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THE SINGAPORE CONVENTION ON MEDIATION: NEW KID ON THE DISPUTE RESOLUTION BLOCK NOW IN FORCE

To Our Clients and Friends:

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the “**Singapore Convention**” or the “**Convention**”) came into force on 12 September 2020.[1] The Singapore Convention is a significant step for international commercial dispute resolution, enabling enforcement of mediated settlement agreements among its signatories. For international businesses this means that they are presented with another viable and effective alternative to litigation and arbitration in resolving their cross-border disputes, especially during the global COVID-19 pandemic.[2]

Key Features of the Convention

By facilitating a negotiated settlement between parties, mediation can usually provide them with a faster, more cost-effective and commercial method of resolving disputes than resorting to litigation and arbitration. With the aid of neutral and qualified professionals, mediated settlements focus parties onto what really matters to them, ironing out their differences swiftly in confidentiality while preserving businesses’ reputation and their long term relationship. However, until the Singapore Convention, no harmonised enforcement mechanism existed for these negotiated settlements. Hence, the only remedy for a party who was faced with an opponent refusing to honour the terms of such negotiated settlement, was to bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in multiple jurisdictions. This was an expensive and inefficient deterrent for parties to even consider mediation for the resolution of their disputes, so they instead turned to arbitration or litigation from the outset.

Now, the Singapore Convention has the potential to greatly increase the appeal of mediation as a mechanism of resolving commercial disputes with a cross-border dimension. The Convention provides parties who have agreed a mediated settlement with a uniform and efficient mechanism to enforce the terms of that agreement in other jurisdictions, in the way that the New York Convention on the Recognition and Enforcement of Arbitral Awards (the “**New York Convention**”) does for international arbitral awards.

Where a State has ratified the Convention, the Convention commands that a relevant court (or other competent authority) in that State enforces an international mediated settlement agreement in accordance with the Convention and its own rules of procedure, without the parties needing to initiate new proceedings for its recognition and enforcement. Provided the settlement agreement falls within the scope of the Convention, the negotiated settlement can also be invoked as a defence by the parties, preventing further litigation or arbitration of a matter already settled by the agreement.

Conditions for Enforcement

The Convention applies to international mediated settlement agreements concluded in writing and which resolve a commercial dispute. A settlement agreement will be classified as “international” under the Convention if the parties have their place of business in different States or the parties’ place of business is different from the State in which a substantial part of the obligations under the settlement agreement is performed or with which the subject matter of the settlement agreement is most closely related. The Convention excludes from its scope agreements arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes, or whose subject matter concerns family, inheritance or employment law. The Convention also does not apply to settlement agreements that have been concluded during court proceedings (and which are therefore already enforceable as a judgment) and to settlement agreements that are enforceable as an arbitral award. In addition, signatory States have the option to make reservations to the application of the Convention, excluding settlements involving them or their government agencies; or agreeing to apply the Convention only to the extent that disputing parties have agreed to its application. So far, Belarus and Iran have made reservations to that effect.

A party seeking to enforce a settlement agreement under the Convention will have to show that it resulted from mediation. The Convention sets out a number of ways parties can do this, including provision of a settlement agreement signed by the mediator herself/himself or confirmation that a mediation was carried out; or an attestation by the institution that administered the mediation. When none of these are available, the Convention also allows proof by any other evidence acceptable to the relevant competent authority enforcing the agreement.

Similar to the New York Convention, there are limited grounds for refusal to enforce a mediated settlement agreement under the Singapore Convention. These include cases where:

1. a party is under some kind of incapacity when entering the settlement agreement;
2. the settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it;
3. the settlement agreement is not binding, or final according to its terms; or has been subsequently modified;
4. the obligations in a settlement agreement have been performed, or are not clear or comprehensible; or granting relief would be otherwise contrary to its terms;
5. there was a serious breach by the mediator of the applicable standards without which a party would not have entered into the settlement agreement; and
6. 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.

Likewise, if granting relief would be contrary to public policy in the enforcing State or the subject matter of the dispute is not capable of settlement by mediation under the laws of the enforcing State, then enforcement can be refused by the competent authority of such State as it is the case under the New York Convention.

Interestingly, the Singapore Convention does not have a reciprocity requirement like the New York Convention, meaning that a mediation performed anywhere in the world could potentially be recognised and enforced in a ratifying State.

Acceptance of the Convention

On the first day the Singapore Convention opened for signature (7 August 2019), 46 States including the U.S., Singapore, and China signed the Convention. This rose to 53 by January 2020. At the time of writing (October 2020), six of these signatories have ratified the Convention (Singapore, Qatar and Fiji for whom the Convention came into force on 12 September 2020, followed by Saudi Arabia in November 2020, Belarus in January 2021 and Ecuador in March 2021).[3] None of the EU Member States or the EU itself have signed the Convention yet.[4] Similarly, according to a policy statement from the UK Government in June 2020 and the following Parliamentary discussions in September 2020, no formal decision has yet been taken on whether the UK should join the Convention.[5]

Like the New York Convention, the Singapore Convention requires implementation into domestic legislation. Thus, the corresponding UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation adopted by the United Nations General Assembly in 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)[6] will also assist signatory countries by providing the legal framework and procedures for implementing the Convention.

Why Is the Singapore Convention More Important Now?

As with everything in the current challenging climate, the impact of the COVID-19 pandemic on the civil justice systems and formal dispute resolution methods has been palpable. Since the early months of 2020, businesses have been forced to search for alternative means of resolving their mounting disputes, allowing them to fast-track resolution before things escalate into intractable ends.

As such, the Convention's entry into force is more than timely. If the current uptake by signatories and the historic experience with the New York Convention in terms of promoting arbitration globally are anything to go by, things are looking very positive for the future of mediation and the Singapore Convention. It is without a doubt that the Convention is a momentous step in growing and developing mediation globally and providing a viable alternative to the current dispute resolution gridlock.

That is probably why international institutions for mediation have been quick to see the opportunities lying ahead. For example, in May 2020, the Singapore International Mediation Centre launched the SIMC COVID-19 Protocol with the aim of providing "*a swift and inexpensive route to resolve commercial disputes during the COVID-19 period*" by introducing expedited online mediation

procedures.[7] Likewise, the London Court of International Arbitration has updated its Mediation Rules for the first time in eight years, effective from 1 October 2020.[8]

Unsurprisingly, Singapore is playing a pioneering role in Asia for the promotion of the Convention and mediation, to further solidify Singapore's place as an international dispute resolution hub. Its proactivity has a high chance of paying off to cement that position in the long run, especially because mediation is viewed as a means of dispute resolution consistent with Asian business culture, as it encourages parties to work towards an acceptable and face-saving outcome, preserving the commercial relationships. Indeed, various Asian jurisdictions have already enacted mediation legislation in recent years, including Singapore, Hong Kong, Malaysia and China. Thus, the Convention is one more step in the right direction for Singapore, perhaps giving it the slight edge over its biggest rival in the region—Hong Kong—as an alternative dispute resolution centre.

[1] Available at:

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

[2] See our previous alert on the Convention here: <https://www.gibsondunn.com/singapore-convention-on-mediation-and-the-path-ahead/>.

[3] See here for a full list of signatories.

[4] However, please note that the Member States have the benefit of the Mediation Directive No.2008/52/EC which allows the enforcement of cross-border mediated settlement agreements through the national courts of EU Member States.

[5] Available here and here.

[6] Available at: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

[7] Available at: <http://simc.com.sg/simc-covid-19-protocol/>.

[8] See <https://www.lcia.org/lcia-rules-update-2020.aspx>.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration and Transnational Litigation practice groups, or the following:

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