SQUIRE PATTON BOGGS

Recent Developments in International Dispute Resolution:

Australia Signs the Singapore Convention

Australia – October

Introduction

On 10 September 2021, Australia signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).[1]

The Singapore Convention represents a significant development in international dispute resolution, as it recognises the importance and utility of mediation in the settlement of international commercial disputes by providing a "uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation".[2]

The Singapore Convention

Mediation is well known to be an effective form of dispute resolution. It improves access to justice[3] by reducing costs, complexity and delay,[4] and is an informal, flexible, less adversarial and complicated process than arbitration or litigation can be. [5] Mediation also involves a consensus, which can be more satisfying than an arbitral or court determination where one party must win and another lose,[6] and has the potential to preserve the parties' relationships for the future. [7] However, the difficulties that can arise in enforcing settlement agreements arrived at through mediation (which usually have to be enforced as a contract in a local court) have made mediation a less common tool in the resolution of international commercial disputes compared to arbitration or litigation, the enforceability of which is backed by the New York Convention and Hague Convention on Choice of Court Agreements respectively.

The Singapore Convention is a promising development in international dispute resolution, as it creates a uniform framework for cost-effective and prompt enforcement of international mediated settlement agreements. The aim is for the Singapore Convention to make mediation a utilised and efficient method of dispute resolution for international commercial disputes, and an attractive alternative to arbitration and litigation.

Accordingly, it has been said that the Singapore Convention is the "missing third piece in the international dispute resolution enforcement framework",[8] in addition to the New York Convention and the Hague Convention on Choice of Court Agreements.

Status of the Singapore Convention

The Singapore Convention opened for signature on 7 August 2019, and entered into force on 12 September 2020. Since the Singapore Convention opened for signature, 55 countries have signed the Singapore Convention and eight countries have ratified it.[9]

Some of the world's largest economies, such as the United States of America, China and India, are among the signatories.

Application

The Singapore Convention applies to written settlement agreements resulting from mediation of an international commercial dispute.[10]

For the purposes of the Singapore Convention:

- **Mediation** is defined to mean "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 ('the mediator') lacking the authority to impose a solution upon the parties to the dispute"[11]
- A dispute is an **international commercial dispute** if:[12]
  - At least two parties to the settlement agreement have their places of business in different states; or
  - The state in which the parties to the settlement agreement have their places of business is different from either (a) the state in which a substantial part of the obligations under the settlement agreement is performed; or (b) the state with which the subject matter of the settlement agreement is most closely connected.

1 https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.
2 https://www.singaporeconvention.org/convention/about.
3 The Honourable Wayne Martin, "Access to Justice" (Speech delivered at the Notre Dame University Eminent Speakers' Series Inaugural Lecture, Fremantle, 26 February 2014) 13 http://www.supremecourt.wa.gov.au/_files/Access%20to%20Justice%20by%20Martin%20CJ%2026%20Feb%202014.pdf.
4 Krista Mahoney, "Mandatory Mediation: A positive development in most cases" (2014) 25 Australasian Dispute Resolution Journal 120, 121.
5 Michael Redfern, "Mediation is good business practice" (2010) 21 Australasian Dispute Resolution Journal 53, 54; Michael Legg and Sera Mirzabegian, "Appropriate dispute resolution and the role of litigation" (2013) 38 Australian Bar Review 55, 56.
6 Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication" (1982) 7(3) The Justice System Journal 420, 429.
7 Michael Redfern, "Mediation is good business practice" (2010) 21 Australasian Dispute Resolution Journal 53, 54.
8 https://www.singaporeconvention.org/.
9 As at 25 October 2021, https://www.singaporeconvention.org/.
10 Singapore Convention, Article 1(1).
11 Singapore Convention, Article 2(3).
12 Singapore Convention, Article 1(1).

- A settlement agreement is **in writing** if it "is recorded in any form", including "by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference"[13]

Importantly, the Singapore Convention does not apply to settlement agreements that:[14]

- Resolve a dispute arising from personal, family or household transactions
- Relate to family, inheritance or employment law
- Have been approved by a court or concluded in the course of proceedings before a court, and that are enforceable as a judgment in the state of that court
- Have been recorded and are enforceable as an arbitral award

Where a settlement agreement meets the requirements set out in the Singapore Convention to be capable of enforcement, and a party can establish the settlement agreement was the result of mediation,[15] then it:

- Shall be enforced directly by the competent authority of a party state, in accordance with its rules of procedure and under the conditions laid down in the Singapore Convention[16]
- Can be invoked to prove that a matter the subject of the settlement agreement has been resolved[17]

Of course, there are circumstances in which a settlement agreement may not be enforced. Those circumstances are:[18]

- Where a party to the settlement agreement was under some incapacity
- The settlement agreement:
  - Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or the law deemed applicable
  - Is not binding or final
  - Has been subsequently modified
- The obligations in the settlement agreement have been performed or are not clear or comprehensible
- Granting relief would be contrary to the terms of the settlement agreement
- 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 the mediator's impartiality or independence, and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement
- Doing so would be contrary to the public policy of the party state
- The subject matter of the dispute is not capable of settlement by mediation under the *lex fori*

Implementation

Like the New York Convention, the Singapore Convention requires implementation into a state's domestic legislation. This means the Australian government still needs to implement it as domestic law and deposit its instrument of ratification before the Singapore Convention applies in Australia. Australia has recently indicated that it will now begin work on implementing the Singapore Convention.[19]

Usefully, the Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). The United Nations Commission on International Trade Law indicates that the intention behind this consistency was to "provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation."[20]

It is not yet clear what approach Australia will take when implementing the Singapore Convention.

Limitations and Impact

While there is little doubt the Singapore Convention is a significant and promising development in international dispute resolution, there are some uncertainties that will likely need to be addressed in the domestic implementing legislation of states. For example, it is not clear in the text of the Singapore Convention:

- Who qualifies as a mediator, and what minimum standards of conduct must apply to the mediator and the mediation. This is significant, as one of the grounds on which a settlement agreement may not be enforced is that 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.

[13] Singapore Convention, Article 2(2).
[14] Singapore Convention, Article 1(2) and 1(3).
[15] Singapore Convention, Article 4.
[16] Singapore Convention, Article 3(1).
[17] Singapore Convention, Article 3(2).
[18] Singapore Convention, Article 5.
[19] https://www.foreignminister.gov.au/minister/marise-payne/media-release/australia-signs-singapore-convention-mediation.
[20] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

- What it means to enforce the settlement agreement? Would the competent authority of a state make an order for specific performance of the settlement agreement, or would damages for breach of the settlement agreement (being the usual remedy for breach of a contractual obligation) be ordered?

One way to mitigate the impact of these uncertainties may be for parties to expressly agree the terms under which they approach their mediation, and before embarking on mediation, to carefully consider the requirements of jurisdictions where enforcement action may later be sought.

It is also not yet clear whether parties may be reluctant to attempt mediation for fear that challenges to enforcement of a settlement agreement under the Singapore Convention, would lead to the disclosure of communications during the mediation that the parties had expected would remain confidential and without-prejudice. This fear may arise because what was said during a mediation may become relevant to whether:

- A party to the settlement agreement was under some incapacity
- There was a serious breach by the mediator of standards applicable to the mediator or mediation
- There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence

The above circumstances are all bases on which the settlement agreement may not be enforced.

Finally, it will also be interesting to see what impact, if any, the Singapore Convention will have on hybrid dispute resolution processes, such as mediation-arbitration (med-arb) or arbitration-mediation-arbitration (arb-med-arb). Of course, if the parties can invoke the Singapore Convention, it may be that, in some instances, there is no need at all to proceed to arbitration. The Singapore Convention may also mean the criticism inflicted on med-arb and arb-med-arb, that it is merely a back-door way to legitimise an "unenforceable" mediated settlement, will cease.

Conclusion

The Singapore Convention represents a significant development in international dispute resolution, as it works to provide a "uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation".[21] Only time will tell if the Singapore Convention will lead to a greater uptake of mediation in the resolution of international commercial disputes, and will gain the support and prominence that the New York Convention has.

In the meantime, by signing the Singapore Convention, Australia has demonstrated its support for mediation as a form of international dispute resolution, and its support for "enhanced simplicity, certainty and autonomy for parties in commercial disputes".[22] Australian businesses should undertake a review of their dispute resolution clauses to ensure they can take advantage of the Singapore Convention once it enters into force in Australia.

Contacts

If you would like more information, please contact:

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
E greg.steinepreis@squirepb.com

Donna Charlesworth
Partner, Perth
T +61 8 9429 7465
E donna.charlesworth@squirepb.com

Tenille Kearney
Associate, Perth
T +61 8 9429 7455
E tenille.kearney@squirepb.com

[21] https://www.singaporeconvention.org/convention/about.
[22] https://www.foreignminister.gov.au/minister/marise-payne/media-release/australia-signs-singapore-convention-mediation.

42261/10/21