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Mediation Matters

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Mediation in International Cases to Advance Cross-Border Disputes

The Singapore Convention and Its Impact on the Process

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The United Nations Convention on International Settlement Agreements Resulting from Mediation, informally known as the "Singapore Mediation Convention" or the "Convention," originally adopted by the United Nations General Assembly in December 2018, applies to settlement agreements resulting from the mediation of international (cross-border) disputes. The Convention's goal is to promote mediation as a viable alternative to the litigation of cross-border trade disputes by creating an effective process for enforcing a resulting settlement agreement.[1] The intent is to provide parties in an international dispute the confidence that if they choose to mediate, any settlement agreement will be recognized and capable of being enforced by the courts of a signatory state, without the need to resort to further litigation.

The Convention was open to all United Nations member-states for signature on Aug. 7, 2019. Since then, 55 states have signed the Convention (including the U.S., Singapore and China, with other key states such as the European Union (EU), Canada and the U.K. still considering). It was given effect in Singapore on Sept. 12, 2020, and only a fraction of those states have presently ratified the Convention. There is a difference between signature and ratification.[2]

Mediation often plays a vital role in larger complex cases, and over the years, the mediation of cross-border disputes has gained traction as an economical and practical means to resolve complicated and competing claims of diverse creditors in multiple jurisdictions. This is especially true where creditors or parties sit in other jurisdictions where their insolvency or workout system is vastly different than that of the U.S., and the ability to perhaps commence a foreign proceeding and secure a "plan" approval process might not be easily achieved or even viable for various logistical or practical reasons.

Enforcement of a settlement agreement through a pre-determined dispute-resolution process is straightforward when all of the parties and enforcement processes are in the same jurisdiction. However, it is more complex for cross-border settlement agreements. For example, the parties may have agreed to court proceedings in one jurisdiction to enforce the terms of a settlement agreement, but the court's judgment may then need to be enforced in another jurisdiction, even assuming enforcement is permitted for a foreign agreement. In the past, parties have been hesitant to utilize mediation as a means to resolve cross-border disputes. This problem led to the creation of the Convention.[3]

Status of Ratification

While the Convention is open for signature by "states" (*i.e.*, countries/nations) and regional economic integration organizations (collectively referred to as "parties"),[4] signature is simply not the same as ratification. In fact, while certain major world players such as the U.S., China and India

1 Leslie A. Berkoff, "The Singapore Convention: A Viable Method to Enforce Settlement Agreements?," *New York Law Journal* (May 21, 2020); *see also* G.A. Res 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (Jan. 24, 2003).

2 Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York 2018), published February 2022, Gov.UK.

3 There are other constructs out there, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). However, these "models" are simply not a binding construct, nor is the Convention.

4 Article 12, Convention.

have signed the Convention, and others have gone on to ratify the Convention (Singapore, Saudi Arabia, Turkey and others — but not the U.S.), neither the EU nor the U.K. have even signed the Convention.

Requirements for Mediation Settlement Agreements to Be Covered by the Convention

Moreover, there are several requirements to enforce a mediated settlement agreement of an international commercial dispute under the Convention. First, at least two of the parties to the settlement agreement must have their places of business in different states. Second, the state in which the parties have their places of business must be different from either the state in which a substantial part of the obligations under the settlement agreement is to be performed or the state with which the subject matter of the settlement agreement is most closely connected.

In addition, certain types of settlement agreements are specifically excluded from the scope of the Convention: (1) agreements that have been approved by a court or concluded in a court proceeding; (2) agreements that are enforceable as a judgment in the state of such courts; or (3) agreements that have been recorded and are enforceable as part of an arbitral award.[5] The Convention also specifically excludes from coverage agreements relating to consumer transactions, family, inheritance or employment law, which could mean that disputes involving a large family-owned business or enterprise could be excluded if those were to fall within the framework of an international dispute.

There are also requirements that the settlement agreement must be in writing, signed by the parties and certified or signed by the mediator, and that there not have been any ethical breaches by the mediator.[6] (While this may seem simple enough, there are some additional exceptions and carve-outs that further dilute the impact of the Convention.) The agreement must also be final and binding according to its terms.

Does the Convention Really Provide an Enforcement Mechanism?

While outside of bankruptcy mediations and other forms of dispute resolution can be private affairs, within bankruptcy cases most settlements are not confidential in nature. In fact, chapter 11, among other chapters, requires most settlements to be noticed upon the creditor body at large under Rule 9019 of the Federal Rules of Bankruptcy Procedure. The reasoning goes to the heart of the bankruptcy process: A debtor's assets, in essence, belong to its creditors on the whole, and, at least in theory, it cannot simply strike a one-off deal with a particular creditor without at least the opportunity for other creditors to weigh in (whether or not in that particular instance their comments will or should have weight).

As a result, a settlement agreement that is approved in a bankruptcy case under Rule 9019 would not be enforceable under the Convention, because it specifically excludes agreements approved by a court. There are many cases where at the outset a process is enacted whereby Rule 9019 motions might be dispensed with and a court-appointed mediator might not need to seek court approval through a motion.[7]

Ultimately, one of the biggest concerns is that the Convention fails to provide a means to enforce international mediated settlement agreements, as it does not create or set forth the actual means of enforcement. Enforcement is left to the jurisdiction where the parties choose to enforce the settlement agreement.

The Convention specifically provides that it "shall not prevail over conflicting rules of a regional economic integration organization," so that the enforcement of settlement agreements will be subject to any additional preconditions imposed by regional organizations, such as obtaining the counterparty's consent, as required under the EU Directive on Mediation. Significantly, the Convention even permits states to make two prescribed reservations at the time that they ratify. Specifically, a contracting state may declare the following: (1) It will not apply the Convention to settlement agreements to which the state is a party, and a state may further extend this reservation to settlement agreements entered into by government agencies or agents of government agencies; and (2) the Convention will only apply to the extent that parties to the settlement agreement have agreed to the application of the Convention. Effectively, a state can ratify and, at the same time, opt out.

Moreover, while the Convention is intended to cover mediated disputes, it broadly 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 ('the mediator') lacking the authority to impose a solution upon the parties to the dispute."[8] As a result, any settlement agreement resolved with the assistance of a third party who is not the ultimate decision-maker would appear to be covered by the Convention; however, this is a very broad definition that may cover situations beyond the scope of what a state might otherwise determine to be a mediated dispute, and that perhaps do not have the proper underpinnings of process to warrant enforcement.

In addition to all of the carve-outs and exceptions previously identified, there are a host of other clauses that provide an "out" for the signatories. The Convention will not allow the enforcement of an agreement if (1) the agreement is not final and binding; (2) the agreement is incapable of being performed; (3) the obligations of the agreement have already been performed or are not comprehensible; (4) the agreement is against the public policy of the enforcing jurisdiction; or

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5 This exclusion is intended to avoid overlapping other governing rules, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on Choice of Court Agreements (2005) and/or the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

6 Article 4, (1), Convention.

7 *See Lehman Bros. Inc.*, (08-13555 (JMP) (Bank. S.D.N.Y.) (75 simultaneous legal proceedings over 40 countries with 250 counterparties; 77 proceedings were mediated); *see* Jack Esher, "The Singapore Convention Is to Mediation as," CBInsolvency.com Newsletter, *available at* cbinsolvency.com/the-singapore-convention-is-to-mediation-as (last visited Nov. 2, 2022). An alternative option that could be relied on could be the appointment of a mediator through the form of a cooperation agreement as contemplated by Article 27(a) of the UNCITRAL Model Law on Cross-Border Insolvency (1997), which provides for the "appointment of a person or body to act at the direction of the court." Under the Model Law, countries that have adopted the Model Law under Article 25 have agreed to cooperate to the "maximum extent possible" with foreign courts and foreign representatives. As such, an appointment of this nature would require countries that have adopted the Model Law to participate in the process, therefore the foreign representative could perhaps seek recognition of a foreign proceeding, then seek to enforce an agreement in that country and provide other avenues of securing approval of an agreement.

8 Article 2 (3), Convention.

(5) there was a serious breach by the mediator of standards applicable to the mediator or the mediation absent which a party would not have entered into the settlement agreement.[9] Any or all of these exceptions could lead to challenges that could defeat the Convention's very purpose by forcing the parties to litigate such issues.

The Convention Is Also at Odds with Some Fundamental Recognized Principles

With respect to the last exception, a state may refuse to enforce a settlement agreement arising from mediation if an objecting party furnishes proof that "[t]here was a serious breach by the mediator of standards." However, the Convention does not contain any definition as to exactly what standards should be applied to evaluate the mediator's conduct. Moreover, there is no universal code governing a mediator's conduct that is instead addressed by each individual jurisdiction. Further, how would a party actually establish before a governing body that a breach occurred? Would you need to call witnesses? Would that include calling the mediator to defend his/her actions? All of the foregoing violates the confidentiality of the entire process — a bedrock principle of mediation.

Further, this is contrary to anything that we are used to seeing within the U.S. process. In fact, most jurisdictions have rules specifically providing that a mediator is protected from being subpoenaed or compelled to testify, and most mediation agreements often contain such provisos. By including a specific provision opening the door for a mediator's conduct to be challenged, the Convention codifies a construct that is fundamentally at odds with commercial mediation as currently implemented in the U.S. and U.K., among other countries.

In addition, the Convention's requirement that the mediator sign or verify the settlement agreement directly conflicts with what has become common practice in many jurisdictions: A mediator will not sign any agreement resulting from a mediation. In fact, there are some very good reasons why mediators do not sign agreements, including to (1) sustain the confidentiality of the process, (2) avoid being subpoenaed as a witness to the execution of the agreement, and/or (3) avoid being considered a party to the rights and obligations set forth in the settlement agreement. Many mediators go a step further and will not even draft a settlement agreement for the parties in order to avoid transforming their role. A workaround could be simply including language in any settlement agreement clarifying that the mediator is merely affixing a signature to verify or confirm that a mediation took place, or perhaps creating a separate certification page for the mediator to sign that states that the mediation took place to comply with the Convention's requirement.

Conclusion

As mediation continues to develop and expand both at home and on the world's stage, and as the number of cross-border insolvency cases also grows, mediation will continue to play a significant role in restructuring reform. However, in order for parties to see this as a meaningful tool, the ability to enforce agreements achieved through mediation needs to continue to be considered and recognized. Thus, some of the foregoing concerns and questions should be kept in mind as parties rely on mediation in resolving conflicts. **abi**

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9 Article 5, Convention.