

The Singapore Convention: A First Look

By Deborah Masucci and M. Salman Ravala

On 25th June, 2018, at its 51st session, the United Nations Commission on International Trade Law (UNCITRAL), the U.N.'s core legal body in the field of international trade law, approved by consensus of its member States a "Convention on International Settlement Agreements Resulting from Mediation." It will be commonly referred to as the "Singapore Convention" upon adoption by the United Nations General Assembly and ratification by at least three member States. The official signing ceremony for the Singapore Convention is expected to be in late 2019.¹

The Background: A Timely Proposal

In May 2014, UNCITRAL, through its Working Group II (WGII), received a proposal from the United States² government to develop a multilateral convention on the enforceability of international commercial settlement agreements.³ The foundation of the proposal was to encourage the acceptance and credibility of mediation as a tool for resolving international cross-border disputes. A second goal of the proposal was to find a more efficient and robust enforcement mechanism when a party breached a mediated settlement agreement without resorting to costly and time-consuming processes such as initiating a new lawsuit to obtain a judgment or court decree on a settlement agreement or utilizing consent awards in arbitration. The need for the proposal was premised on the existing conviction of the global community, adopted by United Nations, that the use of mediation and conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by [member] States."⁴ The United Nations previously adopted UNCITRAL Conciliation Rules (1980) and UNCITRAL Model Law on International Commercial Conciliation (2002), as well as the widely ratified Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention" (1958). Adoption of the Singapore Convention therefore moved relatively swiftly and also included the adoption of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from International Commercial Mediation (the "UNCITRAL Model Law on ICM-ISA"). Adoption of the Model Law will ensure a more widespread global acceptance by member States in their local jurisdictions and smoother domestic implementation across the world.

The Deliberations: Mediation in Action

Since 2014, deliberations on the international instruments took place over eight UNCITRAL Working Group II sessions, by 85 member States and 35 non-governmental organizations, including the International Mediation Institute (IMI). Delegations vigorously participated in debate over the proposed Singapore Convention and related Model Law. The diversity of voices that contributed to the deliberations and eventual adoption is to be celebrated and welcomed by the global business community.

Progress on the instruments had many parallels to a multi-party co-mediation. WG II elected a Chairperson from the member states. The Chairperson (the lead mediator) effectively developed the agenda for the proceedings, secured consensus from the participating members, framed and reframed for action agreements and disagreements, and brought in experts and others to supplement the knowledge of delegates. As meetings progressed, member States substituted delegates to include internal mediation experts in their delegations. Each session convened with a joint caucus. Consultation meetings or private caucuses were used during the sessions to work out language with one or two delegates filling the role of co-mediators. The UNCITRAL Secretariat provided technical assistance to the group ensuring consistency of provisions and language with other instruments adopted by UNCITRAL. Educational programs were held between and during WGII sessions. They provided opportunities for delegates to learn more about practices globally and why there is a need for a Convention despite lack of evidence that mediated agreements are not being honored.

The Key Provisions: Integrating the ADR Landscape

The Preamble section of the Singapore Convention acknowledges that "mediation is increasingly used in international and domestic commercial practice as an alternative to litigation"⁵ and further acknowledges the "significant benefits"⁶ of mediation. There are only 16 Articles in the Convention.

Article 1 outlines the scope, applying the Convention to cross-border commercial disputes resolved through mediation where "at least two parties to the [written] settlement agreement have their places of business in different States"⁷ or in which parties "have their places of business different from either the State in which a substantial part of the obligations under the settlement agreement is performed or the State in which the subject matter of the settlement agreement is most closely connected."⁸ Article 1 specifically excludes settlement agreements

related to consumer, family, inheritance, and employment matters, as well as those enforceable as a judgment or as an arbitral award.⁹

Article 2 defines key terms used in the Convention such as “place of business,” “in writing,” including in electronic form, and even “mediation.” Article 3 summarizes the general principles and obligates member States that ratify the Convention and also permits a party subject of the Convention to invoke a defense and to subsequently prove that a particular dispute being raised was already previously resolved by a settlement agreement.

Article 4 provides a specific but broad checklist of what a party must supply for enforcement of the international settlement agreements that result from mediation. Article 4 includes submission of a “settlement agreement signed by the parties”¹⁰ and “evidence that the settlement agreement resulted from mediation.”¹¹ Evidence includes items “such as” a “mediator’s signature on the settlement agreement,”¹² or “a document signed by the mediator,”¹³ or “an attestation by the institution” administering the mediation. In the absence of such proof, Article 4 allows a party to submit “other evidence” acceptable or required by a competent authority of the member State where relief is sought. Article 4 also addresses key issues related to electronic communication, translation of settlement agreements, and calls for the competent authority of the member States enforcing the settlement agreements to “act expeditiously.”¹⁴

Article 5 was vigorously debated and certain overlaps within the Article are intentional to accommodate the concerns of a member State’s domestic legal systems. Article 5 includes the grounds when a competent authority may refuse to grant enforcement. These circumstances include incapacity of a party, or where the settlement agreement a) is null and void, inoperative or incapable of being performed; b) not binding or not final; c) was subsequently modified; d) was performed; e) is not clear or comprehensible; or where granting relief would be contrary to terms of the settlement agreement or contrary to public policy, and subject matter is not capable of settlement by mediation under the law of that party. A competent authority may also refuse to grant relief where there is a serious breach by the mediation of standards applicable to the mediator or the failure by the mediator to disclose to the parties’ circumstances as to the mediator’s impartiality or independence.

Article 6 addresses issues of parallel applications or claims and draws inspiration from the New York Convention. It grants, to the competent authority of the member State where relief is being sought, wide discretion to adjourn its decision under the Convention where an application or claim relating to a settlement agreement was made in a court, an arbitral tribunal, or other competent authority.

Article 7 also draws inspiration from the New York Convention and allows member States flexibility to enact national legislation in their countries to expand the scope of settlement agreements excluded by Article 1, Paragraphs 2 and 3 of the Singapore Convention.

Article 8 allows for a tailored adoption of the Convention by each member State, allowing for two reservations when ratifying the Convention. The first reservation is one which relates to the member State or its own governmental agency. The second allows for a declaration that the Convention applies only where the parties to the settlement agreement resulting from mediation have agreed to the application of the Convention.

Article 9 clarifies that the settlement agreements encompassed by the Convention include those concluded *after* entry into force of the Convention, related reservations, or withdrawals by the member State. Article 16 similarly clarifies that the settlement agreements encompassed by the Convention include those concluded *before* denunciation of the Convention.

The Future: Mediation Benefits Our World

In 2016 and 2017, the IMI convened the Global Pound Conference series which surveyed an array of participants from around the world, including those in the business community.¹⁵ Participants surveyed represented many fields such as law, construction, energy, architecture, international business, healthcare, food and beverage, tourism, trade, education, and finance.¹⁶ One survey question asked respondents to rank why they believed parties do not try to solve their commercial cross-border dispute through mediation. Lack of a universal mechanism to enforce a mediated settlement was cited as the second highest ranked reason. On a similar question about the likely use of a mediation clause in contracts if there existed a uniform global mechanism to enforce mediation settlements, the survey result found over 80 percent of the respondents answering in the affirmative. One respondent even added a comment that “lack of uniform enforcement mechanism is a problem.”

The enforcement regime promulgated by the Singapore Convention and related Model Law address the concerns raised by those surveyed by the IMI. Incorporating input from around the world, it promises to foster international trade, improve access to justice, and increase confidence, predictability and certainty amongst the business community. It also assists member States and their respective judiciaries to become more efficient in resolving disputes, especially those of commercial nature where parties seek stability and certainty.

Adoption of the Singapore Convention and Model Law on the global stage signals the most credible acknowledgment of mediation as a meaningful tool to resolve cross-border commercial disputes. The timing of the adoption is also significant and perhaps eye-opening,

a subliminal reminder to the world community that the Singapore Convention, akin to the New York Convention, has the power to significantly and positively shape a harmonious regime of international trade around the world.

Endnotes

1. The final text of the Singapore Convention and Model Law is forthcoming on UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, *see* UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. The U.S. is one of 60 member States that consider proposals for recommendation and adoption by UNCITRAL.
3. UNCITRAL, 51st Sess. UN Doc A/CN.9/942 (25 June, 2018).
4. General Assembly resolution 57/18, *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*, A/RES/57/18 (19 November 2002), available from undocs.org/A/RES/57/18.
5. UN Doc A/CN.9/942, *supra* note 1, at Preamble.
6. *Id.*
7. UN Doc A/CN.9/942, *supra* note 1, at Art. 1.
8. *Id.*
9. UN Doc A/CN.9/942, *supra* note 1, at Art. 2, 3.
10. UN Doc A/CN.9/942, *supra* note 1, at Art. 4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Global Pound Conference Series 2016-2017, Shaping the Future of Dispute Resolution and Improving Access to Justice, Cumulated Data Results, *available at* <https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf> (last visited, June 25, 2018).
16. Weiss, David S. and Griffith, Michael R., Report on International Mediation and Enforcement Mechanisms, *available at* <https://www.imimmediation.org/download/.../imi-njcuidr-wgii-report2017v4-0-pdf.pdf> (last visited, June 25, 2018), at p.7.

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