Kluwer Arbitration Blog

Is Singapore Convention to Mediation what New York Convention is to Arbitration?

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If the number of signatories at the launch of a convention is any measure of success, then the Singapore Convention on Mediation (Singapore Convention) had close to five times the signatories as the New York Convention (NYC) which had 10 signatories (by the time the NYC came into force there were 24 signatories). The NYC was signed in 1958, a different world than today. Therefore, drawing parlance between the two conventions based on the number of signatories on the signing date must not be considered an indication of the future success of the Singapore Convention.

The signing ceremony of the Singapore Convention warrants a preliminary dialogue on its ability to break the hegemony of the NYC. This piece is not a clause by clause semantical comparison between the two conventions. Rather, it largely discusses how the Singapore Convention may have to undergo a hiatus due to a combination of factors stemming out of the NYC.

The first factor is the all-encompassing nature of the NYC. Several dispute resolution tools can bask in the NYC's framework. Any settlement by way of mediation, negotiation and expert determination can be confirmed by an arbitral tribunal as a settlement award enforceable under the NYC. Similarly, an arbitration award can be the result of other hybrid procedures such as med-arb and arb-med-arb. As an example, med-arb enables the parties to secure an arbitral award reflecting their settlement on a few issues and the tribunal's decision on the remaining issues, all under the framework of the NYC. Similarly, arb-med-arb enables the parties to filter issues by way of arbitration and then mediate those issues while pausing the arbitration proceedings. If the mediation is successful the parties return to the tribunal to pass a settlement award. If the mediation is unsuccessful, they resume the arbitration from where they had paused.

The limited application of the Singapore Convention could be a reason for its delay to gather steam. Unlike the NYC, the Singapore Convention does not support hybrid dispute resolution methods involving arbitration and litigation. This may not find favor with large international businesses who usually enter into elaborate dispute resolution clauses combining more than one dispute resolution tool. Surely, parties may still draft clauses in a manner allowing the application of Singapore Convention and the NYC alike. This will need careful drafting of the dispute resolution clause where mediation proceedings are divorced from the arbitration or litigation proceedings. The settlement agreement will be then enforceable under the Singapore Convention. If the mediation fails, the parties may then initiate a fresh arbitration proceeding and enforce the emanating award under the NYC. The parties may consider stipulating a time-frame to complete

the mediation exercise so that their claim is not barred by limitation in the event of a failed mediation. Once the arbitration proceedings are initiated and the parties enter into mediation as part of the arbitration proceeding, any resulting agreement would take the form of a settlement award passed by the arbitral tribunal for it to be enforceable. It will no longer be enforceable under the Singapore Convention as it would be enforceable as an arbitral award. Perhaps, the parties could still use the Singapore Convention to enforce a settlement agreement from a mediation initiated mid-way during arbitration by ensuring that the arbitral tribunal is dissolved by the parties without an award. However, this convoluted mechanism may not be commercially or logistically viable.

Thus, parties might still find it easier to mediate their dispute as part of an arbitration proceeding where the success or failure of mediation will not affect the enforceability of the final award rendered by the arbitral tribunal.

The second factor is the NYC's coverage. The NYC has been instrumental in promoting international trade and business, and in drawing the international legal world closer. The NYC has 160 signatories to date and is one of the most successful conventions ever. Thus, from the enforcement perspective, parties may still prefer a settlement award under the NYC than a settlement agreement under the Singapore Convention. Until such time that the Singapore Convention has an equal number of signatories (if not more) as the NYC, the latter may remain an attractive option for the parties to enforce their mediated agreements as settlement awards. As for now, existing hubs for international dispute settlement such as the UK, France, and Switzerland have not signed the convention. None of the EU member states have signed the Singapore Convention either. On the brighter side, some of the largest and fast-growing economies such as India, USA, China, and South Korea have signed the Singapore Convention which will encourage several others to sign and ratify the Singapore Convention.

The third factor is the parties' ability to enforce an arbitration agreement under the NYC. Singapore Convention does not allow enforcement of agreements to mediate. Thus, a party will have no protection under the Singapore Convention if an opposing party breached the agreement to mediate. The party wishing to enforce an agreement to mediate will have to resort to other protracted avenues to enforce the mediation agreement, just like any other contractual agreement. Therefore, parties may prefer entering into a hybrid arbitration agreement enforceable under the NYC and mediating within its framework instead.

The fourth factor is the lack of national laws on mediation. Ratifying the Singapore Convention would mean that the signatories also enact domestic laws to support the Singapore Convention. It is for this reason, the UNCITRAL Model Law mediation was recently adopted. It aims to guide the signatories to draft laws suited to their needs to support the Singapore Convention. Depending on each signatory's legislative and administrative process, an exercise such as this across all the signatories will need time. The NYC, on the other hand, is already supported by tried and tested arbitration laws of its signatories, many of which have been amended several times to suit the framework of the NYC.

The fifth factor relates to soft law, protocols and institutional rules. The users of international arbitration complain that international arbitration has become complex, overtly procedural, time-consuming and expensive. They lament that it has become what it sought to address. While these criticisms are valid, it is also true that over the years international arbitration has streamlined across most jurisdictions and has become predictable. International arbitrations in Brazil proceed the same

way as they would in Japan. International arbitration, for practical purposes, is no longer an "ADR" tool. It has become mainstream and is the "primary" mechanism for resolving international commercial disputes. While on one hand mediation under the Singapore Convention does hold the promise to be an effective "ADR" tool for resolving international commercial disputes, it is without the safety nets that the NYC affords. As an example, there is yet to be convergence on issues such as what constitute conflicts of interest for a mediator. Compare that to IBA Guidelines on Conflicts of Interest in International Arbitration which has been extensively used by the international arbitration community. Similar aspects of divergence on the conduct of mediation will surface as more settlement agreements are challenged in different jurisdictions (although this is unlikely, given the nature of mediation). Thus, it may be a perceived lack of safety net in adapting to something new that might bother large businesses to mediate their disputes under the Singapore Convention. They may want to wait and watch Singapore Convention's functioning before including international mediation clauses independent of arbitration clauses in their contracts.

The sixth factor is the liberty of a signatory to limit the application of the Singapore Convention to itself and any of its agencies. So far two States, Iran and Belarus have made such reservations. The NYC does not allow such reservations. Several NYC enforcements emanate from arbitrations involving state agencies. Possibility of such reservations by signatories may hinder the wide and uniform application of the Singapore Convention. The implications would stand out if more signatories made such reservations.

The seventh factor is the possibility for the parties to opt-out of the Singapore Convention. The Singapore Convention states that enforcement of a settlement agreement may be refused if it is contrary to the terms of the settlement agreement. Thus, individual parties may agree to opt-out of the application of the Singapore Convention in their settlement agreement. While this may appear counter-intuitive, the possibility appears to exist.

Singapore Convention's future looks bright despite the comfort that the NYC affords to the users. While the Singapore Convention seeks to emulate the NYC in the mediation space, it stands on a different pedestal. It comes at a time when international trade is peaking to new heights every day. The Singapore Convention will enter into force after its ratification by at least three signatories. Hopefully, it will be as successful as the NYC and play an important role in aiding the amicable settlement of international commercial disputes.

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