The Singapore Convention: A New Dawn for Worldwide International Mediation

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With much fanfare and high expectations in some quarters, *"a game changer" "mediation will now have teeth"*[i], on the 7th August 2019 at an official signing ceremony in Singapore the United Nations Convention on International Settlement Agreements Resulting from Mediation (Convention), was signed by 46 States, including the US, Singapore, China, India, Malaysia, the Philippines and South Korea, The Convention will enter into force 6 months after 3 States have acceded or ratified the Convention.

The creation of an enforcement mechanism for international mediation, similar to arbitration's New York Convention, has been discussed at mediation conferences and other forums for many years. Consequently 5 years ago the United Nations Commission on International Trade Law's (UNCITRAL) began investigating ways to enhance enforcement. The UN states that the reason it supported the Convention was because it:

- Recognized the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations

- Was convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations.[ii]

Background

Currently in most jurisdictions if parties enter into a settlement agreement (Agreement) following mediation the Agreement document is in effect a contract. So generally there is no difference between a normal contract and such an Agreement in terms of legal enforceability. Should any signatory not honor the Agreement's terms then the other parties may take the recalcitrant party to court to enforce the Agreement. The court will then focus on the interpretation of the terms of the mediation Agreement instead of rehearing once again the complete background and the nature of the original dispute, thus saving time and legal costs.

Need for the Convention

In many jurisdictions some might well ask "What problem is the Singapore Convention trying to solve?" This is simply because in countries like the US, UK and Australia noncompliance with a mediation settlement agreement is rarely a problem. The parties reach the negotiated settlement voluntarily, they feel they have spent time and money in a tough but good faith negotiation arriving at a solution both parties can claim ownership of and live with commercially. It is in neither party's interest to not honor the Agreement. Thus the vast majority of domestic commercial mediation cases even those involving an overseas party have no problems around voluntary self-enforcement.

However enforcement is more complex for cross-border settlement agreements in other jurisdictions. One problem is that parties may agree to mediation and court proceedings in one jurisdiction but the mediation settlement agreement or the court's judgment may need to

be enforced in another country where, for example, assets are located. So this can be a disadvantage because in the absence of a universally recognized enforcement mechanism, the agreement is not internationally binding.

Another problem is that in countries where parties currently experience or fear non-compliance with mediation settlements, there is very little faith in an agreement which can only be enforced as a new contract.[iii] In Asia parties often raise the issue of the effective enforcement of mediation settlement agreements. [iv]Parties fear that mediation will only add extra costs and could be used as a delaying tactic by the other side.

So in Asian countries like Japan, China and Korea a judicial confirmation of the enforceability of the mediation agreement is highly valued. Some commentators believe that this is one of the Conventions great strengths:

"The Singapore Convention lends mediation the regulatory legitimacy needed to become a major player in international dispute resolution practice.[v]

"Just the existence of a global enforcement regime will go a long way to reassuring parties less familiar with the process that it's a reliable dispute resolution option, which courts around the world will recognize."[vi]

Scope and Application of the Convention

The Convention applies to 'international' settlement agreements resulting from mediation which have been concluded in writing by the parties. It is considered 'international' if either:

- at least two parties to the settlement agreement have their places of business in different countries; or
- the country to which the settlement agreement is closely connected to, or to be performed, is different from the respective parties' places of business.

The Convention excludes settlement agreements which:

- have been concluded or approved in the course of a court proceeding;
- are enforceable as a judgement; or
- are enforceable as an arbitral award;

Mediation is defined very broadly to allow for the fact that there are differences in mediation models worldwide:

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.[1][vii]

Convention Enforcement Requirements [2][viii]

A party seeking enforcement under the Convention must provide the competent authority with inter alia:[ix]

- The settlement agreement signed by the parties;
- Evidence that the settlement agreement resulted from mediation, such as:
- The mediator's signature on the settlement agreement;
- A document signed by the mediator indicating that the mediation was carried out;

This requirement for the authentication of a mediation settlement agreement is alien territory for most commercial mediators. Potentially problematical is the requirement for the mediator's signature to be on the settlement agreement. As Philips points out in the US:

"Many mediators conscientiously refuse to sign a settlement agreement. Most American mediators neither follow the practice that, consistent with their mediation agreements providing that they not be subpoenaed as a witness, they draft nor execute any written memorial that may be interpreted as witnesses its execution or – even worse – including them as a party to the rights and obligations set forth therein."3x

Other jurisdictions like the UK and Hong Kong follow US practice, in commercial cases it is the responsibility of the parties' lawyers to draft the final settlement agreement and the parties or their legal representatives sign it. Mediators do not sign because they are not a party to the agreement, merely neutrals that facilitate the parties to reach settlement. So it is possible in the future some mediators may refuse to take a case because they do not intend to sign or the parties may have to accept the risk that the settlement agreement may not pass the Article 4 enforcement requirements.

Grounds for refusing to grant relief

The relevant authority may refuse enforcement in limited circumstances, these include if:[xi]

- There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
- There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

The grounds for refusing to grant enforcement are generally uncontroversial, for example, if a party was under some incapacity. However refusing enforcement on the grounds that there has been a serious breach by the mediator of standards applicable to the mediator could create uncertainty. The problem is that since internationally there is no collective agreement as to what 'mediation standards' are, this could pave the way for legal arguments about 'standards'.[xii] Also the Convention does not define what constitutes a 'serious breach' of standards.

So there is the possibility that after mediation one party suffering from buyer's remorse[xiii] might ask their legal advisers to try to find a possible way to get them out of the agreement.

Taking a cynical view some lawyers may decide that if no other grounds exit then 'let's attack the mediator' on mediator standards grounds. This could result in time wasting challenges to mediation settlement agreements and the danger of the further lawyerisation of dispute resolution.

Conclusion

Overall the response to the Convention has been very positive. The ultimate success of the Convention will of course depend on the extent to which it is accepted and ratified by States. Expectations will have to be managed, mediation industry bodies like CEDR and JAMS have rightly cautioned that although the Convention should lead to a gradual increase in cross border mediation cases it will not a be flood. [xiv] [xv] Hopefully in countries unfamiliar with modern mediation, which employ a primarily authority backed approach to dispute resolution outcomes, the Convention should raise commercial mediation's profile and status.[xvi]

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[i] George Lim, Chairman of the Singapore International Mediation Centre, (SIMC)
http://simc.com.sg/blog/2018/07/25/singapore-convention-milestone-mediation/

[ii] Article 5 Grounds for refusing to grant relief

[iii] Danny McFadden, "Mediation in Greater China; The new frontier for commercial mediation" Kluwer Law, Hong Kong, 2013, p200.

iv Richard Wigley and Xu Jing King and Wood, "Supreme People's Court provides a Guideline Case for Court Enforcement of Settlement Agreements", China Law Insight , 25 April 2012, https://www.chinalawinsight.com/2012/04/articles/dispute-resolution

[v] Nadja Alexander and Shouyu Chong, "The New UN Convention on Mediation (aka the 'Singapore Convention') – Why it's Important for Hong Kong" Hong Kong Lawyer April 2019

[vi] Jan O'Neill , Herbert Smiths, quoted in article by Bruce Love, Financial Times, August 5, 2019

vii Article 2 Definitions, United Nations A/RES/73/198 General Assembly Distr.: General 11 January 2019,18-22460 (E) 150119 *1822460*, Seventy-third session, Agenda item 80,Resolution adopted by the General Assembly on 20 December 2018

[viii] Article 4 Requirements for reliance on settlement agreements

[ix] ibid

[x] Peter Phillips," Concerns on the New Singapore Convention", Online Mediators Dotcom, October 2018
https://www.mediate.com/articles/phillips-concerns-singapore.cfm

[xi] Article 5 Grounds for refusing to grant relief

[xii] On a country by country basis, generally accepted mediator standards do exist, for example, the US has the Uniform Mediation Act; Model Standards of Conduct for Mediators (Model Standards) which were adopted in August 2005 by the American Bar Association (ABA) and the American Arbitration Association (AAA). In the UK courts would likely look to the Mediator Standards and Code of Conduct of the Centre for Effective Dispute Resolution (CEDR) which is the leading authoritative mediation organisation in that jurisdiction.

[xiii] Wikipedia, Buyer's remorse is the sense of regret after having made a purchase.

[xiv] JAMS, "Singapore Convention Brings Big Changes for Litigators and Arbitrators",
https://www.jdsupra.com/legalnews/singapore-convention-brings-big-changes-88709/

xv James South, "Singapore Convention a Mediation Milestone", 29 July 2019 https://www.cedr.com/articles/?item=The-Singapore-Convention-a-mediation-milestone

xvi xvi E.g. Hong Kong Practice Direction 31, 2010 and Australia The Civil Dispute Resolution Act 2011 (Cth).