ENFORCING INTERNATIONAL COMMERCIAL MEDIATION AGREEMENTS AS ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

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Mediation offers enticing advantages over adversarial systems for the resolution of commercial disputes. Mediation preserves party autonomy by vesting process development and final-decision authority in the hands of the disputing parties. Despite these benefits, businesses underutilize mediation in international settings in part because of unpredictable enforcement practices predicated on varied national policies. This Comment considers the potential for enforcing mediated settlements as arbitral awards under the New York Convention. Enforcement under the New York Convention requires a series of modifications to mediation procedure. The Convention affects contracting, convening, caucusing, and the availability of creative solutions to disputes. Although waivers prove promising to resolve procedural challenges, substantive due process challenges present additional problems. Since the New York Convention was designed for immediate deployment, it fails to accommodate materially altered circumstances unlike contract and consent decree systems. These challenges illustrate the imperfect fit between mediation procedure and arbitration enforcement. Parties to a dispute must carefully weigh the loss in procedural efficiencies and public policy review against the relative certainty of international enforcement when deciding whether to pursue a mediated settlement under the Convention.

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INTRODUCTION

International lawmakers are showing a growing interest in mediation.[1] Mediation, or conciliation,[2] offers an attractive option of self-determination

1. The International Chamber of Commerce (ICC) published optional conciliation rules with their arbitration rules in 1988. ICC, RULES OF OPTIONAL CONCILIATION (ICC Publ'n No. 447) (1988), *reprinted in* YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION, app. 8, at 426 (1998) [hereinafter ICC CONCILIATION RULES]. The ICC updated their procedures in 2001 to include a variety of Amicable Dispute Resolution (ADR) approaches with mediation as the ADR default. ICC, ADR RULES (2001) [hereinafter ICC ADR RULES], *available at* http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf. Thirteen of the first thirty-four countries to adopt the United Nations Commission on International Trade Law [UNCITRAL], *Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17/Annex 1 (June 21, 1985) [hereinafter *UNCITRAL Model Law on Arbitration*], added provisions regarding conciliation, although the model law was purposefully silent on conciliation. *See* PIETER SANDERS, QUO VADIS ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTICE 358–360, 371 (1999) (explaining that China had proposed a provision suggesting conciliation as an additional means of settling disputes). These joint conciliation and arbitration acts prompted UNCITRAL to develop the Model Law on Conciliation in 2002. UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE 2002, U.N. Sales No. E.05.V.4 (2004) [hereinafter UNCITRAL MODEL LAW ON CONCILIATION]. The European Commission also developed a code of conduct for mediators in 2004, which has been adapted into a draft directive under review by the Council of the European Union and the European Parliament. EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS, EUROPEAN CODE OF CONDUCT ON MEDIATION (2004), *available at* http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

2. UNCITRAL's Model Law on Conciliation defines conciliation as:

> [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.

to parties involved in international business disputes by allowing them to craft and accept their own agreement. In a perfect world, no enforcement mechanism is required for mediation because a voluntary agreement yields voluntary compliance. In the world of international business, imperfect circumstances affect the performance of mediation agreements. For instance, human rights abuses could make investors balk, the commodity in question could be subject to embargo, or the currency designated for payment could suffer devaluation. Moreover, recent attempts to standardize the international enforcement of mediated agreements have failed, leaving enforcement dependent on varied national policies.[3] As a result, mediating a settlement in good faith does not immunize it from potential future challenges to compliance.[4]

Aware of the potential challenges, parties considering mediation for international disputes must also consider their enforcement options.[5] One option involves grafting mediation agreements onto arbitration—mediation's private-law counterpart. The New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention),[6] a widely adopted international arbitration treaty, may provide an enforcement mechanism, but its application to the amicable process of mediation creates an imperfect fit. This Comment considers the

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UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, at art. 1(3). The terms "mediation" and "conciliation" are often used interchangeably in international practice. They are potentially distinguishable by the extent of third-party involvement in suggesting grounds for resolution. *See, e.g.*, Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 584–85; *cf.* David J.A. Cairns, *Mediating International Commercial Disputes: Differences in U.S. and European Approaches*, 60 DISP. RESOL. J. 62, 65 (2005). For the purposes of this Comment, the terms will be used interchangeably.

3. *See infra* Part I.B.

4. Empirical data on the frequency of international mediation agreement enforcement actions is not available. Scholars have noted an increasing percentage of challenges to domestic mediation agreements. *See, e.g.*, James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 172–73 (2001); James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 65 n.1 (2004); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 47–8 (2006) (noting that "mediation litigation increased ninety-five percent, from 172 decisions in 1999 to 335 in 2003"). As of 2004, only one award on agreed terms had been challenged in UNCITRAL model law jurisdictions. *See* 145 BGHZ 376 (2000) (holding that an award on agreed terms may be set aside if it is based on a willful and intentional violation of public policy). However, UNCITRAL model law jurisdictions are not necessarily representative of international trends.

5. *Cf.* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 331 (1998) (discussing empirical research that identified the lack of a legal framework for international mediation as a relevant factor across cultural backgrounds).

6. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

potential for and the challenges of enforcing mediation agreements as arbitral awards under the New York Convention.

Part I explores the contemporary landscape of international mediation and the efforts of the United Nations Commission on International Trade Law (UNCITRAL) to standardize an enforcement procedure. Part II introduces the New York Convention and the potential avenues for using it to enforce mediated settlements as either contracts or consent decrees. Part III illustrates the procedural and substantive challenges that an amicable settlement potentially faces if enforced through a procedure designed for adversarial arbitration. Procedural challenges include an invalid arbitration agreement, improper convening, a due process violation arising through the use of caucuses, and arbitrator overstep. While parties can waive most of the procedural challenges by signing the arbitral award, substantive public policy concerns still highlight the imperfect fit of the New York Convention to mediation.

I. MECHANISMS FOR ENFORCING MEDIATED AGREEMENTS

A. Domestic Procedures Internationally

Enforcement by contract serves as the default procedure for nations that have no special provisions for enforcing mediation agreements domestically.[7] The wronged party may initiate an independent breach of contract action in which customary contract burdens of proof and defenses apply. Since contract actions can be costly and tedious, some nations have provided for procedures closer to summary enforcement.[8] These alternative procedures are generally determined by the legal context in which the agreement is reached.

Some nations have designed special procedures for cases in which mediation settles a case on a court's docket.[9] Bermuda and India condition summary enforcement upon stipulation and judicial notarization when a case is before a court.[10] Similarly, the United States allows agreements to be recorded by a judge as a consent decree once the judge determines that a settlement is "fair,

7. *See* UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, para. 89; Practicing Law Inst., *Resolving International Disputes Through Mediation*, PLI Order No. 8710 International Business Litigation & Arbitration, 739 PLI/Lit 409, 436 (2006).

8. UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, para. 90.

9. *Id.* para. 91.

10. *See, e.g.*, Arbitration Act 1986 (1986) (Berm.), *available at* http://www.commonlii.org/bm/legis/consol_act/aa1986137/; The Arbitration and Conciliation Act, 1996, No. 26, art. 73–74 (1996) (India), *available at* http://legalservices.maharashtra.gov.in/pdf/arbitration%20and%20conciliation%20act%201996.pdf.

adequate, and reasonable."[11] Consent decrees are contracts with the res judicata effect of a court decision.[12] Should a party breach the recorded terms, the offended party can request deployment of the court's contempt powers.[13] Consent decrees may be modified by the granting courts under changed circumstances if equity so requires.[14]

A few nations have also started providing for summary enforcement of settlement agreements reached by parties in the context of arbitration.[15] These nations differ as to the degree of arbitral context required to record an agreement as an arbitral award. In Hungary[16] and South Korea,[17] disputants may appoint an arbitrator specifically to record an award based on the settlement agreement. In China, by contrast, a settlement must interrupt an ongoing arbitration for the arbitrator to record the agreement.[18] An arbitrator-recorded settlement in China is given "equal legal validity and effect" to an arbitral award.[19] In Hong Kong, a settlement agreement reached during arbitration may only be enforced as if it were an arbitral award if there was a valid arbitration agreement prior to commencing arbitration.[20] Other nations record the agreement as an award on agreed terms or as a consent

11. Georgevich v. Strauss, 772 F.2d 1078, 1085 (3d Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986).

12. United States v. ITT Cont'l Baking Co., 420 U.S. 223, 235–237 (1975).

13. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 523–24 n.13 (1986).

14. *See* Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 391–92 (1992).

15. UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, para. 91.

16. In Hungary, Act LXXI of 1994 on Arbitration provides that:

> (1) If during the arbitral proceedings the parties settle the dispute, the arbitral tribunal shall terminate the proceedings by an order.
>
> (2) If requested by the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms, provided that it considers the settlement as being in accordance with the law.
>
> (3) An award on agreed terms has the same effect as that of any other award made by the arbitral tribunal.

Act LXXI of 1994 on Arbitration, 6 VERZAL 1, § 39, (1995).

17. In the Republic of Korea, the Commercial Arbitration Rules provide that if the conciliation succeeds, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties, and the settlement reached shall be treated as an award on agreed terms. Arbitration Rules of Korean Commercial Arbitration Board, *as amended* Apr. 27, 2000, art. 18(3), *available at* http://user.chollian.net/~mcchang/arbinkorea_02.htm.

18. Arbitration Law of the People's Republic of China (P.R.C.), at art. 51, *discussed in* Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L ARB. 411 (2005).

19. *Id.*

20. Arbitration Ordinance, (1997) Cap. 341, § 2(C).

award[21] that may be enforced as an arbitral award.[22] Many arbitration rules and statutes also provide for arbitrator discretion in recording a consent award.[23] When these rules are in place, an arbitrator may refuse to record an award for public policy reasons.[24]

B. UNCITRAL Model Law on Conciliation: A Failed Attempt at Standardization

UNCITRAL attempted to remedy this varied assortment of enforcement measures by developing a model law on conciliation.[25] Given the diversity of approaches, the drafting committee for UNCITRAL searched for the lowest common denominator.[26] The drafters recognized that the enforcement of conciliation agreements varied greatly by legal system and often relied on adjudication with myriad domestic procedure technicalities and contract law conceptions.[27] The drafters noted that many practitioners advocated for an arbitral award-like process.[28] Practitioners suggested that expedited enforcement would encourage the use of conciliation by avoiding court actions to enforce settlements, which could take years to reach a judgment.[29] Despite noting these currents of opinion, the drafters failed to find sufficient commonality to distill a uniform model law under their lowest common denominator approach. The drafters eventually abandoned their efforts and delegated the development of enforcement procedures to the individual adopting nation-states.[30]

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21. "Award on agreed terms" and "consent award" will be used synonymously throughout this Comment. These terms are found in two widely used sets of arbitration rules. *UNCITRAL Model Law on Arbitration*, *supra* note 1, at art. 30, provides for award on agreed terms. Article 26 of the ICC Court of Arbitration Rules provides for consent awards. ICC, COURT OF ARBITRATION RULES (1998), *reprinted in* DERAINS & SCHWARTZ, *supra* note 1, app. 7, at 391 (1998) [hereinafter ICC ARBITRATION RULES]. Aside from the rules that the terms invoke, the terms bear identical meaning.

22. PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 234 (2d expanded ed. 2004) (explaining that the written agreement requirement is mandatory and not subject to waiver).

23. *See, e.g.*, *UNCITRAL Model Law on Arbitration*, *supra* note 1, at art. 30(2); ICC Arbitration Rules, *supra* note 21, at art. 26.

24. *See, e.g.*, *UNCITRAL Model Law on Arbitration*, *supra* note 1, at art. 30(2); ICC Arbitration Rules, *supra* note 21, at art. 26.

25. UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, at art. 14.

26. *Id.* para. 88.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at art. 14. Pieter Sanders has criticized this failure to suggest a uniform process as a fatal flaw of the model law. SANDERS, *supra* note 22, at 232–34. Without enforcement provisions, nation-states may be less likely to adopt the model law and the uncertainty of enforcement continues.

C. Enforcing Domestic Court Decisions Internationally

Disputes subject to international commercial mediation may require enforcement in multiple nations. International businesses may have assets in offices or subsidiaries spread throughout the world that could be pledged to reach a settlement.[31] At the time of agreement, claimants may not care which country the resources reside in so long as their interests are met by a satisfactory settlement. However, if intervening circumstances lead a party to default on a mediation agreement, the location of assets becomes vitally important.

With UNCITRAL's failure to develop a model law system for enforcing mediation agreements internationally,[32] court judgments in this context face two significant hurdles outside their country of origin. First, most foreign courts are organized by nation-states, making judgments and contempt sanctions immediately enforceable only within their jurisdiction of origin.[33] Some nations have entered bilateral enforcement treaties or regional conventions,[34] but these treaties are limited; the United States, for example, is not a party to such an agreement.[35]

Without a treaty for recognizing foreign judgments, enforcement is unpredictable. As noted above, nations differ in their procedures for enforcing mediation agreements,[36] and some may refuse to recognize the procedure of the nation of origin.[37] For example, the United States might refuse to recognize a summary enforcement award issued in India because India does not allow judges to initially review the fairness of awards. China might refuse to recognize an award on agreed terms

31. Unlike litigated judgments, mediation agreements often specify the sources and mechanisms for implementation. Particular assets may be pledged to satisfy an agreement.

32. UNCITRAL's attempt was not the only attempt to develop a legal framework for international conciliation agreements. The International Bar Association drafted a convention for the enforcement of foreign conciliation awards in 1982, but the convention was never implemented. Ottoarndt Glossner, *Enforcement of Conciliation Settlements*, 11 INT'L BUS. LAW. 151 (1983).

33. *See* BÜHRING-UHLE, *supra* note 5, at 17.

34. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, EC 46 (1978) (Jan. 1, 1973) (Belg.), *reprinted in* 21 O.J. (L. 304) 77 (1978), was extended by the Lugano Convention, Sept. 16, 1988, *reprinted in* 31 O.J. (L. 319) 9–48 (1988), to include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

35. BÜHRING-UHLE, *supra* note 5, at 21. The United States did negotiate a reciprocal recognition of civil judgments treaty with Great Britain in 1976, but this treaty never entered force. *Id.* at 21 n.52.

36. *See supra* Part I.A.

37. *Cf.* SANDERS, *supra* note 1, at 377–78 (discussing the potentiality of courts refusing to enforce foreign consent awards if governing law does not provide for consent awards).

from Hungary, because the mediation in Hungary preceded arbitration rather than interrupting the arbitral proceedings.

The resulting uncertainty of selective enforcement contributes to the underutilization of mediation for international business disputes.[38] Forward-thinking counsel must select a process that ensures international enforcement. Arbitration is such a process after the New York Convention. For reasons discussed below, the Convention may enforce mediation agreements if they are recorded as arbitral awards.

II. THE NEW YORK CONVENTION

A. Background

In 1953, the International Chamber of Commerce (ICC) proposed a new treaty to regulate the enforcement of foreign arbitral awards.[39] The United Nations Economic and Social Council (ECOSOC) began drafting what was eventually adopted in 1958 as the New York Convention.[40] The ECOSOC modeled initial drafts on the Geneva Convention of 1927, which was the primary arbitration convention in force at that time.[41] Under article 1(2)(d) of the Geneva Convention of 1927,[42] enforcement requires

> [t]hat the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.[43]

Article 4(2) of the Geneva Convention allocates the burden of proving finality to the party seeking enforcement.[44] Finality is generally proven by submitting a leave for enforcement in the court at the site of the arbitration.[45] This process, termed exequatur, was then repeated in the country where enforcement was sought.[46] The inefficiency of the "double exequatur"

38. *See* BÜHRING-UHLE, *supra* note 5, at 330–31.

39. DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958, at 15–17 (2001).

40. *Id.*

41. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter Geneva Convention].

42. *Id.* at art. 1(2)(d).

43. *Id.*

44. *Id.* at art. 4(2).

45. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 7 (1981).

46. *Id.*

requirement under the Geneva Convention was a primary concern for the delegates of the New York Convention.[47] The New York Convention streamlined enforcement by allowing a party to seek enforcement abroad without first seeking it in the nation of origin.[48]

Additionally, the New York Convention sought to address the liberty with which courts refused to recognize and enforce foreign arbitral agreements and awards. Under the New York Convention, foreign courts in signatory states must enforce arbitral awards from other signatories unless the limited exceptions enumerated in article V of the Convention apply.[49] The New York Convention thus severely limits the second look that enforcing courts can make into the merits of an award by providing a limited list of exceptions.[50] Unlike the Geneva Convention, the New York Convention places the burden of proving these exceptions on the party seeking to block enforcement, instead of the party defending enforcement.[51] This marked shift in presumption illustrates and enhances a strong policy towards recognizing and enforcing arbitration awards.[52]

Article V(1) of the New York Convention provides that courts "may"[53] refuse to enforce foreign awards where (a) the arbitration agreement is invalid; (b) a party was not given proper notice or was "unable to present his case"; (c) the arbitrator acted outside his authority; (d) the arbitral procedure was not in accordance with the agreement of the parties; or (e) the award is not binding.[54] Article V(2) supplements this otherwise exhaustive list with the general statement: "The recognition or enforcement of the award would be contrary to the public policy of that country."[55]

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47. *See id.* at 332.

48. *See id.*

49. *See* New York Convention, *supra* note 6, at art. V.

50. *See* VAN DEN BERG, *supra* note 45, at 265; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION § 10-30 (3d ed. 1999).

51. *See* New York Convention, *supra* note 6, at art. V(1); Geneva Convention, *supra* note 41, at art. 4(3).

52. *See* REDFERN & HUNTER, *supra* note 50, § 10-30 & n.65; Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) (noting a "pro-enforcement bias" in the New York Convention).

53. *See* REDFERN & HUNTER, *supra* note 50, § 10-30 & n.67 (noting that the permissive "may" allows courts to enforce an arbitration agreement even where the party resisting enforcement proves adequate grounds for refusing enforcement); VAN DEN BERG, *supra* note 45, at 265 (same). *But see* JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION § 26-69 & n.97 (noting that some countries, including Germany, interpret "may" as a mandatory "shall"); Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 64 (2000) (noting that China interprets the "may" as mandatory).

54. New York Convention, *supra* note 6, at art. V(1)(a)–(e).

55. *Id.* at art. V(2).

Each of the grounds for refusing enforcement has been interpreted narrowly with a presumption in favor of enforcement.[56]

The New York Convention is an ongoing success story. With 142 signatories, including all major trading nations, the Convention plays a vital role in the predictability of international business.[57] Each year Kluwer Law International, a company that provides the global business community with international legal information, publishes the Yearbook of Commercial Arbitration, which contains all court decisions involving the Convention indexed by article.[58] The Yearbook enables judges and arbitrators to look up the clause of the New York Convention at issue in a dispute and find English translations of all cases decided internationally on that point.[59] This organization of international opinions, in addition to the UNCITRAL Model Law on Arbitration,[60] assists in facilitating a standardized international interpretation of the Convention.

While this effort at uniformity automatically places new theories in question, a new theory is nonetheless emerging. Scholars are beginning to suggest that mediation agreements might be enforceable under the New York Convention given the right circumstances.[61] This presently untested theory is developed and critiqued below.

B. Contracts Under the New York Convention

Mediation agreements enforceable as contracts are not "binding" under the Convention. As used in the Convention, the term "binding" serves as a gatekeeper to determine whether arbitral awards are eligible for enforcement. Article V(1)(e) provides for refusal of enforcement where the party requesting

56. *See, e.g.*, DI PIETRO & PLATTE, *supra* note 39, at 17 ("Enforcement may only be refused if basic notions of justice have been violated."); REDFERN & HUNTER, *supra* note 50, at § 10-30; VAN DEN BERG, *supra* note 45, at 268 (noting that exceptions are for "serious cases only; obstructions by respondents on trivial grounds should not be allowed").

57. UNCITRAL, Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 3, 2007).

58. ALBERT JAN VAN DEN BERG, THE YEARBOOK OF COMMERCIAL ARBITRATION (published annually 1976–2005).

59. *Id.*

60. *UNCITRAL Model Law on Arbitration*, *supra* note 1.

61. *See, e.g.*, Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 AM. REV. INT'L ARB. 103, 108 (2004); *cf.* Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 589 (2005). *But see* Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 160–61 (2004).

refusal proves that "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[62] The term "binding" was reportedly the most discussed topic at the New York Convention, and its contemporary application continues to fuel debate.[63]

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62. New York Convention, *supra* note 6, at art. V(1)(e).

63. *See*, VAN DEN BERG, *supra* note 45, at 332. When the ICC developed a draft convention in 1953, it omitted the finality requirement of the Geneva Convention. ICC, *Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention*, at 11, ICC Brochure no. 174 (1953), *reprinted in* U.N. Doc. E/C.2/373 ("[I]t has appeared advisable to consider the problem from a more practical angle and to envisage only the case of awards effectively set aside."). The 1955 draft of the United Nations Economic and Social Council (ECOSOC) reinserted a final and operative in the country of origin requirement "[i]n order properly to safeguard the rights of the losing party." U.N. Doc. E/2704 and Corr.1. para. 32. As governments commented on the ECOSOC draft, many objected to the final and operative requirement as reproducing the double exequatur requirement of the Geneva Convention. *See* VAN DEN BERG, *supra* note 45, at 334. The Dutch Proposal at the New York Convention suggested alternative language: "[T]he award has been annulled in the country in which it was made or has not become final in the sense that it is still open to ordinary means of recourse." United Nations Conference on International Commercial Arbitration, June 3, 1958, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF.26/SR.11 (Sept. 12, 1958) [hereinafter *Convention Conference*]. This approach was critiqued, since many common law jurisdictions were not believed to share an understanding of what was meant by ordinary or extraordinary means of recourse. *See* VAN DEN BERG, *supra* note 45, at 334–35. Ordinary means of recourse connote a genuine appeal on the merits, while extraordinary means of recourse are reserved for certain irregularities, especially the procedural ones, that taint a final decision. *Id.* Working Party No. 3 drafted an alternative standard that an award is not final if it "has not yet become binding on the parties, or has been set aside in the country in which it was made." *Convention Conference*, *supra*, U.N. Doc. E/CONF.26/L.30. The chairman of Working Party No. 3 explained this as follows:

> The text of paragraph 1(e) of article IV was drafted with the aim of making the Convention acceptable to those States which considered an arbitral award to be enforceable only if it fulfilled certain formal requirements which alone made the award binding on the parties. The Working Party agreed that an award should not be enforced if under the applicable arbitral rules it was still subject to an appeal which had a suspensive effect, but at the same time felt that it would be unrealistic to delay the enforcement of an award until all the time limits provided for by the statutes of limitations had expired or until all possible means of recourse, including those which normally did not have a suspensive effect, had been exhausted and the award had become "final". The Working Party also agreed to avoid the use of the words "operative" or "capable of enforcement" which many delegations considered unacceptable because they could be interpreted as requiring the award to satisfy all conditions for its enforcement in the country where it was made.

Convention Conference, *supra*, U.N. Doc. E/CONF.26/SR.17. However, the Italian delegate, who was a member of Working Party No. 3, explained: "[I]n the Working Party the term 'binding' had been taken to mean that the award would not be open to ordinary means of recourse." *Id.* On the other hand, the delegate from Guatemala disagreed with the interpretation given by the Italian delegate. In his view, an award "would not become binding until all means of recourse, both ordinary and extraordinary, had been exhausted." *Id.*

Internationally, courts find the "binding" requirement relevant when considering procedures "akin to arbitration."[64] Procedures akin to arbitration follow a general arbitral framework, but lack recognition as formal arbitration in their country of origin.[65] In Italy, parties may select formal arbitration (arbitrato rituale), or informal arbitration (arbitrato irrituale).[66] "While an award from an arbitrato rituale has the effect of a court judgment, an award from the arbitrato irrituale only has contractual force and must be enforced through an Italian court order."[67] The Italian supreme court interpreted binding to include a binding contract.[68] This interpretation was later challenged in Hamburg, where the highest German court interpreted binding to mean no longer subject to ordinary means of appeal on the merits.[69] According to the German opinion, arbitrato irrituale awards should not be enforced because they are subject to review on the merits under contract doctrine.[70] After the German opinion, consensus formed that procedures akin to arbitration are not enforceable under the New York Convention.[71] The binding requirement is not met when there is a potential remedy in contract, since this maintenance of court jurisdiction negates the spirit of the Convention to enforce alternatives to court jurisdiction.[72]

Arbitrato irrituale informs the discussion of mediation because mediation agreements are generally enforced as contracts and open to similar contract

64. Three procedures are generally considered akin to arbitration: Arbitrato Irrituale (Italy), Schiedsgutachten (Austria, Germany), and Bindend Advies (Indonesia, Netherlands). SANDERS, *supra* note 1, at 170–71.

65. *Id.*

66. *See generally* Susan Choi, Note, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 195 (1996). Arbitrato irrituale developed to avoid "arbitrato rituale's inflexible procedural rules, registration duty and requirement that the arbitrator have Italian citizenship." *Id.*

67. *Id.* In a contract action to enforce arbitrato irrituale, a party may argue that a contract was not executed in good faith and no reasonable person would have made such a decision. *See* SANDERS, *supra* note 1, at 170–71.

68. *See* Butera v. Pagan, Cass., sez. un. 18 sept. 1978, n.4167, *excerpted in* 4 Y.B. COM. ARB. 296 (1979). Notably, the language of the enforcement article states that settlement agreements will be binding and enforceable. The use of the term binding might be interpreted to support the Italian interpretation of binding as including contracts under the New York Convention. However, as discussed above, this approach has not garnered much support after the German opinion.

69. *See* 22 Neue Juristische Wochenschrift 1224 (1982), *excerpted in* 8 Y.B. COM. ARB. 366 (1983).

70. *See id.*

71. *See, e.g.*, DI PIETRO & PLATTE, *supra* note 39, at 54–55; LEW, MISTELIS & KRÖLL, *supra* note 53, § 26-38; SANDERS, *supra* note 22, at 62; SANDERS, *supra* note 1, at 170–71; VAN DEN BERG, *supra* note 45, at 44. The Second Circuit of the United States had an opportunity to comment, but held that decision on this point was not necessary for the case at issue. Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998).

72. *See supra* note 69 and accompanying text.

law challenges.[73] Courts have not yet confronted whether mediation settlements enforceable as contracts properly fall within the New York Convention. Analogy to arbitrato irrituale suggests that when mediation agreements are enforceable as contracts the maintenance of national court jurisdiction will bar enforcement under the Convention. It is perhaps because of this predicted result that the practice of award on agreed terms developed.

C. Award on Agreed Terms

The award on agreed terms, also known as a consent award,[74] is a trick of legal fiction. An award on agreed terms results from the process of naming a mediator as an arbitrator after a settlement is reached in order to record the settlement as an arbitral award.[75] Notably, the decision that the arbitrator records is not his own, but rather reflects the agreed settlement terms of the parties. Thus, the parties retain the self-determination of mediation, but, by sleight of hand, their agreement becomes an arbitral award. Multiple systems of arbitration rules endorse this practice,[76] but limitations to enforceability under the New York Convention remain untested.

The New York Convention does not define "arbitral award" or specifically mention a procedure for consent awards.[77] This silence raises the question of whether consent awards qualify as arbitral awards under the Convention. The answer to this question may turn on whether a consent award is, in fact, an arbitral award, or if it is something definitionally distinct to be given the same status and effect as an arbitral award.

It has been argued that some consent awards should not be enforceable under the New York Convention because they are not arbitral awards per se; they are only to be treated like arbitral awards.[78] The word choice

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73. *See supra* note 7 and accompanying text.

74. *See supra* note 21.

75. *See* SANDERS, *supra* note 22, at 232.

76. *See, e.g.*, Am. Arbitration Ass'n, Arch. International Dispute Resolution Procedures, at art. 29 (Sept. 15, 2005), http://www.adr.org/sp.asp?id=22090#Intl_Arb_Rules; ICC ARBITRATION RULES, *supra* note 21, at art. 26; London Court of International Arbitration (LCIA), LCIA Arbitration Rules, at art. 26.8 (Jan. 1, 1998), http://www.lcia-arbitration.com; *UNCITRAL Model Law on Arbitration*, *supra* note 1, at art. 34; World Intellectual Property Organizations Arbitration Rules, at art. 65(a)–(b), *available at* http://www.wipo.int/amc/en/arbitration/rules/index.html (last visited Apr. 16, 2007).

77. *See* REDFERN & HUNTER, *supra* note 50, § 8-06; Albert Jan van den Berg, *New York Convention of 1958 Consolidated Commentary Volumes XXII(1997)–XXVII(2002)*, *in* 28 Y.B. COM. ARB. 657 (2003).

78. Many statutes providing for consent awards specify that consent awards are to be given the "same status and affect" as arbitral awards. *See, e.g.*, Arbitration Law of the People's Republic of China, *supra* note 18.

providing for the "same status and effect" as arbitral awards suggests that these consent awards are not technically arbitral awards.[79] Under this line of reasoning, the reference to "same status and effect" applies to domestic enforcement. However, since these consent awards are not arbitral awards, they cannot fall within the New York Convention.

If this approach is taken, an incongruous system results from pure semantics. As noted above, some nations give consent awards the same status and effect as arbitral awards, while others simply identify consent awards as arbitral awards.[80] Although the physical awards and explicit party intent are practically identical, awards to be given the "same status and effect" would not be enforceable under the New York Convention, while awards classified as arbitral awards would be enforceable. This inconsistent result contradicts the Convention's preference of international consistency.[81]

III. ENFORCEMENT CHALLENGES UNDER THE NEW YORK CONVENTION

If courts interpret the New York Convention to cover consent awards, a larger question is how the standards designed for arbitration apply to mediation. Arbitration is a binding process that begins with a valid arbitration agreement.[82] If a contract contains a valid arbitration agreement, either party can invoke that agreement to demand arbitration when a dispute arises.[83] Once an arbitration clause is invoked, the parties begin convening an arbitration tribunal. Proper convening of a tribunal is important because the parties are bound to the decision of the tribunal.[84] Once a tribunal is convened, it may not conduct private communications with the parties, because due process forbids the presentation of evidence without an opportunity to respond. The tribunal is also tightly held to its mandate of which components of disputes are submitted to it.[85] The grounds for nonenforcement under the New York Convention are interpreted with these concerns in mind.

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79. *See* SANDERS, *supra* note 22, at 234 (suggesting that only an arbitral award as such would fall within the UNCITRAL Model Law).

80. *See supra* Part I.A.

81. *See* REDFERN & HUNTER, *supra* note 50, § 10-33 (suggesting an ideal of international consistency in interpretation and application).

82. *See id.* § 1-09.

83. *See id.* § 1-10.

84. *See id.* §§ 1-09, 1-11.

85. *See id.* § 1-11 ("[T]he jurisdiction of the arbitral tribunal is derived simply and solely from the agreement of the parties.").

Mediation is a fundamentally different process than arbitration.[86] Mediation is a noncompulsory process,[87] so a mediation clause does not have the same effect as an arbitration clause.[88] The decision of whether to settle and on what terms is left to the parties.[89] Mediation convening and due process standards are unique because the mediator does not bear binding decision authority. Since agreement is made by consent, parties are generally free to create value with their settlement—for example, by developing new business relationships that were not originally contemplated.[90]

Applying arbitration standards to mediation is an imperfect fit, which creates multiple potential challenges under the New York Convention. Although many of the potential challenges may be avoided by modification of the mediation process, these modifications risk jeopardizing party autonomy and diluting the effectiveness of the process.

A. Procedural Challenges

1. Invalid Arbitration Agreement

The imperfect fit between arbitration standards and mediation procedures is evident where parties to a mediation do not have a preexisting arbitration agreement. Once a mediation is convened, a mediation clause generally becomes irrelevant;[91] however, the opposite is true for arbitration.[92] Under the New York Convention, a valid arbitration clause to resolve differences is required for enforcing an arbitral award.[93] Since mediation agreements

86. *See* UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, para. 1 ("The intent is to distinguish conciliation . . . from binding arbitration . . . . The words 'and does not have the authority to impose upon the parties a binding solution to the dispute' are intended to further clarify and emphasize the main distinction . . . .").

87. *Cf.* REDFERN & HUNTER, *supra* note 50, § 1-51 (suggesting compulsory and noncompulsory qualities as a possible distinction between arbitration and forms of alternative dispute resolution such as mediation, respectively). Both arbitration and mediation require consent to initiate the process, but mediation participants retain the right to terminate the process at any time. Once parties initiate arbitration, they are bound by the arbitrator's decision. Deason, *supra* note 61, at 589.

88. *See infra* Part III.A.1.

89. *See infra* Part III.A.1.

90. *See infra* Part III.A.4.

91. At most, mediation clauses have been interpreted to require a good faith effort towards settlement. *Cf.* SANDERS, *supra* note 22, at 212–13. After efforts are made, the decision to settle and the terms of the settlement are left to the parties.

92. *See* BÜHRING-UHLE, *supra* note 5, at 43 ("[O]nce this consent [to the arbitral process] is given, the parties are bound by the decision regardless of whether they accept it.").

93. *See* SANDERS, *supra* note 22, at 64 (explaining that the written agreement requirement is mandatory and not subject to waiver).

are termed arbitral awards for the purposes of seeking enforcement under the Convention, the Convention may require a valid arbitration agreement.[94]

Mediations may face a procedural challenge under the New York Convention if there is no written arbitration agreement between the parties. To avoid this legitimate challenge, parties can enter into an arbitration agreement or include an arbitration clause in their contract. The difficulty with this approach is the foresight required for parties that are purely interested in mediation. The Convention implicitly requires parties not only to foresee future disputes, but also to foresee that future disputes might be resolvable through mediation and potentially need the international enforcement mechanism of the New York Convention. If mediation is successful, the clause only serves to establish the operation of the New York Convention's enforcement mechanism. If a dispute is unresolved through mediation, however, an arbitration clause requires parties to arbitrate, and they are then bound to the results of the arbitration.[95] If parties do not intend to be bound to an arbitral award not of their making, they are placed in a difficult drafting position.[96] The Convention essentially requires parties to risk losing their autonomy in resolving disputes, even though autonomy is often the primary reason for choosing mediation.[97]

Recent decisions in Spain and Germany suggest an alternative interpretation to the arbitration agreement requirement. The Tribunal Supremo in Spain found that the parties' behavior in the arbitration established the proof of common intent required by article IV(1)(b).[98] Similarly, the Higher Court

94. *See* Deborah L. Holland, *Drafting a Dispute Resolution Provision in International Commercial Contracts*, 7 TULSA J. COMP. & INT'L L. 451, 461 (2000).

95. Courts enforce arbitration agreements by refusing to hear cases subject to an arbitration agreement. *See* REDFERN & HUNTER, *supra* note 50, § 1-10. The concern that parties would be subject to binding arbitration upon failure of mediation arises from the possibility that one party would invoke the arbitration clause and raise the clause as a bar to court action. If neither party invokes the arbitration clause, the clause becomes moot.

96. *See* Deason, *supra* note 61, at 588–89.

97. A potential remedy for this dilemma would require a further stretching of the Convention. Conceivably, the arbitration agreement requirement of the Convention could be bifurcated so that parties may legitimately submit their dispute to an arbitral convening without submitting to an arbitral decision. This bifurcation would allow parties to contract for mediation within the ambit of the New York Convention without risking unintended submission to binding third-party hearings and awards. The advancement of this argument, however, is probably years from fruition, even assuming that consent awards become routinely recognized. Until such time, parties intending mediation are expected to make the arbitration gamble when drafting their contracts if they want the certainty of enforcement under an arbitration convention.

98. *See* Shaanxi Provincial Medical Health Products I/E Corporation v. Olpesa, Tribunal Supremo [Supreme Court], 7 October 2003, No. 112/2002, *excerpted in* 30 Y.B. COM. ARB. 617, 619 (2005) (curing a challenge to invalid arbitration agreement where a party "appears before the arbitrators or the 'ad hoc' institution without objecting to the submission of the dispute to

of Appeal of Bavaria held that the defendant was "estopped from relying on a formal defect" where the defendant participated in the arbitration without raising any objection.[99] The German court reasoned that "the prohibition of contradictory behavior is a legal principle implied in the Convention."[100] If international consensus develops around estopping challenges to arbitration agreements where parties participate without objection, the arbitration agreement requirement and its implications for mediation will become moot.

2. Improper Convening

Enforcing a mediated settlement from a process that is openly commenced as mediation is ordinarily not a problem when enforcing mediated settlements as contracts or consent decrees. Enforcing mediation agreements as arbitral awards is different, however, because this practice is based on a legal fiction—a mediation becomes an arbitration, in name, for the purpose of recording an enforceable award.[101] The difficulty lies in determining when that fiction must begin to effectively fall within the Convention.[102]

Article 26 of the ICC Arbitration Rules, which regulates consent awards, applies "if parties reach a settlement after the file has been transmitted to the arbitral tribunal."[103] The ICC rule is uncharacteristically specific. Most national and agency rules follow the more general UNCITRAL Model Law approach: "[i]f, during arbitral proceedings, the parties settle."[104] This ambiguous language leaves the definition of "during arbitral proceedings" up for debate.

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arbitration and without objecting to the jurisdiction of the arbitrators . . . and only defends itself as it deems fit on the merits of the dispute").

99. K Trading Company v. Bayerischen Motoren Werke AG, Bayerisches Oberstes Landesgericht [BayObLG] [Higher Court of Appeal of Bavaria] Sept. 23, 2004, No. 4Z Sch 005-04, *excerpted in* 30 Y.B. COM. ARB. 568, 571 (2005).

100. *Id.* at 572.

101. *See supra* Part II.C.

102. Some scholars have taken the stance that, in some instances, arbitration must begin before mediation:

> It is unlikely that a mediated settlement agreement will be enforced other than as a contract if the mediation phase of the . . . proceedings occurs apart from and before the arbitration phase of the process. Arguably, if the arbitration phase has not started by the time the settlement has been reached, the settlement will not be integrated into an arbitral award.

de Vera, *supra* note 61, at 161 (footnote omitted).

103. ICC ARBITRATION RULES, *supra* note 21, at art. 26.

104. *UNCITRAL Model Law on Arbitration*, *supra* note 1, at art. 30.

The ICC rules implicitly require that an arbitral tribunal be convened to receive the case file. Receipt of a file serves as a bright-line timestamp. Presumably, a mediator could receive a file under the title of arbitrator and commence mediation immediately. Under this theory, discovery, opening statements, and negotiations could all occur as facilitated mediation, rather than as adjudicative arbitration. If the mediation is successful, the mediation agreement may be recorded as an arbitral award that is potentially enforceable under the New York Convention. This result is expected, and even required, in some national jurisdictions. In Hong Kong, conciliation may occur before commencement of arbitration.[105] In Brazil, arbitration must begin with an attempt at conciliation.[106] Thus, the only necessary arbitral context is that the conciliator is hired as an arbitrator.

The New York Convention imposes an additional challenge by requiring parties subject to an arbitration agreement to "submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship."[107] The term "differences" is used three times in the first two articles of the New York Convention.[108] It has been argued that a successful mediation resolves all differences.[109] Therefore, if parties agree to arbitrate after a mediation agreement is reached, this is not a valid agreement to resolve differences.[110]

The response to this argument relates back to the arbitral context required to record an agreement as a consent award. Assuming there are differences at play in a dispute, these differences will be present at the time of convening. If convening is nominally conducted for arbitration, then arbitration is being invoked to resolve differences. The weakness of this argument is that arbitration is also necessarily invoked after the differences are resolved to record the settlement as an arbitral award. This weakness may be overcome by classifying the call for arbitration to record the award as a renewal of the original procedure. This is the likely interpretation intended by the consent award statutes that require settlements to occur during arbitration.[111]

A potential drawback to convening a mediation as an arbitration is the resulting structure of the arbitral tribunal. Arbitral tribunals are commonly

105. *See* de Vera, *supra* note 61, at 161–62.
106. *See* SANDERS, *supra* note 1, at 368.
107. New York Convention, *supra* note 6, at art. II(1).
108. *Id.* at art. I(1), (3), art. II(1).
109. *See* Christopher C. Newmark, *Can a Mediated Settlement Become an Enforceable Arbitration Award?*, 16 ARB. INT'L 81, 83 (2000).
110. *See id.* (citing Mustill and Boyd, *Commercial Arbitration* (Butterworths 1995), p. 31).
111. *See supra* note 18 and accompanying text.

comprised of three arbitrators.[112] Each party appoints an arbitrator and the two arbitrators appoint a chair. Mediation is generally conducted solo or by a pair of mediators.[113] By convening an arbitral tribunal under some arbitration rules, parties may be incurring the undesired expense of hiring arbitrators they do not intend to use. The convening process must also be adapted by the parties so that they independently reach consensus on an appropriate and skilled mediator, since qualifications for arbitrators do not necessarily translate into skills to facilitate mediation.[114] These inconveniences may be avoided by drafting a multistep mediation-arbitration clause that provides a solo or co-arbitrator model with an agency that employs strong mediators on its panel.[115]

If parties wish to insure the applicability of the New York Convention, they are presently advised to include a valid arbitration clause in their contract and convene an arbitral tribunal before commencing mediation. Nevertheless, once a mediation is recognized as legitimately within an arbitration, certain limits still constrict the recording of a settlement as an arbitral award.

3. Due Process: Unable to Present Case

Mediators commonly use a practice called caucusing to resolve complicated disputes.[116] In this practice, a mediator meets privately with a party to discuss aspects of the conflict.[117] Mediation confidentiality provisions allow these private conversations to be kept confidential from the other parties.[118] Caucuses are useful to explore bottom lines, confront difficult behavior, discuss sensitive topics, and question the feasibility of positions

112. REDFERN & HUNTER, *supra* note 50, § 1-12.

113. *See generally* BÜHRING-UHLE, *supra* note 5, at 299 (describing the use of two mediators).

114. *See* Barry C. Bartel, Comment, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 688–89 (1991).

115. *See* Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 159, 162–69 (2005).

116. *See generally* MARK D. BENNETT & MICHELE S.G. HERMAN, THE ART OF MEDIATION 123–26 (1996).

117. *See id.*

118. Article 7 of the UNCITRAL Model Law on Conciliation provides that arbitrators may meet with parties separately, and article 8 allows for confidentiality in these meetings. UNCITRAL MODEL LAW ON CONCILIATION, *supra* note 1, at arts. 7–8. Functionally, this means that if a party so requests, an arbitrator may not share with another party information that is potentially relevant to settlement. Even when no confidentiality is requested, the first sentence of article 8 stipulates that only the substance of the information may be disclosed, not the literal content. *Id.* at art. 8.

without causing loss of face.[119] Mediations involving private caucuses may be enforced as either contracts or consent decrees without due process challenges.

Arbitration makes different assumptions. Designed with a binding decisionmaker in mind, the New York Convention has been interpreted to disallow private communications.[120] This prohibition is based on the due process protections provided by article V(1)(b).[121] Article V(1)(b) permits a court to refuse enforcement where a party was "unable to present his case."[122] The application of this protection is illustrated in two paradigmatic German opinions.

In the first case, a single arbitrator decided on the basis of documents.[123] The U.S. firm P submitted a letter that the arbitrator did not forward to the German firm F.[124] The German firm consequently had no knowledge of the letter's existence. The court held that this was a violation of due process, which mandated that the German firm had a right to review all documents and an opportunity to respond.[125] In the second German case, the arbitrator went with one party to examine physical evidence without inviting the opposing party along to provide an alternative explanation.[126] Again, the court found a due process violation. The court held that a party must have an opportunity to review and respond to all substantive communications between an arbitrator and opposing parties.[127]

At first glance, confidential private caucuses in mediation are a direct violation of the New York Convention's due process requirement.[128] Similar to the undisclosed communication in a letter or the ex parte review of physical evidence, caucuses facilitate private conversations between one party and a mediator. The opposing party is not generally apprised of the content of these conversations, so he is not afforded a meaningful opportunity to respond or to refute the information shared.[129] A vital distinction, however, is that a mediator does not possess the binding decision power that an arbitrator possesses. It may be argued that the relevant due process concern in

119. BENNETT & HERMAN, *supra* note 116, at 126 fig.34.

120. *See* de Vera, *supra* note 61, at 159; James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 94 (1997).

121. *See* New York Convention, *supra* note 6, at art. V(1)(b).

122. *Id.*

123. 2 Y.B. COM. ARB. 241, 241 (1977).

124. *Id.*

125. *See id.*

126. *See* LEW, MISTELIS & KRÖLL, *supra* note 53, § 26-88 & n.128.

127. *Cf. id.*

128. de Vera, *supra* note 61, at 159.

129. *See supra* note 118 and accompanying text (discussing the UNCITRAL confidentiality provisions for private caucusing).

arbitrations is that the decisionmaker receives information that a party does not have the opportunity to refute. In mediation, the parties are the decisionmakers. While the parties may not have the opportunity to refute every communication, they do have the opportunity to reject settlement options they believe to be unsupported by the information they have received.

Creating a distinction between arbitration and mediation due process standards cuts against the Convention's efforts towards uniformity by allowing different standards for a single clause in the Convention's text.[130] Given the strong trend towards uniformity, mediations may be subject to the same due process standard as arbitrations. Until international standards are set, the prudent practitioner is best advised to avoid using private caucuses in a mediation that might require enforcement under the New York Convention.

This result removes an effective tool from a mediator's toolbox. Although mediations can function effectively without caucuses, the practice proves valuable by allowing mediators to privately discuss with parties underlying dynamics of the dispute that they may not be willing to share with each other. Mediators often use their knowledge of the unspoken context to facilitate a more productive and efficient conversation. When parties lose the option of caucusing by tailoring their mediation to comport with the Convention, they lose some of the potential benefits of mediation.

4. Overstep of Arbitrator Mandate

Since mediation is a consensual process whereby the parties design their own agreement, parties are free to agree to create a new business relationship. For example, a mediation over past-due royalties can be resolved with an agreement to forgive past royalties in exchange for a collaboration to upgrade the formatting of the films. This result is both accepted and anticipated when mediation stands alone; however, arbitration adds a small complication.[131]

130. This argument is complicated by the existence of hybrid procedures like med-arb, in which unsuccessful mediation is followed by arbitration. *See* Gerald F. Phillips, *It's More Than Just "Med-Arb": The Case for "Transitional Arbitration,"* 23 ALTERNATIVES TO HIGH COST LITIG. 141, 152 (2005). With hybrid procedures, there is a greater due process concern because the mediator participating in the private caucuses can become the arbitrator and the binding decisionmaker. *Cf.* Peerenboom, *supra* note 53, at 25 (noting concerns such as access to confidential or privileged information, which could bias an arbitrator's decision; ex parte confidential caucuses with individual parties, which the other party does not have notice to challenge; and pressure to settle for fear of angering the arbitrator). Courts may favor a uniform approach, rather than attempting to sort out when private caucuses create due process violations.

131. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) ("A federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.").

Since parties are bound by the result of arbitration, there are safeguards on the scope of the arbitrators' decisions.[132] Article V(1)(c) permits courts to refuse enforcement where "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration."[133] Internationally, courts have developed a two-pronged test for determining when a tribunal has exceeded its mandate: (1) What is the scope of the arbitral agreement; and (2) what are the matters that parties have submitted to resolution by the arbitral tribunal?[134]

While new and unanticipated business relationships are not likely to be included within the scope of the initial arbitration clause, they may be interpreted as being within the scope of the submission depending on the relevant time of submission. As discussed above, naming the mediator as an arbitrator to record an arbitral award after the dispute is settled can be interpreted as a separate and independent submission to the arbitral tribunal.[135] Under this theory, the new business relationship is included in the submission for review. This theory is ultimately unhelpful, however, because it undermines the argument that the arbitrator is appointed to resolve an active dispute and that the process is renewed to record an award.[136]

Recent cases suggest another possible avenue for including new business relationships in arbitral awards. Under this approach, courts allow parties to broaden the arbitral mandate beyond the scope of the arbitration clause if they explicitly agree to the extension.[137] This waiver provision works nicely with the fact that an explicit agreement is required of the parties before the arbitrator can record a consent award. Thus, through this workaround, new business relationships are likely recordable within the New York Convention.

Another potential challenge under article V(1)(c) might be more difficult to waive. Parties generally contract to submit future disputes to an institutional set of arbitration rules.[138] Contracting parties may also designate the applicable law for the arbitration.[139] It is conceivable that parties would select an institutional set of rules that provides for consent awards, but national law that is silent on the practice. Pieter Sanders has suggested that arbitrators who make consent awards in the absence of statutory regulation

132. *See* REDFERN & HUNTER, *supra* note 50, § 1-11 ("[T]he jurisdiction of the arbitral tribunal is derived simply and solely from the agreement of the parties."); SANDERS, *supra* note 1, at 331–34.
133. *See* New York Convention, *supra* note 6, at art. V(1)(c).
134. *See* van den Berg, *supra* note 77, at 656–58.
135. *See supra* Part III.A.2.
136. *See supra* Part III.A.2.
137. *See* van den Berg, *supra* note 77, at 657.
138. *See generally* SANDERS, *supra* note 1, at 377–78.
139. *See id.* at 247–48.

might be overstepping their mandate.[140] This infirmity is difficult to waive because it deals directly with interpretations of applicable law rather than the scope of the discrete dispute.[141]

5. Signature as Waiver

Whereas unsigned agreements may invite statute of frauds challenges in contract actions, party signatures play an entirely different role in arbitration awards. Since the Convention is designed to enforce the binding award of a third-party arbitrator whether or not the disputants are satisfied, party signatures are not generally required.[142] However, party signatures may be useful. Pieter Sanders has suggested that most procedural challenges can be explicitly or implicitly waived.[143] If this approach is adopted, a signed consent agreement could waive most procedural challenges.

This provision for waiver is consistent with the general value of party autonomy present throughout the Convention. As noted above, the scope of an arbitration clause may be adjusted with party agreement.[144] The provisions governing irregular arbitral procedure also defer to party agreement.[145] Some scholars have suggested that certain rights are unwaiveable.[146] If courts are hostile to the idea of enforcing mediation agreements as arbitral awards, they may take this approach to strike down mediation agreements on the procedural grounds discussed above. If the competing interest in encouraging use and enforcement of arbitration agreements controls, party signatures on a consent award will waive due process and arbitrator-mandate challenges.

B. Substantive Challenges

The imperfect fit between arbitration standards and mediation procedures is most problematic for substantive public policy reasons. Mediation agreements are reached voluntarily, so voluntary performance is expected. Enforcement mechanisms are generally not invoked until after intervening

140. *See id.* at 248.

141. This potential malady may be easily avoided by designating national law with statutory provisions for consent awards.

142. *See* BÜHRING-UHLE, *supra* note 5, at 43 ("[O]nce this consent [to the arbitral process] is given, the parties are bound by the decision regardless of whether they accept it."); *cf.* SANDERS, *supra* note 1, at 278.

143. *See* SANDERS, *supra* note 1, at 251.

144. *See supra* Part III.A.4.

145. *See* New York Convention, *supra* note 6, at art. V(1)(d).

146. *See* SANDERS, *supra* note 22, at 64.

circumstances have challenged enforcement. Both contract and consent award systems accommodate the consideration of intervening circumstances. For instance, contract law allows defenses of impracticability and frustration of purpose,[147] while consent awards permit adjustment as equity requires.[148] On the other hand, arbitration-enforcement procedures are designed for prompt deployment. The public policy challenges available under the New York Convention[149] are tailored to this immediate timeframe.

The International Law Association Committee on International Commercial Arbitration identifies procedural and substantive grounds for public policy challenges.[150] The substantive grounds include fundamental principles of law, actions contrary to good morals, and national interests.[151] Successful challenges under article V(2)'s public policy provision are rare.[152] As a judge in Hong Kong noted, a broad interpretation would undermine the intent of the New York Convention to facilitate the efficient enforcement of arbitral awards.[153] The most frequently quoted test suggests that the defense is only available "where enforcement would violate the forum state's most basic notions of morality and justice."[154] While other grounds for nonenforcement refer to standards set by party agreement, the public policy exception is left to nation-state discretion.[155] The accepted frame of reference is the enforcing country's international public policy.[156] Although national courts are given discretion to apply their own international

147. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

148. *See* Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 391–93 (1992).

149. New York Convention, *supra* note 6, at art. V(2).

150. *See* Int'l Law Ass'n, Comm. on Int'l Commercial Arbitration, New Delhi Conference, Apr. 2002, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* [hereinafter New Delhi Conference], *available at* http://www.ila-hq.org/html/layout_committee.htm.

151. *See id.* paras. 28–29.

152. *See* VAN DEN BERG, *supra* note 45, at 366.

153. *See* Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., [1999] 2 H.K.C. 205, 216 (C.F.A.) (Bokhary, P.J.), *reported in* van den Berg, *supra* note 77, at 676 ("When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.").

154. Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

155. DI PIETRO & PLATTE, *supra* note 39, at 179–82.

156. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that antitrust claims are not arbitrable in domestic disputes but are arbitrable in international disputes); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (same for securities claims).

public policy, the International Law Association Committee encourages courts to strive towards consistency by considering foreign courts' public policy tests.[157]

The application of the public policy exception to intervening circumstances is best illustrated through examples. In example one, an intervening circumstance yields a different result under the Convention than under contract or consent decree alternatives because of the temporal flaw in the Convention. In example two, a preexisting illegality unknown to a party suggests the similarity between enforcement mechanisms when defects are present at the time of settlement. Example three demonstrates the limits of the public policy exception with a circumstance where none of the enforcement mechanisms would modify the agreement.

1. Example One: Unforeseen Embargo

Assume parties form a valid mediation settlement agreement regarding the ongoing production of a specialized commodity from a designated region. After two years of successful performance under the agreement, an unforeseen embargo renders performance under the mediation agreement illegal and unworkable. Assuming that no party could be identified as having assumed the risk, what results would there be under contract law, consent decree, and the New York Convention?

Under contract law, the defense of impracticability applies. The Restatement (Second) of Contracts excuses nonperformance for reasons of impracticability where, "after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made."[158] Although U.S. courts impose an exacting standard for impracticability,[159] dicta in *Eastern Airlines, Inc. v. Gulf Oil Corp.*[160] suggests that "a severe shortage of raw materials or of supplies due to a contingency such as . . . embargo . . . which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section."[161] An embargo, or an analogous intervening circumstance, could be construed as an event without fault that undermines a basic assumption of the contract and excuses nonperformance.

157. *See* New Delhi Conference, *supra* note 150, para. 35.
158. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).
159. *See, e.g.*, Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 319–20 (D.C. Cir. 1966); Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 437–41 (S.D. Fla. 1975).
160. 415 F. Supp. 429.
161. *See id.* at 438.

Consent decrees are subject to modification as equity requires. U.S. case law provides for consent decree modification where a change in law or fact materially changes the circumstances of performance.[162] An unforeseen embargo appears to be a material change in circumstance that would effectively trigger the equity consideration.[163] Review of both consent awards and contracts is available because the review mechanisms contemplate delayed enforcement triggered by intervening circumstances.[164]

Under the New York Convention public policy exception, there is no clear analog to this hypothetical. The substantive public policy grounds are limited to irregularities that occur during the arbitration process.[165] Although an embargo might meet the spirit of the language interpreting the public policy exception,[166] the contemplated immediate-enforcement window means that the narrow public policy exception will probably not apply.

2. Example Two: Human Rights Abuses

For this example, assume a purchaser enters into a mediation settlement agreement with a manufacturer of textiles in India. A year into the agreement, national authorities successfully prosecute the manufacturer for five years of human rights violations in the manufacturer's factories.[167] Afraid of consumer response, the purchaser refuses to accept delivery of textiles manufactured under illegal conditions as nonconforming goods.

Under contract law, the purchaser may argue that the public policy doctrine of illegality applies. The presence of illegality voids the formation of a contract.[168] Consent decree jurisprudence also incorporates the contract

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162. *See* Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 391–92 (1992); Sys. Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("[S]ound judicial discretion may call for modification . . . if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."); United States v. Swift & Co., 286 U.S. 106 (1932).

163. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 73 cmt. c, illus. 4 (1982) ("[W]hen a change of law occurs following a judgment regulating future conduct, that may be a circumstance justifying relief from the judgment.").

164. *See Sys. Fed'n No. 91*, 364 U.S. at 647.

165. *See* New Delhi Conference, *supra* note 150, para. 28.

166. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974) (concluding that states cannot deny enforcement of foreign arbitral awards on public policy grounds "where enforcement would violate the forum state's most basic notions of morality and justice").

167. Imagine, for the purposes of this hypothetical, a functional human rights law that criminalizes conditions commonly associated with sweatshops.

168. Ala. Rural Fire Ins. Co. v. United States, 572 F.2d 727, 733 (Ct. Cl. 1978); RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a, illus. 1 (1981).

concept of public policy.[169] Thus, both contract and consent decree doctrines permit reconsideration of an agreement premised on illegality.

Analysis under the New York Convention differs from the first example because the potential public policy offense was present at the time of the arbitration. In this case, the public policy analysis applies directly. The relevant question is whether the human rights abuses violate the enforcing nation's most basic notions of morality and justice. While the application of international public policy will be sensitive on the issue of human rights, nonenforcement in this context is conceivable.

3. Example Three: Currency Devaluation

In this third example, a valid mediation agreement provides for ten payments in euros over five years. A year into performance, the value of the euro plummets in the world market. The party receiving payments challenges the award.

In this case, all three methods will likely reject challenges to the award. Under contract law, the risk of devaluation is allocated by designating a particular currency.[170] Consent decrees permit a more lenient analysis under the equity standard, but a strong presumption of enforcement balances this leniency.[171] Vacation of an arbitral award under the New York Convention is even less likely because of the temporal flaw. As discussed under example one, the Convention does not contemplate challenges from intervening circumstances in light of the context of immediate enforcement. Even if the temporal argument becomes moot, the relatively weak public policy interests at issue fail to offset the strong presumption of enforcement. Currency devaluation does not rise to the level of fundamental principles of law, actions contrary to good morals, or national interests as they have been narrowly interpreted by the Convention.

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169. *See, e.g.*, Falk v. Hecker, 98 B.R. 472, 474 (Bankr. D. Minn. 1989) ("A consent decree has the same preclusive effect as if it were fully litigated unless there is a showing of fraud, a contrary intent of the parties, or important countervailing public policy reasons.").

170. *See* Suzanne Raggio Westerheim, Note, *The Uniform Foreign-Money Claims Act: No Solution to an Old Problem*, 69 TEX. L. REV. 1203, 1203–27 (1991); *cf.* Note, *Conversion Date of Foreign Money Obligations*, 65 COLUM. L. REV. 490, 498 (1965) ("[S]uch an approach accords with the general expectation that nationals will bear the risk of fluctuations in their own currency.").

171. *See* Sys. Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("Sound judicial discretion may call for the modification . . . if . . . circumstances, whether of law or fact, obtaining at time of its issuance have changed, or new ones have since arisen.").

CONCLUSION

Enforcement of mediation agreements under the New York Convention results in an imperfect fit that creates challenges. Since the Convention does not recognize agreements with persisting contract remedies, using the Convention limits remedies to those designed for arbitration. Restrictions on contracting, convening, and caucusing stand to strip mediation of some of its benefits. If arbitration clauses are not drafted carefully, parties may lose the option to avoid arbitration if mediation is unsuccessful, the efficiency of mediation convening, the effectiveness of private caucuses, and the freedom to create value in mediation by developing new business relationships.

Some of these procedural challenges could be surmounted by carefully selecting favorable arbitration rules and national laws. Other challenges could be rendered moot by reason of explicit waiver when consent awards are signed. Unfortunately, until these theories are tested, parties desiring to enforce mediations using the New York Convention must be cautious. Parties must design a procedure that comports with the fiction that mediation is secondary to, and located within, arbitration so that the resulting agreement is enforceable as an award and not subject to arbitration-based procedural challenges.

In addition to procedural adjustments to conform with arbitration requirements, public policy concerns may make the application of the New York Convention ill-advised. Enforcing mediation agreements as arbitral awards may foreclose relevant public policy arguments caused by intervening circumstances. The decision to make the Convention applicable must be made long before these public policy concerns arise. Therefore, the decision to record an award so that it will be enforceable under the Convention should be made by carefully weighing the loss in procedural efficiencies and public policy review against the relative certainty of international enforcement under the New York Convention.