The Singapore Mediation Convention: elevating mediated settlements to a higher plane

Kristopher Kerstetter (Managing Partner), Robert Javin-Fisher (Of Counsel) and Alice Glendenning (Associate)

19th JANUARY 2021
A new international convention has recently come into force that businesses engaged in commercial disputes should keep in mind. It is the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Mediation Convention, (the “Convention”) which came into force on 12 September 2020. It seeks to give privileged status to settlements of disputes concluded by way of mediation by providing an enforcement mechanism unique to them in ratifying states.

Under the Convention relevant courts of ratifying states (“Convention States”) are required to recognise and enforce cross-border commercial mediated settlements in accordance with their own rules of procedure and the conditions of the Convention. In so doing it seeks to give a similar status to mediation as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”) has for the cross-border enforcement of arbitration awards.

While only 6 states have ratified or otherwise approved it (Singapore, Fiji, Qatar, Belarus, Saudi Arabia and Ecuador), 47 others are signatories, including South Korea, China the US and most of the states in the Middle East. The UK Government has yet to take a formal decision on whether the UK will accede to the Convention, nor has the EU (or any Member States).

Features of the Convention

The Convention allows for the direct enforcement in a Convention State of settlement agreements obtained through mediation. Unlike the New York Convention there is no reciprocity obligation so a qualifying mediated settlement can be enforced in a Convention State regardless of where it originated.

In order to be recognised and enforceable under the Convention, a settlement agreement must have been concluded in writing, be “commercial” and relate to an “international” dispute. The international requirement can be satisfied where the parties are based in different states, or where the state in which the parties are based is different to the state in which the obligations under the settlement agreement are to be performed, or to the state with which the subject matter of the settlement agreement is connected.

Importantly, the settlement agreement must have been the result of mediation and explicitly must not have been approved by a court or have been concluded in the course of proceedings by a court. Since court judgments and arbitral awards have their own enforcement mechanisms, a settlement does not qualify under the Convention if it is enforceable as a judgment or a arbitral award.

To enforce a settlement agreement in a Convention State, the signed settlement agreement must be produced with evidence that it resulted from mediation. There are a number of ways to evidence that the settlement resulted from mediation, including the mediator’s signature, a document signed by the mediator attesting that the mediation was carried out or an attestation by the institution that administered the mediation.

There are limited grounds on which a court is permitted to refuse enforcement listed in Article 5. These include where:

1. a party to the settlement lacked capacity;
2. the agreement is inoperative or not final;
3. the obligations in the agreement are not clear or comprehensible;
4. the mediator breached applicable standards;
5. the mediator failed to disclose facts raising justifiable doubts as to his or her impartiality or independence which had a material impact on a party’s decision to enter into the settlement; and

---

1 Article 3 of the Convention.
2 In the case of the EU, this may be because Directive 2008/52/EC already enables the enforcement of settlement agreements arising from mediation across Member States. Consideration also needs to be given as to whether the EU would sign as a bloc, or whether it would be a decision for individual Member States.
3 Article 1 of the Convention.
4 Article 1(3) of the Convention.
5 Article 4 of the Convention.
6 Article 4(1)(b) of the Convention.
6. where granting relief would be contrary to public policy.\(^7\)

**Limitations**

The Convention only applies to settlement agreements that result from mediation.\(^8\) It would not, therefore, apply to settlement agreements concluded by other means such as direct lawyer to lawyer negotiations.

Additionally, concerns have been raised as to its application to settlements which are not formally concluded during the mediation process – for example, where settlement is achieved outside of mediation days, and without the mediator present or aware of the detail. The Centre for Effective Dispute Resolution ("CEDR") has added guidance to its Model Mediation Procedure to assist parties in demonstrating how such negotiations form part of the mediation.\(^9\) It is noted that explicit reference to the Convention when drafting the terms of the settlement may assist in resolving any ambiguity.\(^10\)

CEDR has also noted that the methods by which a mediator can sign or otherwise attest that the mediation has been carried out, may be taken as a form of endorsement of its terms, which in turn may undermine the mediator’s status as neutral third party- which would of itself be a means of refusing relief under Article 5(1)(e) and (f) of the Convention. An alternative considered by CEDR is the attachment of an appendix to the settlement agreement containing the mediator’s signature which may be considered as proof that the agreement was agreed through mediation.

**Is it necessary?**

Non-compliance with mediated settlement agreements is rare in jurisdictions where commercial mediation is an established ADR mechanism. Further, parties engaging in mediation tend to do so in good faith and comply as a matter of course, along with protections built into the agreement- for example payment being a condition precedent to settlement. However, in circumstances where enforcement action is necessary a separate contractual claim for breach followed by further cumbersome enforcement action is often necessary. The Convention offers a more streamlined process. Against that backdrop the Convention is to be welcomed as a further tool in the enforcement arsenal.

The Convention has already prompted much debate and discussion as to its utility and application with a number of panel sessions at the IBA Virtually Together Conference in November last year devoted to the topic of mediation in general with a particular focus on the Convention (the prevailing view being resolutely positive). Whether the Convention becomes the “next game changer in the field of international dispute resolution”\(^11\) will only become clear over time, but it is the latest act in a trend which has seen mediation gain traction as a viable ADR mechanism.

**Will it work?**

It is anticipated that the greatest impact of the Convention will be felt in those jurisdictions where mediation is not yet established or where mediation law has not been enacted. Currently in those jurisdictions there is concern that a party to a mediated settlement agreement may not be able to enforce against assets located in that jurisdiction, or that the other party may renege on an agreement or use mediation as a delaying tactic.\(^12\) In the light of the Convention parties may well opt for mediation to put themselves on a stronger footing when it comes to enforcement particularly in circumstances where there is a concern that a counterparty may not honour the bargain.

However, just because an alternative, more streamlined process is available in Convention States, this does not mean that settlement agreements will necessarily be easier or more likely to be enforced in all cases. As

\(^7\) Article 5 of the Convention.
\(^8\) Article 4(1)(b) of the Convention.
arbitration practitioners will attest, courts that lack independence will be able to find reasons to avoid enforcement if they are so inclined even where the possible grounds to refuse enforcement are narrowed by the Convention.

Also, given the infancy of the Convention, a number of questions remain as to how the Convention will be applied in practice in Convention States. For example, presently, in order to enforce their settlements, parties often include exclusive jurisdiction clauses in their settlement agreements. What would be the effect of such a clause should a party then try to enforce the agreement in another jurisdiction under the Convention? Could it be taken as the parties’ intention to opt out? Will enforcement be equally effective in a Convention State where a party’s assets are located as it would be where a party has its domicile? It is hoped that clarity on these questions (and more) will be obtained over the coming years as the Convention is invoked. Much also depends on the larger states like China and the US ratifying the Convention. As with all such efforts, the proof of the pudding will be in the eating.

**Should the UK join the Convention?**

With the full economic impact of COVID-19 yet to be determined and having formally departed from the EU on 1 January 2021, the UK will be keen to maintain its pole position as an ADR hub and to demonstrate it is still fully open for international business. Since the Convention does not require reciprocity, it is not necessary for the UK to accede to the Convention in order for mediated settlements concluded in the UK or subject to English law to benefit from the streamlined process for enforcement in other Convention States. However, since London is one of the world’s pre-eminent financial centres, it is common for parties to seek to enforce their settlement agreements in the UK. If the UK were to accede to the Convention and provide a more direct process for enforcing mediated settlement agreements, this would send a useful signal that it intends to stay on the cutting edge of efficient resolution of international business disputes.