

Singapore Convention Series: How Does The Singapore Mediation Convention Affect International Dispute Resolution? ISDS Perspective

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Surya Kapoor (Georgetown University Law Center)

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"Does the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") apply to investor-state disputes?" This intriguing question was deliberated recently at George Washington University Law School by a star-studded panel comprising of the Hon'ble Judge Charles N. Brower (Twenty Essex Street Chambers, London), Ms. Frauke Nitschke (Legal Counsel, ICSID) and Mr. Michael Coffee (Attorney-Advisor, US State Department). The discussion was moderated by Ms. Chiara Giorgetti (Professor of Law and LLM faculty director, University of Richmond School of law). This post summarises the key points discussed.

Negotiations preceding the Convention

UNCITRAL has played an important role in bringing uniformity in international dispute resolution. Mr. Coffee Views expressed by Mr. Coffee are in his personal capacity, and do not necessarily reflect the views of the U.S. State Department. referred to the work done by UNCITRAL in the field of arbitration, including the landmark New York Convention Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and Mauritius Convention United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014. In the field of Conciliation, apart from the Singapore Convention and the 2018 Model law, he listed the 2002 Model Law on International Commercial Conciliation, and the 1980 Conciliation Rules as important UNCITRAL formulated international instruments. He referred to the article by Timothy Schnabel, titled *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*. Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, 19 Pepp. Disp. Resol. L.J. 1 (2019) Available at: <https://digitalcommons.pepperdine.edu/drlj/vol19/iss1/1/> as a near primary source and Convention 'gap-filler' by providing explanations of key provisions on the basis of the records of the negotiations. The Convention was proposed by United States and was finally drafted as well as adopted by the UNCITRAL within a short period of four years. During the negotiations, there was initial opposition from the European Union, which had expressed a preference for a soft law instrument over the Convention. The EU or any EU countries are noticeable absentees amongst the list of Convention signatories however he hopes that this will change in the future.

Singapore Convention- An overview

Ms. Giorgetti hailed the convention to be a success and gave a broad overview of the Convention. The Convention opened for signature on August 7, 2019, and already has 51 signatories. In order to come into force, the Convention needs to be ratified by a minimum of three states. The Convention was formulated with the main objectives of establishing a framework for international settlement agreements resulting from mediation and for promotion of mediation as a mainstream cross-border dispute resolution mechanism. At present, the enforcement of settlements arrived at in cross-border commercial disputes varies amongst different jurisdictions, some require filing a suit before a competent court to recognize and enforce it as a foreign judgment or treat the settlement as a foreign award, etc. On the other hand, the Singapore Convention provides for a common regime for direct enforcement of international settlements arrived at by mediation in all signatory states. In order to ensure timely enforcement, the Convention mandates the relevant competent authorities to act expeditiously on enforcement applications. Mr. Coffee believes that since the Singapore Convention is closely based on the New York Convention, the interpretations given to the provisions in the New York Convention can apply to the Singapore Convention mutatis mutandis.

Application of the Singapore Convention to investor-state disputes?

Judge Brower lauded the Convention as being a "great idea" for international dispute resolution. He pointed out that despite there being repeated references to "commercial relations" in the UN General Assembly Resolution, to "commercial disputes," "commercial practice," "commercial relationship," and "commercial parties" in the Preamble to the Convention, and to "commercial dispute" in Article 1 of the Convention, the word "commercial" is nowhere defined in the Convention. He referred to the article by Timothy Schnabel where Mr. Schnabel, who proposed and negotiated the Convention on behalf of the United States, enunciated that the term "commercial" in the Convention "could include thus at least some of the investor-state disputes in the areas of construction and natural resource extraction." Ibid p.22-23; supporting the view that at least those investor-state disputes which stem from contractual agreements may possibly be included within the purview of the Convention. Judge Brower raised but deliberately left open for a later discussion the question of whether this article and commentary therein can be used as a supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties ("VCLT") and if yes, what weight ought to be ascribed to these comments.

Judge Brower drew from the 2018 UNCITRAL Model Law On International Commercial Mediation And International Settlement Agreements Resulting From Mediation ("Model Law"), which was developed simultaneously along with the Singapore Convention, as pertinent to understand whether investor-state disputes were contemplated by the drafters of the Convention. The first footnote of the Model Law states that the term "commercial" should be given a wide interpretation and that it covers all disputes arising out of both contractual or non-contractual commercial relationships. It also states that commercial relationships include "investment" transactions. Further, the UNCITRAL Working Group II's proposal to limit the scope of the Singapore Convention to "commercial agreements between businesses only" A/CN.9/WG.II/WP.188, at 3. was not accepted by the delegates. He also referred to Annex E of the ICSID (Additional Facility) Mediation Rules, which confirms that the Singapore Convention will apply to settlements reached in the context of investment disputes. Proposals for Amendment of the ICSID Rules - Working Paper Volume 3, Annex E (Additional Facility) Mediation Rules ¶1318 (August 2, 2018). He concluded that there can be "agreement to disagree" and there is "room for interpretation" on the question of whether investor-state disputes are covered by the Singapore Convention.

Ms. Nitschke echoed the points made by Judge Brower and stressed that ICSID has taken into account the growing demand by the states for having a credible international forum for mediating its disputes. ICSID Conciliation (Additional Facility) Rules were the first set of rules applicable to investor-state mediation. Each ICSID mediator files a statement of independence and undergoes regular investor-state mediator training. The ICSID Mediation Rules have taken the Singapore Convention into consideration and ICSID settlements will also receive comparable enforceability.

Article 5 - Grounds for refusal of relief

Judge Brower pointed out Article 5(1)(e) and 5(1)(f) as being part of the five-issue compromise reached by the Working Group-II. It approved a five-issue compromise package in 2017 which included i) the absence of the word 'recognition' from the Convention, ii) exclusion of otherwise enforceable settlements; iii) unprecedented drafting of two instruments i.e. the convention and the model law together; iv) giving option to the states to make declarations under Art. 8; and lastly v) the convention would include mediator's misbehaviour (Article 5(1)(e) and (f)) amongst other Art. 5 grounds for refusal of enforcement. The applicable test for a serious breach of applicable standards under Article 5(1)(e) is an 'objective' rather than a 'subjective' test.

Absence of a Seat

In an international arbitration, "Seat" determines *inter alia* the courts within whose jurisdiction an arbitral award can be set-aside. The absence of a seat of mediation implied that a settlement agreement cannot be set aside in any jurisdiction. The refusal of enforcement of a settlement as being against public policy under Article 5(2)(a) in one jurisdiction, would encourage forum shopping to another jurisdiction which does not bar such enforcement.

Closing remarks

Judge Brower in his closing remarks raised two points. First, he highlighted the absence of a definition of "competent authority". He referred to the language "arbitral tribunal or any other competent authority" mentioned under Article 6 of the Singapore Convention to be very wide and including a "huissier de justice" (bailiff in common law jurisdictions) in certain civil law jurisdictions. The absence of a formal recognition requirement under the Convention makes it possible to not limit the competent authority to only Courts. Secondly, he raised the point of the effect of the recent *Achmea* decision, which gave exclusive jurisdiction over investment issues within the European community to the European Court of Justice(EJ), on the Singapore Convention. He said that it remains to be seen if the EJ would be averse to individual member states becoming parties to the Convention and seeking to apply its enforcement provisions in conjunction with an intra-EU enforcement.

Ms. Giorgetti rounded off the discussion by noting that the Singapore Convention on mediation caters to a long-felt need in international dispute resolution by providing a faster and cost-effective alternative to cross-border litigation and even arbitration. She anticipates that developments in international mediation and interpretations given to the Convention by various national courts will be keenly followed by the international arbitration community as well.

Conclusion

The discussion ended with a broad consensus that, when in force, the Singapore Convention can play a pivotal role in the settlement of investor-state disputes. It remains to be seen, however, if the Convention will prove to be a game-changer in times when the investor-state dispute settlement system is under fierce attack.