

A “DONE DEAL” FOR STATES AND INVESTORS?

THE NEW UNCITRAL CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

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“The issue of finality goes well beyond the search for certainty and is particularly important in commerce and finance, as they are per definition transactional and dependent on payment.”¹

Jan Dalhuisen

“Finality, Sir, is not the language of politics.”²

Benjamin Disraeli

It has been said that one of the great strengths of International arbitration is finality. With the expected adoption of the Draft UNCITRAL Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)³ and

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¹ Dalhuisen, Jan *Opinio Juris* 4 April 2012.

² Disraeli, Benjamin Letter to his father from Malta (25 August 1830), cited in Lord Beaconsfield’s Letters, 1830-1852 (1882), p. 32.

³ Singapore Convention Text: United Nations Commission on International Trade Law, Fifty-first Session, New York, 25 June-13 July 2018 A/73/17, Annex I. It is expected that the Convention will be adopted by the UN General

amendments to the UNCITRAL Model Law on International Commercial Conciliation States will have the opportunity to support increased use of amicable negotiation/mediation to preserve commercial relations where possible and otherwise resolve disputes arising therefrom with finality in a process which reserves decision-making to the parties and allows flexibility of both process and outcomes.

This article is intended to address the rationale for and highlights of the Singapore Convention. It will also examine the risks and benefits to both commercial interests and public entities and, in particular, examine the possible application of the Singapore Convention to Investor-State relations.

Importantly, the Singapore Convention provides a major step forward for international trade law in using the term “mediation”, as opposed to “conciliation”. The international acceptance and increased use of mediation can hardly be overstated. In 2017, parties from 31 countries and independent territories filed mediations with the ICC International Center for ADR.⁴ The International Centre for Dispute Resolution (ICDR-AAA) administered 128 international mediations in 2017. In both common and civil law jurisdictions mediation has become part of the standard commercial dispute resolution procedure, with many States now requiring disputing parties to consider or use mediation before proceeding with more formal court proceedings.

I. THE CASE FOR UNIFORMITY

The Singapore Convention drafters saw value in a mediation settlement framework applicable in diverse legal and economic cultures. And indeed, it appears that the status of mediated agreements changes depending on the jurisdiction. By way of example, it is a commonly held perception in the US and the UK that mediated agreements requiring future performance are enforceable only by way of separate action for breach of contract.

Assembly and signed in Singapore on 1 August 2019, hence “Singapore Convention”.

⁴ ICC Dispute Resolution Bulletin 2018 – Issue 2; Samaa Haridi and Julien Fouret Eds. p. 64.

As such, mediated settlement agreements would be susceptible to set aside based on all the traditional defences to enforcement including the absence of agreement on essential terms, fraud, duress, mistake, incapacity or lack of authority. That said, one commentator has noted more favourable treatment in the US, suggesting that the broad public policy support for negotiated settlements has enhanced the enforceability of mediated settlements, likening them to “super contracts”⁵ and noting Court’s reluctance to set them aside, particularly in commercial disputes where the parties have received competent legal counsel. More friendly treatment of mediated settlements can be found in some civil law jurisdictions. In France and Italy, by way of example, simplified procedures for the enforcement of mediated agreements are provided by statute.⁶ Notwithstanding the favourable treatment of mediated settlements in some common and civil law jurisdictions, the absence of an effective global enforcement mechanism mitigates against mediation’s use in transnational contracts, enabling those who argue mediation only delays the inevitable hearing before a decision-making judge or arbitrator. This absence of certainty may have been what motivated attendees at a recent global series of dispute settlement stakeholder conferences to register the absence of an effective enforcement mechanism for settlements as a major concern.⁷

II. THE SINGAPORE CONVENTION

The Preamble to the Singapore Convention provides a brief but effective rationale for its consideration and adoption. The Preamble notes increased use of mediation as an alternative to litigation, references the significant benefits of mediation

⁵ Sussman, E. and Weiner, C., Striving for the “Bullet-Proof” Mediation Settlement Agreement. NYSBA New York Dispute Resolution Lawyer, Spring 2015, Vol. 8. No. 1, p. 22

⁶ France – Code of Civil Procedure Articles 1565,1566 and 1567; Italy - Legislative Decree 28/2010, art. 12.

⁷ Attendees at the 2016-2017 Global Pound Conference Events included “the use of legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation” among their top needs. Information regarding the Global Pound Conference is *available at* <https://www.globalpound.org/>.

including the opportunity to preserve commercial relations and enable savings by States in the administration of justice and welcomes the opportunity to bring a common framework to the judicial management of mediation settlements “that is acceptable to States with different legal, social and economic systems...”.⁸

The Singapore Convention adopts a simple, modern reference to mediation, *i.e.* “a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably”.⁹ The Definitions section adds a further requirement, noting the mediator must “lack the authority to impose a solution upon the parties to the dispute”.¹⁰

In Annotations to the Singapore Convention the drafters note “in its previously adopted texts and relevant documents, UNCITRAL used the term “conciliation” with the understanding that the terms “conciliation” and “mediation” were interchangeable.” The text goes on to say that “this change in terminology “does not have any substantive or conceptual implications”.¹¹ That said, it should be noted that in some legal cultures and commercial practice, “conciliation” has been understood and practiced as a more formal, quasi-adjudicative process where the neutral conciliator is expected to issue written recommendations for settlement as part of the remit. (For example see the ICSID Conciliation Rules). While modern definitions of mediation would allow for a “mediator’s recommendation” as a procedural choice in mediation, common practice is to avoid doing so except when requested and only as a final attempt to bring the parties to an amicable settlement.

⁸ Singapore Convention Text; A/CN.9/942, p. 3.

⁹ Singapore Convention Text; *Ibid* p. 2.

¹⁰ Singapore Convention Text; *Ibid* p. 4.

¹¹ Singapore Convention Text; *Ibid* p. 9.

III. SCOPE

Perhaps it should go without saying that a United Nations Convention prepared by the UN Commission on International Trade Law is intended to apply to commercial disputes. That said, the Singapore Convention specifically excludes its application to settlement agreements reached in consumer, family, inheritance or employment matters.¹²

The Singapore Convention goes further, requiring a settlement agreement recorded in writing (includes electronic communications)¹³ to resolve a dispute which is international in nature. The international element is satisfied in either of two ways; parties from separate States or the places where the parties have their places of business is different from the place of performance or the place where the subject matter of the agreement is most closely connected.¹⁴

Finally, as regarding scope, the drafters went to some trouble to avoid confusing the application of the Singapore Convention to settlement agreements otherwise enforceable by State courts or agreements recorded and enforceable as arbitration awards (“consent awards”).¹⁵

IV. SINGAPORE CONVENTION IN PRACTICE

Parties to the Singapore Convention are required to enforce settlement agreements resulting from mediation in accordance with their own procedural rules and the conditions applied by the Singapore Convention.¹⁶ Similarly, Parties to the Singapore Convention will allow a disputant to invoke a settlement agreement reached in mediation in order to prove a matter has been previously resolved.¹⁷

¹² Singapore Convention Text; *Ibid* p. 3

¹³ Singapore Convention Text; *Ibid* p. 3-4.

¹⁴ Singapore Convention Text; *Ibid* p. 3.

¹⁵ Singapore Convention Text; *Ibid* p. 3.

¹⁶ Singapore Convention Text; *Ibid* p. 4.

¹⁷ Singapore Convention Text; *Ibid* p. 4.

In order to rely on the settlement agreement parties need only produce a copy of the settlement agreement and provide evidence that the settlement agreement resulted from mediation.¹⁸ The Singapore Convention doesn't spell out any particular evidentiary requirements, instead providing examples of evidence that might be found satisfactory. Examples provided include a mediator's signature on the settlement agreement, a document signed by the mediator indicating that the mediation was carried out or an attestation by an administering institution.¹⁹ In considering applications for relief competent authorities "shall act expeditiously."²⁰ While "make it simple and fast" seems to be the message to enforcing entities, it is equally clear that bringing mediated settlements into the realm of enforcement creates a need for additional detail and review. At least early on disputants intending to rely on mediated settlements will do well to have the added protection afforded by an administering institution.

The Singapore Convention also provides grounds for refusing to grant relief. Standards for refusal include issues with the settlement agreement (*e.g.* void, inoperable, impossible to perform, not final or binding in accordance with its terms, has been modified or performed or lacks clarity), the mediator (*e.g.* serious breach of conduct by the mediator, lack of independence and impartiality) or a finding by the enforcing authority that granting the relief sought would be contrary to public policy or the subject matter of the dispute is not capable of settlement by mediation.²¹

V. A CHOICE FOR STATES

Two Reservation options are prescribed for adopting States. The future of Investor-State mediation may well be determined in their choice and application.

The first option provides that the Convention will not apply to mediated settlement agreements to which a State, government

¹⁸ Singapore Convention Text; *Ibid* p. 4.

¹⁹ Singapore Convention Text; *Ibid* p. 4.

²⁰ Singapore Convention Text; *Ibid* p. 5.

²¹ Singapore Convention Text; *Ibid* p. 5.

agency or any person acting on behalf of a government agency is a party, to the extent specified in the declaration.²²

The second option is an intriguing one, preserving but not requiring application of the Convention to the State. Signing on to this Reservation, the Convention will apply “only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.”²³

Reservations may be made at any time, though Reservations made or withdrawn after entry into force of the Convention will become effective six months after deposit with UNCITRAL.

VI. INVESTOR-STATE DISPUTE SETTLEMENT – OBSTACLES AND SOLUTIONS

A uniform and efficient method for enforcing international commercial agreements reached in mediation will be welcomed by the global business community, but what about States?

The conventional wisdom is that “States don’t settle (their disputes)”. Or do they? Statistics maintained by the International Center for the Settlement of Investment Disputes (ICSID) claim that one-third of the cases filed at ICSID in 2017 were either settled or withdrawn.²⁴ Those statistics need more analysis, but it would seem that Investor-State (IS) cases do settle. And, if that is the case, the benefits of mediated negotiations are also worthy of exploration.

Experts focused on reform of the IS dispute settlement system have been suggesting an IS mediation option for years.²⁵ Benefits including early resolution, preservation of economic relationships, preserving the investment friendly image of a State by providing the investor with alternatives to litigation, flexibility

²² Singapore Convention Text; *Ibid* p. 6.

²³ Singapore Convention Text; *Ibid* p. 6.

²⁴ See 2017 ICSID Statistics for cases settled or otherwise discontinued at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf).

²⁵ Coe, Jack J. Jr., *Toward a Complimentary Role for Conciliation in Investor-State Disputes – A Preliminary Sketch* (2005) 12 *University of California Davis Journal of International Law and Policy* 7.

of process and remedies and the ability to energize the negotiation process by bringing in one or more skilled mediators have been touted as reasons for embracing mediation.²⁶

Notwithstanding the salutary benefits noted above IS dispute resolution experts have identified challenges to negotiating IS disputes. In 2016, the Centre for International Law of the National University of Singapore (“CIL”) conducted a survey of experienced IS arbitration professionals focused on obstacles to settlement in IS disputes.²⁷ While the sample size was small (97 correspondents and 47 responses) the results were both indicative of perceived obstacles to the settlement of IS disputes and provide a useful means of assessing both obstacles to settlement and possible solutions.

CIL provided correspondents with a list of 29 possible obstacles to settlement, asking them to rank-order obstacles in terms of their deterrence to settlement. Among the listed obstacles “the desire to defer responsibility for decision-making to a third party” was ranked number 1. That approach has been described to the author as a lack of political will but, to be fair, the “not on my watch”, delay the day of judgement approach isn’t unique to government. Corporate executives occasionally act similarly, preferring to leave the bad news to their successor.

Key findings in the CIL Survey include a note that the significant majority of respondents believed the State is the party more reluctant to settle. What sets States apart is, of course, public perception and politics. Number 3 among the ranked obstacles to settlement was “fear of criticism”. In the world of politics criticism can result in loss of support or worse. Indeed, perhaps the worst-case scenario in the rough and tumble of politics is the potential for associating the settlement of a case

²⁶ See IMI Investor State Mediation Taskforce Submission to the EU Commission at file:///C:/Users/Mark/Downloads/ISM-Task-Force-response-to-EU-Commission-July-2014%20(2).pdf.

²⁷ Seraphina Chew, Lucy Reed and J Christopher Thomas QC, ‘Report: Survey on Obstacles to Settlement of Investor-State Disputes’ (NUS Centre for International Law Working Paper Series 2017/001, June 2017) <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-states-disputes>.

with favours granted the opposing party and resulting allegations or charges of corruption (CIL rank-order obstacle number 7).

By way of solutions, States might consider taking a page from their corporate colleagues' strategy in defraying criticism. Multi-national companies in particular frequently have policies in place supporting the use of mediation and other non-adversarial alternatives to litigation. The existence of a policy provides both an answer of sorts to internal critics and an answer to adversaries who mistake willingness to negotiate for weakness. Several States in both developed and developing economies have already taken the lead in welcoming mediation in IS relations.²⁸ Global NGOs are also providing educational leadership aimed at assisting the "normalisation" of mediation at the State level.²⁹

If anything, there is an even more compelling argument for government's use of mediation. Sovereignty, long a watch word for government, isn't surrendered in mediation (as it is for example in arbitration) as both the process and outcome require the parties' agreement. What should be even more attractive to States is the range of remedies available for settlement. Largely unconstrained by contract or law, parties to a mediated settlement can tear up the contract, resolving the matter in terms of current political and economic needs. A further important

²⁸ See Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) at <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-5/en/pdf#page=38>; See also Prevention of Disputes arising in relation to WTO Agreements, Free Trade Agreements and International Investment Agreements, Dominican Republic Decree 303-15, 1 October 2015.

²⁹ The International Bar Association published a set of IS Mediation Rules in 2012. The Energy Charter Secretariat, working with the International Mediation Institute (IMI), developed a Guide on Mediation in 2016; IMI published competency criteria for IS mediators to assist the selection of mediators in IS disputes, also in 2016; ICSID, the Energy Charter Secretariat, UNCITRAL, IMI and the Centre for Effective Dispute Resolution (CEDR) have cooperatively carried out a series of educational programmes and IS mediator skills training programmes on several continents over the last several years. See at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx; <https://energycharter.org/fileadmin/Documents/Media/CCDECS/2016/CCDEC201612.pdf>; [file:///C:/Users/Mark/Downloads/Investor-State-Mediation-Competency-Criteria%20\(3\).pdf](file:///C:/Users/Mark/Downloads/Investor-State-Mediation-Competency-Criteria%20(3).pdf); <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>; www.cedr.com/blog/investor-state-mediation-training/.

benefit for States is that third parties, not party to the original contract can participate in the mediation. This allows community groups, NGO's or others critical to the legitimacy of a settlement agreement to take part in the process where appropriate and with party agreement. Mediation can be accessed at any point in the relationship. So, for example, an investor and a State can use mediation to address existing problems during the course of a long-term project, preserving contractual relations and preventing problems from escalating into full blown disputes.

Mediation can also complement the arbitration process in IS dispute settlement machinery. While traditional thinking is that the so-called "cooling off" period is the perfect time to mediate, mediation can take place at any time during the pendency of an IS arbitration, presenting the parties with multiple chances to exit the third-party decision-making process as they find out more about the case and explore their respective needs and interests. Mediation might also be used to resolve important elements of a dispute, while perhaps leaving technical matters such as pricing formulas to be resolved by arbitration. Mediation can even be accessed after an Award has been entered, with parties possibly avoiding a nullification panel and enforcement proceedings in favour of a negotiated solution.

Skilled mediators can also aid the acceptance of the negotiated agreement. In the first instance, mediators can facilitate the negotiation of media and information protocols, allowing for the transparency required in the public arena while preserving confidentiality of the mediated negotiations where necessary. In complex, multi-party negotiations involving community or other third party interests a second mediator ("co-mediation") can be engaged at the outset to both divide the workload and ease the addressing of cultural, linguistic or technical issues.³⁰ As mentioned earlier, drafters of the Singapore Convention acknowledged the legitimacy issue in recognising the value of a mediator's signature on the agreement or an attestation from an administering authority. In public sector mediation it would not

³⁰ Coe, Jack J. Jr., *Concurrent Co-Mediation – Toward a More Collaborative Center of Gravity in Investor-State Dispute Resolution*; forthcoming in Catharine Titi and Katia Fach Gómez Eds. *Mediation in International Commercial and Investment Disputes*, Oxford University Press, 2019.

be unusual for the mediator to do more, providing an attestation that the parties were well represented and bargained diligently in respect of their individual interests. This “vouching” process³¹ can provide useful and even necessary re-assurance for both investor and state watchdogs.

A more surprising concern identified at various educational fora and supported by the CIL survey is the absence, in many States, of a State protocol for managing IS disputes. It seems simple, but the absence of policy and protocols leads to multiple problems including who speaks for the State, who coordinates the various and perhaps disparate interests of separate State ministries (CIL obstacle 6), how IS disputes are budgeted (CIL obstacle 4) and paid for, how and when legal counsel are engaged and even who pays the mediator. Putting a single ministry in charge makes sense, not simply for coordination purposes but particularly given the value of developing expertise in claims management and resolution. As easy as that sounds it may run afoul of current practice, where the ministry managing a particular project is more likely to maintain control when problems arise.³²

Again, and thankfully, NGO's have taken leadership on developing guidelines for States who are looking for a model framework to manage IS disputes. The Energy Charter Secretariat, working in conjunction with the International Mediation Institute's Investor State Mediation Taskforce, is in the midst of developing a model IS dispute management instrument for State use.

Returning to the Singapore Convention, States are presented with two choices in terms of reservations. The first would eliminate the application of the Convention to the signatory State, its various entities and representatives, *to the extent specified in the declaration* (emphasis added). Hopefully, adopting States will

³¹ Coe, Jack J. Jr., Concurrent Co-Mediation – Toward a More Collaborative Center of Gravity in Investor-State Dispute Resolution; *Ibid*.

³² Legum, Bart, The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward a Complimentary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch," Mealy's International Arbitration Report, April 2006.

use this reservation not to eliminate the application of the Convention to the State but rather to limit which agency or individual can speak for the State. This option can provide States who have a developed conflict management protocol with the opportunity to bring both State expertise to the IS dispute settlement process and clarity to contracting parties who might otherwise wonder who they can negotiate with.

The second option (“plan b” if you will) would allow the application of the Convention on a case-by-case basis, with the approval of the State required at the time of the particular settlement agreement. This would provide additional flexibility to the State, allowing the state to offer finality as part of a settlement offer where the return to the State, political needs and economic interests justifies giving the investor the added insurance of an enforceable settlement, but withholding that agreement otherwise. In the hands of skilled State negotiators “plan b” can provide the State with a powerful new bargaining chip, an offer of finality to the investor.

Even with reasonable reservations, a State wishing to attract inward investment would provide real assurance to potential investors by allowing itself to become part of an efficient and effective regime for IS conflict management.

So, is widespread adoption of the Singapore Convention a sure thing, a “done deal”? Time will tell.