The Singapore Convention on Mediation - a new era in international dispute resolution?

Mediation, where parties to a dispute request the assistance of a third person, or mediator, in their attempts to settle their dispute, is an established method of dispute resolution, especially in the commercial sector. It is seen as a less formal method of dispute resolution than court or arbitration proceedings and can be cheaper and quicker. However, it currently suffers from a major disadvantage with regard to disputes with an international background: mediated settlements are not internationally binding.

That may be about to change. The so-called Singapore Convention on Mediation (the “Convention”), a new convention that paves the way for settlements reached by mediation to be recognised internationally, officially opened for signature on 7 August 2019. Under the Convention, parties will be able to apply directly to the courts of a state party to the Convention to enforce settlement agreements resulting from mediation without needing to initiate new proceedings. UNCITRAL, which has developed the Convention, hopes that it will make settlements resulting from mediation much easier to enforce, akin to the New York Convention for arbitral awards, thereby promoting mediation as a mechanism for international dispute resolution.

In this alert we analyse the key aspects of the Convention and examine how it might impact the conduct of international disputes. Businesses entering into contracts with international parties and considering mediation as a dispute resolution mechanism will need to ensure they comply with the Convention’s requirements should they wish later to rely on it.

The problem

Many commercial contracts include provisions for disputes between the parties to be resolved by mediation. A successful mediation may result in a settlement agreement between the parties, resolving the issues. However, there is currently no process by which such agreements can easily be recognised and enforced internationally – they effectively have the status of contracts only and will require further court proceedings to force compliance should one party fail to abide by the terms agreed. In this respect, mediation compares unfavourably to arbitration proceedings; many arbitral awards are directly enforceable in a large number of countries across the world under the New York Convention of 1958, a feature which is regarded as one of arbitration’s main attractions as a method of resolving commercial disputes.

Contents

The problem ...................... 1
The solution ...................... 2
Scope of application and reservations ...................... 2
Conditions ...................... 2
Grounds for refusing relief 3
Recommendations for clients ...................... 4
Comment ...................... 4
Additional Material ............ 5
Contacts ...................... 5
The solution

The United Nations Convention on International Settlement Agreements Resulting from Mediation (to give it its full title) was adopted on 20 December 2018 by UN General Assembly resolution 73/198. 85 member states and 35 intergovernmental and non-governmental organisations participated in the development of the text over four years. A ceremony attended by representatives of over 50 states was held on 7 August 2019. Singapore was the first signatory, followed by 45 other states including economic heavyweights such as the US and China (but not, as yet, any European countries). The signatory states must now ratify the Convention which will come into effect six months after deposit of the third instrument of ratification, acceptance, approval or accession. For states acceding to the Convention after that date, it will come into effect six months after they deposit their instrument of accession with the Secretary-General of the UN.

Under the Convention, provided that certain conditions are satisfied (discussed further below), most agreements to resolve international commercial disputes resulting from a mediation and concluded in writing will be enforceable in the courts of any signatory state. Signatories will enforce settlement agreements in accordance with their own rules of procedure and under the conditions laid down in the Convention. The Convention also provides that if a party commences court proceedings in respect of a dispute that has already been resolved by a settlement agreement or takes any other action inconsistent with the settlement agreement, the opposing party would be able to rely on the settlement agreement to prove that the matter had already been resolved.

Scope of application and reservations

Settlement agreements relating to family, inheritance or employment law or those where one party is a consumer are not covered by the Convention. In addition, the Convention will not apply to settlement agreements that have been approved by a court or concluded during court proceedings (and which are therefore already enforceable as a judgment) and to settlement agreements that have been recorded and are enforceable as an arbitral award.

Moreover, signatory states may declare that the Convention will not apply to public contracts involving the government or any of its agencies. It may also stipulate that the parties to the settlement agreement to be enforced have to have agreed to the Convention’s application.

Conditions

First, the settlement agreement must (i) have been concluded after the Convention entered into force for the state concerned, (ii) result from mediation and (iii) be concluded in writing. In this context,

> “mediation” means a process whereby the parties attempt to reach an amicable settlement of their dispute with the assistance of a third party who does not have the authority to impose a solution upon them, and

> “writing” means recorded in any form, including electronically.
Second, the dispute must be international in nature. This will be the case where

- at least two parties to the settlement agreement have their places of business in different states, or
- the state in which the parties have their places of business is different to the state in which the substantial part of the obligations under the settlement agreement is performed or the state with which the subject matter of the settlement agreement is most closely connected.

Third, parties applying to have their settlement agreement recognised under the Convention must supply a number of documents to the competent authority of the state in which they wish enforcement to take place, including:

- the settlement agreement signed by the parties and the mediator, and
- evidence that the settlement agreement had resulted from mediation, signed by the mediator.

Commentators have noted that in some jurisdictions, mediators may be reluctant to sign the settlement agreement as to do so may be seen as endorsing an agreement in which the mediator is supposed to remain neutral, or that it may breach the mediator’s duty of confidentiality. The Convention therefore includes the possibility that a party may provide “any other evidence acceptable to the competent authority” to prove validity of the settlement agreement.

Grounds for refusing relief

The competent authority may nevertheless refuse enforcement under the Convention. Grounds for refusal include that:

- a party to the settlement was under some form of incapacity,
- the settlement agreement is technically ineffective, is not binding or not final, or has been subsequently modified,
- the obligations in the settlement agreement have already been fulfilled or are not clear or comprehensible,
- granting relief would be contrary to the terms of the settlement agreement itself,
- there was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement,
- there was a failure by the mediator to disclose circumstances that raise justifiable doubts as to his or her impartiality or independence and that failure had a material impact or undue influence on a party which would not otherwise have entered into the settlement agreement,
- it would be contrary to the public policy of the state where enforcement is sought (for example, fulfilment of the underlying contract would amount to fraud or would be otherwise illegal), or
the subject matter of the dispute is not capable of settlement by mediation under the law of the state where enforcement is sought.

In practice, demonstrating the existence of a ground on which to challenge enforcement may be difficult. For example, there is no explanation or guidance of when a breach by a mediator will be “serious” enough to enable a party to argue it would not have entered the agreement but for the breach. Nor is any indication given in the Convention of what “standards” will be applicable to the mediator. The process of challenging the enforcement of a settlement on the grounds of serious mediator misconduct or bias is likely to involve examination of the mediation process itself, displacing the confidentiality of that process, (which is perhaps an even greater hallmark of mediation than even of arbitration).

Recommendations for clients

It is expected that the enforcement regime established by the Convention will increase confidence in mediation among international parties and encourage parties from different jurisdictions to choose this method of alternative dispute resolution more often. However, much will depend on the states that sign and then ratify its terms.

Parties to commercial contracts who are considering including mediation as a method of dispute resolution and who wish to make use of the Convention’s provisions should consider the following points:

˃ specifying that the Convention will apply, if that is their wish, to deal with any reservations signatory states may have made,

˃ ensuring, as far as possible, that any settlement agreement they may reach at mediation is recorded and verified in accordance with the provisions of the Convention, and

˃ as states may join over the space of months or even years, noting who has signed up to the Convention and when its provisions will come into force for that state.

Comment

Under the Convention, settlements with parties originating from states which are members of the Convention should be easier to enforce. Ratification of the Convention may therefore have the potential to enhance the business attractiveness of parties originating from member states, as settlement agreements with them will be more readily enforceable.

In addition, if international parties to court proceedings mediate their dispute and settle, they might now opt not to register their mediation outcome as a court judgment, if they believe enforcement of the settlement will be easier under the Convention than the enforcement of a court judgment cross-border.

However, concerns remain about how the Convention will operate in practice. Much will depend on local implementation procedures. Singapore, for example,
already has a Mediation Act governing the process of mediation but many states do not. One of the oft-cited benefits of mediation is its ability to find inventive solutions to disputes, enabling the parties to achieve an outcome that would not be available through court procedure, such as exploring related or future issues. A settlement can even lay down the basis for an on-going commercial relationship. How states will provide for the enforcement of such outcomes (which are less common in arbitration), will be a challenge.

The Convention is being heralded as a “game-changer” for international mediation. The UN has high hopes that it will not only be ratified by a sufficient number of member states soon but that it will quickly become as widely accepted as the New York Convention, thereby paving the way for mediation to become another attractive and successful means of dispute resolution.

Will the enthusiasm of the first signatory states be borne out? Only time will tell.

Additional Material

The text of the Convention is available here. You will find member status updates here.

Linklaters has published a review of the availability and process of mediation in 21 jurisdictions across the Americas, South Africa, Asia-Pacific and Europe, available here.