INTERNATIONAL COMMERCIAL MEDIATION: INTERNATIONAL RECOGNITION AND ENFORCEMENT OF MEDIATION AGREEMENTS

1 Introduction

Global economic output has increased dramatically owing to an increase in cross-border trade, the rise of multinational corporations and globalisation (Mohammed *Commercial Cross-Border Mediation: Is There a Better Way of Promoting It?* (Master's thesis, Uppsala University) 2020 1).

The globalisation of trade has resulted in an increasing interaction between different cultures and legal traditions with different value systems and philosophical foundations, leading to increased dispute potential that could eventually develop into conflict (Mohammed *Commercial Cross-Border Mediation* 1).

The default setting for conflict resolution is widely recognised as judicially sanctioned dispute resolution – otherwise referred to as litigation (Mohammed *Commercial Cross-Border Mediation* 2). Commercial litigation processes are, however, getting more costly and burdensome (Mohammed *Commercial Cross-Border Mediation* 12).

Commercial disputes are furthermore becoming more complex because of the globalised trade landscape and increasing cross-border mobility (Mohammed *Commercial Cross-Border Mediation* 1). This poses unique challenges for litigants and courts. Typical problems encountered include governing law issues, enforcement issues, differing national administrative requirements and legal processes (Ehrenhaft "Effective International Arbitration" 1977 9(4) *Law and Policy in International Business* 1191–1228). Dispute resolution by means of litigation is subject to intrinsic characteristics that exacerbate the complexity of cross-border disputes. For instance, for EU member states, it takes between 100 and 300 days to obtain a first-instance judgment in civil proceedings (Mohammed *Commercial Cross-Border Mediation* 2).

2 International arbitration

An alternative mode of conflict resolution that has developed over the past 50 to 80 years is international arbitration (Born *International Commercial Arbitration* 3ed (2009) 68). The main difference between this dispute resolution mode and domestic proceedings is that it involves essential

questions of private and public international law, and it frequently involves awards of very high amounts (Strong "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" 2016 73(24) *Washington and Lee Law Review* 1973–2085). International arbitration tribunals delivered 113 awards exceeding $1 billion dollars in 2011 (Strong 2016 *Washington and Lee Law Review* 1977).

The frequency of international commercial arbitration has also increased dramatically to over 5 000 proceedings per year (Strong 2016 *Washington and Lee Law Review* 1978).

The primary treaty dealing with international commercial arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (United Nations Commission on International Trade Law (UNCITRAL) 330 UNTS 3; 4 ILM 532(1965) Adopted: 10/06/1958 EIF: 07/06/1959). The New York Convention has been signed by 170 states (New York Arbitration Convention "Contracting States: List of Contracting States" (undated) https://www.newyorkconvention.org/list+of+contracting+states accessed 2023-03-02), and it is globally considered as the most successful commercial treaty (Sorieul "Message from the Secretary of UNCITRAL" (2013) https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1). It deals with the enforceability of international arbitration awards and the grounds for refusal by a court to enforce such an award.

Arbitration, like litigation, is a complex and sophisticated process that frequently renders awards spanning many pages. During arbitration proceedings, a dispute is adjudicated by an individual arbitrator or a panel of arbitrators. They deliver a legally binding ruling referred to as an arbitration award.

As a result, arbitration is a popular dispute resolution mode for the resolution of commercial disputes, and, owing to the New York Convention, it is especially useful in cross-border commercial transactions.

3 International mediation

Mediation, as opposed to arbitration, is a much more flexible mode of dispute resolution. The benefits of mediation as a conflict resolution tool (in comparison to court proceedings) are similar to those of arbitration – that is, benefits in relation to confidentiality, cost-effectiveness and efficiency (Mohammed *Commercial Cross-Border Mediation* 5). The process is also substantially faster than traditional litigation, while at the same time also being much less adversarial in nature, which assists in preserving business relationships (Lindell "Alternative Dispute Resolution and the Administration of Justice: Basic Principles" 2007 51 *Scandinavian Studies in Law* 311–344). However, mediation is difficult to define. Several, equally valid definitions exist in different legal cultures. In some countries, terms like arbitration, mediation and conciliation are used interchangeably (Alexander *International and Comparative Mediation: Legal Perspectives* (2009) 15).

Moore defines mediation as:

> "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." (Moore *The Mediation Process: Practical Strategies for Resolving Conflict* (2004) 15)

Despite some disagreement on a definition for mediation, there seems to be agreement on the purpose of mediation – namely, "to assist people in reaching a voluntary resolution of a dispute or conflict" (Kovach *Mediation: Principles and Practice* (2004) 26).

More than 66 per cent of multinational corporates prefer commercial arbitration to traditional litigation, whether on its own or combined with other alternative dispute resolution mechanisms like mediation. This is due to the flexibility, speed and confidentiality of its processes being major advantages (Lagerberg and Mistrelis "Corporate Choices in International Arbitration: Industry Perspectives" 2013 *PricewaterhouseCoopers and Queen Mary University of London*).

The major flaw in mediation is that the resulting final agreement has an unclear legal classification. Also, historically, unlike arbitration, mediation has not generally resulted in an enforceable award.

Despite litigation and arbitration being mature established forms of dispute resolution the latter's popularity among the international business community developed only recently (Strong 2016 *Washington and Lee Law Review* 1980). In the period before the Second World War, most international commercial disputes were resolved by means of consensual processes like mediation and conciliation (Strong 2016 *Washington and Lee Law Review* 1980). The New York Convention played a significant role in the popularisation of international commercial arbitration (Strong "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" 2014 *Washington University Journal of Law and Politics* 11–41).

The cost of international commercial arbitration has increased dramatically over the last two decades. Owing to the confidential nature of these proceedings, it is difficult to estimate the costs, but costs could amount to $400 000 in administrative and arbitrators' fees in arbitrations where the amount in dispute is $10 million (Strong 2016 *Washington and Lee Law Review* 1982). This can escalate to more than $1 million in disputes involving larger amounts (Strong 2016 *Washington and Lee Law Review* 1982). In addition, the legal representatives' fees could easily be between $1 and $2 million (Strong 2016 *Washington and Lee Law Review* 1982).

The time to finalise an international commercial arbitration typically runs anything between one and two years and this does not take into consideration the time for preparation, which could be up to a further 18 months (Strong 2014 *Washington and Lee Law Review* 11–41; Cata "International Commercial Mediation: A Supplement to International Arbitration" 2015 *International Law Quarterly* 2). The main disadvantages of these extended time frames are long periods of commercial uncertainty, as well as increased interest accruing on outstanding defaults or loans (Kantor

"Negotiated Settlement of Public Infrastructure Disputes" in Weiler and Baetens (eds) *New Directions in International Economic Law: In Memoriam Thomas Walde* (2011) 214).

As a result of the increased complexity and the damages amounts involved in international commercial disputes, resolving these disputes through arbitration requires increased fact-finding, cross-border legal research and opinions, and greater investigation of damages issues (Cata *International Commercial Mediation* 3). This, in turn, motivates parties to use litigation-style techniques and to undertake broader fact discovery. Also, a significant number of arbitrations are "seated" in the United States and arbitrators from the United States are generally more likely to allow broader discovery (Strong "Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, a New Approach to Cures" 2013 7(2) *World Arbitration and Mediation Review* 117). This trend has been exacerbated by electronic record keeping, which becomes another significant cost factor in international arbitration (Cata *International Commercial Mediation* 3). There is also a tendency in arbitration hearings to afford the presentation and testing of oral testimony a greater importance, which further increases costs (Cata *International Commercial Mediation* 3). These procedural elements were a cause of great concern for many commercial entities, with reference to the efficiency of this adjudication method (Seidenberg "International Arbitration Loses Its Grip" 2010 *American Bar Association Journal* 2), and have resulted in efforts to formulate more efficient arbitration rules (Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) 2018).

In 2010, the ICC (International Chamber of Commerce) compiled a comparison between international commercial arbitration and international commercial mediation. The differences are substantial, with the differences in costs being staggering. In respect of the duration, a comparison revealed that a typical mediation takes one to two days to complete, with preparation time being between three to five days, compared to arbitration involving a one-to-two-week hearing and 12 to 18 months of preparation (Cata *International Commercial Mediation* 2).

In respect of costs, the comparison showed that for an international arbitration where the amount in dispute is $25 million, with three arbitrators in London, the total costs amount to $2 836 000.00, compared with an international mediation with one mediator costing $120,000.00 (Cata *International Commercial Mediation* 2).

International commercial actors have consequently been searching for alternative cross-border resolution methods. Mediation has been promoted as a possible solution by some of the foremost international organisations, such as the World Bank, the International Finance Corporation and the European Commission, as well as some private organisations like the ICC, the International Institute for Conflict Prevention & Resolution (CPR) and the International Mediation Institute (IMI) (Nolan-Haley "Mediation: The New Arbitration" 2012 17(61) *Harvard Negotiation Law Review* 1–36).

The use of mediation for the resolution of international commercial disputes has been inhibited for two main reasons. The first is that there is a

relative paucity of information in respect of the procedure, resulting in the discipline being regarded as undertheorised (Strong 2016 *Washington and Lee Law Review* 1984).

The second reason is systemic, being the initial lack of an international treaty dealing with the enforcement of settlement agreements that have been concluded as a direct result of international commercial mediation (Strong 2016 *Washington and Lee Law Review* 1985).

4 Enforcement of mediation settlement agreements

To address shortcomings in the dispute resolution landscape, in 2014 the government of the United States of America proposed that UNCITRAL consider creating an international treaty dealing with the enforcement of settlement agreements resulting from international commercial mediation (United Nations General Assembly (UNGA) "Proposal by the Government of the United States of America: Future Work for Working Group II" (2 June 2014) https://documents.un.org/doc/undoc/gen/v14/035/93/pdf/v1403593.pdf?token=kzjuHAU4KtqqODEu6o&fe=true (accessed 2023-03-02)). Working Group II, dealing with arbitration and conciliation, was mandated to consider the proposal further (United Nations "United Nations Commission on International Trade Law, Working Group ii: Dispute Settlement" Working Documents (27 November 2014) https://uncitral.un.org/en/working_groups/2/arbitration (accessed 2023-03-02)).

This was, however, not the first instance where UNCITRAL considered the enforceability of such settlement agreements as it has been discussing such possibility since 2000 (UNCITRAL Working Group on Arbitration "Settlement of Commercial Disputes: Possible Uniform Rules On Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement" A/CN9/WGII/WP108 (14 January 2000) https://documents.un.org/doc/undoc/ltd/v00/501/85/pdf/v0050185.pdf?token=vbnnRnHU5vBiaTgaOj&fe=true (accessed 2023-03-02).

A lack of empirical data has been one of the largest impediments to the negotiations in preparation for such a treaty (Strong 2016 *Washington and Lee Law Review* 1990). The urgency for an international enforcement mechanism increased owing to the rising number of legal instruments dealing with cross-border commercial mediation – such as the European Directive on Mediation in Civil and Commercial Matters, the UNCITRAL Model Conciliation Law and the UNCITRAL Conciliation Rules (Strong 2016 *Washington and Lee Law Review* 2012).

Mediation of cross-border disputes has become increasingly significant, and interest continues to grow. This is primarily due to the increased use of litigation tactics within arbitration, to such an extent that arbitration is referred to as the "new litigation" (Stipanowich "Arbitration: The 'New Litigation'" 2010 *University of Illinois Law Review* 1–60). Mediation is consequently often regarded as a useful and successful additional tool to deal with the increased costs, litigation tactics, procedural burdens, and delays of international arbitration. Settlement rates in international mediation

reportedly range between 70 and 85 per cent (Cata *International Commercial Mediation* 12).

A 2013 survey by the International Mediation Institute indicated that 75 per cent of users indicated that arbitration providers should encourage parties to attempt to settle their disputes through mediation (Cata *International Commercial Mediation* 12). This seems to indicate that international commercial mediation is gaining favour in both common law and civil law jurisdictions.

At the Convention on Shaping the Future of International Dispute Resolution in 2014, attended by more than 150 delegates from countries in North America, Europe, Asia, Australasia, the Middle East and Africa, the delegates indicated the following:

- Risk and cost reduction were the most important factor in international dispute resolution for 66 per cent of users.
- More than 75 per cent of users were in favour of using mediation as early as possible in a dispute.
- Dispute resolution clauses requiring mediation prior to litigation or arbitration were preferred by 66 per cent of users (and providers).
- Close to 80 per cent of users were in favour of arbitration institutions and tribunals exploring other appropriate resolution methods at the initial meeting.
- The need for an UNCITRAL convention on the recognition and enforcement of mediated settlement agreements was identified by 85 per cent of users and 47 per cent of advisors (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" 2014 *University of Missouri School of Law Legal Studies Research Paper No 2014–28*).

5 The Singapore Convention on Mediation

The United Nations General Assembly recognised 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." (UNGA Resolution A/Res/57/18 (24 January 2003) http://www.worldlii.org/int/other/UNGA/2002/102.pdf (accessed 2023-03-02)).

Owing to the success of mediation in the United States of America, the government submitted a proposal in 2014 in support of future work in the area of international commercial mediation to UNCITRAL, a subsidiary body of the General Assembly (United Nations "United Nations Commission on International Trade Law: A Guide to UNCITRAL (January 2013) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf (accessed 2023-03-02)). Its mission is the

facilitation of international trade and investment, and its main mandate is to promote the progressive harmonisation and unification of international trade law through conventions, model laws, and other instruments in key areas of commerce, including dispute resolution (United Nations https://uncitral.un.org/en/about).

UNCITRAL identifies impediments to international commerce and then creates solutions to such problems (United Nations https://uncitral.un.org/en/about). The lack of predictable governing law is a sure impediment to international commerce.

As a result of the proposal by the United States, UNCITRAL decided that its arbitration and dispute settlement working group would study the enforcement of international mediation agreements. This was done mainly because enforcement issues presented an obstacle to the use of mediation as a conflict resolution mechanism in international transactions. The general position is that agreements reached through mediation in international commercial transactions are enforceable as contracts between the parties. However, such enforcement may be burdensome and time-consuming. Consequently, irrespective of whether a successful mediation results in an agreed solution, the enforcement challenges that might have been the reason for mediation in the first place could result in the mediation process being costly and thus less attractive. Mediation also does not guarantee a definitive resolution to a conflict as any of the parties may later fail to comply.

The Working Group envisioned an enforcement mechanism that would provide commercial actors involved in the mediation process with greater certainty and which would not entail an inefficient and costly process. After four years of negotiation by UNCITRAL's delegations, consensus was reached on an instrument for the enforcement of settlement agreements. The settlement agreement could also serve as a procedural impediment that could be raised as a defence to prove that the disputed matter had already been resolved.

The final product was the Singapore Convention on Mediation (*United Nations Convention on International Settlement Agreements Resulting From Mediation* A/RES/73/198 (2018) Adopted 20/12/2018; EIF: 12/09/2020). As of 13 October 2022, 55 states had signed the Convention.

6 Enforcement under the Singapore Convention on Mediation

6 1 Scope

Article 1 contains the scope of the Convention. It is applicable to written international mediation agreements that were concluded with the aim of resolving a commercial dispute. A commercial dispute is not defined in the Convention.

An agreement is in writing if its content is recorded in any form (including electronic) and if it is accessible for use as a reference in the future (art 2(2)).

Mediation is defined as a process where parties to a dispute endeavour to settle the dispute amicably with the assistance of a third person. This third person is not permitted to impose a solution on the parties (art 2(3)). A mediation agreement is international in the following instances (art 1(*a*)–(*b*)):

- when at least two parties to the settlement agreement have their places of business in different states; or
- when the state in which the parties to the mediation agreement have their places of business is different from either:
  - the state in which a substantial part of the obligations under the settlement agreement are performed, or
  - the state with which the subject matter of the settlement agreement is most closely connected.

Where a party has several places of business, the relevant place of business is the one closest to the dispute to which the agreement relates. If a party lacks a definitive place of business, the party's domicile is considered its place of business (art 2(1)(*a*) and (*b*)).

6 2 Exclusions

The Convention is not applicable where the settlement agreement was concluded to resolve any of the following disputes (art 1(2)):

- consumer transactions for personal, family or household purposes;
- family, inheritance, or employment law; or
- settlement agreements aimed at resolving consumer disputes for personal, family or household purposes.

It is likewise not applicable where the settlement agreement has been approved by a court or if it was concluded during proceedings before a court, and the agreement is consequently enforceable as a judgment of the courts of the state (art 1(3)(*a*)).

Where the agreement has been recorded as an arbitration award, and is enforceable as such, the Convention is also not applicable (art 1(3)(*b*)).

6 3 Enforcement mechanism

Article 3 prescribes the enforcement mechanism. Enforcement can occur in two ways: the parties can either apply for a declaration of enforceability with the competent authority (art 3(1)) or can invoke the settlement agreement as a procedural impediment and a defence, proving that the disputed matter has already been resolved (art 3(2)).

This aspect was comprehensively debated during the negotiation phase, as the main purpose of the Convention was to provide an executable enforcement mechanism (UNGA "Report of Working Group II, 66th Session, A/CN.9/901" (16 February 2017) https://documents.un.org/doc/undoc/gen/v17/010/10/pdf/v1701010.pdf?token=iudppF3ZA9ZBL7VtIP&fe=true (accessed 2023-03-02). The product resulted in a liberal approach to

enforcement, including situations where a party does not desire the enforcement of the agreement but instead wants to use the agreement as a defence or wants to refer to the agreement during other legal processes.

The requirements to be complied with for enforcement of a settlement agreement in terms of article 3 are the following:

- the agreement must be in writing and signed by the parties (see heading 6 1 Scope; art 4(1)(*a*));
- the agreement must contain evidence to the effect that an agreement resulted from mediation – such as a signature from the mediator, or a document signed by the mediator indicating that they carried out the mediation, or an attestation by the administering institution, or any other evidence acceptable to the competent authority (art 4(1)(*b*)); and
- where electronic communications are involved, the signature requirement is met if a reliable method is used to identify the parties or the mediator, and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication (art 4(2)).

6 4 Grounds for refusal to enforce a mediation agreement

The grounds for refusal fall broadly into two categories – namely, grounds that the parties may claim (art 5(1)), and grounds that a court may raise on its own initiative (art 5(2)).

A party who wants to prevent the execution of the mediation agreement may first rely on non-compliance with the requirements of article 4.

An opposing party may also oppose enforcement on the following grounds:

- A party to the settlement agreement was under some incapacity (art 5(1)(*a*)).
- The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected themselves (art 5(1)(*b*)(*i*)).
- The settlement agreement is not binding according to its terms or has been subsequently modified (art 5(1)(*b*)(*i*)*,* (*ii*)).
- The obligations in the mediation agreement have been modified or they are not clear or comprehensible (art 5(1)(*c*)).
- Granting enforcement would be contrary to the terms of the settlement agreement (art 5(1)(*d*)).
- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement (art 5(1)(*e*)).
- The mediator failed to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party,

without which failure that party would not have entered into the agreement (art 5(1)(*f*)).

Courts may refuse to enforce a mediation agreement on two grounds:

- if granting enforcement of the settlement agreement would be contrary to the public policy of the state, including national security and national interest (art 5(2)(*a*)); and
- if the subject matter of the dispute is incapable of being settled by mediation under the governing law of the nation (art 5(2)(*b*)).

7 Conclusion

The benefits of mediation as opposed to arbitration are clearly in the reduced time it takes to reach a settlement and the much-reduced costs incurred. However, liberal enforcement mechanisms may serve as a deterrent for parties when considering mediation.

The effect of a liberal enforcement mechanism is that parties have options on how they use the Singapore Convention on Mediation. The foundational protection of the integrity of mediation agreements is thus solid. It also distinguishes itself from the New York Convention, which does not have a similar mechanism.

The grounds for refusal are extensive and the effectiveness of the Convention will be determined by how these grounds are interpreted by the executing authorities.

Liberal interpretation can widen the refusal scope to such an extent that reneging on agreements post-mediation becomes too simple, decreasing the incentive for international commercial actors to revert to mediation because the enforcement issue persists.

More conservative interpretation would bolster referral to the mediation process as it would provide greater finality to participants, resulting in turn in an increase in the popularity of mediation as a viable conflict resolution mode for international commercial transactions.

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