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The Singapore Mediation Convention and its Potential Impact on Mediation in the Americas

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The Singapore Mediation Convention and its Potential Impact on Mediation in the Americas

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Summary

IN SUMMARY

This article examines the United Nations Convention on International Settlement Agreements Resulting from Mediation and considers selected issues of interest arising under it. The article also looks generally at the current status of mediation in the Americas and includes viewpoints from practitioners in the Americas as to the concrete need for, or desirability of, entry of the Convention into force in that area.

DISCUSSION POINTS

- Background information and current status of the Singapore Convention.
- Issues of interest arising under the Singapore Convention.
- Current status of mediation in the Americas.
- Viewpoints from practitioners in the Americas on the Singapore Convention.

REFERENCED IN THIS ARTICLE

- The Singapore Convention – The United Nations Convention on International Settlement Agreements Resulting from Mediation.
- The New York Convention on the Recognition and Enforcement of Foreign Arbital Awards.
- UNCITRAL Model Law – UNCITRAL Model Law on International Commercial Arbitration.
- Agreement No. 138/013 issued by the Presidency of the Judicial System in Guatemala.
- Agreement No. 19-2013 issued by the Supreme Court of Justice in Guatemala.
- Law No. 13.140/2015 in Brazil.
- The Brazilian Civil Procedure Code.
- Colombian Mediation Law 640 of 2001, Chapter II.
- Colombian procedural law.
- Law No. 7727 – the Alternative Dispute Resolution Law.

Today, there can be no serious question that mediation constitutes a highly effective form of dispute resolution. Indeed, around 70 per cent of disputes mediated globally are settled within one day.[1]

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention or the Convention), adopted by the General Assembly in December 2018, is arguably the most significant recent development in the field of mediation. The scope of this convention could reshape the global dispute resolution landscape by raising cross-border mediation's standing on the international stage in the same way that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) facilitated the growth of international arbitration in recent decades.

A total of 52 states have now signed the Convention since it opened for signature on 7 August 2019, making it one of the most successful multilateral treaties prepared by the United Nations Commission on International Trade Law (UNCITRAL). To come into force, the Convention needed at least three states to ratify it. As of March 2020, Qatar, Singapore and Fiji had done so, meaning that, for those states, the Convention will go into effect in September 2020.[2] As of May 2020, one additional state, Saudi Arabia, has ratified.[3]

Within the Americas specifically, 11 states are signatories: Chile, Colombia, Ecuador, Grenada, Haiti, Honduras, Jamaica, Paraguay, the United States (the country that initially proposed the Convention), Uruguay and Venezuela. None of them, however, has yet ratified it. Canada has not signed, which was perhaps predictable given its initial reaction after the Convention was proposed: '[a] fundamental question raised by this project is what policy rationale justifies giving expedited recognition and enforcement to one type of contracts over all the others'.[4] Although the sentiment in the Americas is generally positive toward the Convention, as discussed below, this seems to be based on a belief that its widespread adoption will be a boon to and raise the profile of mediation in general, rather than rectify any actual difficulties or perceived problems relating to enforcing settlement agreements entered into in mediation.

In the following sections, we first discuss the purposes of the Convention; then address certain issues of interest arising under it; and, finally, we turn to the current status of mediation in the Americas, and include viewpoints from practitioners in the Americas as to the concrete need for, or desirability of, entry of the Convention into force in that area.

THE CONVENTION'S UNDERLYING GOALS

The goals underlying the Singapore Convention were discussed during the United Nation Working Group II's 62nd session.[5] One main aim was to streamline the process of enforcing cross-border settlement agreements arrived at through mediation to encourage use of mediation as a dispute resolution alternative. When the United States proposed the Singapore Convention to the Working Group, it called the difficulty of enforcing mediation settlement agreements 'an obstacle to greater use of conciliation', and noted that enforcement of settlement agreements under contract law may be burdensome and time-consuming,[6] and conciliation does not guarantee that the parties will reach an agreement, and even a party that agrees to a resolution may subsequently fail to comply with the terms of the settlement agreement.[7] The US cited statistics from international surveys[8] to support the view that a convention was needed to facilitate the enforcement of settlement agreements arrived at through mediation; however, these surveys apparently asked respondents if they believed there would be difficulty in enforcing mediated settlement agreements under the then current regime, and did not seek to collect data reflecting the presence or absence of actual enforcement problems. The bulk of the surveys focused on whether respondents believed adopting a convention would make contracting parties more willing to use mediation.[9]

While no delegates disputed the utility of mediation, or the need for agreements arrived at through mediation to be enforced, some countries – particularly civil law countries – were sceptical of the need for, or even wisdom of, a convention intended to specifically facilitate enforcement of mediated settlement agreements. For example, Germany noted that, in its view, 'there is no fundamental difference between agreements which are the outcome of (simple) negotiation, and agreements resulting from mediation or conciliation. … Their binding nature derives from party autonomy, and they are subject to the rules of

contract law'.[10] To date, no European Union member country has signed the Convention, though that may be due to a lack of clarity as to whether member countries need to sign individually, or whether the EU can sign on their behalf (or must, for it to be in force in EU member countries in light of the Court of Justice of the European Union's decision in ***Slovak Republic v.Achmea BV*** (Case C-284/16) and developments subsequent to it).

In sum, it seems fair to conclude the Convention's stated purpose was to eliminate, or at least lessen, obstacles to enforcing cross-border mediated settlement agreements, while its unstated purpose was to enhance the use and acceptability of mediation as a dispute resolution mechanism.

ISSUES ARISING UNDER THE CONVENTION

Against that background, we now consider four topics that the authors consider of interest and bear in particular on how, or whether, the Convention has met or will meet its intended goal of streamlining the enforcement process for mediated settlement agreements and avoiding difficulties in enforcement that may exist under ordinary contract law.

What Is The 'competent Authority'?

Under article 4.1 of the Convention, a party relying on a mediated settlement agreement must provide that agreement (signed by both parties) to the 'competent authority' of the contracting state in which relief is sought, along with evidence that it resulted from international mediation.[11] This competent authority is then asked to enforce the settlement agreement in accordance with the rules of procedure of the state in which enforcement is sought and the provisions of the Singapore Convention.[12]

Interestingly, the Convention neither defines nor attempts to explain what constitutes a competent authority. The UNCITRAL Model Law in its article 11.3, defines the term 'competent authority' as meaning 'an arbitral tribunal, court or other competent governmental authority'. However, according to Judge Brower, it could also include a '***huissier de justice***' in certain civil law jurisdictions (or bailiff in common law jurisdictions).[13]Because the term is not defined or limited in the Convention, a contracting state could, in theory, designate a specific governmental agency or administrative or law enforcement unit as its competent authority for Convention purposes. However, it is unclear whether a contracting state could preclude a court sitting in that state or an arbitral tribunal designated by the parties from acting as a competent authority, as article 6 of the Convention seems to assume that both would, necessarily, constitute competent authorities. To date, it does not appear that any contracting state has designated a competent authority that is not a court, so, at least by default, the competent authority would seem to be a given country's court system. Thus, in practical terms, the Convention does not appear to have resulted in any changes in the basic route through which enforcement of mediated settlement agreements is sought.

Interpretation And Enforcement Issues

As noted above, one of the stated objects of the Convention was to provide a mechanism for enforcing mediated settlement agreements that would avoid obstacles involved in seeking enforcement based solely on their status as contracts. Has that objective been met?

In the view of the authors, the answer is 'probably not'. Article 5 of the Convention seeks to streamline the process for enforcement, allowing only limited defences, much as defences to enforcement of arbitral awards are limited under the New York Convention. But, an arbitration award is very different from a mediated settlement agreement, as the former is largely

equivalent to a judgment and the latter remains a contract and so is, in many cases, subject to interpretation.

Article 5.1(c)(ii) of the Convention endeavours to deal with this, and provides, as one of the limited grounds for non-enforcement, that the competent authority may refuse to grant relief if the party requesting it 'furnishes to the competent authority proof that . . . the obligations in the settlement agreement . . . [a]re not clear or comprehensible'. But this language itself appears problematic. To begin with, because settlement agreements are indeed contracts, they may, despite the settling parties' (or mediator's) best efforts and intentions, employ language that is ambiguous and so require interpretation to arrive at their intended meaning. By definition, at least in many jurisdictions, contract language that is ambiguous is not 'clear'. Does this mean that, in the event that language in a mediated settlement agreement is found by the competent authority to be ambiguous, the competent authority should simply refuse to enforce it, even though the ambiguity is capable of being resolved? If so, that would leave a party to the agreement worse off (again, at least in many jurisdictions) than the party would be if enforcement were sought under ordinary contract law. The Convention, however, does not provide any guidance on this.

Similar issues arise with respect to the defence that the obligations in the settlement agreement are incomprehensible. Does that mean anything more than ambiguous? Is incomprehensibility to be determined at the sole discretion of the competent authority? Also, obligations that are 'not . . . comprehensible' are, presumably, already 'not clear'; this, arguably, renders the reference to terms that are 'not . . . comprehensible mere surplus.

In the Convention's preparatory works, there were various discussions of the 'not clear or comprehensible' criterion, but none that is particularly illuminating. The Working Group explained that the 'purpose of adding such a requirement' was to ensure that 'only settlement agreements with enforceable obligations and which clearly set out the content of the settlement would be accepted for enforcement under the instrument'.[14] While concerns were raised that this might give 'too wide a discretionary power to the competent authority', they were not substantively addressed.[15] Another observation made was that the qualifiers 'clear' and 'comprehensible' could be interpreted differently in different jurisdictions, since some states are not familiar with those concepts. This point was not substantively addressed either.

According to Timothy Schnabel, the US representative on the drafting committee, the clause only applies if the mediated settlement agreement is 'so confusing or ill-defined that the competent authority could not confidently provide the requested relief even if it found the party entitled to relief'.[16] He added that '[i]f the competent authority can determine whether the mediated settlement provides for an obligation, and can adequately frame its order providing relief, then this ground for refusal does not apply; the exception is meant only to protect competent authorities from being forced to act in situations in which they truly do not know what relief to provide'.[17] This approach would eliminate the issues raised in the third and fourth paragraphs of this section. However, it appears difficult to reconcile with the language of article 5.1(c)(ii) because the terms 'not clear' and 'not . . . comprehensible' are used disjunctively. It is presently unknown how article 5.1(c)(ii) will be interpreted and applied in actual practice.

Even more generally, and irrespective of article 5.1(c)(ii), at the end of the day, a party seeking to enforce a settlement agreement under the Convention will still have to prove that the agreement was made and that the counterparty failed to perform under it, and a party that

failed to perform will still, if applicable, have the right to prove that its failure was excused or excusable. As the Convention does nothing to change these basic principles, it is not fully clear why or how seeking enforcement of a mediated settlement agreement under the Convention would provide concrete advantages to seeking enforcement under ordinary contract law.

Another potential issue, specific to settlements that involve more than the bare payment of money, comes up in the context of article 3, which provides that a state's competent authority 'shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention'. In the authors' experience, in the context of commercial disputes, it is not uncommon for a mediated settlement to involve, at least in part, the provision of services. For example, a contractor claiming that a project owner failed to pay for extra work incurred on the project may, through mediation, agree to a settlement whereby the project owner agrees to hire the contractor for an agreed-upon number of upcoming projects, thus at minimum assuring the contractor of continued cash flow. Assume that, after the settlement, the project owner fails to hire the contractor for the new projects, and the contractor seeks to enforce the settlement agreement under the Convention. Assume also that, in the state where enforcement is sought, courts are the competent authority and will under local law decline to order specific performance of construction contracts (eg, on the ground that they involve ongoing personal services or because ordering specific performance would require the court to become intertwined in ongoing commercial matters). In such a case, in an enforcement proceeding brought under the Convention by our hypothetical contractor, would the court be required under the Convention to order specific performance? And, if not, would the court be authorised under the Convention to award the contractor damages based on the project owner's breach of the settlement agreement – as awarding damages for breach of an agreement is not necessarily the same thing as 'enforcing' a settlement agreement. On these issues, the Convention is silent.

Parallel Applications Or Claims

Article 6 of the Convention addresses issues of parallel applications or claims. It provides that, if it 'considers it proper', a competent authority that has been presented with a an application or claim under the Convention may 'adjourn the decision and may also, on the request of a party, order the other party to give suitable security'. As written, this language may give parties incentive to initiate parallel enforcement proceedings and then request that the proceedings, in the forums they perceive as less favourable, be held in abeyance – in essence, to forum shop.

Standards For Mediators And Mediation Under Articles 5(1)(e) And 5(1)(f)

Much has been written about the import of these articles, which allow a competent authority to refuse enforcement if there was a serious breach by the mediator of standards applicable to the mediator or mediation without which breach the objecting party would not have entered into the agreement, or a failure by the mediator to disclose circumstances raising justifiable doubts as to the mediator's impartiality or independence and the objecting party would not have entered into the agreement if disclosure had been made. Accordingly, we comment only briefly.

Mediated settlement agreements have no nationality under the Singapore Convention. The concept of a 'seat' was considered, but rejected, by the Working Group, partly to avoid

favouring one jurisdiction over others that the mediation might impact. By decoupling mediation proceedings from seats, the Convention freed mediated settlements from the legal requirements of any given place of mediation. However, in the context of articles 5(1)(e) and (f), that gives rise to its own issues, as, among other things, the parties to a mediated settlement agreement cannot know in advance what law or standards will apply if defences under these articles are raised at the time enforcement is sought. To take a few examples, different states may apply different standards to mediators, or possibly none at all. And, different states may have different rules governing confidentiality or the ability to obtain evidence from a mediator.

In the United States, where the authors are based, challenges to the 'impartiality' of arbitrators, while rarely successful, are ubiquitous, and parties seeking enforcement of awards are frequently required to expend time and resources to defeat them. It remains to be seen whether that will likewise become the case under the Convention.

MEDIATION AND VIEWS ON THE CONVENTION IN THE AMERICAS

In this section, we discuss the results of an informal (and certainly not statistically significant) survey the authors conducted among practitioners and mediation institutions in the Americas. The survey covered the following countries: Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Mexico, the United States and Uruguay.

Overview Of The Status Of Mediation And The Enforcement Of Mediated Settlement Agreements In The Americas

Status Of Mediation

In the Americas, there appears to be a distinct difference in the status of mediation as a dispute resolution mechanism between the North (Canada and the United States) and the South (Latin America). Mediation is used widely in North America, whereas practitioners and institutions in Latin America reportedly face an uphill battle in placing mediation on equal footing with other, and more adversarial, dispute resolution methods. It is probably no coincidence that Canada and the United States are primarily common law countries whereas Latin America has a civil law tradition, as alternative dispute resolution, including mediation, has historically been promoted more widely in common law countries.

According to our respondents, it is relatively uncommon for parties in the Latin American countries covered by the survey to include mediation clauses in their commercial contracts. Typically, they provide recourse to litigation or arbitration. In Guatemala, for instance, parties may include mediation in arbitration clauses as a method of dispute resolution during the cooling-off period, which means mediation will not be included in the absence of arbitration clauses. That is not to say that mediation is unknown in Latin America; it is, but often employed in non-commercial areas.[18] However, in Canada and the United States, it is not uncommon for parties to contracts involving substantial sums of money to include multi-tiered dispute resolution clauses that begin with mediation before proceeding to arbitration or litigation. And, in both Canada and the US, it is very common for parties to existing disputes, whether before a court or arbitration panel, to endeavour to resolve their issues through mediation.

Most survey respondents in Latin America reported that the biggest obstacle to mediation's growth is cultural. They noted that mediation is largely viewed as a 'weak' and inefficient method of dispute resolution. Respondents noted that, in practice, they often observed that

party representatives attending a mediation lacked decision-making authority, resulting in a highly inefficient process. At the same time, survey respondents reported optimism that the current perception may be changing as use of mediation becomes more prevalent.

In this regard, respondents in some Latin American countries reported a noted increase in mediation, at least in certain discrete areas. For example, while mediation has been historically uncommon in Brazil, respondents reported that a trend to including mediation clauses in complex commercial contracts is emerging.

In Mexico, a relative uptick in mediation was reported in insurance, construction, real estate, labour and general commercial disputes. Three factors were identified as explaining the increase: first, users understand that arbitration or litigation will cost them more; second, users recognise that parties that choose mediation are more likely to emerge as continuing business partners; and third, some arbitral institutions now encourage parties to mediate as part of the dispute resolution process, thereby promoting dialogue as well as the potential for earlier amicable settlements. That said, the total number of commercial cases going to mediation in Mexico is still fairly low.[19]

In Costa Rica, the mediation caseload at some institutions can be as high as 50 per year, which is a significant increase from the past, with some involving a cross-border component. Respondents report that, in recent years, the country has seen an increase in commercial cases, but a decrease in labour cases. The latter is likely due to recent labour legislation that limits the way in which private centres can administer labour mediations. Chile also is experiencing an increase in mediation cases. One mediation institution reported that it has nearly quadrupled its number of cases in five years, from 11 in 2014 to 38 in 2019.

Enforcement Of Mediated Commercial Settlement Agreements

Overall, no significant problems in enforcing mediated settlement agreements were reported.

Canada allows each province and territory to have its own laws dealing specifically with enforcement. For regular commercial matters, generally settlement agreements are treated as ordinary contracts. However, because certain areas, like Quebec, are civil law jurisdictions, the approaches may differ.

In the United States, mediated settlement agreements are also treated as ordinary contracts. While the specifics of contract law can differ from state to state, as a general matter mediated settlement agreements are enforceable as ordinary contracts.[20] Indeed, since US law 'favors the settlement of disputes by agreement of the parties', courts 'will enforce the agreement which the parties have made absent any fraud, mistake or overreaching'.[21]

As reported by our respondents, while many Latin American countries, including Guatemala,-[22] Brazil,[23] Colombia,[24] Costa Rica[25] and Mexico,[26] have legislation that in some way touches on mediation, applicable codes and regulations typically do not contain provisions dealing specifically with the enforcement of commercial settlement agreements resulting from mediation.[27]

Notwithstanding, in practical terms, our respondents did not report any significant difficulties in enforcing mediated settlement agreements in Latin America. While the concept of 'international commercial mediated settlement agreements' seems to be new to most Latin American countries, as is the case with most of the world's countries,[28] our respondents did not report that as presenting any significant issues. For most Latin American countries, enforcement of settlement agreements is generally conducted through the ordinary court

process,[29] with some permutations. Colombian law provides that settlement agreements resulting from mediation have the same effects as judicial awards,[30] hence from an enforcement perspective they may even be in a stronger position relative to ordinary contracts. In Costa Rica and Chile, settlement agreements are enforceable through the courts. In Mexico, mediated settlement agreements can only be enforced through ordinary court proceedings.

Views On The Convention

None of our respondents identified a practical need for the Convention in their respective countries, since, as discussed above, procedures already exist to enforce mediated settlement agreements if and when the need arises.

But, there was a general consensus that ratification of the Convention would encourage the use of mediation as a dispute-resolution device. For example, one respondent, from a Mexican mediation institution, said that the Convention adds 'credibility to the process'. Another added that the Convention marks 'a milestone in the development of international mediation', because most civil law jurisdictions 'require statutes and formal recognitions for the legal industry to fully embrace it'. A Brazilian respondent expressed the view that the Convention's importance is 'more related to the necessity of creation of a mediation culture than to the real need [for] the template's existence itself. In the case of Brazil, our legal culture is still deeply anchored in litigation, which sometimes results in an unsupportive field for mediation or ADRs in general'. Likewise, in Chile, where the Convention is waiting to be ratified, respondents were hopeful that the Convention will lead to mediation being more generally accepted as a way of amicably settling disputes.

CONCLUSION

It appears relatively clear that, at least in the Americas, there is no pressing need for a convention to address obstacles to enforcement of mediated settlement agreements. And, as discussed in 'Issues arising under the Convention', questions remain as to how, if at all, the Singapore Convention would make enforcement of mediated settlement agreements simpler or more efficient than enforcement under laws and procedures already in place. Nonetheless, in the views of the authors, it would be a mistake to overlook the potential benefit of the Convention in international commercial transactions and disputes, as its very existence tends to legitimise the concept of mediation and may also help overcome the hesitancy of parties to employ mediation to enter into a mediated settlement agreement based on a concern, whether justified or not, that the agreement may not be enforceable, either through an even-handed process, or at all. For these reasons, the Convention – warts and all – should be viewed as a positive and its proliferation encouraged.

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Endnotes

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