

## Encouraging mediation to settle disputes

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Beginning this week, India will participate in deliberations at the United Nations Commission on International Trade Law (UNCITRAL) in New York on an important issue concerning resolution of commercial disputes. Commercial disputes are resolved not only through courts and arbitration but also through mediation. The deliberations will consider how these settlement agreements in disputes in international commercial transactions will be implemented by courts in different countries.

Several concerns make this draft important for India and its businesses. Mandatory pre-litigation mediation has been introduced in commercial disputes. The adoption of the convention will address a policy gap on outcomes from the mediation process involving cross-border disputes. With a definitive legal framework recognising and enforcing mediated settlement agreements, businesses will be encouraged to consider mediation in managing and resolving disputes that arise in their commercial transactions. India has lost substantial earnings as a result of international disputes being taken for resolution outside the country. Strengthening the dispute resolution policies will encourage dispute resolution in India, where the commercial relationship once began.

As is evident, international transactions involve the application of different laws, by virtue of the persons from different countries being involved, or their undertaking a business in a third country. The draft convention that is now under consideration relates to the enforcement of settlement agreements arising from disputes in international commercial contracts. The convention will link laws adopted by countries to recognise domestic mediation and extend them beyond their boundaries. UNCITRAL has formulated principles on which countries should recognise and enforce mediation agreements arising from cross-border disputes. Once formalised, countries will have a consistent framework for enforcing mediation agreements made in other countries.

The draft convention defines mediation as a “process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person (the mediator). The mediator lacks the authority to impose a solution upon the parties to the dispute.” Courts of a country before which a mediated settlement agreement is brought must ensure implementation of the terms of settlement. The courts will allow a party to a settlement agreement to rely on this agreement as a defence in cases filed on the basis of disputes already settled by the agreement.

When the settlement agreement comes up before the court for implementation or enforcement, the court will review it on the basis of certain conditions. These include the capacity of the parties to enter into the agreement, the question whether the subject matter of the agreement is one that can be settled through mediation in terms of its domestic laws, and so on. Once the agreement has been reviewed, the court must enforce the agreement on the terms agreed. Courts can decline enforcement only on these conditions. The importance of the draft convention is in the identification of these conditions after careful deliberation.

Mediated settlement agreements typically don't need court assistance for enforcement since the terms of settlement have been chosen and determined by the parties. However, with this convention comes the certainty that settlement agreements through mediation will be acknowledged as a resolution of the dispute, and will be respected and enforced. Further, if the court were to decline enforcement, this will be done on grounds that are known to international parties.

One hundred and seventy-four countries recognise mediation and conciliation as a method of resolving disputes, and as an alternative to going to courts. International business and dispute resolution institutions such as the International Chamber of Commerce, the Singapore International Mediation Centre and the World Intellectual Property Organisation all have established rules and assist businesses in resolving disputes through mediation. Businesses, in turn, have turned to mediation as the first step in resolving differences that arise in their international disputes. The convention is opportune and will facilitate legal reform to ease dispute resolution.

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