

DESIRABILITY OF A NEW INTERNATIONAL LEGAL FRAMEWORK FOR CROSS-BORDER ENFORCEMENT OF CERTAIN MEDIATED SETTLEMENT AGREEMENTS

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ABSTRACT

There is the New York Convention for the international enforcement of arbitral awards. But there has not been a counterpart convention for the cross-border enforcement of international mediated settlement agreements (hereinafter “iMSAs”). This article argues that an iMSA is different from an ordinary commercial agreement in many ways and thus there is higher justification to have iMSA being directly enforced. Due to the nature of dispute settlement procedures that one of the parties could look for various possibilities to avoid the performance of an iMSA, ensuring iMSAs being properly performed is of high importance. Also the common practice of parties relying on arbitral award to include the contents of their settlement agreement made during the mediation proceedings also reflects the need of enforceability of iMSA. Hence, it is desirable to have iMSAs of commercial matters eligible for cross-border enforcement. The existence of EU Directive 2008/52/EC and the UNCITRAL Model Law on International Commercial Conciliation (2002) also reinforce such desirability. The paper also argues that there should be certain mechanisms

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to prevent deceptive practice in mediations. One way of preventing possible fraud is to limit the enforceability to institutional iMSAs. The article also suggests that there must also be certain minimal procedural requirements to ensure procedural fairness. The author is of the view that there must be a convention of mandatory nature to require the cross-border enforcement of iMSAs. A soft law would not change the current situation too much.

KEYWORDS: *mediated settlement agreement, MSA, iMSA, cross-border enforcement, ADR, New York Convention*