United Nations Convention on International Settlement Agreements Resulting from Mediation

Australian Government | Attorney-General's Department

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"Singapore Convention on Mediation"

Submission by Jo Delaney (Baker McKenzie) and Ana Stanič (E&A Law)

1. Introduction

1.1 The Australian Government is seeking submissions in relation to law and policy matters raised by the Singapore Convention on Mediation (**Singapore Convention**), as outlined in the Public Consultation Paper issued by the Attorney-General's Department on 12 October 2020.

1.2 In this submission, we consider:

(a) whether Australia should become a Party to the Singapore Convention;

(b) the advantages and disadvantages posed by Australia's prospective involvement;

(c) any reservations that should be made;

(d) our views on the Singapore Convention's broad definition of mediation; and

(e) our views on the grounds for refusing to enforce a mediated settlement agreement.

1.3 We trust that this submission provides the Attorney-General's Department with another perspective on the benefits and drawbacks of Australia becoming a Party to the Singapore Convention. We welcome the opportunity to discuss these views with you further.

2. Should Australia become a Party to the Singapore Convention?

2.1 Yes, Australia should become a party to the Singapore Convention. The Convention is intended to facilitate the enforcement of settlement agreements that have been entered into with the assistance of mediation.

2.2 At the moment, if two parties enter into a settlement agreement following a mediation and one of the parties does not comply with its obligations thereunder, the other party must seek to enforce the settlement agreement through the dispute resolution clause (if there is a dispute resolution clause) in the settlement agreement. For example, the parties may have agreed that disputes arising under the settlement agreement are to be resolved through court proceedings in a particular country or by arbitral proceedings. In other words, the party seeking enforcement is required to commence court proceedings or arbitration.

2.3 Enforcement of the settlement agreement through the agreed dispute resolution process is relatively straightforward when all of the parties and the enforcement process are in the same jurisdiction. For example, the settlement agreement may be enforced by the courts in that jurisdiction and the judgment may be executed (if required) against assets located in that jurisdiction.

2.4 However, the enforcement process is more complex for cross-border settlement agreements. The parties may agree to court proceedings in one jurisdiction but if the assets are located in one or more jurisdictions, the judgment of the court will need to be in enforced in one or more countries. Enforcement of the court's judgment may not be possible in some jurisdictions. Or

if parties have agreed to enforcement through arbitration, then an arbitral award must be first issued before it can be enforced in the courts where the assets are located (pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**)).

2.5 Both of these processes may involve substantial time and costs, thereby delaying the ultimate remedy to the party seeking enforcement. These potential enforcement issues may discourage parties from agreeing to try to resolve their dispute by mediation in the first place.

3. Advantages of the Singapore Convention

3.1 We do not have any concerns about Australia becoming a party to the Singapore Convention. Nonetheless, we thought it would be helpful if we set out some of the advantages and disadvantages of the Convention.

3.2 Mediation is a more time and cost-efficient process for resolving disputes. As the process facilitates a settlement agreement, it often results in the relationship between the parties being preserved.

3.3 The key benefit of the Singapore Convention is that it provides a process for the direct enforcement of a cross border settlement agreement between parties resulting from mediation. The Convention establishes a uniform framework, allowing for a standardised approach to enforcing settlement agreements. This in turn provides more certainty and predictability that a settlement agreement will be enforced in States that are party to the Convention. It also encourages parties involved in cross-border projects and transactions to consider mediation as part of their dispute resolution toolkit. By reducing risks and costs associated with cross-border transactions, it will furthermore encourage cross-border trade.

3.4 By providing a streamlined and effective process for the direct enforcement of cross border settlement agreements, it also allows for increased efficiency of judicial resources by encouraging parties to resolve their cross-border commercial disputes outside of court.

3.5 The Convention provides that a settlement agreement may be enforced directly by the courts of a State party thereto. This allows the party seeking enforcement to apply directly to the courts of the State where the assets of the other party are located, avoiding the need to commence multiple court and/or arbitration proceedings.

3.6 The Convention will only apply where the settlement agreement:

- is in writing;
- results from a mediation;
- is an agreement between two or more parties who have their place of business in different States; and
- the place of business of each party to the agreement is in a State that has acceded to or ratified the Convention.

3.7 The Convention will not apply to settlement agreements:

- relating to consumer transactions nor to family, inheritance or employment law;
- that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgment in the State of that court; or

- that have been recorded and are enforceable as an arbitral award.

3.8 The enforcement procedure involves the party seeking enforcement to provide to the relevant authority in the State where enforcement is sought:

- a copy of the signed settlement agreement; and
- evidence that the settlement agreement resulted from mediation (e.g. the mediator's signature on the settlement agreement or a document signed by the mediator confirming that there was a mediation).

3.9 The relevant authority is to "act expeditiously" in considering an enforcement application.

4. Disadvantages of the Singapore Convention

4.1 There are limited disadvantages to Australia becoming a party to the Singapore Convention.

4.2 The Singapore Convention does not require reciprocity. This means that a settlement agreement may be enforced in any State that is party thereto.

4.3 Hence, Australian businesses will need to consider whether or not a settlement agreement that they enter into during a mediation is going to be enforceable in a State that is party to the Singapore Convention, irrespective of whether Australia is a party to the Singapore Convention.

4.4 This is one additional matter on which Australian businesses will need legal advice. However, this issue can be considered at the same time that the disputes resolution provisions in the settlement agreement are being drafted and negotiated.

4.5 A way to minimise the risk of Australian businesses in the initial years of the Convention not being aware of its terms or until there is greater clarity regarding the approach States parties to the Convention will take concerning the enforcement of settlement agreements is for Australia to adopt the reservation in Article 8(1)(b) of the Singapore Convention. This will mean that the Convention will only apply to settlement agreements where the parties to the settlement agreement have expressly agreed to the application of the Convention.

4.6 If Australia does not adopt the reservation in Article 8(1)(b), parties may wish to consider excluding the application of the Singapore Convention in their settlement agreements if they have concerns about how the Convention may be applied by particular courts.

4.7 There will also be some uncertainty as to:

(a) how the Singapore Convention will be applied by States that are a party;

(b) how and whether they will enforce a settlement agreement;

(c) how the grounds for refusal of enforcement of a settlement agreement will be interpreted by the courts; and

(d) whether the enforcement process will be effected by a State's reservations to the Convention, depending on the timing of the State's ratification.

4.8 For example, a State's reservation to the Convention can be reviewed and considered at the time the parties enter into their settlement agreement. However, if a State ratifies the Convention after the settlement agreement is entered into then there may be some uncertainty about the impact of any reservations made by that State.

4.9 Some of these uncertainties will diminish over time as more States ratify the Convention, States and parties become familiar with the Convention and jurisprudence around enforcement of the Convention develops.

4.10 These uncertainties will arise regardless of whether or not Australia is a party to the Convention.

5. Reservations

5.1 We note that reservations may be made by a State in accordance with Article 8 of the Singapore Convention.

5.2 As indicated above, we suggest that Australia make the reservation as per Article 8(1)(b) that is to say that the Convention shall apply "only to the extent that the parties to the settlement agreement have agreed to the application of the Convention". This reservation ensures that enforcement of settlement agreements against Australian companies in Australian courts can only be pursued by foreign companies in respect of settlement agreements who contain an express opt in provision.

5.3 Adopting this reservation will assist Australian businesses who are not aware of the adoption of the Singapore Convention and thus its potential application to settlement agreements. This may prevent such businesses from discovering after they have entered into a settlement agreement that the agreement may be enforced under the Convention in any State party to it around the world.

5.4 In our view, there is no need for Australia to make the reservation under Article 8(1)(a) which provides that the Convention shall not apply "to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration".

5.5 Government entities are often parties to contracts in Australia, such as contracts relating to infrastructure development. If there are foreign parties to those contracts then the parties (including the government parties) may want settlement agreements to be subject to the Singapore Convention in order to assist with effective enforcement of such agreements.

5.6 The adoption of the reservation as per Article 8(1)(b) will protect such government entities as well by requiring an express opt in. We believe this will provide government agencies with the needed flexibility and discretion to on an *ad hoc* basis determine whether mediation is an appropriate mechanism for resolving a specific dispute.

6. Definition of "mediation"

6.1 We believe that a broad definition of mediation as per Article 2(3) in the Convention is necessary to capture all forms of settlement agreement agreed between the parties which are facilitated by a third party and regardless of the setting.

7. Grounds for refusing enforcement of a settlement agreement

7.1 The Singapore Convention sets out limited grounds on which a mediated settlement agreement may not be enforced:

(a) where a party to the settlement agreement was under some incapacity;

(b) the settlement agreement is null and void, inoperative or incapable of being performed;

(c) the settlement agreement is not binding or is not final, according to its terms;

(d) the settlement agreement has been subsequently modified;

(e) the obligations under the settlement agreement have been performed or are not clear and comprehensible;

(f) granting relief would be contrary to the terms of the settlement agreement;

(g) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement;

(h) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement;

(i) granting relief would be contrary to the public policy of that State; and

(j) the subject matter of the dispute is not capable of settlement by mediation under the law of that State.

7.2 These grounds are similar to the grounds for refusal of enforcement of an arbitral award under the New York Convention. They are very narrow, limited grounds with the burden of proof resting on the party refusing enforcement.

7.3 It is anticipated that, as with the exceptions to enforcement of an arbitral award under the New York Convention, courts that are supportive of the Singapore Convention will adopt a strict interpretation of these exceptions. This means that it is likely to be difficult for a party to demonstrate that enforcement of a settlement agreement should be refused. The discretion granted to courts on whether or not to refuse enforcement further emphasises this pro-enforcement approach.

7.4 Importantly, we note that the Australian courts will have discretion as to whether or not to refuse enforcement, including on the important ground of Australian public policy, thereby providing additional security to Australian business in respect of settlement agreements concluded in another State party to the Convention. The courts may give due consideration to the circumstances in which it is appropriate to exercise this discretion.

8. Conclusion

8.1 On balance, our view is that Australia should become a party to the Singapore Convention. The Convention is a valuable contribution to a harmonised dispute resolution framework for cross border contracts. By facilitating the cost and time effective resolution of cross-border disputes, the Convention will also encourage and support more cross-border trade and transactions.

About the Authors

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Jo is a Partner at Baker & McKenzie in Sydney with more than 20 years experience in the resolution of cross-border disputes.

Jo has experience of mediation, expert determinations, arbitration and court proceedings. She has been involved in commercial, construction and investment arbitrations under the ICC, LCIA, SIAC, AAA, UNCITRAL and ICSID arbitration rules. That experience covers a diverse range of industries, including energy, resources and infrastructure, general construction and telecommunications and information technology.

Jo is one of Australia's members of the ICC Court of Arbitration and the ICC Taskforce on Climate Change Related Disputes. She is also a member of CIArb (Australia branch) Council, CIArb Practice and Standards Committee, ACICA Practice and Procedures Committee, The Pledge Steering Committee and the ILA Management Committee. Jo regularly publishes and gives lectures and presentations.

Jo has an Arts/Law degree from UNSW and a LLM from Cambridge University.

Ana Stanič

Ana Stanič, an Australian, English and (since Brexit also Irish lawyer), has over 25 years of experience of advising States, companies and international institutions on matters of energy law, EU law and international law with specific emphasis on dispute resolution.

She has been appointed as an arbitrator in ICC and SCC arbitrations and regularly represents States and companies in international commercial arbitrations and investment treaty arbitrations. She also advises States on inter-state disputes including before Court of Justice of the European Union. As a member of the Slovenian government she negotiated 10 Bilateral Investment Treaties and Free Trade Agreements.

Ana is an Australian nominated member of the ICC Commission on Arbitration and ADR. Since August 2019 she is a member of the Permanent Court of Arbitration in The Hague.

Ana is a Commerce/Law Graduate of UNSW and has an LLM from Cambridge University.