

Why Have a Disclosure Protocol for Mediation?

My colleague, Ana Maria Maia Goncalves, and I have been working for the past year and a half on the development of a Universal Disclosure Protocol for Mediation (UDPM). I'll describe the process we've used and report on the status of the Protocol, but first let me address the fundamental question that prompted us to begin work in the first place: why do we need a universal protocol for disclosure in mediation?

The answer revolves around what Manon and Fred Schonewille have called the “variegated” nature of international mediation¹, and the language of the Singapore Convention on Mediation.²

The Schonewilles compared mediation and mediation processes in sixty countries, and while they found some commonalities among some countries, they found it difficult to even craft a simple questionnaire that was relevant to all of the practitioners they approached. It would be fair to say that, based on their research and other observations of the international mediation environment, one could easily envision a party to mediation entering the process with little or no knowledge of mediation, or with a view of mediation developed locally that was significantly at odds with the view of mediation held by the other party or the mediator.

The Singapore Convention was adopted by UNCITRAL in December 2018, and was open for signatures in Singapore in August 2019. It envisioned a “harmonized legal framework” for international mediation among signatory nations: to date 55 countries have signed on, but only 7 have ratified the Convention.

One of the “harmonizing” elements in the Convention addresses the grounds for refusing to grant relief based on a mediated settlement agreement. Article 5e of the Convention stipulates that a “. . . serious breach by the mediator of standards applicable to the mediator or mediation without which breach the party would not have entered into the settlement agreement . . .” is

¹ Manon Schonewille and Fred Schonewille, eds., *The Variegated Landscape of Mediation*, Eleven International Publishers, The Hague, 2014.

² United Nations Convention on International Settlement Agreements Resulting from Mediation [Singapore Convention on Mediation], UNCITRAL, New York, 2019. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf

one of the grounds for refusing relief. No standards are included or referenced in the Convention.

It seemed reasonable to assume that if there are a multitude of standards or ways to approach mediation, and if violation of standards is one reason to set aside an agreement, and further if there is no agreed upon set of standards that cross borders and cultures, there could be confusion. This is an argument that we offered during the conference surrounding the roll-out of the Convention in 2019.

We first began thinking about the problem of standards in an international context, but in the multicultural societies in which we now live, one need not cross national borders to run into differences in assumptions about how mediation will be or should be conducted.

As we began the process of developing a suggested UDPM, it was clear to us and those who worked with us that finding a way to standardize mediation was not the goal. That would, in the first place, be impossible, and in the second place would simply be a bad idea. Our goal was to find a way to regularize the way in which mediators discuss their mediation process with the parties in order to recognize and adapt to cultural and national differences, and to promote self-determination among the parties. Self-determination, we think, begins when the parties say, yes, I will enter into the mediation process, and actually understand and agree to what they are getting into.

As a point of departure, we developed a rather long list of things that could be included in a disclosure discussion between parties and the mediator. Many of the initial items are routinely included in agreements to mediate, but we have seen agreements to mediate that are one paragraph long, and agreements to mediate that are several pages long. Again, there are no firm standards. Our hope was and is that a UDPM will simply offer a framework for any mediation in any venue that will ensure that these crucial issues are discussed and understood in the same way by the parties and the mediator.

The long list of items that we first developed was given to working groups in Europe, Africa, Asia, MENA, Latin America, North America, and Australia. Universally, the guidance that came back from their work was first that the idea of a UDPM was a good one, and that it should be as simple as possible. Given that guidance, and a remarkable degree of agreement across all of

the groups, the UDPM as it exists in final form has six critical elements, with some secondary suggestions under each element. The six primary elements are:

- Conflict of Interest
- Confidentiality
- General Mediation Process
- Role of the Mediator and Parties
- Technology
- Impact of Venue

At this point, we are asking organizations and individuals to review the UDPM and, if it seems important, to endorse the Protocol and its use.

A full explanation of the Protocol and an invitation to endorse the concept can be found at <https://universaldisclosureprotocolmediation.com/the-protocol/>

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