Towards enforceability and confidentiality in international commercial mediation

By Gonzalo Vial

A. Mediation: concept and advantages

Commercial mediation is an alternative dispute resolution procedure whereby "(…) two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator".[1] It can be considered international when it involves transnational relations.[2]

Arguably, the biggest advantage of mediation is that helps avoiding an outcome with winners and losers, facilitating the maintenance of the relationship between the parties.[3] Additionally, it is a swift and cost-effective method,[4] which can adopt flexible approaches to prevent or resolve conflicts, like the Dispute Review Boards utilised in the construction of the Channel Tunnel between England and France.[5]

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[1] Article 3(a) of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en

[2] In this regard, article 1(4) of the 2002 UNCITRAL Model Law on International Commercial Conciliation states that conciliation is international if, "(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or (b) The State in which the parties have their places of business is different from either (…) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or (…) The State with which the subject matter of the dispute is most closely connected".

Even though the heading of the commented law uses the word "conciliation" (which is not strictly the same as mediation), it is aimed to regulate mediation process as well, as noted in article 1(3) which states: "For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute". UNCITRAL Model Law on International Commercial Conciliation (Oct 7, 2015 10:17 AM) https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

[3] Raquel Sánchez Hernández & Rafael Jordá García, *La Mediación, una solución a los conflictos derivados de la contratación internacional que fomenta la continuidad de las relaciones comerciales*, Anales de Derecho, N 31, 33 (2013), *available at* http://revistas.um.es/analesderecho/article/view/179951/152541

[4] Ignacio Gómez-Palacio, *Ley Modelo sobre Conciliación Comercial Internacional de la CNUDMI (UNCITRAL). Posible incorporación al derecho mexicano*, UNAM Institute for Legal Research, web document, 157 (Oct 6, 2015 4:30 PM) http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/35/pr/pr7.pdf, citing ROBERT M. NELSON, NELSON ON ADR, THOMSON CARSWELL, 58-60 (OTTAWA, CANADA 2003).

Regarding the aforementioned, recital 6 of the Directive 2008/52/EC explains the benefits of mediation for commercial (and civil) matters in the following way: "Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more

B. Harmonising enforceability provisions

Notwithstanding that its characteristics make commercial mediation attractive for international trade, a broader utilisation of this method faces the problem that parties from different legal backgrounds usually have no certainty on how to validate or enforce settlement agreements in other jurisdictions.

In this regard, scholars have proposed a progressive harmonisation of different legislations and the celebration of multilateral conventions giving enforceability to these agreements.[6] Among efforts already conducted to create a uniform system of rules for international mediation, are the 2002 UNCITRAL Model Law on International Commercial Mediation (Model Law) [7] and the 1980 UNCITRAL Conciliation Rules (Rules). However, none of these norms solve the issue of enforceability.

In 2014 the United States (US) put forward to the UNCITRAL a proposal to "work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through mediation/conciliation".[8] In February of 2015 the UNCITRAL Working Group II on Arbitration and Conciliation (WGII) examined this suggestion and agreed to submit a proposal to the UNCITRAL Commission,[9] receiving last July a mandate from UNCITRAL to address the issue. That mandate was

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likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements". Directive 2008/52/EC, *supra* note 1.

[5] Jeswald W. Salacuse, *Mediation in International Business*, article originally published in JACOB BERCOVITCH, STUDIES IN INTERNATIONAL MEDIATION 213-227 (PALGRAVE MACMILLAN 2002), article available at the web page from the International Mediation Institute (Oct 7, 2015 4:36 PM) https://imimediation.org/jeswald-salacuse-article, citing Nael G. Bunni, *Major Project Dispute Review Boards*, In-House Counsel International, 13-15 (1997). The author explains the utilization of Dispute Review Boards in the following terms: "Under this procedure, a Board, consisting of three members, is created at the start of the project. One member of the board is appointed by the project owner and a second by the lead contractor. The third member is then selected either by the other two members or by mutual agreement between the owner and the contractor. The Board functions according to rules set down in the construction contract. Generally, it is empowered to examine all disputes and to make recommendations to the parties concerning settlement. If the parties to a dispute do not object to a recommendation, it becomes binding. If, however, they are dissatisfied, they may proceed to arbitration, litigation or other form of mandatory dispute settlement".

[6] Raquel Sánchez Hernández & Rafael Jordá García, *supra* note 3, at 49-50.

[7] UNCITRAL Model Law, *supra* note 2.

[8] Laila El Shentenawi, *Vienna said "I do!" Why A New York Convention for Mediation Might Be Brewing*, Kluwer Arbitration Blog (Sept 2015), (Oct 12, 2015 11:14 AM) http://kluwermediationblog.com/2015/09/04/vienna-said-i-do-why-a-new-york-convention-for-mediation-might-be-brewing/

[9] Herman Verbist, *Report on the 62nd session of the UNCITRAL Working Group II: "Arbitration and conciliation" (New York, 2-6 February 2015)*, web document available at CEPANI web page, piece originally published in CEPANI Newsletter from February 2015, (Oct 12, 2015 9:30 AM) http://www.cepani.be/en/report-62nd-session-uncitral-working-group-ii-%E2%80%9Carbitration-and-conciliation%E2%80%9D-new-york-2-6-february

broad enough to encompass the following forms of work: (i) a guidance text: (ii) model legislative provisions; and (iii) a convention of the enforcement of settlement agreements.[10]

The improvement of a guidance text and model legislative provisions can be done expanding on the Model Law and Rules.[11] What seems more interesting regarding the mandate to the WGII is the possibility of preparing a convention on the enforceability of international settlement agreements, a measure that has a strong support from the international community and that was the core of the US proposal"[12] The idea is based on the successful role played by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in the development of international commercial arbitration.[13] Certainly, having the possibility to enforce a settlement agreement in different jurisdictions will encourage the use of mediation in international trade.

The WGII is meeting again in November of 2015 to discuss "existing legal frameworks under which settlement agreements can be enforced, the issues underlying the enforceability of settlement agreements as well as the possible forms of work".[14] Even though it is too soon to predict where the efforts by the group will lead,[15] one possible outcome could emulate what occurs in the field of international commercial arbitration, where the 1985 UNCITRAL Model Law on International Commercial Arbitration affords certainty about the arbitral procedure, while the New York Convention provides security regarding the enforceability of arbitral awards.

Whatever the results are, the harmonisation of legislation and enforcement rules regarding international commercial mediation is an ongoing process, which will not be stopped easily.

C. Looking guidelines for establishing limits to confidentiality in international mediation

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[10] Laila El Shentenawi, *supra* note 8.
[11] ibid.

[12] ibid.

[13] ibid. As stated by a different author: "(…) the New York Convention went on to become the primary motor behind the growth of international arbitration (…)". Michael McIlwrath, *The Proposed Mediation Convention: UNCITRAL at a Crossroads in Vienna*, Kluwer Arbitration Blog (June 2015) http://kluwerarbitrationblog.com/blog/2015/06/28/the-proposed-mediation-convention-uncitral-at-a-crossroads-in-vienna/

[14] African Center of International Law Practice web page, *UNICITRAL continues discussions on the proposal for an International convention for enforcement of settlement agreements resulting from conciliation proceedings* (Oct 12, 2015 11:52 AM) http://acilp.org/?q=content/unicitral-continues-discussions-proposal-international-convention-enforcement-settlement

[15] Laila El Shentenawi, *supra* note 8.

Many issues are required to be settled in the process of harmonising international mediation legislation. Among them are the limits to the duty of confidentiality in the mediation process. The discussion gained attention this year due to the situation involving the former leader of the Conservative Party of New Zealand, Colin Craig, who justified a breach of confidentiality arguing the need to protect his good name.[16]

There is universal agreement about the crucial role that confidentiality plays in mediation, being considered necessary to the survival of the process.[17] Confidentiality facilitates communication by allowing the parties to feel confident and speak frankly, without fear of their statements being used against them in future dispute resolution procedures.[18] This is necessary to reach solutions that meet the expectations of everybody.

Unsurprisingly, the importance of confidentiality is recognised in the Model Law, which stipulates that "(…) all information relating to the conciliation proceedings shall be kept confidential (…)".[19] Additionally, its relevance has been highlighted in regional conventions, like the European Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Directive), which in its recital 23 states that confidentiality "(…) is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration".[20]

Notwithstanding its relevance, there is no universal agreement regarding the limits of confidentiality in mediation. Different laws set dissimilar boundaries for this duty,[21] impeding its broader utilisation in

[16] Deborah Hart, *Breaching Mediation Confidentiality may come at a cost for Colin Craig*, NBR Special Report (June 2015), (Oct 7, 2015 10:46) http://www.nbr.co.nz/article/breaching-mediation-confidentiality-may-come-cost-colin-craig-174607#.VY5h708iWNE.email

[17] Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 JOURNAL OF DISPUTE RESOLUTION, ISSUE 2, 1-2 (1991), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1223&context=jdr

[18] Isabel Viola Demestre, *La confidencialidad en el procedimiento de mediación*, International Workshop on ADR/ODRs, 1-2 (2009), web document (Oct 8, 2015 4:42 PM), accessible from Google search in the following address: https://www.google.cl/?gws_rd=ssl#q=limites+del+deber+de+confidencialidad+en+la+mediacion, citing Pascual Ortuño Muñoz, *El Proyecto de Directiva Europea sobre la mediación* (Sept 2009), http://cgae.iurisline.net/jmf/recursos/pdf/4_foro_jornadas_2.pdf.

[19] Article 9 UNCITRAL Model Law, *supra* note 2.

[20] Directive 2008/52/EC, *supra* note 1.

[21] "In many countries, the legal rules affecting conciliation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality and evidentiary privilege and exceptions thereto". *Guide to Enactment and Use of*

international trade. Thus, as with issues of enforceability, it is necessary to reach a common understanding regarding the limits of confidentiality in international commercial mediation.

For said purpose, it seems that the Directive could be used as a useful guideline, particularly its article 7(1). This provision identifies the limited occasions in which a court (or an arbitral tribunal) could compel the mediator or the parties involved in the mediation to present as evidence in the procedure information related to the mediation. The norm allows the aforementioned in the following cases: (i) after a previous agreement of the parties; (ii) for considerations of public policy; (iii) in the best interest of children; (iv) to prevent harm to the physical or psychological integrity of a person; and (v) where it is necessary in order to implement or enforce an agreement.[22]

Arguably, the occasions in which the referred disposition allows to present information related to mediation as evidence in other procedures are precisely the cases in which the duty of confidentiality could be breached. In other words, the cases mentioned in article 7(1) of the Directive could be adopted as the universal exceptions to the duty of confidentiality in international commercial mediation.

Whatever the decision taken at the time of setting a universal scope for the duty of confidentiality, it is important not to deter the occurrence of this alternative dispute resolution method because "(…) early mediation remains the best, most effective resolution tool for all kinds of disputes",[23] being its promotion desirable for international trade.

D. Conclusions

In order to increase the use of international commercial mediation it is necessary to harmonize legislations and secure the enforceability of the agreements reached in those procedures, being suggested by recent efforts by the WGII that this will be the path followed in the coming years. In this context, having clarity regarding the limits of the duty of confidentiality is of the utmost importance because it is

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the UNCITRAL Model Law on International Commercial Conciliation (2002), Section C, Background and history (Oct 8, 2015 9:30 PM) http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

[22] Article 7(1) of the Directive states the following: "Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except: (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement". Directive 2008/52/EC, *supra* note 1.

[23] Deborah Hart, *supra* note 16.

precisely that feature of mediation what allows the parties to speak frankly about what they need. Absent that, it seems too difficult to reach solutions that meet the expectations of everybody.