Singapore Convention: The next tool in resolving international disputes

Wilson Chan is a barrister in Nine Wentworth Chambers and in Hong Kong, SAR. **Evatt Styles** is an Accredited Specialist, Dispute Resolution, & Commercial Litigation at Carroll & O'Dea.

Snapshot

- Given the ongoing impact of the COVID-19 pandemic on supply chains and business liquidity, contract breaches are likely to occur.
- The *Singapore Convention* can provide Australians conducting international business with the opportunity to engage in amicable commercial discussions, and hold counterparties to account for agreed outcomes. It also provides a potentially cheaper, faster and more flexible alternative to international arbitration or litigation.
- Choice of mediator is vital to an enforceable agreement.

The *United Nations Convention on International Settlement Agreements Resulting from Mediation* (the '***Singapore Convention***') came into force on 12 September 2020. At the time of writing, there are 53 participant States, among them China and the United States. Australia is not yet a party, however given the *Convention* does not operate on the basis of reciprocity between States, it is still relevant to Australian businesses engaging in international trade and commerce with other participant States or in other participant States.

International dispute resolution

Previously arbitration was the only alternative dispute resolution ('**ADR**') method that could be easily enforced internationally. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('***New York Convention***'), allows parties to easily enforce their arbitral award in jurisdictions which are contracting States.

The *Singapore Convention* now provides another tool to assist international dispute resolution. It recognises the value of mediation as a method of amicably settling disputes (therefore helping preserve the relationship) arising in the context of international commercial relations. It has arisen in response to the increasing use of mediation in international commercial practice as an alternative to litigation (*Singapore Convention*, Preamble). Parties who resolve international disputes through mediation can have their award recognised and enforced in any State that is a signatory to the Convention. This provides an established framework by which mediated settlement agreements can be recognised and enforced around the globe. Together with that framework comes certainty of outcome, a cost-effective method of dispute resolution, ease of recognition and enforcement.

Benefits for Australian businesses

The *Singapore Convention* provides Australians conducting international business with the opportunity to engage in amicable commercial discussions and, critically, to hold participants to account for agreed outcomes. In the present economic climate, breaches of contract are likely as a result of the COVID-19 pandemic and the ongoing effect on supply chains and business liquidity. The *Singapore Convention* will allow parties to resolve those disputes amicably, provide a flexible ADR process during unpredictable times and, importantly, to preserve relationships into the future.

Uniform dispute resolution framework

The *Singapore Convention* provides a unified framework by which parties can resolve their disputes. Australians conducting business with counterparties from different legal systems and traditions can now have confidence that mediation, with all its benefits, is viable and enforceable in the international landscape.

Ease of application

For the *New York Convention* to apply, the parties must have agreed to arbitration. That may be done before or after the discovery of a dispute. Generally, it is harder to obtain such consent after a dispute arises because the party in the wrong would likely disagree. On the other hand, it may be easier to obtain the counterparty's consent to mediation after the dispute arises (even if they may be in the wrong) as the process is perceived as a collaborative.

Time

Mediations are typically easier to organsie and quicker than other forms of ADR. Other forms of ADR closer to the litigation model will attract more formality and documentary preparation. Mediation is relatively inexpensive and can provide a timely outcome in a quickly evolving commercial landscape.

Costs

The *Singapore Convention* presents a cheaper alternative to litigation and arbitration. Like the *New York Convention*, it is likely to save the parties the full cost of litigating in each jurisdiction where the counterparty's assets are located. However, it is likely that the costs of mediation will be lower than the alternative of arbitration. This will represent savings to the client on the costs of preparing evidence and retaining representation.

Application

The *Singapore Convention* only applies to an agreement:

a. resulting from mediation;

b. concluded in writing;

c. in relation to a commercial dispute; and

d. international in nature (Art 1, cl 1).

The *Singapore Convention* is excluded where:

a. one party is a consumer for personal, family or household purposes (Art 1, cl 2(a));

b. the agreement relates to family, inheritance or employment law (Art 1, cl 2(b));

c. the agreement is enforceable by a court and has been:
   - approved by a court; or
   - concluded in the course of proceedings before a court (Art 1, cl 3(a)); or

d. agreements recorded and enforceable as arbitral awards (Art 1, cl 3(b)).

'Mediation' is defined under Art 2, cl 3 as a process by which parties reach an amicable settlement with the assistance of a third person(s) lacking the authority to impose a solution on the parties. This definition is unsurprising but it raises the question whether a hybrid form of ADR such as med-arb or arb-med (where the mediator may ultimately determine unresolved issues as an arbitrator) will be covered.

A settlement agreement is 'international' in nature if the parties are located in different States (Art 1, cl 1(a)). It may also be 'international' if the parties are located in the *same* State but where the subject matter of the settlement agreement is closely connected to, or the obligations are to be performed in, another State. As such, the Singapore Convention could be applied to disputes between purely Australian parties doing business overseas.

The exclusion of disputes which have reached the domestic courts (Art 1, cl 3(a)) does have the consequence that parties should think carefully before commencing court proceedings. Once an originating process has been filed then the dispute will be in the court. Any mediated outcome during those proceedings, whether by private or court-annexed mediation, will fall outside the *Singapore Convention*. This issue will be most acute where parties are forced to apply for an interim injunction or Mareva orders due to the perceived objective risk of harm should the status quo not be preserved.

Evidentiary requirements

A party seeking to enforce a mediated agreement must prove that:

a. the settlement agreement was signed by the parties (Art 4, cl 1(a)); and

b. it was brought about by a mediation (Art 4, cl 1(b)).

Clause 1(b) sets out the manner by which that may be proved but the easiest method will be by the mediator's signature on the agreement (Art 4, cl 1(b)(i)). Therefore, it becomes important to ensure that the outcome is reduced to writing and signed by all parties including the mediator.

Grounds for refusing relief

If a party wishes to avoid of the settlement agreement, they may seek to rely on limited grounds set out in Article 5. The burden of proving a ground rests on the party resisting enforcement. A number of those grounds are what we would recognise in common law as matters going to capacity and certainty. The substantive principles governing those areas are beyond the scope of this article.

What is unique about the *Singapore Convention* is that under Art 5 cl (1)(e) and (f), relief may be refused where the mediator committed a serious breach of the applicable mediator standards, or failed to disclose circumstances raising justifiable doubts as to their impartiality or independence. Therefore, the choice of mediator will be an important factor in ensuring any settlement agreement holds. The mediator's skill and conduct is directly relevant to the ultimate enforceability of any agreement.

Seat of the mediation

Article 5, clause 1(b)(i) makes reference to 'the law to which the parties have validly subjected [the settlement agreement]' and, where none is indicated, 'the law deemed applicable'. Similar words are found in Art V(1)(a), (d) and (e) of the *New York Convention*. In the context of arbitration, this has been interpreted to be a reference to the 'seat' of the arbitration, i.e. the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated. The seat then sets 'a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration' (*Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 at 130). That body of rules (or *lex arbitri*) governs the form, validity and finality of the award.

It is likely that a similar interpretation will be applied to the *Singapore Convention* and this means it will be necessary to identify a 'seat' to the mediation. This may have consequences in the future when questions of form, validity and enforceability of any resultant settlement agreement become an issue. Therefore, when drafting a mediation dispute resolution clause, careful consideration should be given to the 'seat' of the mediation.

A new way forward

The *Singapore Convention* makes mediation a viable, cost effective, flexible and collaborative method for resolving international disputes. It provides another tool in addition to arbitration under the *New York Convention*, or litigation. While it is straightforward to apply the *Singapore Convention*, care must be taken to ensure that the mediated outcome is enforceable through suitable drafting, selection of an appropriate mediator, and securing documentary proof of agreement. **LSJ**