International Mediation and Conciliation in Cyprus and the Implications of the New Convention on the Enforcement of Settlement Agreements Achieved Through International Mediation

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Whether inside or outside of the commercial context, there has been increasing interest in mediation and conciliation. This ranges from debates before the United Nations Security Council to revisions to the rules of the International Centre for the Settlement of Investment Disputes to the recent conclusion of a convention and model law on the enforcement of settlement agreements arising from international mediation, which will open for signature in August 2019.

What is meditation and what its benefits? Mediation is a form of alternative dispute resolution, which brings two parties to the negotiating table, with the assistance of a neutral third party who facilitates a dialogue and sets the grounds for a mutually accepted solution.

An essential prerequisite to commence the mediation process is the consent of the two parties to the mechanism. That both parties consent to the mediation process with a shared commitment to reaching a solution increases the likelihood of settling the dispute. The structural and procedural flexibility of mediation often discourages parties from adopting antagonistic positions. Mediation allows parties to follow a tailor-made process, reducing costs and saving time, bearing in mind that litigation and even arbitration usually imply high costs and long timescales.

How will the Singapore Convention alter the domestic legal framework in Cyprus? Under the current domestic and international regulatory framework, there are certain disadvantages which may make the mediation process less attractive. These mainly relate to the non-binding nature of mediation. A settlement agreement reached through mediation may not be easily enforceable, even where the parties incorporate the solution into a written agreement. A party may elect not to comply with a settlement agreement. In the absence of a comprehensive legal framework for the enforcement of such agreements, the only option available for a party seeking to enforce a settlement agreement against a non-complying party would be to file an action for breach of contract in the relevant forum. This may result in a lengthy

proceeding, with the consequent high costs and long delays with a consequence that the benefits of mediation may be lost.

The United Nations Commission on International Trade Law (UNCITRAL) Working Group II has identified a means of creating a streamlined, uniform enforcement process for settlement agreements achieved through international mediation to remedy the deficiency regarding enforceability and otherwise promote the use of international mediation.

On 9 February 2018 the UNICTRAL Working Group II concluded negotiations on a draft convention and model law on the enforcement of settlement agreements reached through international commercial conciliation or mediation, which were subsequently approved at the fifty-first session of UNICTRAL on 26 June 2018. The Convention will be open for signature in Singapore in August 2019 and will enter into force once it has been ratified by at least three states.

What are the key features of the new draft convention and the model law?

The convention and model law cover only international settlement agreements resulting from mediation involving commercial parties having their main place of business in different states. Certain matters are outside their scope, including consumer transactions for personal, family and household purposes, agreements relating to family, inheritance and employment matters, and settlement agreements that have been approved by a court or have been concluded before a court and are enforceable as a judgment, as well as those that have been recorded and are enforceable as an arbitral award.

To seek application of a mediated settlement agreement, parties will be required to furnish the competent authority of a contracting state with the signed settlement agreement and provide evidence that the agreement was the result of international mediation.

Each contracting state will be required to enforce settlement agreements in accordance with its own rules of procedure and the conditions set out in the convention and model law. The court or other competent authority of each contracting state will be responsible for deciding whether the subject matter of the agreement sought to be enforced is susceptible to mediation under its domestic law and whether granting the relief it prescribes is compatible with national public policy. The other grounds on which a judicial review or declaration of non-recognition of a settlement agreement can be sought are limited, and must be raised by the interested party, with whom the burden of proof lies. They include issues relating to the mediator's

impartiality or independence, breach of the standards applicable to a mediator or grounds for avoidance of the agreement such as incapacity of one of the parties or nullity of the agreement under the applicable law.

What is the current legal framework for mediation in Cyprus?

Creating a reliable and effective alternative dispute resolution method has been on the agenda of the EU for many years, leading to the adoption of Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters of the European Parliament and of the Council of 21 May 2008. For purposes of harmonization with the Directive, Cyprus enacted the Law on Several Matters of Mediation in Civil Disputes (159(I)/2012) and incorporated the provisions of the Directive into its national legal order, but with a wider range of disputes covered.

As provided in article 1 of the Directive its objective *is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.*

Even though the Directive covers only cross-border disputes, Cyprus extended its applicability to encompass domestic disputes, thus covering a wider range of disputes such as those between Cyprus companies belonging to foreign investors carrying on business abroad, which might not have been eligible for mediation under the more restrictive framework of the Directive.

Law 159(I)/2012 and the Directive apply to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law, disputes relating to revenue, customs or administrative matters or to the liability of the State for conduct in the exercise of State authority (*acta iure imperii*). Cyprus also opted to extend the categories of disputes which are outside the scope of the law to include employment matters.

The Law places particular emphasis on the quality of the mediation process by establishing rules of procedure, as well as rules for safeguarding the professional standards expected from mediators and a control mechanism for the professionals who intend to act as mediators. In particular, for disputes between businesses or between businesses and the government concerning delivery of products or services, mediators should be registered in a special registry kept by the Ministry of Justice. For other categories of disputes, the law requires that mediators satisfy certain requirements and hold certain qualifications in order to register as mediators, thus ensuring a high level of professionalism for the most complicated cases.

The mechanism for the enforcement of the agreement reached by mediation is the principal weakness of the Law and the Directive, as any application to the court to declare an agreement enforceable requires the consent of both parties, except in cases where the terms of the agreement specifically allow the application to be filed without the consent of both parties. As already noted, this particular weakness of the regulatory framework, both on an EU level and further afield, has been an issue for many years, which the Convention and the Model Law now aim to resolve.

Cyprus's aim to promote mediation as an alternative dispute resolution method is evidenced by the incorporation of mediation into one of the most important sectors of economic activity, namely financial services. The Law relating to the Establishment and Operation of a Single Agency for the out of Court Settlement of Disputes of Financial nature of 2010 provides for the establishment of the Financial Ombudsman, who has the competence to deal with complaints of consumers against financial corporations for disputes not exceeding €170,000. Such complaints may concern abusive clauses or overcharges in a loan contract. Under the Law, the Ombudsman is required to act in a fair and impartial manner using a transparent and quick process to safeguard consumers' rights.

In 2014, the Law was amended to give the Financial Ombudsman the authority to appoint mediators to commence a mediation process between debtors and banks for restructuring non-performing loans, on application by the debtor. For an application for the appointment of a mediator to be submitted the following criteria must be satisfied:

i. The amount of the loan at the time of the conclusion of the contract must not exceed €350,000,
ii. the mortgaged property must be used as the main residence of the debtor, and
iii. that at the time of the submission of the application, no judgment has been issued by a domestic court and there is no pending court procedure or pending sale of the mortgaged property by auction.

The existing national legal framework, which applies also to cross-border disputes, provides that the parties by mutual consent or one of the parties with the express consent of the others, have the right to file a petition in court for the enforcement of a settlement agreement. The court has the authority to issue a judgment with the content of the agreement, which will be enforceable in the same way as a court order, or to reject the petition if judged that its content is contrary to law or the dispute subject matter cannot be solved through mediation.

CONCLUSION

The recent developments on an international level, in conjunction with the advantages of mediation in terms of time and cost-efficiency, combined with increased certainty regarding enforceability of mediation outcomes, are expected to increase the attractiveness of mediation as an alternative dispute resolution method and relieve the burden on the overloaded litigation system. Cyprus's position as an international business center with many high net worth individuals and multinational corporations, along with its highly experienced dispute resolution professionals, give it the potential to develop into one of the most reputable and recognized international mediation centres.