc arbitration and appoint an arbitrator to issue a consent award based on the settlement agreement.

The UNCITRAL noted these legislative trends when adopting the Model Law on International Commercial Conciliation 2002 (the "Model Law on Conciliation" or the "Model Law"). It concurred with the general policy to promote easy and fast enforcement of mediated settlement agreements.<sup>18</sup> But it foresaw difficulties to harmonise domestic legislation. Therefore, article 14 of Model Law on Conciliation recognises the principle that mediated settlement agreements should be binding and enforceable, leaving issues of enforcement, defences to enforcement and designation of competent authorities from which enforcement might be sought to applicable domestic law.<sup>19</sup> Domestic legislative frameworks have continued to develop along similar paths since then, as reflected in 14 responses to a questionnaire circulated by the UNCITRAL Secretariat to 60 Member States in August 2014 and February 2015.<sup>20</sup> Is it timely to introduce an international framework for enforcement? Are there any

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17 Guide to Enactment of the Model Law on Conciliation, above n 16, paras 90-91; A/CN.9/WG.II/WP.187, above n 16, paras 20-30; A/CN.9/WG.II/WP.190, above n 8, paras 13-14.

18 Guide to Enactment of the Model Law on Conciliation para 88, above n 16.

19 Ibid.

20 Note by the UNCITRAL Secretariat, 'Settlement of Commercial Disputes: Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation - Compilation of Comments by Governments' (A/CN.9/846); Note by the UNCITRAL Secretariat, 'Settlement of Commercial Disputes: Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation - Compilation of Comments by Governments' (A/CN.9/WG.II/WP.191); Note by the UNCITRAL Secretariat, 'Settlement of Commercial Disputes: Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation - Compilation of Comments by Governments' (A/CN.9/WG.II/WP.196); Note by the UNCITRAL Secretariat, 'Settlement of Commercial Disputes: Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation - Compilation of Comments by Governments' (A/CN.9/WG.II/WP.196/Add.1); see also A/CN.9/WG.II/WP.187, above n 16) paras 20-30.

changes of circumstances and other compelling reasons to justify intervention where domestic regimes dealt with this issue, albeit inharmoniously?

The US proposal tabled before the UNCITRAL merely referred to strong support from initial consultations with the domestic private sector.<sup>21</sup> It did not demonstrate a practical need for an international mechanism on enforcement. It lacked empirical data to identify the reasons for and extent of non-compliance of international mediated settlement agreements, even though data collection could be barred by the principle of confidentiality. But it broached the topic of supra-national development rather than harmonisation of domestic legislation.<sup>22</sup> It put forward the main policy consideration in favour of an international enforcement mechanism, which is to increase the attractiveness of mediation. Parties to a mediated settlement agreement might find cross-border enforcement under contract law burdensome and time-consuming.<sup>23</sup> They might pursue duplicative litigation in more than one jurisdictions if unsuccessful.<sup>24</sup> An international mechanism on the enforcement process would obligate competent authorities to enforce mediated settlement agreements emanating from other jurisdictions and restrict the grounds on which they can decline enforcement.<sup>25</sup> Such a centripetal influence would confer certainty and promote finality in the settlement of cross-border disputes, which does not depend solely on domestic law.<sup>26</sup> The existence of an international enforcement regime would also constitute a significant inducement for parties to voluntarily perform their settlement terms without the need for any external intervention.

There are other policy factors that cast doubt on the desirability of developing an international enforcement mechanism. Regulatory intervention in mediation meets with reluctance in many States, in order to maintain flexibility and informality of the process, encourage responsiveness to parties' interests and circumstances, and accommodate various models of mediation in practice.<sup>27</sup> Further, mediation can generate options which do not conform to legal rights and duties. Terms in mediated settlements may be relational, future-focused and contingent in nature. They are not

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21 A/CN.9/822, above n 8, Annex.

22 A/CN.9/822, above n 8.

23 A/CN.9/822, above n 8, Annex.

24 *Ibid.*

25 Laurence Boulle "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework" (2014) 7 *Contemporary Asia Arbitration Journal* 35 at 59.

26 *Ibid* at 59-60.

27 Boulle, above n 25 at 61-62.

amenable to enforcement, which might otherwise stifle the depth, creativity and richness of a mediated settlement agreement.<sup>28</sup> Additionally, confidentiality of mediation communications may be subject to modification in the enforcement mechanism.<sup>29</sup> This may occur when the enforcing authority is asked to consider possible grounds for resisting enforcement. All these competing interests became evident when Working Group II discussed the issues to be addressed in the proposed international framework.

#### ***IV CONTENT OF AN INTERNATIONAL FRAMEWORK***

##### ***4.1 Subject Matter of Enforcement***

It was generally agreed within the Working Group that the proposed instrument applies to the enforcement of international commercial settlement agreements resulting from conciliation,<sup>30</sup> in order to be consistent with the mandate given by the UNCITRAL, to promote conciliation as an effective means of solving disputes, to bring certainty to the enforcement procedure which would favour settlement agreements over ordinary contracts, and to avoid additional disputes on whether or not a settlement agreement falls within the scope of the instrument.<sup>31</sup> The Working Group intended to adopt the broad notion of "conciliation" as stated in article 1(3) of the Model Law on Conciliation.<sup>32</sup> Therefore, "conciliation" is an umbrella term which includes mediation or any expression of similar import. It does not distinguish among different practice styles and techniques.<sup>33</sup> It highlights the key features of the process, i.e. parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute, irrespective of the terminology used to refer to that process.<sup>34</sup>

While the Model Law does not define "settlement agreement", the Working Group considered to include it either in the scope provision or formulate as part of

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28 Boulle, above n 25 at 62-63.

29 Boulle, above n 25 at 63-64.

30 A/CN.9/861, above n 10, paras 19 and 39-40.

31 A/CN.9/861, above n 10, para 19.

32 A/CN.9/861, above n 10, para 21; Note by the UNCITRAL Secretariat, 'Settlement of Commercial Disputes: International Commercial Conciliation - Enforceability of Settlement Agreements' (A/CN.9/WG.II/WP195) paras 22-23.

33 A/CN.9/861, above n 10, para 21.

34 A/CN.9/867, above n 10, para 121.

the form requirements.<sup>35</sup> The meaning of "settlement agreement" appeared to be uncontroversial. It refers to an agreement in writing that is concluded by the parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute.<sup>36</sup> It covers settlement agreements reached through judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award.<sup>37</sup> The mere involvement of a judge or an arbitrator in the conciliation process should not result in exclusion,<sup>38</sup> though the approach to address this issue is subject to further consideration.<sup>39</sup> However, it does not extend to settlements recorded in a judicial decision or an arbitral award, which could lead to overlap or conflict with existing instruments, result in unnecessary difficulties in the implementation of the proposed instrument, open doors to abuse by the parties, and complications resulting from multiple enforcement regimes.<sup>40</sup>

The Working Group preferred to state the concept of "commercial" in general terms rather than providing an illustrative list or a definition.<sup>41</sup> The "commercial" nature of a settlement agreement has a broad scope, without any limitation as to the types of remedies or obligations provided under a settlement agreement.<sup>42</sup> In light of article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods 1980, the proposed instrument does not apply to settlement agreements concluded by one of the parties for personal or household purpose.<sup>43</sup> It also excludes those agreements relating to family or employment law matters, as party autonomy was limited due to overriding mandatory rules or public policy.<sup>44</sup> But it applies to

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35 A/CN.9/867, above n 10, para 132.

36 A/CN.9/WG.II/WP195, above n 32, para 29; A/CN.9/867, above n 10, para 132.

37 A/CN.9/867, above n 10, para 125.

38 A/CN.9/867, above n 10, para 131.

39 A/CN.9/867, above n 10, paras 126-130.

40 A/CN.9/867, above n 10, para 123.

41 A/CN.9/867, above n 10, paras 103-104.

42 A/CN.9/861, above n 10, paras 40, 47, 50.

43 A/CN.9/861, above n 10, para 41; A/CN.9/WG.II/WP195, above n 32, para 18; A/CN.9/867, above n 10, para 107.

44 A/CN.9/861, above n 10, para 42.



settlement agreements involving government entities,<sup>45</sup> subject to exclusion by reservation or declaration if the instrument were to take the form of a convention.<sup>46</sup>

The Working Group aimed to set out broad, objective, relevant, clear and simple criteria for determining the "international" character of a settlement agreement.<sup>47</sup> By making an easy analogy to the definition of an international conciliation process in article 1(4) of the Model Law on Conciliation, the requirement of internationality will be met where at least two parties to the settlement agreement had their places of business in different States at the time of the conclusion of the settlement agreement<sup>48</sup> or where the State in which either a substantial part of the obligations is to be performed under the settlement agreement or with which the subject matter of the dispute is most closely connected differs from the State in which the parties have their places of business.<sup>49</sup> However, cross-border enforcement of a settlement agreement concluded by parties that had their places of business in the same State did not gain popularity in the Working Group.<sup>50</sup> The terms "party" and "place of business" are subject to further deliberations.<sup>51</sup>

#### **4.2 *Pre-conditions for Enforceability***

The Working Group insisted that settlement agreements should fulfil certain requirements in order to be enforceable. Those requirements would provide the necessary level of certainty to the enforcing authority faced with a request for enforcement, determine the elements that would need to be considered by the enforcing authority, and clearly and objectively differentiate settlement agreements from other agreements so as to avoid enforcement of agreements other than those reached through conciliation.<sup>52</sup> Two form requirements received overwhelming support. A settlement agreement should be in writing.<sup>53</sup> It should also indicate the agreement of

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45 A/CN.9/861, above n 10, para 46.

46 Ibid.; A/CN.9/WG.II/WP195, above n 32, para 21.

47 A/CN.9/861, above n 10, para 39; A/CN.9/867, above n 10, para 94.

48 A/CN.9/861, above n 10, para 37; A/CN.9/WG.II/WP195, above n 32, para 10; A/CN.9/867, above n 10, para 96.

49 A/CN.9/861, above n 10, para 38; A/CN.9/WG.II/WP195, above n 32, para 10; A/CN.9/867, above n 10, para 98.

50 A/CN.9/861, above n 10, para 98.

51 A/CN.9/WG.II/WP195, above n 32, para 12; A/CN.9/867, above n 10, paras 97 and 100-101.

52 A/CN.9/861, above n 10, para 51.

53 A/CN.9/861, above n 10, paras 52-53 and 67.

the parties to be bound by the terms of the settlement, such as by signing or by concluding the agreement.<sup>54</sup> The principle of functional equivalence embodied in UNCITRAL texts on electronic commerce applies, allowing for the use of electronic and other means of communication to meet the form requirements.<sup>55</sup> The Working Group was in favour of additional requirements to ascertain the involvement of the conciliator and the settlement agreement resulting from conciliation, though there were diverging views on how to formulate them.<sup>56</sup>

Placing emphasis on formalities is reminiscent of the traditional common law requirement that agreements were enforceable only if under seal.<sup>57</sup> Such requirements would bring rigidity.<sup>58</sup> They would also encourage satellite litigation on issues unrelated to the subject matter of the settlement agreement.<sup>59</sup> While the New York Convention did not include any form requirements of arbitral awards, setting them out for mediated settlement agreements could complicate the objective of providing a simple and straightforward enforcement mechanism,<sup>60</sup> harm the informal nature, amicable atmosphere and variance in style of the conciliation process,<sup>61</sup> and be detrimental to the development of conciliation in those jurisdictions not familiar with conciliation.<sup>62</sup> The potential impact on policy and practical considerations depends on the extent of prescription and details provided in these form requirements.<sup>63</sup>

### ***4.3 Procedural Aspects of Enforcement***

Courts or other competent authorities at the originating state of a settlement agreement would be in a better position to determine prima facie questions that facilitate the overall enforcement procedure, such as the validity of such an agreement and

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54 A/CN.9/861, above n 10, paras 52 and 67.

55 A/CN.9/861, above n 10, para 53; A/CN.9/867, above n 10, para 133.

56 A/CN.9/861, above n 10, paras 54-58, 67.

57 Peter N Thompson "Enforcing Rights Generated in Court-Connected Mediation - Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2004) 19 Ohio State Journal on Dispute Resolution 509 at 541.

58 A/CN.9/867, above n 10, para 139.

59 A/CN.9/861, above n 10, para 65; Thompson, above n 57 at 546-547.

60 A/CN.9/861, above n 10, para 65.

61 A/CN.9/861, above n 10, para 65.

62 A/CN.9/867, above n 10, para 139.

63 A/CN.9/861, above n 10, para 67.

fulfilment of procedural requirements pertaining to the conciliation process.<sup>64</sup> But the Working Group preferred direct enforcement at the place of enforcement.<sup>65</sup> It considered that a party to a settlement agreement could raise defences to enforcement then and there, rendering any review by a court at the originating state superfluous.<sup>66</sup> Furthermore, establishing a control mechanism could amount to double *exequatur*, which defeats the underlying policy of the intended instrument to provide an efficient and simplified enforcement mechanism.<sup>67</sup> There would also be practical difficulties in determining the originating state, as the connecting factor might be subject to different interpretations.<sup>68</sup>

The procedural aspects of obtaining enforcement are yet to be worked out. An analogy could be made to article IV of the New York Convention, which requires proof of the authenticity of a settlement agreement and the fact that it was made on the basis of a *prima facie* valid agreement to mediate. Certification of a copy of either or both documents would also suffice. Translation of both documents would be required, unless it is not practicable to do so, such as where the enforcing court can master a foreign language sufficiently well or where the contract containing the alternative dispute resolution clause is lengthy.<sup>69</sup> More importantly, submission of these documents is not a prerequisite for the commencement of enforcement proceedings.<sup>70</sup> Non-submission at the time of application can be cured in the course of the proceedings or by filing a new application.<sup>71</sup>

#### **4.4 Recognition of Settlement Agreements**

The Working Group could not reach a consensus on whether courts or other competent authorities at the enforcing state should recognise settlement agreements, as distinguished from enforcement.<sup>72</sup> Let alone domestic procedures, international texts attach different meanings to the term "recognition", depending on the subject of such

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64 A/CN.9/861, above n 10, para 83.

65 A/CN.9/861, above n 10, para 84.

66 A/CN.9/861, above n 10, para 81.

67 *Ibid.*

68 *Ibid.*

69 International Council for Commercial Arbitration, 'ICCA's Guide to the Interpretation on the 1958 New York Convention' Ch III para II.5.

70 International Council for Commercial Arbitration, above n 69, Ch III para II.4.

71 *Ibid.*

72 A/CN.9/861, above n 10, paras 71-76.

recognition. Paragraph 1 of the Geneva Protocol on Arbitration Clause 1923 states that arbitration agreements shall be recognised as valid, whereas article II(1) of the New York Convention does not clarify this term. Both article 1 of the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and article III of the New York Convention provide that arbitral awards shall be recognised as binding. Further, there are different understandings of the notion of "settlement agreements", as contracts between private parties or acts of a particular nature resulting from a dispute resolution procedure. It is commendable that the Working Group agreed to examine further as to the need to give effect to a settlement agreement through a procedure akin to recognition and, if so, the nature of legal value to be effected and the relationship with assessing the validity of the settlement agreement.<sup>73</sup> At the very least, preparation for the proposed instrument provides an opportunity to clarify the meaning and practical effects of "recognition".<sup>74</sup>

#### **4.5 Defences to Enforcement**

The Working Group agreed on the general principles that the grounds for resisting enforcement should be limited, exhaustive, stated in general terms and not cumbersome to implement.<sup>75</sup> It showed support for three grounds: the settlement agreement is invalid from the outset based on fraud; the subject matter of the settlement agreement is not capable of being conciliated under the law of the enforcing state; and enforcement of the settlement agreement would be contrary to the public policy of the enforcing state.<sup>76</sup> The first ground for refusal resembles article V(1)(a) of the New York Convention, which applies to arbitration agreements rather than arbitral awards. An allegation of dishonesty is easy to make. But it is often difficult to satisfy the high threshold of proof. The other two grounds share striking similarities with article V(2) of the New York Convention. Not only do they apply at the request of the party against whom a settlement agreement is invoked, but they could also be considered by the enforcing authority *ex officio*.<sup>77</sup> Likewise, the terms "conciliability" and "public policy" are not defined. By analogy, the non-conciliable ground refers to disputes that are reserved exclusively for the jurisdiction of courts, which is a

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73 A/CN.9/WG.II/WP195, above n 32, paras 49-50.

74 A/CN.9/WG.II/WP195, above n 32, para 49.

75 A/CN.9/861, above n 10, para 93.

76 A/CN.9/861, above n 10, para 88.

77 A/CN.9/867, above n 10, paras 154-155.

question to be determined under the law of the enforcing state.<sup>78</sup> Yet its usefulness may be limited, as the domain of non-conciliable matters has considerably shrunk over time as a consequence of the growing acceptance of conciliation.<sup>79</sup> With respect to claims of violation of procedural or substantive international public policy, they include fundamental principles pertaining to justice or morality that the enforcing state wishes to protect even when it is not directly concerned; rules designed to serve the essential political, social or economic interests of the enforcing state; and the duty of the enforcing state to respect its obligations towards other states or international organisations.<sup>80</sup> This ground for refusal is applicable in serious cases only.<sup>81</sup>

Two possible defences appeared to gain traction in the Working Group. They are similar to article V(1)(a) and (e) of the New York Convention: incapacity of a party to the settlement agreement; and the settlement agreement is not binding on the parties, is not a final resolution of the dispute, has been subsequently modified by the parties or the obligations therein have been performed.<sup>82</sup> Further, concerns grew in the Working Group over the integrity of the process and conduct of the participants. This prompted an emerging view that serious misconduct of the mediator or a party during mediation, which had an impact on its outcome, should be covered in the list of defences.<sup>83</sup> A separate issue related to defences is the impact of judicial or arbitral proceedings on the enforcement procedure.<sup>84</sup> There was a general understanding that article VI of the New York Convention could provide useful guidance, which enables the enforcing authority to suspend the enforcement procedure pending setting aside proceedings.<sup>85</sup>

Apart from the above, there was little consensus on other possible defences and how they should be presented. Proof of defences to enforcement requires admissibility of all relevant mediation communications at the enforcing authority, and hence risks undermining the principle of confidentiality. Listing exhaustive grounds<sup>86</sup>

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78 International Council for Commercial Arbitration, above n 69, Ch III para V.1.

79 Ibid.

80 International Council for Commercial Arbitration, above n 69, Ch III para V.2.

81 International Council for Commercial Arbitration, above n 69, Ch III para I.

82 A/CN.9/867, above n 10, paras 152 and 162.

83 A/CN.9/867, above n 10, paras 172 and 175.

84 A/CN.9/861, above n 10, para 107.

85 A/CN.9/WG.II/WP195, above n 32, para 57; A/CN.9/867, above n 10, para 169.

86 A/CN.9/861, above n 10, para 93.

could restrict the extent of modification, as clearly demonstrated in the New York Convention.

#### **4.6 Possible Form of Instrument**

Developing a guidance text on the enforcement of mediated settlement agreements is *de minimus*. It merely requires an expansion of paragraphs 87 to 92 of the Guide to Enactment on article 14 of the Model Law on Conciliation, providing a legislative guide to States with relevant recommendations and commentaries.<sup>87</sup> The international framework for enforcement can also take the form of a model law, with an aim of harmonising domestic legislation in this area.<sup>88</sup> This long-term goal is likely to take a more gradual approach to achieve, as the challenges to harmonise domestic enforcement mechanisms that vary greatly and intertwine with procedural law persist. Unsurprisingly, the Working Group expressed a preference for preparing a convention, which could readily promote the use of conciliation and eventually contribute to harmonisation of the process.<sup>89</sup> If a convention were the final form of the proposed instrument, it will not seek to harmonise domestic legislation, address matters related to the attachment or execution of assets, and develop uniform rules for the conciliation process.<sup>90</sup> The Working Group would need to consider whether to give States the flexibility to make reservations or declarations<sup>91</sup> and treat settlement agreements at least as favourably as foreign arbitral awards under the New York Convention.<sup>92</sup>

### **V CONCLUSION**

Despite global trade negotiations in the World Trade Organisation's Doha Development Round stalled in July 2008, cross-border commercial transactions have been rising with the proliferation of regional trade agreements worldwide. Notable agreements such as the North American Free Trade Agreement and the Central America - United States - Dominican Republic Free Trade Agreement include a dispute settlement mechanism in Chapter 20, which recommends the use of consultations, conciliation and mediation prior to arbitration. But mediation fails to gain traction in resolving cross-border commercial disputes, partly due to an inherent feature of the

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87 A/CN.9/WG.II/WP195, above n 32, para 64.

88 A/CN.9/WG.II/WP195, above n 32, para 62.

89 A/CN.9/861, above n 10, para 108.

90 A/CN.9/822, above n 8, A/CN.9/WG.II/WP195, above n 32, para 59.

91 A/CN.9/WG.II/WP195, above n 32, para 60.

92 A/CN.9/WG.II/WP195, above n 32, para 61.

process which does not render a binding outcome and partly because enforceability of mediated settlement agreements is a matter of domestic law.

While domestic legislation may or may not address enforceability, and varies considerably among different jurisdictions if it does, an international legal framework that is currently under the UNCITRAL's consideration would become effective if it demonstrates the following characteristics. First, it reflects national objectives and policies in defences to enforcement of mediated settlement agreements, which should be limited, exhaustive, stated in general terms and not cumbersome to implement. Secondly, it runs in parallel to existing domestic regimes with a long-term goal of furthering progressive harmonisation and unification of the law of international trade. Thirdly, it is conducive to compliance and encourages transparent actions, in order to uphold the integrity and reliability of the international system. An international convention would clearly address these issues best.

