Beyond the Singapore Convention

The Importance of Creating a 'Code of Disclosure' to Make International Commercial Mediation Mainstream

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Abstract

On 6 August 2019, the Singapore Convention on Mediation was announced. The Convention parallels the New York Convention for arbitration by moving to legitimize mediation as a dispute resolution method for international commercial transactions. The Convention tries, in particular, to address the enforceability of mediation settlements by referring to the application of mediation 'standards' in Article 5 (e). Mediation standards have been a controversial topic in professional circles since the rise of mediation as an alternative dispute resolution process, because of the extreme diversity of mediation approaches across the world. We argue that all stakeholders in the mediation ecosystem should focus on creating a 'Code of Disclosure' as a complement to the Singapore Convention, that such a 'Code of Disclosure' may be the first step towards a future 'Uniform Code of Conduct', and that a code of disclosure will bring certainty to parties about the international commercial mediation process, which is a key prerequisite for its true adoption.

Keywords: Singapore Convention, mediation, expectations, enforcement, commerce, international.

1 International Commercial Mediation in the Mind of the Parties: Welcome to Uncertainty

The lack of common standards for mediation across cultures and national borders has led to a kaleidoscopic landscape of mediation styles and norms, which in turn can create uncertainty for parties interested in using mediation. Unlike legal or arbitral proceedings, mediation practice can vary greatly on the basis of nationality, legal setting, culture or mediator preference. As Manon Schonewille and Jeremy Lack argue,

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> It is difficult to extract any clear standards of processes for mediation when two parties come from different jurisdictions, especially when the expectations, styles and approaches to mediation vary greatly from country to country.[1]

A party coming to an international commercial mediation may feel uncertainty about what to expect from the process of mediation, depending on the venue and on the mediator. The Singapore Convention on Mediation asserts the use of 'standards' to judge the legitimacy of mediation settlement agreements, The Convention's reliance on standards notwithstanding, mediation approaches between signatory countries will likely remain as different as they were before the Convention.

2 The Singapore Convention on Mediation: An Illusion of Uniformity?

A fundamental goal of the Singapore Convention on Mediation is to make the mediation process attractive and mediation settlements enforceable. As we have argued, Article 5 (e) could create an expectation of uniformity by referring to "standards applicable to mediation" (which do not exist universally) and by declaring that mediation agreements can be set aside if:

> ... 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.[2]

Many states and professional organizations have established mediation standards and model rules, but there are no universally accepted 'standards' for the mediator's conduct, and even less for the mediation practice as a whole. In the past there has been little appetite for developing them since to do so would require some, even most, mediators to change their habits and even their mindsets. The UN rules on conciliation are marginally helpful. The rules state that "The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate ...."[3] Further guidance from the UN rules states that:

> The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.[4]

1 M. Schonewille & J. Lack, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?,' *in* M. Schonewille and F. Schonewille (Eds.), *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World*, The Hague, Eleven International Publishing, 2014.

2 United Nations Convention on International Settlement Agreements Resulting from Mediation, Art. 5 (e).

3 UNCITRAL Conciliation Rules, Art. 7 (3).

4 UNCITRAL Conciliation Rules, Art. 7 (2).

Objectivity, fairness and justice are all concepts commonly found in the standards and rules created by states or professional organizations. While commonly found, they can be interpreted radically differently, depending on the cultural and legal venue from which one views them.

To be clear, the Convention was not created with the assumption that a universal set of mediation standards exists currently, nor that one would be developed. Rather the assumption was that in many, if not most, cases there would be standards or laws in at least one of the parties' venues that could be used to judge whether gross violations had occurred. In UNCITRAL working group discussions:

> It was mentioned that such standards took different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations. Therefore, it was suggested that the *travaux preparatoires* or any explanatory material accompanying the instrument could provide examples of standards applicable.[5]

This is, obviously, a vast improvement over a completely 'unregulated' environment, but there are at least five conditions under which reliance on declared state or professional standards would be problematic.

The first condition would involve a mediation conduced in a venue where state or organizational standards or rules did not exist. In such a case, and in the absence of any declaration of process, it would be difficult if not impossible to determine 'gross' violations of mediator conduct.

The second condition would involve a case in which there were state or organizational standards or rules in one party's venue but not in the other party's venue, and in which there was no declaration that the mediation would be conducted based on the one existing set of standards or rules.

The third condition would involve a case in which a declaration was made regarding adherence to a specified set of standards or rules that were vague or imprecise as to how the mediator would conduct the mediation sessions. For example, the Model Rules in the United States, adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution, declare that the mediator should guarantee confidentiality. The Model Rules do not specify how this high level goal is to be achieved, and it is possible for a mediator to handle communication and record keeping in a myriad of ways that could be described as confidential. What might be seen as reasonable by the mediator might be seen as grossly inadequate to a judge.

The fourth condition would involve a case in which a declaration of adherence to a set of state or organizational standards or rules is made, but in which a judge

5 UNCITRAL working group meeting discussion, para. 87. Found at https://undocs.org/en/A/CN.9/901.

evaluating the conduct of the mediator has insufficient information or expertise to judge the fidelity of the mediator's conduct in relation to the standards.

The fifth condition, although rare, would be a case in which there were no standards or rules extant in either party's venue, and in which no declaration regarding standards was made by the mediator.

Given these potential issues, the question is whether there is a way to create a substitute for a universal 'Code of Conduct', another kind of 'code' that would bring more certainty to parties about the process and approaches used by the mediator and at the same time that would create a platform for enforceability of agreements. We believe such a way exists.

3 A Possible Step Forward: A 'Code of Disclosure'

A 'Code of Disclosure' is a simple but very powerful concept. It would dictate that the very first thing a mediator would do when meeting parties during pre-mediation would be to disclose to them a set of information about how the mediator will conduct the mediation. The disclosure statement would always be structured in the same way, whatever the country and venue. The Code would have a uniform list of topics of disclosure about the mediator's practice. The mediator's conduct could vary underneath each topic, but the list of topics would always be the same. In addition to a declaration of adherence to a specific state or professional code of conduct or model rules, such a list of topics may include critical elements such as independence, neutrality, impartiality, confidentiality, steps in the mediation process, mediation style, the mediator's role, conflicts of interest, a complaint process and accreditation.

Taking 'Mediation Process' as an example, the 'Code of Disclosure' would not require that the mediator use a specific process but that the mediator explain to parties what kind of process she/he would use and to get agreement from the parties that they are willing to enter into that process. This broad 'process' topic could even be broken down into subtopics such as 'pre-mediation', 'Mediation', 'post-mediation'. 'Accreditation' is another good example: under this header, the mediator would disclose if she/he is credentialed by any institution(s) but would not be forced to be accredited if the parties are willing to work with her or him.

Creating such a 'Code of Disclosure' is a goal that is within reach and reachable within a reasonable time frame. Compared with a fully realized 'Code of Conduct' for mediation, creation of a 'Code of Disclosure' would only require discussing and agreeing about the broad topics to be disclosed. Table 1 contains a comparison between a 'Code of Conduct' and a 'Code of Disclosure'

Table 1 Comparison between a 'Code of Conduct' and a 'Code of Disclosure'

	'Code of Conduct'	'Code of Disclosure'
Mission	Sets out expectations about how practitioners who present themselves as mediators will conduct mediation sessions.	Sets out the expectation that mediators will, before beginning mediation, disclose a uniform set of information that will allow and guarantee parties self-determination.
Contents	Guidelines about the minimum standard of appropriate behaviour.	Guidelines about the minimum standard of disclosure.
Basis	Draws on ethical principles and 'best practices' prescribing general standards of behaviour for mediators.	Draws on ethical principles prescribing standards for the mediator's responsibility to inform parties about her/his practice and behaviours.

4 The Benefits of a 'Code of Disclosure'

The creation of such a 'Code of' Disclosure' would bring many benefits to mediation and its various stakeholders. It would:

1 Support and guarantee parties' self-determination, which is today as close to being a universally accepted principle in the mediation field globally as currently exists;
2 Build confidence in the profession's trustworthiness by showing the emergence of a uniform practice;
3 Provide greater transparency and certainty to parties on how their case will be handled;
4 Provide a framework for clarifying to all stakeholders what mediators can be accountable for;
5 Codify what must be disclosed by the mediator to parties and their counsel to be an integral part of the mediation agreement at the beginning of each mediation;
6 Allow mediators and parties to continue benefiting from what is one of the most important hallmarks of mediation: flexibility. The Code would not impose behaviour on the mediator but would impose the duty to explain and get party agreement about what is going to be done and how;
7 Provide to a judge a set of mutually agreed 'case-specific standards' against which he or she will be able to measure 'serious breaches';
8 Provide a platform for a future conversation between professionals about a uniform 'Code of Conduct'.

5 How to Make a 'Code of Disclosure' a Reality

We recommend that the creation of the 'Code of Disclosure' be initiated by convening a 'working group' of respected academics and professionals, independent from any existing mediation institution. This working group should consult existing texts (e.g. codes of conduct) and involve all key mediation-related institutions

to define the topics that most stakeholders want to see covered by a uniform Code and recommend a language to describe those topics. It should then publish a recommendation for adoption that could be endorsed by the UN and/or international professional bodies, or actually incorporated into the Convention or the rules for conciliation.