

CEDR note on the United Nations Convention on International Settlement Agreements Resulting from Mediation (Known as the Singapore Convention)

3 February 2020

The Singapore Convention (the “Convention”) was adopted by the United Nations in December 2018 and was open for signatories in August 2019. The original rationale for the Convention was to give international commercial mediation a similar status to that of arbitration, by helping harmonise the international rules for enforcement of mediated settlement agreements, just as arbitration awards were given recognition for cross-border enforceability by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The rationale of these Conventions is to support and harmonise international trade.

CEDR is keen to support the Convention, where applicable, but is aware that it will not come into effect until the Convention has been fully ratified/enacted by three countries. Until the ratification/enactment requirements are fulfilled guidance on the Convention will need to be limited.

What is the Singapore Convention?

The Convention is a legal Convention between signatory countries that cross-border commercial mediation settlements will be recognised and enforced between countries who are signatories of the Convention. The Convention is designed to give assurance to parties in international disputes, who may otherwise have concerns that a settlement achieved in a mediation will not be legally enforceable.

Initial significance

The existence of the Convention most importantly builds confidence and provides security for using mediation in those jurisdictions where there might have been hesitation in using mediation as a dispute resolution mechanism.

Prior to the Convention, the enforcement of mediated cross-border settlements has not been a pressing need in a wide number of jurisdictions, as notably where commercial mediation is established within the relevant jurisdiction settlement agreements are complied with as a matter of course and courts support settlements.

However in jurisdictions where mediation has not been established, or where mediation law has not been enacted or coded into civil procedure, there is concern as to enforceability and

the potential for a party to renege on a mediated settlement. Therefore, in order to assuage this concern, the Convention was developed to give explicit enforceability in signatory countries.

A note of caution: Ratification of the Singapore Convention

Whilst 51 states have signed the Convention to date (February 2020) no state has ratified the Convention. The Convention will come into effect six months after three states have ratified it. At the time of drafting this note there is no indication of imminent ratification by any signatories so for the time being the situation will need to be monitored for developments.

CEDR is considering what changes may be necessary to its Rules, Model Documents and Contract Clauses under the Convention and will ensure such changes are introduced when ratification occurs.

The key points for consideration are:

Evidencing origin of settlement under the Singapore Convention

A condition to apply for enforcement under the Convention will be to evidence that the settlement agreement originates from a mediation. The Convention specifies ways in which this can be evidenced, including that the Mediator has signed the settlement agreement or the Mediator or an administering institution attests to the mediation having been carried out, or any other evidence acceptable to the competent authority designated by a country for the Convention.

CEDR is concerned that this would be problematic for the status of the process if the signature of the Mediator were to be taken as some form of endorsement of the terms of the mediation settlement, albeit that the Mediation Agreement should protect the Mediator from attempts to call him or her as a witness if there were to be any subsequent litigation. Whilst a mediator will test the parties on terms or conditions which he or she believes may be problematic in a settlement agreement, it is ultimately the parties' decision to make an agreement and the content contained therein.

CEDR is currently considering options to allow the parties to satisfy the Convention whilst also recognising the need for the Mediator to be independent, as it is CEDR's view that the Mediator should not sign an agreement between the parties. One option suggested is to attach as an appendix to the settlement agreement, the dated Mediation Agreement, which does have the Mediator's signature and which the parties refer to in the settlement. This



appendix would serve as demonstrable proof that the settlement agreement was agreed, drafted and signed in the mediation. (This would also apply if the Mediation Agreement was for multiple days and the Settlement Agreement was dated for the final day).

Settlement outside the mediation day(s)

Where the settlement agreement occurs after the day of the mediation then achieving protection under the Convention may be more challenging. Drafting of the settlement agreement may have occurred without the Mediator present and the Mediator may not be aware of any subsequent negotiation of detail that is included in a final settlement agreement. Thus, achieving endorsement from the Mediator that the settlement agreement resulted from the mediation could well be difficult.

Lawyers will need to consider these points – as well as whether to include any explicit reference to the Convention - when drafting terms of settlement.

There are other issues raised for mediators around the questions of mediator conduct in the Convention (Article 5), and CEDR will be considering these over the coming year.