The Singapore Mediation Convention, 2019

Zafar Iqbal Kalanauri [i]

New Treaty to Encourage Cross-Border Mediation

The United Nations Convention on International Settlement Agreements Resulting from Mediation was signed by 46 Countries, including China and USA on 7th August,2019 at an official signing ceremony in Singapore. To be known as the "Singapore Mediation Convention", the Convention is intended to facilitate the enforcement of settlement agreements that have been entered into with the assistance of mediation[1]. The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). According to UNCITRAL, the intended benefits of the Convention include that it will 'bring certainty to the international framework on mediation' and facilitate 'the promotion of mediation as an alternative and effective method of resolving trade disputes'.[2] The Convention reflects a business need and an increasing prevalence of mediation as an international dispute resolution mechanism (whether stand-alone or in combination with other hybrid dispute resolution mechanisms, such as the practices of 'med-arb', 'arb-med', and 'arb-med-arb').
This approach is intended to provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation. It will come into force six months after three countries have signed. The Convention will make international settlements resulting from mediation easier to enforce, in much the same way as the New York Convention has made awards from international arbitrations easier to enforce.

---

1. Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 Pepp. Disp. Resol. L.J. 1 (2019). [Accessed 2 June 2019], 8.

2. UNCITRAL. *United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation')* | *United Nations Commission on International Trade Law*. [online] Uncitral.un.org. [Accessed 2 June 2019].

This should promote the use of mediation as a dispute resolution mechanism for international disputes.

What it Means

- Despite the fact that many commercial agreements (particularly those between parties from different countries) provide for arbitration as a means of resolving disputes, settlement agreements arising out of disputes under the same contracts do not have the legal status of an arbitration award.
- This can present difficulties in enforcing settlements even in countries that are party to the New York Convention, which facilitates the enforcement of arbitration awards.
- The Convention will enable parties to apply directly to courts in a State which is a party to the Convention to enforce settlement agreements resulting from mediation in a similar manner to enforcing an arbitration award under the New York Convention.

Current State of Affairs

At the moment, if two parties enter into a settlement agreement following a mediation and one of the parties does not comply with its obligations under the settlement agreement, the other party must enforce the settlement agreement through the dispute resolution clause (if any) in the settlement agreement. For example, the parties may have agreed that disputes are to be resolved through court proceedings in a specified jurisdiction or to arbitration proceedings. The party seeking enforcement would then need to commence court proceedings or arbitration.

Enforcement of the settlement agreement through the agreed dispute resolution process is straightforward when all of the parties and the enforcement process are in the same jurisdiction. For example, the settlement agreement may be enforced by the courts in that jurisdiction and the judgment may be executed (if required) against assets located in the same jurisdiction.

However, the enforcement process is more complex for cross-border settlement agreements. The parties may agree to court proceedings in one jurisdiction but the court's judgment must be enforced in another jurisdiction where, for example, the assets are located - if such enforcement is permitted. If the parties have agreed to arbitration, then an arbitral award must be first issued before it can be enforced in the courts where the assets are located (pursuant to the New York Convention).

Both of these processes may involve substantial time and costs thereby delaying the ultimate remedy to the party seeking enforcement. These potential enforcement issues may discourage parties from agreeing to attend a mediation in the first place.

Once in force, the Convention will apply to *international* written settlement agreements resulting from *mediation*. Settlement agreements are international in circumstances where at least two parties to the settlement agreement have their places of business in different States, or where the State in which the parties have their places of business is different to:

- the State in which the substantial part of the obligations under the settlement agreement is performed; or
- the State with which the subject matter of the settlement agreement is most closely connected.

Accordingly, it will not apply to domestic mediations. It also expressly does not apply to settlement agreements that have been approved by a court, are enforceable as a judgment or

are recorded and are enforceable as an arbitral award (e.g. consent awards).[3] Such settlement agreements would already be covered by other instruments, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*), or the draft Convention on Recognition and Enforcement of Foreign Judgments currently being developed by the Council of the Hague Conference on Private International Law. The Convention only applies to mediated settlements and does not apply to agreements to enter into a dispute resolution process.[4] Article 2(3) of the Convention defines mediation broadly as '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 third persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute'. This definition is wide enough to include conciliation as well as mediation, or mediation in which the mediator could be converted into an arbitrator[5]. It would not, however, include negotiated settlements that did not have third party (mediator) involvement. The Convention can be relied upon as both a 'sword' and a 'shield': the courts of ratifying States will be required to enforce both the mediated settlement agreement itself, and the right of a party to invoke the settlement agreement against an inconsistent claim by the other party.

The circumstances where a court may refuse to enforce a settlement agreement are set out in Article 5:

- (a) A party to the settlement agreement was under some incapacity;
- The settlement agreement sought to be relied upon:
    - Is null and void […];
    - Is not binding, or is not final according to its terms; or
    - Has been subsequently modified;
- The obligations in the settlement agreement:
    - Have been performed; or
    - Are not clear or comprehensible;
- Granting relief would be contrary to the terms of the settlement agreement;
- 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

---

3. However, Chua states that 'the mere involvement of a judge or arbitrator would not exclude the settlement agreement from the scope of the Singapore Convention'. Chua, Eunice. The Singapore convention on mediation - A brighter future for Asian dispute resolution. (2019).Asian Journal of International Law. Research Collection School of Law. [Accessed 2 June 2019].

4. See Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, 19 Pepp. Disp. Resol. L.J. 1 (2019). [Accessed 2 June 2019], 14.

5. Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, 19 Pepp. Disp. Resol. L.J. 1 (2019). [Accessed 2 June 2019], 17.

disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

Further, Article 5(2) includes two additional grounds on which a court may refuse to grant relief, drawing on Article 5(2) of the New York Convention, being where:

- it would be contrary to the public policy of the State where relief is sought; or
- the subject matter of the dispute is not capable of settlement by mediation under the law of the State where relief is sought.

Where there is an issue of fraud or bribery affecting the settlement, for example, this would likely fall under the public policy grounds in Article 5(2)(a).

The Convention is expected to have similar benefits for mediation as an international dispute resolution mechanism as the New York Convention has had for arbitration.

Key Benefit of the Singapore Mediation Convention

The Singapore Mediation Convention provides a process for the direct enforcement of cross-border settlement agreement between parties resulting from mediation. The Convention provides that a settlement agreement may be enforced directly by the courts of a State. This allows the party seeking enforcement to apply directly to the courts of the State where the assets are located such that execution may also be sought if the enforcement process is successful. This prevents potential multiple proceedings.

The Convention will only apply where the settlement agreement:

- is in writing;
- results from a mediation;
- is an agreement between two or more parties who have their place of business in different States;
- and the place of business of each of the parties to the agreement is in a State that has acceded to or ratified the Convention.

The Convention does not apply to settlement agreements:

- relating to consumer transactions nor to family, inheritance or employment law;
- that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgment in the State of that court;
- or that have been recorded and are enforceable as an arbitral award.

Simplified Enforcement Procedure

The enforcement procedure involves the party seeking enforcement to provide to the relevant authority in the State where enforcement is sought:

- a copy of the signed settlement agreement;

- and evidence that the settlement agreement resulted from mediation (e.g. the mediator's signature on the settlement agreement or a document signed by the mediator confirming that there was a mediation).

The relevant authority is to "act expeditiously" in considering an enforcement application.
The relevant authority may refuse to enforce the settlement agreement in limited circumstances, these including:

- where a party to the settlement agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed;
- the settlement agreement is not binding or is not final, according to its terms;
- the settlement agreement has been subsequently modified; the obligations under the settlement agreement have not been performed or are not clear and comprehensible;
- granting relief would be contrary to the terms of the settlement agreement;
- 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;
- 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 had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement;
- granting relief would be contrary to the public policy of that State;
- the subject matter of the dispute is not capable of settlement by mediation under the law of that State.

It is anticipated that, as with the exceptions to enforcement of an arbitral award under the New York Convention, it may be difficult to demonstrate enforcement of a settlement agreement should be refused.

Uncertain Status of Defences Usually Available

One issue is the uncertain status of some of the defences that would usually be available to parties in respect of any claim to enforce any agreement. e.g. it is not clear whether a party could allege it was misled, and that such conduct induced the settlement, as an objection to the other party seeking to enforce the settlement agreement. In Australia, a settlement induced by misleading or deceptive conduct may give rise to statutory remedies which could extend to a declaration that a settlement agreement is null and void (see section 243(a) of the Competition and Consumer Act 2010)[6], but, unless and until such a declaration is made, the settlement agreement is enforceable in accordance with its terms. Under the draft terms of the Convention, a claim based on such conduct would not of itself appear to prevent enforcement.

The text of the Convention also makes no mention of the availability of estoppel or other equitable defences, or rectification defences. Again, under the draft terms of the Convention, defences of this kind would not defeat enforcement.

[6] https://www.legislation.gov.au/Details/C2019C00149

It may be (depending upon the facts) that in such circumstances one or more of the exceptions to enforcement are available, e.g. public policy (Art 5(2) (a)) or the obligations not being clear and comprehensible (Art 5(1)(c)(ii)), but if not, there is a prospect that the enforcement of the agreement could itself give rise to further causes of action by the party against whom enforcement is invoked.

In addition, there is likely to be greater scope for disputes as to the meaning or effect of a settlement agreement, compared to an arbitral award or court judgment, for instance.

These issues, as well as the generally broader scope of exceptions to enforcement when compared with the New York Convention, suggest that at least in theory there is greater scope for disputes arising out of proceedings to enforce mediated settlements.

Despite these issues, the Convention does have the advantages that it answers a need from users of international arbitration and strengthens the efficacy of mediation as an alternative method of international dispute resolution. Of course, assisting mediation in this way will depend upon the Convention gaining widespread acceptance, as was the case with the New York Convention.

Attestation by a Mediator and Mediator Conduct

Article 4(1)(b) requires a party seeking to rely on a settlement agreement to provide evidence to the competent authority that the settlement agreement resulted from mediation. Two of the methods specified in Article 4(1)(b) contemplate signature by the mediator, either on the settlement agreement itself (Article 4(1)(b)(i)), or on a separate document indicating that the mediation was carried out (Article 4(1)(b)(ii)).

Some authors have observed the difficulty with such requirements, because in some jurisdictions mediators typically refuse involvement in enforcement procedures, and do not sign settlement agreements.[7] Even a separate attestation document confirming that the settlement agreement is a result of mediation may not align with the confidentiality obligations imposed upon a mediator. Mediators would likely also seek to avoid testifying in relation to settlement agreements.

However, the inclusion of Article 4(1)(b)(iv), which allows a party to provide 'any other evidence acceptable to the competent authority' is intended to address this concern. Schnabel suggests, for example, that a party might provide an agreement to mediate together with documents evidencing that a mediator was paid.[8]

It is also unclear what 'standards applicable to the mediator or the mediation' referred to in Article 5(e) of the Convention would include, and how those standards can be measured.

---

[7] See, for example, F. Peter Phillips, *Concerns on the New Singapore Convention* (October 2018), [Accessed 30 May 2019], and Lucy Reed, 'Ultima Thule: Prospects for International Commercial Mediation' NUS Centre for International Law Working Paper 19/03 (January 2019), [Accessed 30 May 2019], at footnote 40.

[8] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 Pepp. Disp. Resol. L.J. 1 (2019). 32.

Concerns were expressed in the drafting of the Convention that the inclusion of these defences could ultimately lead to further disputes, especially where standards could be interpreted differently.[9]

It may be difficult, practically speaking, to demonstrate that a party had been treated unfairly in a mediation, where a wide range of mediation techniques might be used. It is for this reason that the Working Group ultimately included the qualifications in the drafting of Article 5(e) that the breach must be 'serious', and one 'without which breach that party would not have entered into the settlement agreement' (i.e. a party would need to establish a causal link between the breach and the decision to settle).

Ultimately, in the context of mediation, where there is usually no means for a party to challenge the conduct of a mediator (other than by refusing to participate), the Working Group considered it was preferable to include Article 5(e) as grounds for refusal, but with a high threshold. This may, however, be complicated to deal with in practice.

What it Means for You?

As various member States sign and the Convention comes into force, parties considering utilising international arbitration as their dispute resolution method should also consider whether or not they wish to specify mediation as a step in the dispute resolution process under their contract.

In order to enforce a settlement, parties seeking to rely on the Convention will also need to demonstrate that a mediation has taken place within the meaning of the Convention, which, as discussed above, may be practically difficult in circumstances where a mediator is not willing or able to sign the settlement agreement or a document of attestation.

Parties might therefore consider whether to provide for mediations to take place in accordance with the rules of a specific mediation centre, or the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). [10]

The Singapore Mediation Convention also provides for two potential reservations in Article 8. A State party to the Convention may declare that:

- It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
- It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

---

[9] See Report of Working Group II (Dispute Settlement) on the Work of its Sixty-sixth Session, UNCITRAL, UN Doc. A/CN.9/901 (2017), para 50.

[10] https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

Where a State in which enforcement is likely to be sought has made such a declaration, parties should ensure the dispute resolution clause explicitly provides for the application of the Convention if they wish to benefit from its provisions.

International arbitration and mediation are often viewed as opponents in an antagonistic battle for the hearts, minds and wallets of disputants. The fear of arbitration losing its status as the most preferred form of alternative dispute resolution is palpable: Mediation's key disadvantage has long been the difficulty of enforcing mediated settlement agreements. But the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") would promote the widespread international enforceability of settlement agreements, which directly erodes the edge of arbitration, considering that the enforceability of arbitral awards is usually ranked as arbitration's most important feature. I believe that mediation will not eclipse arbitration anytime soon, but at the same time that the Singapore Convention is a positive development for the dispute resolution system as a whole.

During the official signing ceremony, 46 States signed the Singapore Mediation Convention, including the US, Singapore, China, India, Malaysia, the Philippines and South Korea. Notably, the UK, the European Union and Australia have not yet signed the Convention. The Convention will enter into force 6 months after 3 States have acceded or ratified the Convention.

The success of the Convention (when entered into force) will in large part depend on the extent to which it is accepted and ratified by States. Nonetheless, the Convention is likely to encourage parties involved in cross-border projects and transactions to consider mediation as a time and cost-efficient process as part of their dispute resolution toolkit.

---

[i] **Zafar Iqbal Kalanauri**, Advocate Supreme Court of Pakistan, Arbitrator, Mediator , Adjunct Faculty of Law at SAHSOL, Lahore University of Management Sciences (LUMS), SAF Center, #3 3rd Floor, 8-Fane Road Lahore 54000, Pakistan. Cell: (92) 300- 4511823 E-mail:kalanauri@gmail.com ; Web: http://www.zklawassociate.com