

# Kluwer Mediation Blog

## Singapore Convention Series – Harmonization of China’s Legal System with the Convention: Suggestions for the Implementation of the Convention in China (Part 1)

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On June 26, 2018, the United Nations Commission on International Trade Law (UNCITRAL) approved the final draft of the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Mediation Convention” or “the Convention”) at its fifty-first session. The Convention aims to promote international commercial mediation, and to establish a mechanism for the direct enforcement of mediated international commercial Settlement Agreements (“Settlement Agreements”). It is a landmark document in the history of mediation and is praised by the legal profession as the “New York Convention of Mediation”.

The Convention will be open for signature by countries on August 1, 2019. China’s current legal system needs to be effectively adapted to the Convention, to ensure successful enforcement of Settlement Agreements covered by the Convention in China. This article, the first of a two-part series, looks into potential problems of implementing the Convention in China and proposes corresponding solutions.

### **1. The Supreme People’s Court (“SPC”) should designate a body of the courts to be responsible for reviewing and ascertaining the content of Settlement Agreements**

According to Article 463 of the Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China and Article 18 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Judicial Enforcement of People’s Courts (for Trial Implementation), an effective legal instrument requested by a party for enforcement by the court must have clear and definite stipulations on the subjects of rights and obligations, and the objects of claims as well. In the practice of separating trials and enforcement by China’s courts, the enforcement division of the courts would only enforce effective legal instruments which contain definite provisions on claims and debts. It is common for the courts to refuse enforcing conditional debts in effective legal instruments. The content of a commercial settlement agreement is arguably more flexible and elastic than a judgment or an award. Therefore, obligations subject to conditions, time limits and concurrent or advance performance by the other party are likely to be more prevalent in settlement agreements than in judgements and awards. If a party relies on the Convention to seek direct enforcement of a settlement agreement, there will be a considerable number of unenforceable settlement agreements under China’s current institution of mandatory enforcement.

Therefore, it is necessary for the SPC to designate a trial body to review the content of the Settlement Agreements which the enforcing body finds to be indefinite. And the ascertained results can be used as a basis for subsequent enforcement procedures. The existing foreign-related commercial and maritime division of the courts (e.g. No.4 Civil Division and the International Commercial Court of the SPC) is an ideal reviewing body. Regarding the procedural arrangements, it is suggested that the provisions of the Convention should be complied with, under which the application for enforcement directly commences the enforcement procedure. If the enforcement division of the court considers it necessary to ascertain the content of the settlement agreement, it shall refer the case to the foreign-related commercial and maritime division to ascertain the content.

## **2. The parties should be allowed to file request for preservative measures in the course of applying for enforcement of Settlement Agreements**

Preservation in China is only applicable to litigation and arbitration cases conducted domestically. Because there is no specific provision on the preservation of property in the procedure of recognition and enforcement of foreign arbitral awards either in the New York Convention or relevant laws of China, regional courts hold different views on this type of preservation application. It is argued that property preservation requested by the parties during the judicial review of recognition and enforcement of foreign arbitral awards by the courts falls into the scope of international judicial assistance, and therefore should be considered based on international treaties China has concluded or joined, or reciprocal treatments between China and the country where the arbitration institution is located.

The Convention does not address the issue of preservation either. By reference to established rules in domestic litigation and arbitration, the SPC may allow the parties to file preservation requests when applying for enforcement of Settlement Agreements. This is not only in line with the principle of direct enforcement stipulated in Article 3.1 of the Convention, under which Settlement Agreements are presumed to be valid and enforceable, but also manifests China's pro-mediation stance and equal treatment of mediation, litigation and arbitration.

## **3. The SPC should provide a guide to the understanding and application of some provisions of the Convention**

For the Convention to gain a wider support, the Second Working Group of UNCITRAL ("Working Group") took the middle ground and vagueness is left in its drafting of some provisions of the Convention. As a result, the onus is on the relevant governmental agencies of the contracting states to interpret and implement those provisions. In the case of China, the SPC needs to take on this role by issuing relevant judicial interpretations.

*(1) Article 1 "Scope of Application": the Convention applies to the entire settlement agreement, including monetary and non-monetary claims*

When drafting Article 1, it was debated by the delegates whether the Convention should apply to non-monetary claims. The Working Group eventually decided not to exclude non-monetary claims from the scope of application and adopted an inclusive expression that the Convention applies to settlement agreements resulting from mediation. In practice, non-monetary claims are frequently seen in settlement agreements reached through mediation, and sometimes the parties are simultaneously entitled to claims on each other.

For example, a settlement agreement may provide that Party A should pay Party B a certain amount of money, and Party B will deliver specific items (such as a famous painting) to Party A. In reviewing the application for enforcement of settlement agreement, if a party's non-monetary claims, such as delivery of a famous painting, cannot be enforced because e.g. the painting has been destroyed, it is uncertain whether the court should enforce the other party's monetary claims. In this regard, the Supreme People's Court should provide further guidance in future judicial interpretations in order not to result in unfairness to any party.

*(2) Paragraph 2, Article 3 “General Principles”: invocation of Settlement Agreements in non-enforcement proceedings*

Paragraph 2, Article 3 of the Convention provides, “[i]f a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has been already resolved.”

This paragraph allows the parties to use settlement agreement as a defense to claims raised in non-enforcement proceedings. For instance, if a party raises a claim or request on an issue, the other party may invoke the settlement agreement to prove that the issue has been resolved. However, this provision is silent on the conditions and effect of invoking the settlement agreement. Therefore, the SPC is expected to specify the procedural prerequisites for the parties to invoke the settlement agreement in non-enforcement procedures and its consequent legal effects under Chinese laws in future judicial interpretations. Questions that need to be addressed include whether a settlement agreement without notarization or certification conforms to the form requirements stipulated in the Civil Procedure Law of China, and whether the invocation of settlement agreement has the effect of impeding the litigation proceedings, or conversely, its effect is not more than that of evidence.

*(3) Sub-paragraph 1(c), Article 5 “Grounds for refusing to grant relief”: the obligations in the settlement agreement are “not clear or comprehensible”*

When drafting the Convention, the delegates had a heated debate over whether “the obligations of the settlement agreement are unclear or incomprehensible” should be included as a ground for resisting enforcement. Those who are against inclusion suggested that this would give the competent authority an excessive amount of discretion. The Working Group eventually decided to retain this instance as a ground for refusal to grant relief and leave the determination of the clarity and comprehensibility of the obligations in the Settlement Agreements to the contracting parties. Therefore, the SPC should prescribe the standard for reviewing the content of settlement agreement.

The standard of review can be categorized as prima facie and interpretivism. Under the prima facie standard, so long as the settlement agreement is “unclear or incomprehensible” on the surface, the competent authority may refuse to grant relief. Whereas under the interpretivism standard, the competent authority may only refuse to grant relief when the content of a settlement agreement remains to be “unclear or incomprehensible” after efforts to interpret it having been made. Both standards are reasonable, but the SPC needs to make the standard clear in future judicial interpretation to ensure the consistency of the standard of review adopted by courts of all levels.

Later this month, the second article in this series will consider further potential problems of

implementing the Convention in China and propose corresponding solutions.


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