

THE SINGAPORE CONVENTION ON MEDIATED SETTLEMENT AGREEMENTS: A NEW STRING TO THE BOW OF INTERNATIONAL MEDIATION?

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Summary: 1. Introduction. – 2. Features of Settlement Agreements. – 3. Enforcement of a Mediated Settlement Agreement and Its Refusal. – 4. Final Provisions of the Singapore Convention. – 5. Conclusions.

On 7 August 2019 the Singapore Convention on recognition and enforcement of international mediated settlement agreements (hereinafter, the Singapore Convention)¹ became open for signature. This multilateral treaty was drafted by UNCITRAL after a labourious discussion that spanned several years and was adopted by the United Nations General Assembly on 20 December 2018. In order to mirror the provisions of the Singapore Convention, the UNCITRAL Model Law on International Commercial Conciliation of 2002 was amended and renamed as UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.² The purpose of this essay is to present an overview of the major contents of the Singapore Convention, a treaty aimed at providing uniform enforcement mechanisms for the mediated settlement agreements by which international commercial disputes are resolved. The hope is that the Convention will promote a wider use of cross-border mediation. Just as the New York Convention of 1958³ has been a successful instrument of international arbitration, the Singapore Convention is expected to make mediation more appealing thanks to specific and harmonized rules that are intended to make enforcement of settlement agreements easier and quicker to obtain.

1 United States Convention on International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf> accessed 20 August 2019. The name 'Singapore Convention' is connected to the fact that Singapore offered to be the location where the States will convene for the signing ceremony of the treaty.

2 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) <https://www.uncitral.org/pdf/english/commissionersessions/51st-session/Annex_II.pdf> accessed 20 August 2019.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>> accessed 20 August 2019.

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1. INTRODUCTION

The Singapore Convention will enter into force ‘six months after deposit of the third instrument of ratification, acceptance, approval or accession’ (Article 14), meaning that, in principle, for the entry into force of the treaty it is sufficient that at least three States ratify the Convention. There was much speculation as to the States that would be the first ones to sign the treaty,⁴ in light of the fact that the drafting of the Convention progressed, at least in its initial stages, along a bumpy road and had to face (and eventually overcome) the strenuous opposition of the European Union’s representatives.⁵ In any event, thanks to the Convention, the party willing to enforce an international settlement agreement resulting from mediation in a State that is a party to the Convention itself will be able to turn to the courts (or any other ‘competent authority’) of that State and request relief. If the requirements of the agreement laid down by the Convention are met, the court must ‘act expeditiously’ (Article, 4, sec. 5), since it is devoid of any powers to impose further formalities concerning either the form or the content of the agreement. Enforcement can be denied by the court only insofar as it finds one of the grounds for refusal listed in Article 5.

Further on in this essay, the main features of the enforcement mechanisms provided for by the Singapore Convention will be outlined. For now, it seems critical to emphasize that the Convention ‘accords new status to mediated settlements in their own right. It converts what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally binding international framework.’⁶ And this ‘new status’ granted to international settlement agreements is likely to boost mediation as a method of resolving cross-border commercial disputes, overcoming the concern – widespread in the business community – that if a party to a successful mediation procedure later has a change of heart, the company interested in compliance with the terms of the agreement will be forced to start over, commencing either litigation or arbitration.

2. FEATURES OF SETTLEMENT AGREEMENTS

For the applicability of the Singapore Convention, a settlement agreement must comply with a number of requirements: it must be mediated, international and commercial. Furthermore, it must not fall within the scope of the exclusions listed in Article 1, sections 2 and 3.

As far as the first requirement is concerned, it is self-explanatory that the agreement must be the outcome of a successful mediation procedure. The Singapore Convention, at Article 2, section 3 offers a definition of mediation that echoes the definitions one may find in other international legal instruments, such as the UNCITRAL Model Law

4 See Eunice Chua, ‘The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution’ (2019) 9 Asian JIL 195.

5 See Bruno Zeller, Leon Trakman, ‘Mediation and arbitration: the process of enforcement’ (2019) Uniform LR <<https://doi.org/10.1093/ulr/unz020>> ACCESSED 20 August 2019.

6 Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19 Pepp. Disp. Resol. LJ 1–60, 11.

on international commercial mediation,⁷ or the EU Directive 2008/52/EC on certain aspect of mediation in civil and commercial matters,⁸ just to mention two texts that almost inevitably come into play in any discourse regarding mediation. A common element is the insignificance of the name by which the procedure followed by the parties to reach an agreement representing an ‘amicable settlement’⁹ of their dispute is referred to. This feature appears to make it clear that what counts is the presence of a third disinterested person, whose assistance is supposed to bring the parties closer so as to come to a peaceful resolution of their controversy. While the EU Directive defines mediation as ‘a structured process’,¹⁰ the procedure by which the agreement is reached does not seem to have any bearing on the applicability of the Convention. By the same token, it can be noticed that no reference to the impartiality of the mediator appears in Article 2, section 3 that defines mediation and its essence.¹¹ In spite of that, among the grounds to refuse enforcement of the settlement agreement at least two relate to possible flaws in the mediation proceeding and its development, as well as in the mediator’s behavior, a point that will be clarified later on in this essay.

It is important to underline that the Singapore Convention does not take any stand on the source of mediation. In other words, the parties may have decided voluntarily to resort to mediation instead of commencing litigation, or an attempt at mediation may have been mandatory because it was ordered either by a legal rule or by a court or an arbitral tribunal. This issue, which is debated in the European Union, where some Member States believe that the only way to persuade individuals to resort to mediation is to make it mandatory,¹² does not surface in the Convention. However, on a different issue the text of the Convention is adamant: it provides that the ‘third person’ assisting the party qualifies as mediator insofar as he is devoid of any authority ‘to impose a solution upon the parties to the dispute’.¹³ In the context of the Convention, the emphasis is on the lack of adjudicative powers in the hands of the mediator, while the question whether he is allowed to propose to the parties a solution to their dispute stays in the background and it is not specifically addressed.

In order to fall within the scope of the Singapore Convention, the settlement agreement must be international, too. This requirement is essentially connected with the parties’ places of business, which must be located in different States. This is listed as the main criterion to take into account to evaluate whether the settlement agreement is international, but Article 1 provides for other, supplemental criteria, replicating almost verbatim the relevant part of the definition of international commercial mediation laid down by the Model Law, at Article 2(2).

It has been emphasized that the notion of the ‘state of origin’ of the settlement agreement is alien to the Singapore Convention, which in principle makes the settlement agreement a ‘stateless instrument’.¹⁴ That said, though, since the

7 See UNCITRAL Model Law (n 2) *supra* note 2.

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

9 See Article 2, s. 3 of the Singapore Convention (n 1) and Article 1, s 3 of the Model Law (n 2), as well as Article 3(a) of the EU Directive (n 8).

10 Article 3(a) of the EU Directive (n 8).

11 For a completely different approach, see Article 3(b) of the EU Directive (n 8).

12 Italy, for one, is a Member State that relies heavily on the debatable virtues of mandatory mediation: see Elisabetta Silvestri, ‘Too Much of a Good Thing: Alternative Dispute Resolution in Italy’ (2017) 21 Netherlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 29.

13 See Article 2, s3 of the Singapore Convention (n 1) and, along the same lines, Article 1, s 3 of the Model Law (n 2).

14 Schnabel (n 5), *supra* note 6, at 22.

enforcement is supposed to follow the rules of procedure of the State where relief is sought (according to Article 3, sec. 1), domestic law may interfere with the procedure by which enforcement is granted or refused.

Last, but not least, the Singapore Convention applies to international settlement agreements that have resolved commercial disputes. Like the Model Law, the Singapore Convention does not offer any definitions of commercial disputes; but some guidance as to which types of settlement agreements, even though mediated and international, cannot be enforced under the Convention is given by the numerous exclusions listed in Article 1, sections 2 and 3. In this regard, what is relevant is the subject matter of the dispute: therefore, consumer disputes, as well as disputes arising out of family law, inheritance law or labour law are excluded from the application of the Convention. Other exclusions concern settlement agreements that are enforceable as judgments or as arbitral awards, as well as settlement agreements approved by a court or reached in the course of a judicial proceeding.

To be enforceable under the Singapore Convention, a settlement agreement must comply with the requirements listed in Article 4. Differently from the requirements analyzed above, these requirements have to do with formal features of the agreement. First of all, the agreement has to be 'in writing', but the requirement of a written form is satisfied if the content of the agreement 'is recorded in any form', including modern IT devices, provided that 'the information contained therein is accessible' so that it can be used later on.¹⁵

The signatures both of the parties and the mediator are required. If the settlement agreement is recorded in an electronic document, special rules are laid down in order to guarantee that the electronic communication was reliable and appropriate, taking into account the circumstances of the case.¹⁶

An important requirement that the party willing to rely on the settlement agreement is expected to satisfy is the offer of evidence demonstrating that the settlement agreement resulted from mediation. To this end, the mediator's signature will suffice or, as possible alternatives, evidence can be given by submitting either a document in which the mediator asserts that a mediation took place between the parties or a statement released by the institution that administered the mediation. If none of these options are available, the party can rely on 'any other evidence acceptable to the competent authority'.¹⁷ It is quite puzzling to note that the party is expected to give evidence as to the mediated nature of the settlement agreement, while no proof is necessary to demonstrate that the agreement is commercial and, most of all, international: commentators on the Singapore Convention themselves find this odd, in light of the fact that disputes over the source of the agreement are not likely to occur frequently.¹⁸

The authority petitioned for the enforcement of the settlement agreement may require its translation or the production of the documents that appear to be necessary to confirm that the requirements of the Singapore Convention have been met. However, reliance on these provisions should not be used as an *escamotage* to impose further formalities with a view to slowing down the procedure for the recognition and enforcement of settlement agreements: this would run contrary to the very purpose of the Convention and its aim to provide a unified and straightforward enforcement mechanism for mediated agreements.

15 See Singapore Convention (n 1) Article 2, s 2.

16 See Singapore Convention (n 1) Article 4, ss 1(a) and (b)(i), as well as s 2(b)(i).

17 See the Singapore Convention (n 1) Article 4, s (b)(iv).

18 See, for instance, Schnabel (n 5) *supra* note 6, at 30.

3. ENFORCEMENT OF A MEDIATED SETTLEMENT AGREEMENT AND ITS REFUSAL

The party that relies on a mediated settlement agreement which has resolved an international commercial dispute and is willing to have it enforced in a State that is signatory to the Singapore Convention can turn to a court or any other 'competent authority' based on the law in force in that State. According to Article 3, section 1, each Party to the Convention will provide enforcement 'in accordance with its rules of procedure and under the conditions laid down in [*the*] Convention'. The court (or the 'competent authority') is under the obligation to recognize and enforce the settlement agreement (and must do so 'expeditiously') unless the party against whom enforcement is sought is able to prove that one or more grounds for refusal exist. Some say that the Singapore Convention makes it possible to use the settlement agreement both as a 'sword' and as a 'shield':¹⁹ the 'sword' effect is the mere fact that the party interested in the enforcement of the agreement can obtain it without the necessity of overcoming specific hurdles; the 'shield' effect is the fact that this very party is allowed to invoke the settlement agreement as a defense in order to demonstrate that the dispute has been resolved, should the other party try to litigate anew the same matter.²⁰

With regard to the grounds that, if proved by the party trying to avoid compliance with the settlement agreement, can persuade the court to refuse enforcement, their list, laid down by Article 5, is permissive, on the one hand, and exhaustive, on the other: permissive, since States that are signatories to the Singapore Convention, when they transpose it into their domestic law, are free to reduce the number of the grounds for refusal; exhaustive, in light of the fact that enforcement cannot be denied for grounds that are additional to those listed in Article 5.²¹

The 'grounds for refusing to grant relief' can be grouped in different categories.²² The incapacity of a party, as well as the invalidity of the settlement agreement, can be defined as 'substantive grounds'. The second group of grounds has to do with the content of the settlement agreement. Therefore, enforcement can be denied when the settlement agreement is not binding, or it is not final; when its terms have been modified after the settlement was reached; when the obligations arising out of the agreement have already been complied with, or are unclear; and when granting relief would be at odds with the terms of the settlement agreement.

Interestingly, the last two grounds listed in Article 5, section 1 under sub-sections (e) and (f) are different from the grounds mentioned above, since they do not directly concern the settlement agreement, but the mediator and his behavior. In fact, enforcement can be denied if the party opposing relief is able to prove that the mediator was responsible for 'serious breach ... of standards applicable to the mediator or the mediation', insofar as the same party can show that such a breach was the main reason prompting him to settle the dispute. The first example of a 'serious breach' that comes to mind occurs

19 See Lucy Reed, 'Ultima Thule: Prospects for International Commercial Mediation' (NUS Centre for International Law Working Paper 19/03 – January 2019) 13 <<http://cil.nus.edu.sg/library/>> accessed 20 August 2019.

20 According to Article 3, s 2, 'If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.'

21 See Schnabel (n 5) *supra* note 6, at 42.

22 The classification offered in the text is suggested by Edna Sussman, 'The Singapore Convention. Promoting the Enforcement and Recognition of International Settlement Agreements' (2018/3) ICC Dispute Resolution Bulletin 42, 52.

when the mediator violates his duties of impartiality and independence; but both duties come into play in the description of the other ground for refusal dealing with the mediator's conduct. Failure to disclose circumstances that could cast a shadow over the mediator's impartiality and independence can cause the denial of enforcement if the missing disclosure had 'a material impact or undue influence on a party', so that that party accepted a settlement agreement which otherwise it would have refused. It is hard to figure out the difference between the two grounds just described. Even commentators seem to find it difficult to offer examples of the mediator's misconduct that would allow drawing a clear line of distinction between the hypotheses contemplated by sub-sections (e) and (f) of section 1 of Article 5. The emphasis is placed on the cause-and-effect relationship that must exist between the mediator's misconduct and the party's decision to settle the dispute, as well as on the difficulty to offer positive and convincing evidence of the mediator's misbehavior.²³

Two additional grounds for refusing relief are listed in Article 5, section 2: unlike the ones mentioned above, these grounds can be raised by the court (or by the 'competent authority') on its own motion. Therefore, enforcement can be denied when:

- (a) granting relief would be contrary to the public policy of that Party; or
- (b) the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

It is clear that these grounds echo the corresponding grounds that can prevent the recognition and enforcement of arbitral awards under Article 5, section 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As for mediated settlement agreements, it is difficult to imagine that in practice the public policy ground will be resorted to in order to refuse enforcement, while refusal due to domestic rules forbidding the mediation of disputes concerning specific matters seems to describe a more realistic occurrence, at least in certain jurisdictions.

Legal scholars have mixed feelings with regard to the list of the grounds for refusing enforcement of mediated settlement agreements. On the one hand, there are those who emphasize that the effort to contain as much as possible the risk of granting enforcement to unlawful settlement agreements is laudable; on the other hand, there are those who maintain that a few grounds, in order to be established, force the court petitioned for relief both to investigate thoroughly the facts of the dispute and to look into the mediation procedure and the settlement agreement, which could work against the purpose of the Singapore Convention that aims at making the enforcement of mediated settlement agreements simpler and more expedited.²⁴

4. FINAL PROVISIONS OF THE SINGAPORE CONVENTION

Among the remaining provisions of the Singapore Convention, a few appear to be quite significant and deserve a brief account.

Article 6 grants the discretion to the court or the other 'competent authority' of the signatory State where enforcement is sought to adjourn the proceeding and order security when the judgment of another court or an arbitral award may affect its decision to grant or deny relief.

23 See Schnabel (n 5) *supra* note 6, at 49–54.

24 For these remarks, see Miglė Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019) *Teisé* 111, 2019 205, 213 <<http://www.journals.vu.lt/teise/article/download/12826/11628/>> accessed 20 August 2019.

Under the heading ‘Reservations’, Article 8 deals with two complex and controversial issues, namely the applicability of the Convention to public entities and the choice between ‘opt-out’ or ‘opt-in’ as the basis for determining whether or not the Convention will apply to mediated settlement agreements as default law. As to the first issue, each signatory State can announce that the Convention will not apply to settlement agreements to which the State itself, any government or governmental agency (as well as any person acting on their behalf) is a party. With reference to the second issue, each Party to the Convention can state that the Convention will apply only insofar as the parties to the settlement agreement have opted-in, that is to say, that the parties must have affirmatively chosen to avail themselves of the Convention.

Two more provisions are worth mentioning. Article 12 allows regional economic integration organizations to sign the Singapore Convention, assuming the rights and undertaking the obligations of a Party to the Convention, to the extent that the organization has competence over matters governed by the Convention. Finally, Article 13 addresses the problem of non-unified legal systems, namely signatory States incorporating a number of territorial units subject to different systems of law: these States will be able to declare that the Singapore Convention will apply to all its territorial units, or only to one or more units.

5. CONCLUSIONS

According to an empirical survey conducted by the School of International Arbitration at Queen Mary University of London in partnership with White & Case LLP,²⁵ for 97 percent of respondents arbitration is still the preferred method for the resolution of international commercial disputes, essentially because of the ease of enforcing arbitration awards almost worldwide thanks to the New York Convention, which is one of the most successful international treaties. But the high costs of international arbitration are still a drawback that seems difficult to overcome, and so is the fact that an arbitral proceeding, just like adjudication, is bound to produce a win-lose outcome that is not likely to persuade the parties to work towards a restoration of their commercial dealings. In contrast, mediation, according to the Preamble of the Singapore Convention, brings about ‘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 States’. The Singapore Convention is expected to make enforcement of mediated settlement agreements simpler at the international level thanks to a relatively effortless and uniform procedure. Should this goal be reached, international mediation will undoubtedly become a fierce competitor of arbitration.

25 See 2018 International Arbitration Survey: The Evolution of International Arbitration <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed 20 August 2019.