The Singapore Convention on Mediation: Australia's Options for Implementation

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Introduction

'Parties nominate, and engage in, mediation as a means of dispute resolution to reduce the costs of dispute resolution, to amicably settle disputes, and to preserve commercial relationships.'[1] Where mediation results in a settlement agreement, those agreements may be enforced in Australia as contracts (not reflected in consent orders) or as foreign judgments (reflected in consent orders). The process of recognising and enforcing commercial settlement agreements is viewed as costly and time-consuming. The United Nations Convention on International Settlement Agreements Resulting from Mediation ('the Singapore Convention on Mediation'), which came into force on 12 September 2020, could simplify and reduce the costs associated with the recognition and enforcement of international mediated settlement agreements (iMSAs) in Australia—agreements that are already enforceable under our law.

Australia became a signatory of the Singapore Convention on Mediation on 10 September 2021. In a subsequent press release, the Australian Government said that signing the Convention affirmed 'its commitment to mediation as a method of international commercial dispute resolution'.[2] Describing the signing as a 'significant milestone for Australia', Attorney-General Michaelia Cash remarked that 'access to enforceable and effective mediation should reduce the time and cost of dispute resolution, thereby enhancing access to justice for individuals and businesses in Australia'.[3] Minister for Foreign Affairs Marise Payne commented that the Convention 'ensures that privately mediated agreements are able to be readily recognised by law'.[4]

Signing a Convention is, as we know, only the beginning. Australia must consider how it might accede to the Singapore Convention on Mediation—if at all. If implemented, the Singapore Convention would introduce major change to Australian law. Perhaps most significantly, it would give a settlement agreement (not reflected in consent orders) preclusive effect—it would preclude the parties from contesting in an Australian court the issues addressed in that agreement. I begin my presentation with further background on the Convention and its complementary instrument—the UNCITRAL Model Law on International Commercial Mediation and International Settlement

[1] Mary Keyes et al, Submission to the Attorney-General's Department, *Singapore Convention on Mediation* (12 October 2020) 1.
[2] <https://ministers.ag.gov.au/media-centre/australia-signs-singapore-convention-mediation-30-09-2021>.
[3] Ibid.
[4] Ibid.

Agreements Resulting from Mediation, 2018 (or the 'Model Law'). I will outline the key features of the Singapore Convention and the Model Law to give attendees who may know nothing or very little about either instrument an opportunity to find out more. But, in doing so, I will also seek to highlight some limitations of the Singapore Convention from a private international law perspective. I conclude by considering the implementation of the Singapore Convention, the Model Law or both in Australia.

The Singapore Convention on Mediation

The Singapore Convention on Mediation is a multilateral treaty that provides parties with a harmonised legal framework for the cross-border recognition and enforcement of settlement agreements resulting from mediation in international commercial disputes. Described by Singapore PM Lee Hsien Loon as the 'missing third piece' in international dispute resolution,[5] the Singapore Convention on Mediation complements the New York Convention (foreign arbitral awards) and the HCCH Convention on Choice of Law Agreements (foreign court judgments).[6] It would also, in my view, square with the Hague Principles of Choice of Law in International Commercial Contracts and the Hague Judgments Convention. Under the Singapore Convention, a competent authority (for example, the courts) of a party to the Convention would be responsible for handling applications to enforce an international mediated settlement agreement ('iMSA') or to allow a party to invoke an iMSA to prove the matter has already been resolved by it.

The Singapore Convention was negotiated at the United Nations Commission on International Trade Law ('UNCITRAL'). Following three years of negotiations, the Convention was finalised in June 2018 concurrently with an update to the Model Law, which was adopted. The Singapore Convention was adopted by the UN General Assembly on 20 December 2018. A signing ceremony was held in Singapore on 7 August 2019: 70 countries attended and 46 signed the Convention. Major trading nations were among the first signatories, including the United States of America, China, India, and South Korea. The Convention entered into force on 12 September 2020 (six months after the third instrument of ratification was deposited in accordance with Article 14(1)). As of 25 February 2022, 55 countries have signed the Singapore Convention, out of which nine countries have ratified or approved it.

Scope

To come within the scope of the Singapore Convention, a settlement agreement must be 'mediated', 'international', and 'commercial'.

The Convention does not apply to 'agreements to mediate' nor does it include settlement agreements: (1) that have been approved by a court or concluded in the course of proceedings before a court; (2) that are enforceable as a judgment in the State of that court; and (3) settlement agreements that have been recorded and are enforceable as an arbitrable award.[7] These exclusions

[5] <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>.
[6] <https://imimediation.org/2020/09/11/the-singapore-convention-from-a-blizzard-a-convention-blooms/>.
[7] Singapore Convention, Article 1(3)(a)–(b)).

ensure that the Singapore Convention functions as a 'gap filler'—it is intended to operate alongside the Hague Choice of Court Convention and the New York Convention.[8]

'Mediation'
'Mediation' is defined in Article 2(3) to mean:

> ***a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.***

This draws on the definition of mediation found in the Model Law.[9] Components of this broad definition of 'mediation' warrant further elaboration including: 'amicable settlement', 'assistance of third persons', and 'no authority to impose a solution'.

The first point to observe is that the expression used to describe the process is irrelevant. So, the definition might be applied to a process which the parties did not describe as or understand to be 'mediation' (eg, 'conciliation' or some other dispute resolution process).[10] Moreover, how the dispute resolution process began does not appear to matter.[11] Other important points to note: the third party who assisted must lack the authority to impose a solution; it only applies to 'amicable' dispute resolution methods; and the settlement must 'result' from the mediation.

'International'
A settlement agreement will be 'international' if, at the time of its conclusion:[12]

> ***At least two parties to the settlement agreement have their places of business in different countries, or***
>
> ***The country in which the parties to the settlement agreement have their places of business is different from either:***
>
> ***The country in which a substantial part of the obligations under the settlement agreement is performed; or***
>
> ***The country with which the subject matter of the settlement agreement is most closely connected.***

[8] Shouyu Chong and Felix Steffek, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 31 *Singapore Academy of Law Journal* 448, 459.
[9] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 *Pepperdine Dispute Resolution Law Journal* 1, 15.
[10] Ibid.
[11] Ibid 16.
[12] Singapore Convention, Article

If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement. If a party has no place of business, habitual residence is the relevant connecting factor.

'Commercial'

The Singapore Convention embraces commercial disputes only. 'Commercial' is not defined in the Singapore Convention, but assistance is drawn from the illustrative list in footnote 1 of the Model Law and by what is expressly excluded from the Convention's scope. Consumer disputes 'for personal, family or household purposes' and those involving 'family, inheritance, or employment law' are excluded.[13] Agreements involving government entities fall within the scope of the Singapore Convention; however, contracting parties may declare that its government is not bound under Article 8(1)(a).

Mechanisms for recognition and enforcement

Article 3 of the Singapore Convention provides a recognition and enforcement mechanism for iMSAs. The Convention consciously avoids the term 'recognition'—using 'invocation' instead[14]—to avoid doubts. A mediated settlement may be used as a sword or a shield:[15]

> ***Each party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.***
>
> ***If 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 already been resolved.***

If enforcement is needed, the mediated settlement may be used as a 'sword'. The parties may commence proceedings to directly enforce the mediated settlement in any contracting state. If recognition is needed, the mediated settlement may be used as a 'shield' in the courts of signatory states—for example, as a defence or in dismissal proceedings to prove that the matter has been resolved in the agreement.[16]

From a private international law perspective, the Convention clearly expands the number of instruments available for recognition and enforcement. There are no jurisdictional rules set out in the Convention.

A mediated settlement falling within the scope of the Convention may be enforced by fulfilling the conditions set out in Article 4. The mediated settlement must be written, signed by the parties, and accompanied by evidence that it resulted from mediation.[17] The agreement is written 'if its content is recorded in any form … [including] an electronic communication if the information

[13] Singapore Convention, Article 1(2).
[14] Chong and Steffek (n 8) 465–6.
[15] Schnabel (n 9) 36.
[16] Ibid 35; Chong and Steffek (n 8) 466.
[17] Singapore Convention, Article 4(1).

contained therein is accessible so as to be useable for subsequent reference'.[18] The evidence needed to prove the agreement resulted from mediation includes: the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; and any other evidence acceptable to the competent authority.[19] This list is not exhaustive.[20] The signature requirement may be satisfied through electronic communication.[21]

Grounds of Refusal

Article 5 provides an exhaustive list of grounds upon which a court *may* refuse to recognise or enforce a mediated settlement. The grounds are permissive and largely mirror Article V of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration. The grounds for refusal may be grouped into four categories: contract (of which there are seven grounds);[22] mediator (mis)conduct (of which there are two grounds);[23] public policy;[24] and non-mediability.[25] A court may, on its own initiative, refuse to enforce a mediated settlement on the last two grounds.

While the grounds for refusal in article 5 are largely appropriate, the language is arguably less than ideal in places. Take article 5(1)(b)(i) as an example:

> ***(b) The settlement agreement sought to be relied upon:***
>
> ***(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4.***

In a joint submission to the Attorney-General's Department in late 2020, my co-authors (Mary Keyes, Michael Douglas, Brooke Marshall) and I considered that the language of article 5(1)(b)(i) 'provides an opportunity for parties to contest recognition'.[26] In short, the Singapore Convention fails to provide criteria for determining the applicable law leaving it up to the competent authority—the courts—to select the applicable law. While the applicable law to determine whether the settlement agreement is 'null and void, inoperative or incapable of being performed' is 'the law to which the parties have validly subjected it'—identical to the wording of the New York Convention that refers to an express choice of law[27]—uncertainty is introduced where the parties have not expressed a choice of law. Where the parties have not expressed a choice of law, the Singapore Convention requires the competent authority—the courts—to apply the law which it deems applicable. In our submission, we proposed that Australia might 'include in the implementing legislation a clearer rule about the applicable law to determine the substantive

[18] Ibid, Article 2(2)(2).
[19] Ibid, Article 4(1)(b).
[20] Ibid, Article 4(1)(b)(iv).
[21] Ibid, Article 4(2).
[22] Ibid, Article 5(1)(a)–(d).
[23] Ibid, Article 5(1)(e).
[24] Ibid, Article 5(2)(a).
[25] Ibid, Article 5(2)(b).
[26] Keyes et al (n 1) 4.
[27] Ibid.

validity of the settlement agreement (eg, the objective proper law of the settlement agreement)'[28] but recognised that this may not be desirable in promoting a consistent interpretation of the Convention. Stute and Wansac also expressed a similar view recently and drew attention to another ambiguity: how the defence of incapacity in article 5(1)(a) omits the phrase 'under the law applicable to them' included in the New York Convention.[29]

No 'setting-aside' mechanism

Unlike the New York Convention, Singapore Convention does not have a set-aside mechanism. Article V(1)(e) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the party against whom it is invoked furnishes to the competent authority proof that: '[t]he award… has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'[30] A situs-of-mediation concept, analogous to the situs-of-arbitration concept in the New York Convention, was a deliberate omission from the Singapore Convention. Proponents of this omission argue that the place of mediation is 'not as a relevant' compared to the situs of litigation or arbitration and that an MSA need not have a res judicata effect in the country where it was concluded to be enforced internationally.[31] Yet, it must be at the very least prudent for parties to specify an applicable law to govern their mediated settlement agreement.[32] Article 6 may offer a workaround.

Lis Pendens

Lis pendens is incorporated in Article 6, which addresses the issue of parallel applications or claims.

> ***If an application or a claim relating to a settlement agreement has been made to a court, arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper adjourn the decision and may also, on the request of a party, order the other party to give suitable security.***

The effect of this provision is to allow courts in their discretion to adjourn proceedings relating to the enforcement of settlement agreement because of parallel or related proceedings elsewhere.

Reservations

Two reservations are set out in Article 8. Under Article 8(1)(a), contracting parties may provide that the Convention does not apply to iMSAs to which the government or one of its government agencies is a party. The second reservation is an opt-in regime whereby the parties to an iMSA

[28] Ibid.
[29] David J Stute and Alexis N Wansac, 'The Singapore Convention: Not Much There, There' (2021) 3(1) *ITA in Review* 32, 39.
[30] Ibid, 44.
[31] Haris Meidanis, 'International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements' (2019) 85(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 49, 53–4.
[32] Stute and Wansac (n 32) 46.

must expressly agree in their settlement agreement to the Singapore Convention's application.[33] From an Australian perspective, neither of the reservations appear to be necessary.

Key features of the Model Law 2018

The Model Law 2018 is designed to provide a template for domestic legislation implementing the Singapore Convention. It updates the Model Law on International Commercial Conciliation adopted in 2002. A new section (section 3) on international settlement agreements and their enforcement Convention is included in the updated Model Law, which aligns with the Singapore Convention. The term 'conciliation' in the 2002 Model Law has been replaced with 'mediation'. Procedural aspects of mediation are dealt with in section 2 of the Model Law.

Where to from here? Australia's options for implementation

The way in which the Singapore Convention will be implemented in Australia is anyone's guess. In November 2016, Federal Parliament's Joint Standing Committee on Treaties recommended Australia's accession to the Hague Choice of Court Convention. The Convention was to be implemented through an *International Civil Law Act*.

So, there is a possibility that the Singapore Convention may be implemented domestically as a standalone Act or—if this is still on the cards—as part of an *International Civil Law Act*. There is also the possibility that the Singapore Convention may not be implemented at all.

Concluding remarks

Earlier in this presentation, I remarked that signing the Singapore Convention is only the beginning for Australia. That is true if the recent past is any guide. Australian Government proposals to implement the Hague Convention on Choice of Court Agreements, the Hague Principles of Choice of Law in International Commercial Contracts, and the Hague Judgments Convention by way of an *International Civil Law Act* have been in the offing since November 2016. Despite being eagerly anticipated by private international lawyers since 2017,[34] a Commonwealth *International Civil Law Act* has not yet emerged. The Australian Government can—and, indeed, should—correct this situation. If the Australian Government is committed to implementing the Singapore Convention on Mediation soon, it should redouble its efforts to accede to the Hague Choice of Court Convention, the Hague Principles of Choice of Law in International Commercial Contracts, and

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[33] Singapore Convention, Article 8(1)(a).

[34] See Sarah McKibbin, 'Book Reviews: Commercial Issues in Private International Law: A Common Law Perspective' (2020) 39(1) *University of Queensland Law Journal* 147, 150 (nn 20–4); 'National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements' [2016] ATNIA 7; Yuko Nishitani, 'Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia' (2016) 59 *Japanese Yearbook of International Law* 300; Michael Douglas, 'Will Australia Accede to the Hague Convention on Choice of Court Agreements?' (2017) 17 *Macquarie Law Journal* 148, 148; Michael Douglas, 'Choice of Court Agreements under an *International Civil Law Act*' (2018) 34(3) *Journal of Contract Law* 186, 187; Michael Douglas and Nicholas Loadsman, 'The Impact of the Hague Principles on Choice of Law in International Commercial Contracts' (2018) 19(1) *Melbourne Journal of International Law* 1, 1–2; Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after Valve' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 202; Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the Hague Convention on Choice of Court Agreements' (2017) 41(1) *Melbourne University Law Review* 246, 248; Michael Douglas et al, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420, 433, 436 n 4; P Sooksripaisarnkit, 'CISG's Place in the Content of the Anticipated *International Civil Law Act* in Australia', in P Sooksripaisarnkit and SR Garmella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 115.

the Hague Judgments Convention as well. That would certainly transform Australia's international dispute resolution framework.