DREW & NAPIER

LEGAL UPDATE

MEDIATION UPDATE

1 August 2019

SINGAPORE CONVENTION ON MEDIATION – WHAT THIS MEANS FOR US

Singapore Convention on Mediation

On 20 December 2018, the United Nations ("**UN**") General Assembly passed a resolution to adopt the UN Convention on International Settlement Agreements Resulting from Mediation. This brings to fruition three years of discussions with participation from 85 member states and 35 international organisations.

The Convention will be known as the Singapore Convention on Mediation. This is the first UN treaty to be named after Singapore and means that businesses are likely to look to Singapore as a key destination for mediation.

The signing ceremony for the Convention will be held in Singapore on 7 August 2019.

Singapore: The Ideal Dispute Resolution Hub

Singapore is recognised across the world to be a neutral venue with high quality jurisprudence.

Singapore is an ideal dispute resolution hub for the region. Various dispute resolution institutions, including the Singapore International Mediation Centre, the Singapore International Arbitration Centre and the Singapore International Commercial Court, have been set up to complement adversarial court proceedings.

The Parliament also passed the Mediation Act 2017 which encourages the resolution of disputes by mediation. Specifically, the Mediation Act 2017 allows for the recording of mediated settlement agreements as court orders, thereby facilitating the enforcement of mediated settlement agreements.

The Attractiveness of Mediation

The attractiveness of mediation lies in resolving disputes while encouraging an intact relationship between the parties.

Mediation also facilitates the administration of international transactions by commercial parties and encouraging savings in the administration of justice.

Additionally, mediation complements other forms of dispute resolution as it can be used together with litigation or arbitration.

One of the main challenges to the utility of mediation has been the lack of a framework for cross-border enforcement of settlement agreements resulting from mediation. The Convention addresses this by providing for cross-border enforcement of international commercial settlement agreements.

Overview of Singapore Convention on Mediation

Generally, the Convention will apply to international commercial settlement agreements concluded in writing and resulting from mediation.

The exceptions are where:

(a) the settlement agreements were concluded in the course of judicial or arbitral proceedings, and which are enforceable as a court judgment or arbitral award (to avoid possible overlap with existing and future conventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Choice of Court Agreements (2005); or

(b) the settlement agreements were concluded for personal, family or household purposes by a consumer; or

(c) the settlement agreements relate to family, inheritance or employment law.

The courts of a contracting party will need to handle applications either to enforce an international settlement agreement or to allow the party to invoke the settlement agreement in order to prove that the matter has already been resolved.

The courts of a contracting party may refuse to grant relief if the circumstances fall within the grounds expressly articulated in the Convention.

These include instances where:

(a) a party to the settlement agreement was under some incapacity;

(b) the settlement agreement is not binding, null and void, inoperative or incapable of being performed under the law which it is subjected to;

(c) there was a serious breach by the mediator of standards applicable to the mediator, without which breach that party would not have entered into the settlement agreement;

(d) failure by a mediator to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement; and

(e) granting relief would be contrary to the public policy of the contracting party.

COMMENTS

The Convention has been met with much anticipation.

Presently, about 25 countries, including, United States, China and Singapore, are expected to be amongst the first signatories of the Convention. 54 countries have confirmed their attendance at the signing ceremony. The encouraging response to the Convention has seen comparisons drawn with the New York Convention which started with 10 signatories in 1958 and now has 160 parties.

The strong international support for the Convention coupled with Singapore being the venue for the signing ceremony augurs well for the development of international commercial mediation as well as the growing profile of Singapore as a premier hub of international commercial dispute resolution.

However, the Convention in its final approved draft does create issues in its practical application, especially in terms of how the mediator's non-conformity with applicable standards can result in refusal to grant relief.

Article 5(1)(e) provides that "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" is a ground upon which a contracting party may refuse to grant relief. This provision raises some questions:

What are the standards applicable to a mediator or mediation?

At present, there are no such uniform international or national standards. In Singapore, most standards are set by the mediation service providers themselves. For example, Singapore Mediation Centre ("**SMC**") has a Code of Conduct for its mediators in sessions held by SMC. Elsewhere, Singapore International Mediation Institute ("**SIMI**") is an independent professional standards body which has a Code of Professional Conduct applicable to any mediation that is mediated by a SIMI Mediator while the Society of Mediation Professionals (Singapore) is a group of mediators looking to develop a collective, localised and contextualised code of ethics. The application of Article 5 presents the possible emergence of a uniform code of standards and it remains to be seen whether the government will take the lead or leave it to the industry to self-regulate such matters.

What is a serious breach?

Article 5 provides that a serious breach is required in order to refuse relief. However, despite the plethora of different codes of ethical standards set by various mediation service providers or institutions, those standards have been general statements without identifying what may amount to a serious breach, as compared to a trivial, or even a normal breach. Mediation service providers or institutions may have to start reviewing their own standards and decide on whether they wish to

identify which breaches are considered "serious" enough to warrant an application of Article 5. It will also be important for mediators to be aware of such changes to the applicable standards so as to avoid getting themselves into circumstances where such a serious breach occurs.

The signing of the Convention in Singapore signals the government's move to establish Singapore as an international dispute resolution centre, building on the past efforts in setting up the Singapore International Arbitration Centre and the Singapore International Commercial Court. The mediation industry now needs to review if adjustments have to be made to past practices to ensure that it is kept up to date with this newest initiative. As mediation becomes more widely used, legal counsels will also have to keep themselves abreast of such developments so as to properly and effectively advise clients on suitability of mediation and enforceability of mediated settlement agreements.

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