

Mediation — International Enforcement — a Viable Alternative to Arbitration?

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) (“**Convention**”) was adopted on 20 December 2018, and Malaysia became a signatory in 2019. This Convention seeks to recognise and enforce settlement agreements arising from a mediation, internationally, similar to arbitral awards.

Presently, when a dispute is successfully mediated resulting in a settlement agreement, that agreement may be enforced by suing on the same, as one does with any breach of contract. Parties, however, are generally not inclined to arbitrate/litigate again having resolved their disputes amicably through mediation. This is particularly so when the counter party and its assets are in a foreign state.

The adoption of the Convention allows parties to apply directly to the Courts of party states that have ratified the Convention to enforce these settlement agreements without having to commence fresh proceedings. The Convention provides a similar enforcement mechanism to the New York Convention, which deals with the enforcement of arbitral awards.

Not unlike the enforcement of arbitral awards, the Convention does have pre-requisites for recognition. The prerequisites include the following: a written settlement agreement arising from a mediation which postdates the Convention; the dispute must have an international flavour — this means that parties have places of business in different States or the obligations are performed in a State different from where the parties have their places of business.

That said, fulfilment of the above-referenced prerequisites does not guarantee enforcement. Enforcement of a settlement agreement may be refused for various reasons to preserve the integrity of the settlement agreement. As such, where a party is incapacitated from entering into the settlement agreement or where the finality of the settlement agreement is in issue or where the settlement agreement is contrary to public policy, enforcement may be refused. Other considerations may also affect the enforceability of the settlement agreement; for instance, serious breaches by the mediator, the subject matter

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of the dispute not being capable of settlement by mediation or the underlying obligations having been fulfilled.

Whilst the Convention will facilitate mediation and the quick and effective enforcement of the settlement agreements achieved through the mediation process, it is relatively new and its efficacy is dependent on an increased number of member states ratifying the same, for international enforcement of mediated settlements. The United Kingdom is one of the latest states to signal its agreement to ratify the convention.

As with arbitrations, there will be teething problems; a few readily present themselves; the absence of a uniform set of procedural rules to regulate the process and what constitutes a mediated settlement. As with all such solutions, only time will tell how effective the Convention is in promoting mediation for international commercial disputes.

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