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THE PREDICTED FUTURE OF THE SINGAPORE CONVENTION ON MEDIATION

Abstract

When a business is conducted in a cross-border manner, the international element that is present in the transaction will inherently introduce additional complexities. Apart from reducing the confidence of companies interested in international businesses, this heightened complexity also demands a higher level of rigour from legal practitioners, hence resulting in higher legal fees. Thus, it is no surprise that parties who do find themselves in a cross-border dispute, would ideally hope to avoid litigation and the costly fees that comes with it. With the increasing cost of litigations and the benefits of alternative dispute resolutions becoming more apparent, the increase in demand for mediation has significantly grown over the years, pervading into cross-border disputes. However, as there are concerns about the enforceability of international mediation, the latter does little to raise the confidence of individuals and businesses interested in international trade. In light of this, Singapore introduced a multi-lateral convention on mediation which aims to provide a framework in ensuring the enforceability of outcomes from international mediations so as to promote confidence in cross-border matters and hence international trade. This paper aims to evaluate the benefits and challenges of the convention and what its advent would portend.

Key words: Convention, Mediation, Cross border, Alternative, Dispute

I. Introduction

Mediation is the legal process where parties to a dispute come to an amicable resolution in private with the assistance of a neutral mediator. It is an alternative dispute resolution mechanism to litigation which carries many benefits for both parties of a dispute. While litigation favours one party due to its adversarial nature, mediation grants autonomy to parties in serving their mutual needs, hence making it a mutually beneficial process,

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which also saves costs and time.¹ Parties are also able to create their own terms of agreement, rendering the compliance rate of the agreements to be relatively high compared to other forms of dispute resolution methods. The benefits of mediation have even attracted the attention of world leaders, with several countries legislating mediation to be a mandatory process before litigation can take place.² However, mediation is not without its disadvantages. Apart from the lack of formal rules for processes, equitable treatment in the process of a mediation is difficult to achieve as parties may not be truthful and/or have more resources to push the opposing party into a settlement that isn't in their best interest.³

Yet, its benefits seem to supersede its disadvantages as the demand for mediation has made a subtle climb unbeknownst to many in the legal industry due to its private nature. Consequently, with its benefits of collaboration and effectively maintaining key commercial relationships becoming more evident, there is a demand for mediation even for cross-border matters. Cross-border disputes have additional barriers to reaping the benefits of mediation. For instance, researchers who studied negotiators from Japan and the United States have found that participants are likely to rely on their stereotyping of the other party's culture and make adjustments to their style of negotiation. When both parties mutually make this adjustment, there resulted in a clash in cultures. Even after putting aside the issue of negotiators stereotyping, there is still a need to overcome cultural barriers to communication.⁴ More critically, a common objection that parties to a cross-border dispute may have is the worry of non-enforceability of mediations from other jurisdictions as well as the complexity of resolving international disputes. These briefly show how the additional international element in a dispute can quickly mess a

1 Lim Yu Jie Isabelle, "Mediating Neighbour, Racial and Religious Disputes – Takeaways from the Second Conference of the International Institute of Mediators", (*Lexicon*, 14 December 2022) <smulexicon.com/2022/12/14/mediating-neighbour-racial-and-religious-disputes-takeaways-from-the-second-conference-of-the-international-institute-of-mediators/> accessed 1 January 2023.

2 Jonathan C. Hamilton, Michelle Grando, "The Rise of Global Mediation: A New Treaty Portends Growth" White & Case LLP (*White & Case*, 28 June 2021) <www.whitecase.com/insight-alert/rise-global-mediation-new-treaty-portends-growth> accessed 2 January 2023.

3 Upcounsel "Disadvantages of Mediation: Everything You Need to Know" (*Upcounsel*, 20 October 2020) <www.upcounsel.com/disadvantages-of-mediation#disadvantages-of-mediation> accessed 1 January 2023.

4 Harvard Law School "International Negotiations: Cross-Cultural Communication Skills for International Business Executives" (*Harvard Law School*, 2012) <www.pon.harvard.edu/tag/international-mediation/> accessed 1 January 2023.

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mediation up or discourage parties from choosing it as an alternative dispute resolution method.

However, with mediation growing in popularity as an alternative dispute resolution method, especially for cross-border matters, Singapore introduced a landmark convention, which seeks to enhance the global framework for mediation and resolves some of the abovementioned challenges that the international element of cross-border disputes adds to the process of mediation.

II. Introduction to Singapore Mediation Convention

The Singapore Convention on Mediation (hereinafter referred to as the “**Convention**”) is a multilateral treaty that was made open for signatories on 7 August 2019.⁵ The Convention provides a framework for the enforcement of agreements that were made during the course of a cross-border mediation such that Member States would recognise and enforce settlements that were reached through mediation from anywhere in the world.⁶ Some of the notable provisions of the Convention include conditions for the agreement arising from the mediation to be enforced (e.g. the institution that had administered the mediation must produce an attestation to it), criteria where enforcement of a settlement may be denied, and subjecting enforcement to the rules of procedure of the enforcing state. By having its signatories adopt the same legal framework, the Convention has facilitated the process of mediation for international disputes as rules in different jurisdictions are much more uniform among the signatories, resulting in many benefits such as the simplification of enforcement, which consequently promotes confidence and hence more international trade. With its appealing effect predicted to take place for a Member State's trade and commerce, it is no surprise that as of 1 January 2023, there are 55 countries that have signed the convention.

III. Benefits of The Convention

⁵ United Nations “*United Nations Convention on International Settlement Agreements Resulting from Mediation*” United Nations Treaty Series
<treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>
accessed 1 January 2023.

⁶ Ibid.

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With the advent of the Convention, international commerce is catalysed as parties to a cross-border commercial dispute are now able to easily invoke and enforce the agreement made between parties during the course of the mediation. By simplifying the enforcement of agreements that arise from mediation to tackle non-compliance, the Convention provides parties with more legal certainty and confidence, especially for parties who are apprehensive of the international and complex nature of cross border disputes. Consequently, it would encourage parties to be more confident in cross-border transactions, businesses and investments, enhancing a signatory's economy. Although it is rare for settlements reached through mediation to be defaulted on, the impression and certainty created by the convention would promote economic activity. Legal counsels for such parties can also be more certain in recommending their clients to mediation as an alternative dispute resolution method as they would no longer have to worry about the non-enforceability of a mediation settlement and can no longer advise their clients to refuse mediation on that basis.

The Convention also further legitimises mediation as a viable and reliable option for resolving cross-border disputes, promoting its use to jurisdictions where mediations are less popular. When a Member State signs the Convention, they would be signifying their jurisdiction's position in the usage of mediation as an alternative dispute resolution method as they would essentially be creating the impression that their jurisdiction takes mediation seriously, being prepared to enforced internationally mediated settlements as equally as settlements from their own domestic mediations. A common misconception that most people have about the Convention is that it is based on reciprocity, like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Hereinafter referred to as the "**New York Convention**"), where only arbitration awards made in Member States can considered be considered by other Member States.⁷ On the contrary, as briefly mentioned during the introduction of this Convention, the Singapore Convention obliges Member States to recognise and enforce the mediated settlement regardless of whether the settlement was made in a jurisdiction of a country that ratified the Convention. In short, Member States have to give recognition to mediated settlements from any jurisdiction in the world. As such, the value of the Convention is not limited to

7 Jan O'Neill "Why the UK should join the Singapore Convention On Mediation" (*Herbert Smith Freehills* 2022) <www.herbertsmithfreehills.com/lang-ko/insight/in-the-club-%E2%80%93-why-the-uk-should-join-the-singapore-convention-on-mediation> accessed 5 January 2023.

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its technical benefit of facilitating the procedure of mediation but also the reassurance to parties from all over the world as well as the promotion of the use of mediation to other jurisdictions.

IV. Challenges faced by The Convention

One of the most glaringly obvious obstacles that stand before the Convention was evident at the signing ceremony of the Convention: a lack of signatories from the Members of the European Union.⁸ Looking through the list of signatories for the Convention as seen in **Annex A** affirms this worry as it is evident that Member States of the European Union have not yet come to a common consensus on whether they would want to sign the Convention.⁹ It may not necessarily be a sign of disinterest as the European Union does in fact have several significant obstacles to make their decisions on with regard to the Convention. For instance, will they sign the Convention as a bloc or as their own individual countries? Furthermore, the European Union is currently adopting the European Mediation Directive (2008/52/EC) for its mediation processes, which obliges Member States of the European Union to give recognition and enforcement to settlements that arise from mediations in other Member States.¹⁰ Should the European Union decide to sign the Convention, they would also have to be meticulous in considering whether the Directive aligns or contradict with the Convention and what were to happen to the Directive. With the European Union withholding its decision, other countries close to the Bloc such as the United Kingdom are also seen to be hesitant in engaging with the Convention, although these countries may have their own individual concerns about the Convention as well. As mentioned above, the enforcements of mediated settlements are rarely an issue as parties would have usually undergone thorough and tough negotiations before arriving at a particular outcome, which they would both have voluntarily agreed to. As such, it would seem that the current absence of the framework of recognition and

8 James South, Ben Thomson, Jan O'Neill "The Singapore Convention Enters into Force- Reflections, Practicalities & Opportunities" (*Centre for Effective Dispute Resolution*, N.D.) <www.cedr.com/podcasts/detail/the-singapore-convention-enters-into-force-reflections-practicalities-opportunities/> accessed 5 January 2023.

9 Annex A.

10 Benedicte Deboeck, Bruno Garcia Da Silva "The European Mediation Directive" (*Linklaters* 24 May 2022) <www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/eu-commercial-mediation> accessed 5 January 2023.

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enforcement is not a significant hindrance to certain jurisdictions.¹¹ Without any added benefits, these states may see no reason to sign the Convention.

Furthermore, it can be noted from the provisions of the Convention that there are high levels of discretion and flexibility granted to member states on how they can apply the provisions, which may counteract the legal certainty granted to parties as the approach used by the Court in the application of the convention is subject to its own jurisdiction's norms such as the norms of the legal system and public policy considerations.¹² Even though such concerns are inherently present in any international matter, the Convention grants foreign Courts the ability to enforce a settlement directly rather than enforcing the judgment of another Court pertaining to the mediated settlement, which increases the risk of uncertainty for parties that are unsure of the expectations of a foreign jurisdiction.¹³ However, it could be argued that the certainty granted by the Convention would supersede the uncertainty formed as a by-product of the Convention. As such, one should be careful not to throw the baby out with the bathwater and regard this to be a damning challenge for the Convention.

V. Conclusion

As a relatively new convention, the effects of Singapore Convention on Mediation may still seem latent, especially with the hindrance caused by the Covid-19 Pandemic. However, with the pandemic beginning to settle and the Convention being given time to mature, we see an increase of Member States ratifying the Convention and with the Convention being subsequently entered into force¹⁴. As such, the effects of the Convention may soon become more evident and certain. Despite this uncertainty, one can say for certain that the introduction of the Convention portends the continued development and growth of mediation as an invaluable instrument for alternative dispute resolutions.

11 Jan O'Neill "Why the UK should join the Singapore Convention On Mediation" (*Herbert Smith Freehills* 2022) <www.herbertsmithfreehills.com/lang-ko/insight/in-the-club-%E2%80%93-why-the-uk-should-join-the-singapore-convention-on-mediation> accessed 5 January 2023.

12 Jan O'Neill "Why the UK should join the Singapore Convention On Mediation" (*Herbert Smith Freehills* 2022) <www.herbertsmithfreehills.com/lang-ko/insight/in-the-club-%E2%80%93-why-the-uk-should-join-the-singapore-convention-on-mediation> accessed 5 January 2023.

13 Ibid.

14 Annex A.

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ANNEX A: List of Member States and Status¹

Country	Date Signed	Date Ratified	Entry into Force
Afghanistan	7-Aug-19	-	-
Armenia	26-Sep-19	-	-
Australia	10-Sep-21	-	-
Belarus	7-Aug-19	15-Jul-20	15-Jan-21
Benin	7-Aug-19	-	-
Brazil	4-Jun-21	-	-
Brunei Darussalam	7-Aug-19	-	-
Chad	26-Sep-19	-	-
Chile	7-Aug-19	-	-
China	7-Aug-19	-	-
Colombia	7-Aug-19	-	-
Congo	7-Aug-19	-	-
Democratic Republic of Congo	7-Aug-19	-	-
Ecuador	25-Sep-19	9-Sep-20	9-Mar-21
Eswatini	7-Aug-19	-	-
Fiji	7-Aug-19	25-Feb-20	12-Sep-20
Gabon	25-Sep-19	-	-
Georgia	7-Aug-19	29-Dec-21	29-Jun-22
Ghana	22-Jul-20		
Grenada	7-Aug-19	-	-
Guinea-Bissau	26-Sep-19	-	-
Haiti	7-Aug-19	-	-
Honduras	7-Aug-19	2-Sep-21	2-Mar-22
India	7-Aug-19	-	-
Iran (Islamic Republic of)	7-Aug-19	-	-
Israel	7-Aug-19	-	-
Jamaica	7-Aug-19	-	-
Jordan	7-Aug-19	-	-
Kazakhstan	7-Aug-19	23 May 2022	23 November 2022
Lao People's Democratic Republic	7-Aug-19	-	-
Malaysia	7-Aug-19	-	-
Maldives	7-Aug-19	-	-
Mauritius	7-Aug-19	-	-
Montenegro	7-Aug-19	-	-
Nigeria	7-Aug-19	-	-
North Macedonia	7-Aug-19	-	-
Palau	7-Aug-19	-	-
Paraguay	7-Aug-19	-	-
Philippines	7-Aug-19	-	-
Qatar	7-Aug-19	12-Mar-20	12-Sep-20
Republic of Korea	7-Aug-19	-	-

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Rwanda	28-Jan-20		
Samoa	7-Aug-19	-	-
Saudi Arabia	7-Aug-19	5-May-20	5-Nov-20
Serbia	7-Aug-19	-	-
Sierra Leone	7-Aug-19	-	-
Singapore	7-Aug-19	25-Feb-20	12-Sep-20
Sri Lanka	7-Aug-19	-	-
Timor-Leste	7-Aug-19	-	-
Turkey	7-Aug-19	11-Oct-21	11-Apr-22
Uganda	7-Aug-19	-	-
Ukraine	7-Aug-19	-	-
United States of America	7-Aug-19	-	-
Uruguay	7-Aug-19	-	-
Venezuela (Bolivarian Republic of)	7-Aug-19	-	-