

## **United Nations Convention for International Settlement Agreements; a second New York Convention in the realm of ADR?**

**By Ying Xia**

On 25 June 2018, the final drafts for the *UN Convention on International Settlement Agreements Resulting from Mediation* and the corresponding Model Law were approved by the United Nations Commission on International Trade Law ('UNCITRAL'). This new convention (also known as the Singapore Mediation Convention) will be open for signature on 1 August 2019.<sup>1</sup> Most expect this convention to come into force as it only requires three ratifications of the member states, which constitutes a fairly low bar.<sup>2</sup>

### **What is the purpose of the International Settlement Agreements Convention (ISAC)?**

Akin to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), ISAC aims to facilitate the enforcement of commercial settlement agreements resulting from mediation in foreign jurisdictions. This is set out in the Article 3, which reads '[E]ach Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention'.<sup>3</sup> Before this Convention, unless a mediated settlement is reached within a Med-Arb process, where the arbitrator can convert the settlement into an enforceable arbitral award, parties can only enforce the mediated agreement in the same way as any other contract.<sup>4</sup> This can mean onerous and lengthy court proceedings, and extra effort to have that court judgment recognised and enforced in a foreign jurisdiction.<sup>5</sup>

### **Will ISAC exert the same level of influence as the New York Convention?**

Although this ISAC seems to share a similar approach with the New York Convention, the potential strength and practical influence of this convention remains untested. The following discussion expands on currently perceived 'pros and cons'.

### ***The Practical Utility of the Convention***

Mediation has long been known for its user-friendly characteristics such as cost-efficiency, strong party autonomy and swiftness. Commercial entities value the opportunity for self-determination, their ability to try and preserve existing business relationships and the flexible and creative solutions made possible, for which they often leave the mediation room with a great sense of satisfaction. ISAC enables mediated settlements to be enforceable beyond the domestic jurisdiction and this adds a further pull towards mediation as an effective choice for resolving cross-border disputes.

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<sup>1</sup> Article 11 of *UN Convention on International Settlement Agreements Resulting from Mediation*.

<sup>2</sup> Article 14.

<sup>3</sup> Article 3.

<sup>4</sup> <http://simc.com.sg/singapore-convention-milestone-mediation/>.

<sup>5</sup> <https://hsfnotes.com/adr/2018/06/27/new-convention-on-the-enforcement-of-mediation-settlement-agreements-approved/#page=1>.

## Is ISAC really needed?

Unlike an arbitral award, where the decision is made by a third party, a mediated settlement agreement is formed by both parties to the dispute voluntarily and willingly. Thus, the parties are far less likely to dishonour their promises and desert their prior efforts in mediating an agreement.

However, in situations where one party later regrets their settlement agreement and is reluctant to comply, or their circumstances have taken an unexpected turn and they would prefer not to comply, or they have simply used the settlement agreement as a delaying tactic,<sup>6</sup> the Convention can step in to enforce the mediated agreement. In reality these circumstances may not regularly occur, but when they do, having a Convention that can effectively respond will help international mediation become an even more reliable, comprehensive and powerful dispute resolution mechanism.

## The Enforcement of Mediated Agreements

There are concerns in relation to whether a mediated agreement can be enforced in the same manner as is an arbitral award. An award is drafted by the arbitral tribunal with authority, imposing obligations on the parties that are capable of being enforced.<sup>7</sup> In contrast, mediated agreements are formed with the parties' consent. The provisions in those agreements can be ambiguous and are sometimes incapable of being 'enforced'.<sup>8</sup> Phillips suggests that the frequent use of wording such as 'reasonable' or 'as both parties think fit' in the provisions would be such examples.<sup>9</sup>

However, if during or after the mediation process parties are willing to seek help from experienced legal professionals who are competent in drafting contractual terms, it is far more likely that any such difficulties in the enforcement of mediated agreements can be avoided.

## The Conduct Standards of Mediators

Article 5 of the Convention also provides that a court may refuse to enforce a settlement agreement arising from mediation if '[t]here 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'.<sup>10</sup> The ramification of such a provision is that the party having 'buyer's remorse' about the mediated agreement may seek to relieve their obligations by focusing on the conduct of the mediator. As there are currently no universally applicable standards for the conduct of mediators, some worry that the force of the convention will be adversely affected as a consequence of Article 5.<sup>11</sup>

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<sup>6</sup> <https://www.mishcon.com/news/briefings/the-singapore-mediation-convention-a-game-changer>.

<sup>7</sup> <https://www.mediate.com/articles/phillips-concerns-singapore.cfm>.

<sup>8</sup> [ibid.](#)

<sup>9</sup> [ibid.](#)

<sup>10</sup> Article 5(1)(e).

<sup>11</sup> <https://www.mediate.com/articles/phillips-concerns-singapore.cfm>.

Nevertheless, an overview of the guidelines and codes for mediators in multiple countries shows that the standards for professional conduct of mediators are to a large extent homogeneous across different jurisdictions.<sup>12</sup> They share common grounds on most of the critical issues, including diligence, competence, independence and impartiality of the mediators, confidentiality of the process, party self-determination and so forth. Even though in reality, good practice of a mediator varies depending on the nature of the cases being dealt with, with these guidelines and codes that in nature resemble each other, it seems the standards for conduct of mediators are factually uniform and thus leave no loophole that can be taken advantage of by disputants in international mediation.

### **The Right for States to Make Reservations**

Differing from the mandatory scheme laid down by the New York Convention that covers all arbitral awards, Article 8 of the convention gives states a right to make reservations about the extent to which they would like to apply the convention. The practical ramification of this is that the Convention may only apply 'insofar as the parties to a settlement agreement have specifically agreed that the convention will apply' in certain jurisdictions.<sup>13</sup> This could compromise the universality of the Convention and therefore lessen the strength and value of this scheme. Nevertheless, experienced practitioners also point out that whether this right would in fact restrict the new regime's scope depends on the proportion of States that ultimately choose to exercise this reservation.<sup>14</sup>

### **A game changer or not?**

With both praises and doubts revolving around the upcoming convention, it remains unclear whether the convention can live up to UNCITRAL's ambition of altering the landscape of international dispute resolution.<sup>15</sup> The final answer may be subject to the practical nitty-gritty of the parties' mediated agreements that may circumvent any difficulties of enforcement and also the number of countries choosing to sign up to the Convention. Still, one thing seems to be certain that this Convention will provide even greater reassurance and confidence in the mediation process<sup>16</sup> and elevate the status of mediation as a desirable choice for cross-border dispute resolution.

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<sup>12</sup> See *European Code of Conduct for Mediators of European Commission (2004)*, *Ethical Guidelines for Mediators (2011)*, and *Model Standards of Conduct for Mediators Adopted by AAA, ABA and ACR*.

<sup>13</sup> <http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/>.

<sup>14</sup> Ibid.

<sup>15</sup> THE SINGAPORE CONVENTION ON MEDIATION: A FRAMEWORK FOR THE CROSS-BORDER RECOGNITION AND ENFORCEMENT OF MEDIATED SETTLEMENTS, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527), 47.

<sup>16</sup> <http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/>.