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Legal Update

The Singapore Convention on Mediation: A Further Dispute Resolution Option for Businesses

On 7 August 2019, representatives from 46 countries gathered in Singapore to sign the UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").

The Convention establishes a legal framework for the cross-border recognition and enforcement of mediated settlement agreements.

This complements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which regulates the recognition and enforcement of arbitral awards, and the 2005 Hague Convention on Choice of Court Agreements, which regulates the recognition and enforcement of court judgments based on exclusive choice-of-court agreements.

The founding 46 signatories included major economic powers, including the United States, China and India, and was the highest number of first-day signatories of a UN trade convention to date. The number of countries (including major players) that put pen to paper at its inception is especially remarkable when one considers the fact that (a) the UN General Assembly only adopted the Convention eight months ago in December 2018 and (b) the Singapore Convention's arbitration cousin, the New York Convention, was signed by just 10 countries at its opening in 1958.

The key takeaways for business and corporates are: (a) the Convention adds teeth to mediated settlements, with a clear and simplified framework for cross-border recognition and enforcement and (b) strengthens mediation as a dispute resolution option among the suite of mechanisms available to resolve international disputes. The fact that the Convention was successfully brokered by Singapore and named after Singapore reflects growing global consensus about the valuable role that Singapore plays on the global stage as a neutral dispute resolution hub.

Background to the Singapore Convention

The idea behind the Singapore Convention began in May 2014, when the United States submitted a proposal to the UNCITRAL Commission to "develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration."

The UNCITRAL Commission agreed to transmit this proposal to its Working Group II for further consideration. Over six sessions from 2015 to 2018, the Working Group II deliberated on and prepared the Convention's text. More than 100 delegations were involved, including country representatives and technical experts from observer, inter-governmental and non-governmental organisations. The

Working Group II was chaired by a Singaporean delegate.

When the Convention's text was finalised by the UNCITRAL Commission and submitted to the UN General Assembly, the General Assembly passed a resolution on 20 December 2018 to adopt the Convention and to name it after Singapore.

Key Provisions of the Singapore Convention

WHICH MEDIATED SETTLEMENTS WILL COME WITHIN SCOPE OF THE CONVENTION?

The Singapore Convention applies to all settlement agreements concluded in writing and resulting from mediation to resolve international commercial disputes.

The Convention defines "mediation" as a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute.

The Convention also provides a comprehensive definition of what constitutes an "international" dispute to pre-empt disagreements over its interpretation.

The wide applicability of the Singapore Convention is subject to the proviso that the settlement agreement must (a) be concluded after the Convention enters into force, and (b) not fall in either of the following two exceptions in Article 1 of the Convention:

1. settlement agreements (a) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; or (b) relating to family, inheritance or employment law; and
2. settlement agreements (a) concluded during court proceedings and are enforceable as court judgments; or (b) that have been recorded and are enforceable as arbitral awards.

HOW WILL RECOGNITION AND ENFORCEMENT WORK AND CAN IT BE RESISTED?

The Convention obliges each Contracting State to recognise and enforce a mediated settlement agreement, in accordance with its rules of procedure, and under the conditions laid down by the Convention.

Of the conditions set out by the Convention, the two most important conditions to note are:

1. that a party who relies on a settlement agreement to seek relief from a Contracting State's courts must submit the settlement agreement signed by the parties, and evidence that the agreement resulted from mediation, such as the mediator's signature on that agreement; and
2. that the Contracting State's courts may only refuse relief if one of the grounds in Article 5 of the Convention are satisfied.

These grounds for refusal of relief may appear numerous, but they can easily be categorised into the following four groups, based on the problems which they purport to address.

1. The first group addresses problems that may arise from **the settlement agreement**. Relief may be refused where the settlement agreement is null and void, inoperative or incapable of being performed; where the settlement agreement has been subsequently modified; or where the settlement agreement is not final or not binding. Relief may also be refused if the settlement agreement's obligations are unclear or incomprehensible, or have been performed, or where granting relief would be contrary to the settlement agreement's terms.
2. The second group addresses problems that may arise in relation to **the parties to the settlement agreement**. The courts may refuse relief if any party was "under some incapacity". Because this borrows language from the New York Convention, which also allows courts to refuse enforcement of arbitral awards if a party was under some incapacity, one can expect this ground to be interpreted in similar fashion.
3. The third group addresses problems that may arise in relation to the mediator. Relief may be refused where the **mediator** had (a) committed a serious breach of standards applicable to him or the mediation, or (b) failed to disclose

circumstances that raise justifiable doubts as to his impartiality or independence. The bar here is a high one, because the party opposing relief must show that he would not have entered into the settlement agreement but for the breach or failure to disclose.

4. The final group addresses **public policy problems**, i.e. where granting relief would be contrary to the Contracting State's public policy, or where the subject matter of the dispute is not capable of settlement by mediation under the Contracting State's law. This category borrows language from the New York Convention as well, so the grounds in this group can be expected to be interpreted in similar ways too.

There are also two other important features of the Singapore Convention which businesses should note.

First, the Singapore Convention obliges each Contracting State to recognise and enforce a mediated settlement agreement, **irrespective of where the mediation took place**. In other words, even if the mediation took place in the territory of a *non*-Contracting State, a Contracting State is still obliged to enforce a settlement agreement emerging from that mediation. This distinguishes the Singapore Convention from the New York Convention, which enables Contracting States to declare that they would apply the New York Convention to the recognition and enforcement of awards made only in the territory of **another Contracting State** (i.e. the principle of reciprocity). It also distinguishes the Singapore Convention from the Hague Convention, which only obliges Contracting States to recognise and enforce judgments delivered by the courts of **another Contracting State** designated in an exclusive choice-of-court agreement.

Second, the Singapore Convention permits each Contracting State to make a reservation that it will apply the Convention "*only to the extent that the parties to the settlement agreement have agreed to the application of the Convention*". In other words, it enables a Contracting State to convert the Singapore Convention into an optional regime within its own borders, so that parties to a settlement agreement have to **opt in** to the Convention's application before that Contracting State will apply the Convention's terms. This feature does not exist in the New York Convention, which obliges each Contracting State to apply the New York Convention, regardless of whether the parties to the arbitration agreement had agreed to the application of the New York Convention. It also does not exist in the Hague Convention.

Why does the Singapore Convention allow Contracting States to make reservations of this nature? One possible rationale is that, since mediation is a fully consensual process, the applicability of the Convention's enforcement regime should also be consensual. Regardless of the merits of this rationale, a reservation would only serve to water down the enforceability of mediated settlement agreements. It is to be hoped that the Contracting States to the Convention will not make reservations of this nature.

Impact and benefits for businesses and cross-border transactions

First, the Convention provides the final puzzle piece to the international framework of commercial dispute resolution mechanisms, i.e. arbitration, litigation and mediation. The Convention, together with the Hague Convention, provides an avenue for mediated settlement agreements and court judgments to catch up with arbitral awards in terms of enforceability. And there are encouraging signs that mediated settlement agreements will catch up: already the Singapore Convention has been signed by 46 countries at its opening. So, as long as the enforceability gap narrows, that is a positive development, because it means one less consideration for businesses to worry about over time (enforceability) when deciding which dispute resolution mechanism to insert into their contracts. Businesses will be able to focus their decision-making on other legal, commercial and strategic considerations, in order to tailor their dispute resolution choices according to their specific commercial needs.

Second, prior to the Singapore Convention, a party could not directly enforce a mediated settlement agreement concluded during litigation or arbitration proceedings because settlement agreements are contracts. The party could only commence fresh proceedings to seek relief for breach of the settlement agreement, or record the settlement

agreement in a court judgment or arbitral award to make it directly enforceable as such. The Singapore Convention removes this necessity, by safeguarding the direct enforceability of unrecorded mediated settlement agreements under the Convention's terms. Parties of course may still wish to record the mediated settlement agreement in an arbitral award or court judgment. But that strategic question will now depend primarily on non-enforceability factors, including whether they desire to apply the grounds for refusal of enforcement under the Singapore Convention, which are targeted at protecting the integrity of the mediation process.

Singapore's support for mediation and dispute resolution services generally

As a committed supporter of mediation, Singapore is an appropriate symbolic host for the Convention. Singapore not only offers accredited mediation services through the Singapore International Mediation Centre (SIMC), but has also built the necessary legal and institutional infrastructure to support those services. For example, Singapore has enacted laws to enable its courts to stay proceedings if the matters in these proceedings are already covered by mediation agreements (the Mediation Act 2017). Singapore has established the Singapore International Mediation Institute (SIMI) to develop and maintain mediators' professional standards. And Singapore has established the Singapore International Dispute Resolution Academy (SIDRA), a thought leadership institution, to pioneer new ideas in negotiation and dispute resolution, including mediation, to promote best practices. Businesses have the clear option of tapping into Singapore's infrastructure to resolve their disputes by mediation in Singapore.

More broadly, the Convention draws attention to Singapore's stature and reputation as a global dispute resolution hub. Singapore is constantly improving its infrastructure for mediation, arbitration in the Singapore International Arbitration Centre (SIAC) and litigation in the Singapore International Commercial Court (SICC) to enhance users' experiences. To give one example, Singapore has most recently launched Maxwell Chambers Suites, the world's first and largest integrated dispute resolution complex of its kind, to house the largest number of case management offices of dispute resolution institutions worldwide. Singapore has also welcomed the American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR), an alternative dispute resolution service provider, which will open its Asia headquarters and case management centre in Singapore. These are all indicators of the qualities which businesses value when choosing dispute resolution services: connectivity, reliability and professionalism. Singapore's successful leadership of the Singapore Convention, hosting of the signing ceremony, and continued investment in best in class physical infrastructure such as Maxwell Chambers keeps Singapore in the limelight with regard to global developments in dispute resolution.

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