

### Ⅲ . Challenges in Leveling ADR Playing Field: International Enforcement of Mediated Settlement Agreement

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Alternative dispute resolution or ADR has played a significant role in dealing with various kinds of disputes. Its efficiency and effectiveness has been well noted, and embraced by parties. However, all means of dispute resolution mechanism are not created equal. Some mechanism is probably more equal than others. Such situation has long contributed to the vast gulf of disparity in adoption of some particular types of ADR, even though some mechanism left behind has great benefits to parties.

In arbitration, parties have long reaped the benefits of having internationally recognized system for enforcing arbitral award. Its latest and most successful convention, i.e., the New York Convention<sup>1</sup>, has been in place since 1958. Under the system, parties can bring their arbitral awards to courts in more than 150 jurisdictions, and ask those courts to enforce the awards against assets of the losing parties in the jurisdictions. Courts that receive such request are obliged to enforce the awards. Refusal to enforcement can be done only due to the specific and limited grounds<sup>2</sup> as provided in the convention. The most important thing in this regards is that the criteria applied by courts throughout the world are consistent in accordance with the standard provided in the convention. Parties can then have the peace of mind in realizing that the solution for their dispute will be enforced throughout the world as long as they comply with such single consistent criteria. It is not surprising to see that arbitration has become the dispute resolution mechanism of choice for parties in transnational transactions.

On the other hand, mediation, another ADR mechanism, has enjoyed far less

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

2 *Id.*, Article V.

recognition and utilization in transnational disputes, notwithstanding the immense benefits that it can bestow on the parties. To pinpoint a few of such benefits, mediation can heal the rift between business partners through direct communication in non-confrontational manner guided by mediators. In mediation, parties can also seek mutual solution that all of them are satisfied with, or, at least, can live with. Despite such benefits, parties seldom select mediation as mechanism of choice in their dispute resolution clauses. One of the hindrances is the lack of enforcement mechanism, especially in the international arena. Currently, when a party wants to enforce the settlement agreement that is the outcome of mediation, the party has to initiate an ordinary lawsuit, just like when they want to enforce ordinary contracts. When courts in various jurisdictions have to entertain such requests, they have to apply their domestic criteria that may be greatly different from one another. Parties in the dispute will be effectively clueless in how to structure their settlement agreements to comply with such disparate criteria and standard.

Having recognized the unfortunate situation, the United Nations Commission on International Trade Law or UNCITRAL<sup>3</sup> has decided to embark on the effort to create a new international instrument to address the impediment that parties in mediation confront in enforcing the settlement agreements that they have painstakingly worked on. It is hoped that once the project comes to the conclusion, there will be some kind of coherent criteria and standard in the enforcement of settlement agreements. However, to achieve such lofty goal, there are quite a number of challenges that we have to overcome. This article tries to identify such challenges, and offer a few thoughts on the matters, especially on why, at the other end of the tunnel, we should create a new convention similar to the New York Convention for enforcement of mediated settlement agreements, so that parties who prefer to solve their disputes by mutual consents can enjoy the same benefits as parties in arbitration. In having such new mechanism, the playing field for mediation can then be at the same level as that of arbitration. The two ADR mechanisms will, from there on, operate on equal footing.

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3 Report of the United Nations Commission on International Trade Law, 48<sup>th</sup> Session (29 June – 16 July 2015), A/70/17, available at <http://www.uncitral.org/uncitral/commission/sessions/48th.html>.

## I. The Current Means for Dealing with the Enforcement of Settlement Agreements

In case parties want their settlement agreements to have greater enforceability, they can transform the settlement agreement into an arbitral award on agreed-terms. In such case, the settlement agreements will be enforced in the same way as ordinary arbitral awards, and enjoy the benefits of the New York Convention.

Some institution even creates innovative means to strengthen the tie between mediation and arbitration such as the mechanism called “arb-med-arb”<sup>4</sup>. Under the process, parties will first commence an arbitral proceeding. The proceeding, however, will be paused, so that the parties can bring the dispute to mediation. If the mediation is successful, the parties will then bring the settlement agreement back to the paused arbitral proceeding, and continue with the procedure for achieving an award on agreed-terms.

The practices demonstrated that parties in mediation do need greater enforceability for their settlement agreement. Due to the lack of an international mechanism for enforcement of settlement agreements, they have to disguise their true intention to have their disputes settled by mediation, by using awards on agreed-terms as their camouflage. In other words, the parties just want to borrow the enforceability and the mechanism that the New York Convention has long been giving to parties in arbitration, even though they have no real will to use arbitration as such.

The mechanism, criteria and standard under the New York Convention, however, do not fit nicely with the enforcement of settlement agreements, because they were drafted with arbitration and the arbitral proceeding in minds, not mediation and the settlement agreements. Therefore, some aspect of the New York Convention can only be awkwardly applied to mediation and settlement agreements. For example, among the criteria for refusal of enforcement under the New York Convention, courts may refuse to enforce arbitral awards if it is found that a party is not duly notified of the arbitral proceeding and the appointment of arbitrators<sup>5</sup>, or the arbitral award is beyond the scope of the underlying

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4 SIAC-SIMC Arb-Med-Arb Protocol, available at <http://simc.com.sg/siac-simc-arb-med-arb-protocol>.

5 *Supra* note 1, Article V(1)(b).

arbitration agreements<sup>6</sup>. Notification of the proceeding and the appointment does not seem to be a relevant factor in mediation, because, regardless of the service of the notification, parties have participated in the mediation, and negotiated the terms of the settlement agreements themselves. Moreover, although disputes may arise from a contract, and parties bring particular disputes to mediation, they are totally free to discuss any other problem or matters between them. If it is useful for reaching settlement, parties are at their liberty to include in the settlement agreements any terms or matters that they deem appropriate. Such terms or matters may be well beyond the scope of the disputes that they bring to mediation in the first place. Again, the defense that an arbitral award is beyond the scope of the underlying arbitration agreement may have no role to play in the context of enforcement of settlement agreements reduced into the form of awards on agreed-terms. That is one of the reasons why there should be a specific instrument and mechanism tailored with mediation and settlement agreements in minds.

## II. Mediated settlement agreement

In the New York Convention, only arbitral awards qualified as “foreign awards”<sup>7</sup> can enjoy the benefit of the enforcement mechanism under the regime. So, if we are going to create an instrument to govern the enforcement of settlement agreement, there should also be the proper scope for the regime under the new instrument. An aspect of the scope of application is about the type of settlement agreements that can come under the roof of the new instrument, because settlement agreements can be done in various contexts.

Settlement agreements may be the result of negotiation between disputing parties after disputes erupt, without any intervention of a neutral or any third party. Such settlement agreements serve the same purpose as any settlement agreement in resolving disputes, and substituting the old obligations disputed between the parties with the new obligations specified in the new agreements. However, if the new instrument covers all kinds of settlement agreements, including those arising from ordinary negotiations, there will be a lot of questions about the appropriateness of the new instrument, because, by nature, a

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<sup>6</sup> *Supra* note 1, Article V(1)(c).

<sup>7</sup> *Supra* note 1, Article I(1).

settlement agreement is still a kind of contracts entered into by parties<sup>8</sup>. Therefore, if there is no special necessity, it will be hard to argue why a kind of contract should obtain special treatment not given to other kinds of contracts.

It is widely accepted that mediation can foster harmonious environment, preserve valuable relationship, and give parties power to choose their own terms for resolving disputes. There is necessity to promote more use of mediation in resolving disputes. If there is no special enforcement mechanism, parties might be reluctant to lean toward mediation, and still pursue solution for their disputes by some confrontational means. The new instrument should therefore provide for such special enforcement mechanism for settlement agreements that are the products of mediation, instead of any kind of settlement agreements. Such settlement agreements may be referred to as “mediated settlement agreements”<sup>9</sup>.

In practice, there are still several issues that might occur, even though settlement agreements are the outcomes of mediation, because very often mediation does not take place in isolation from other procedures or processes. Mediation can occur while there are court or arbitral proceedings dealing with the very same disputes brought to mediation. Once settlement agreements have been reached by parties, they may ask courts or arbitral tribunals to record the terms of the settlement as parts of court judgments or arbitral awards. Such settlement agreements might be beyond the scope of application of the new instrument<sup>10</sup>, because including such settlement agreements might cause the regime under the new instrument to be in conflict with other instruments, such as the New York Convention, if the settlement agreements become parts of arbitral awards on agreed-terms. If the terms of settlement agreements become parts of court judgments, the new instrument may also potentially be in conflict with the regime for enforcement of foreign judgments, due to the different treatment and standard. Including such settlement agreements will also do little in

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8 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session, A/CN.9/832, at p.8 available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

9 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, A/CN.9/861, at p.5 available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

10 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session, A/CN.9/867, at p.19–20 available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

terms of strengthening their enforceability, because those other regimes or instruments already provide for the necessary enforcement mechanism. Moreover, once those settlement agreements have become parts of court judgments or arbitral awards, it can also be said that their legal status has also been transformed. They are no longer mere settlement agreements. They should be treated as any other court judgments or awards.

### III. International commercial disputes

Another issue closely related to the scope of application is about the types of disputes that have been resolved by mediated settlement agreements, and thereby can be enforced under the regime of the new instrument.

Again, settlement agreements can be used in the resolution of various kinds of disputes, as long as parties in those agreements agree to the terms and conditions of the agreements. However, several types of disputes may pose different consideration and policy concern. For example, if the disputes relate to family matters or family laws, such disputes will inevitably touch upon the delicate and sensitive issues when we have to deal with family disputes. Therefore, when a foreign court is requested to enforce such settlement agreements, the foreign court may have to consider some matters regarding public policy of another state. Similar problems will also occur when settlement agreements deal with labor or consumer disputes.

On the other hand, settlement agreements regarding commercial disputes<sup>11</sup> pose little difficulty, and rarely deal with policy issues, because most countries in international trade, more or less, allow for autonomy of parties. So, parties in commercial disputes can agree upon any terms and conditions as they think appropriate for their circumstances. Moreover, most players in commercial disputes are not the kind of parties whom the opposite parties may easily exploit, or trick into unconscionable settlement agreements, unlike those in consumer disputes. They have relatively sufficient resources and knowledge to protect their own interest. Therefore, the settlement agreements that they once willingly agree upon can be readily enforceable. The new instrument dealing commercial disputes can also promote

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11 *Supra* note 9, at p.9.

transnational trade, by encouraging parties in dispute to utilize mediation more. Mediation takes significantly less time and resources than arbitration. Hence, parties can go back to their normal course of business relationship within shorter period of time, and the flow of international trade will not be interrupted much.

Another issue relating to the type of disputes is about whether the new instrument should cover only disputes with international nature, or it should cover any kind of disputes, international and domestic alike. It is tempting to incorporate both kinds of disputes into the new regime, because the expansive nature of the instrument may also expand its influence and usability. However, dealing with settlement agreements on domestic disputes may set the new instrument on a collision course with domestic laws of various countries, because the new instrument will inevitably interfere with domestic contract laws that usually govern such settlement agreements. Such laws vary from country to country. It will be unlikely that we will be able to find a common standard that can accommodate pure domestic concerns inherent in contract laws of many countries. Limiting the scope of application of the new instrument to disputes with international nature<sup>12</sup> can circumvent those matters, and is also consistent with its international origin.

#### IV. Form of Settlement Agreements

Among parties in a settlement agreement, they may be well aware of the rights and obligations that they agree upon. However, when they want to bring the settlement agreement to various countries, and ask courts in those countries to enforce the agreement, there have to be some requirement to ensure the existence of such agreement as well as the rights and obligations contained therein. That is why form requirement comes into play in framing an instrument to establish international enforcement mechanism.

The most obvious form requirement is arguably the “writing” requirement<sup>13</sup>. If a settlement agreement is concluded orally, it will be very difficult for a court, let alone a foreign one, to enforce the agreement, because, before the court can do so, there must be an

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12 *Supra* note 10, at p.15-17.

13 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fifth session, A/CN.9/896, at p.12 available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

establishment of facts regarding the terms and condition. Such proof will engender controversial proceeding vehemently contested by the opposite party. Having a settlement agreement reduced into a written form can sidestep such situation, and enable courts in various jurisdiction to enforce the agreement with confidence regarding its terms and conditions.

In today technology-crazed world, we can hardly pass a moment without coming into contact with some forms of information technology. The writing requirement whose origin predates the information technology must also take into account this modern means of transacting<sup>14</sup>. As adopted in the UNCITRAL Model Law on Electronic Commerce<sup>15</sup>, the modern writing requirement must accommodate any means of communication that are functionally equivalent to the conventional written form, as long as such means can be used for subsequent reference<sup>16</sup>.

A requirement for signature of the parties is almost always attached to the writing requirement, in order to demonstrate the approval of the parties concerned. To accommodate modern means of communication, such signature requirement must also be flexible enough to allow parties to use modern means of communication in “signing” their documents, as long as such means can provide proof of the identity of persons who conclude the agreement, and the endorsement of such persons with regard to the terms and conditions of the agreement. Therefore, parties should be able to utilize some form of “digital signature” to satisfy of the requirement<sup>17</sup>.

The most difficult part of the form requirement is probably the demonstration that a settlement agreement relied upon in the enforcement procedure is actually a product of mediation<sup>18</sup>. Otherwise, it might not be able to enjoy the benefit of the new instrument. The difficulty arises from the fact that, in practice, there has never be a consistent method for providing such proof, because such proof has never been a relevant factor under conventional procedure for enforcing settlement agreements. But if we are going to limit the

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14 *Supra* note 9, at p.21.

15 UNCITRAL Model Law on Electronic Commerce 1996.

16 United Nations Convention on the Use of Electronic Communications in International Contracts 2005, Article 9(2).

17 UNCITRAL Model Law on Electronic Signature 2001, Article 6.

18 *Supra* note 13, at p.13-14.



scope of application of the new instrument to settlement agreements that are the outcomes of mediation, it is inevitable to have some kind of proof.

A proposal was made that the relevant mediator must also sign in the settlement agreement to indicate his or her involvement in the conclusion of the settlement agreement<sup>19</sup>. Such method might directly show that there is actually the necessary linkage between mediation and the settlement agreement. However, in practice in many countries, mediators do not sign in settlement agreements, because such participation might inadvertently place the mediators into some kind of legal relationship with regard to the settlement agreements, and might put the mediator at risk of bearing some kind of liability<sup>20</sup>, if something wrong happens to the settlement agreement. Moreover, although mediators may help parties to settle their disputes, at the conclusion of mediation, parties may just be able to agree upon principles for their settlement. After that, parties may work out the detail of their agreement themselves. In such situation, mediators do not involve in the preparation of the final settlement agreements. It will be impractical then to require that mediators affix their signatures in settlement agreements.

Any requirement demonstrating linkage between mediation and settlement agreements should be practical in most instances, so that the requirement will be in line with practices in mediation in the real world. Actually, it can take several forms<sup>21</sup>. For example, it might also be possible that parties can just indicate in their settlement agreements that there has been mediation relating to the agreement. It is also possible that, instead of having mediators sign in settlement agreements, mediators may just attest the existence of mediation in separate documents, so that the mediators do not have to directly involve in the settlement agreements. These forms should be sufficient to show the necessary linkage.

## V. Defenses

As mentioned earlier that, under the regime of the New York Convention, its cornerstone of success is the coherent, consistent, but limited, grounds for consideration of

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19 *Id.*

20 *Id.*

21 *Id.*

the courts. Courts may refuse to enforce arbitral awards exclusively on the grounds specified in the convention<sup>22</sup>. National courts cannot invoke domestic laws to refuse enforcement, unless it is the laws that the New York Convention provides as applicable laws for particular issues in certain circumstances. The new instrument for enforcement of settlement agreements should also proceed along the same model of success, if it is to aspire to achieve the same level of worldwide recognition.

The main hindrance on this matter is that settlement agreements are, in essence, contracts that parties agree upon, just like any other commercial contracts those same parties regularly enter into in the course of their business. If we are going to frame the criteria and grounds that courts in various jurisdictions have to consider, there is a temptation to introduce into the new instrument those defenses that parties may raise to argue against the application of ordinary contractual obligations<sup>23</sup> in national courts, for example, misrepresentation, mistake, coercion, duress, unconscionability etc. If we were to introduce those defenses, the new instrument would not provide any additional benefit, and the ensuing procedure will look a lot like ordinary court proceeding. Parties who want to enforce settlement agreements still bear a lot of burden of proof. However, doing away with those defenses recognized domestically will not create comfort for countries to join the new instrument as well, because they might think that their domestic concern is not given due regard, and they might stand to lose too many things to warrant participating in the new regime.

Some of the defenses might be inevitable, regardless of which points of view we take. Public policy<sup>24</sup> defense will have to be included, because it signifies very important concern that countries may have when they come to deal with enforcement of settlement agreements. This is one of flexibilities that the new instrument must provide for countries, so that any concern they might have will be alleviated. Such defense is also available under the New York Convention. However, there might be future arguments regarding the exact meaning of the term. Even in the context of arbitration where such term has been used for more than

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22 ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HAND BOOK FOR JUDGES, 78 (Neil Kaplan, ed. International Council for Commercial Arbitration 2011).

23 *Supra* note 9, at p.16.

24 *Id.*

half a century, there are still differing views. Some argue that it should encompass only “international public policy”, or policy concerns that are accepted internationally, not any idiosyncratic concern peculiar to a particular country. Such debate may have to be left for future application of the new instrument.

Another defense available under the New York Convention is the incapacity of parties to settlement agreements. If a party is incapable to enter into a particular settlement agreement in the first place, it is logical that such settlement agreement should not be enforced under the new regime. On this matter, the laws of the country of such party may come into play, because legal capacity of a person should be in accordance with the laws of the country of such person. This may include a situation where laws of a country might place some restriction on power of some kinds of person, such as state agency or enterprise, to enter into this kind of agreement. If there is no specific restriction, even those state agencies or enterprises should also be entitled to enjoy the benefits of the new instrument.

Itemizing defenses may also be problematic, because they will have to accommodate various concerns and criteria. In the New York Convention, there is a similar matter when it has to deal with enforcement of arbitration agreements. Under the convention, courts are obliged to refer disputes in court proceedings to arbitration, if there is an arbitration agreement between the parties in the case. Courts may refuse to refer parties to arbitration only if the arbitration agreements are null and void, inoperative or incapable of being performed<sup>25</sup>. Such criteria may be applied to enforcement of settlement agreements as well. They can encompass several aspects of the defenses that may occur in national laws, because at the end the determination on this matter must be done in the light of relevant governing laws. Such criteria can even accommodate situations where settlement agreements provide for reciprocal obligations between the parties and the obligation on the part of the party requesting for enforcement has not been fulfilled. So, it may be considered that the enforcement of the obligation of the other party has not yet been capable of being enforced.

Another proposal that is more problematic is about the due process of mediation and the conducts of mediators<sup>26</sup>. It has been proposed that mediation process should be properly

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25 *Supra* note 9, at p.17.

26 *Supra* note 13, at p. 19.

conducted to treat all parties fairly, and mediators should not act in such manner that is unfair or provide undue favor to one of the parties. Such incident may constitute grounds for refusal of enforcement of settlement agreements. The concerns are derived from legal proceedings such as court or arbitral proceedings, because when decisions may be made against a party, the party must be given proper opportunity to participate in the proceedings, defend his or her case, and present arguments and evidence. Once their views and arguments have been taken into consideration, any judgment or award may be rendered.

Due process and mediators' conducts may, however, take different seats in mediation. We have to bear in mind that in mediation mediators do not have power or authority to decide the disputes, or impose any resolution on parties. Any terms and conditions may be vetoed by a party who has full authority to accept any terms or conditions he or she pleases. By nature, mediation process must be carried out with participation of all parties. So, they are well aware of the ongoing proceeding, and play significant roles in the process. Procedure such as caucus meeting with one of the parties is just a means of communication and exploring issues and solutions. No matter what mediators say or do, parties can always reject or accept. Therefore, it is highly unlikely that there will be any irregularity or improper conduct by mediators that may qualify as violation of due process. Including this kind of defense may open the door for recalcitrant parties to try to find way out of the deals they willingly agree upon.

## VI. Form of the Instrument

At the end of all discussions, a salient issue must be finally determined whether the new instrument should take the form of another model law, or a new convention. The issue is extremely important because it will directly affect the fate of all efforts that so many countries have put into this project.

The form of a model law seems attractive to many countries, because it will just give them the main idea of how an instrument on enforcement of settlement agreements should look like<sup>27</sup>. It will not oblige countries to do anything. When those countries decide to create

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27 *Supra* note 13, at p.24.

their national laws on enforcement of settlement agreements, they can take a look at the model law, and decide for themselves what they want to do with their own laws. So, this form can accommodate various concerns that those countries may have, because we have to admit that popularity, acceptance and understanding of mediation vary, and differ from country to country. In some countries, there is not sufficient trust in the process to warrant a special legally-binding instrument on this matter yet. If the instrument takes the form of a model law, these countries will be comfortable to accept some provisions or standard that they know not legally binding.

This project is not the first time that the UNCITRAL embarks regarding mediation. In 2002, UNCITRAL adopted the Model Law on International Commercial Conciliation. The model law tries to lay down several principles that may be applicable to mediation, such as confidentiality, conduct of conciliation process, admissibility of evidence and information arising in the course of mediation. However, one notable absence is the mechanism for enforcement of settlement agreements. There is no consensus on this issue, so it was left open for countries to decide for themselves what they want to do with the mechanism<sup>28</sup>. The model law has so far received limited success, especially when compared to the model law on arbitration. Although countries may adopt and enact their own laws on mediation and settlement agreements, the lack of harmonious and consistent standard and criteria for enforcement of settlement agreements has hampered the use of mediation. Hence, if the new instrument takes the form of another model law, it might not solve the problem that is the origin of this project, because at the end there will not be an international mechanism that creates binding obligations on countries to enforce settlement agreements, and courts seized with requests for enforcement will still apply their national standards that differ from country to country<sup>29</sup>. Parties will not be able to ascertain how they should behave or handle their settlement agreements. It might be better for the sake of promoting the use of mediation, if the new instrument will be a new convention specifically providing for enforcement of settlement agreements.

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28 UNCITRAL Model law on International Commercial Conciliation (2002), Article 14.

29 *Supra* note 13, at p.24-25.

## VII. Conclusion

Mediation has vast potential to effectively heal transnational disputes, by providing parties with new chances to reconsider solutions that they might overlook, see opportunity they cannot figure out by themselves, and craft their own destiny, not leaving it in the hands of outsiders. Currently, parties who go to mediation and painstakingly obtain settlement agreements have to disguise their intention by appointing arbitrators to render awards on agreed terms to enhance enforceability of the settlement agreements. Otherwise, they have to enforce settlement agreements in the same way as other contracts. This deficiency causes many parties to perceive mediation as an inferior means for dispute settlements, and be reluctant to use mediation for their transaction. Hence, if there is a new international convention on enforcement of settlement agreements, it will send a strong and unequivocal signal to parties in transnational disputes that mediation can be an effective means for resolving disputes, and any outcome of the process can be internationally enforced through special mechanism that binds courts in contracting countries to apply a single and coherent standard and criteria. Such scenario will definitely help mediation fulfill its vast potential that we long recognize.

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