UNCITRAL clearly invests in International Mediation

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Authorship: Mariana Soares David.

After three years of debate, on 26 June 2018, in its 51st annual session held in New York, Uncitral approved final drafts for a Convention on the Enforcement of Mediation Settlement Agreements (hereinafter "the Singapore Mediation Convention") and for a Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (hereinafter "the Mediation Model Law").

These drafts will be submitted to the Commission for adoption by the end of 2018 and only then will their final wording be available, although it will likely be very similar to the one that has recently been approved.

The aim of these two documents is to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation.

The first draft is to be called the Singapore Mediation Convention, as it is expected to be signed by the Uncitral Member States at a ceremony in Singapore on 1 August 2019. This Convention was highly influenced by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NYC").

In a nutshell, these seem to be the most important features of this Mediation Convention:

- **Scope of application**: written agreements resulting from mediation to resolve a commercial dispute, deemed international at the time of the conclusion of the settlement agreement[1].
- **Broad definition of mediation**: a process whereby parties request a third person(s) to assist them in reaching an amicable settlement of their dispute and where the mediator does not have the authority to impose a solution to the dispute[2].

This final expression raised a significant debate within the Working Group, considering that in a certain

type of med-arb the appointed mediator may be expected to act as an arbitrator if the parties are not able to reach an amicable solution at the end of the mediation. However, even in this case the mediator will only be able to impose a solution to the parties once it starts its functions as an arbitrator; hence, the expression was approved unchanged.

Nonetheless, from our personal point of view, despite knowing that this is admitted in some jurisdictions, we find this type of med-arb practice very difficult to conciliate, on the one hand, with the mediator's crucial impartiality and confidentially[3] and, on the other hand, with due process in arbitration. This is why many ADR Regulations prohibit or dissuade mediators from acting as arbitrators in a same case.

- **General principles**: each Party to the Convention shall enforce international settlement agreements resulting from mediation in accordance with its rules of procedure and under the conditions laid down in this Convention and may even invoke that settlement agreement, in accordance with those same rules of procedure and conditions, if a dispute arises concerning a matter that has already been resolved in that settlement[4].
- **Grounds for refusing to grant relief**[5]: the Singapore Mediation Convention sets forth a list of situations – applicable both to requests for enforcement and to settlement agreements invoked as a defence against a claim[6] – based on which the competent authority can refuse to grant relief.

The list is quite comprehensive and includes, among others, situations where *(i)* the settlement is not valid, operative, binding or final; *(ii)* the subject matter of the dispute is not capable of settlement by mediation; *(iii)* the settlement was entered into due to a serious breach of standards applicable to the mediator / mediation or due to a failure to disclose relevant circumstances regarding the mediator's impartiality or independence; *(iv)* the obligations of the settlement are not clear or have already been performed; *(v)* granting relief would be contrary to the terms of the settlement agreement or to the public policy of the State where relief is sought[7].

The second draft is an amendment to the Uncitral Model Law on International Commercial Conciliation of 2002, mostly intended to adapt the existing Model Law to the Singapore Mediation Convention. In brief, one might say that the four most relevant amendments brought by this new Mediation Model Law are:

- The enlargement of its scope of application so as to **include "international settlement agreements"** besides "international commercial mediation";

- The **replacement of the term "conciliation" by "mediation"**, in an effort to adapt to the actual practice and use of these terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Mediation Model Law, although "with no substantive or conceptual implications"[8] – or, at least, with no intentional or declared implications, one would add;
- The **inclusion of a new "Section 3 – International settlement agreements"**, which mostly reproduces part of the Singapore Mediation Convention, by clarifying that settlement agreements deemed international at the time of their conclusion shall be enforceable and may be invoked as proof that a certain matter has already been resolved by mediation; and
- The inclusion of **different criteria for the assessment of the internationality** of mediation, on the one hand, and of settlement agreements arising from mediation, on the other hand.

In fact, according to the new Mediation Model Law, whereas the internationality of mediation itself is still assessed "at the time of conclusion of the agreement to mediate"[9], the internationality of the settlement agreement shall be assessed "at the time of conclusion of the settlement agreement"[10].

This latter notion of internationality was subject to a wide debate among the Working Group. In favour of this solution, some said that the assessment of the internationality of the settlement agreement at the time of its conclusion *(i)* would be more in line with the approach of the draft Convention, *(ii)* would cater for situations where there might not be an agreement to mediate between the parties and *(iii)* would be the only possible solution for the assessment of internationality as provided for in Article 16(4)(b) of the draft Mediation Model Law, referring to the obligations of the parties under the settlement agreement, as the place of performance of those obligations would not be known at that time of the conclusion of the agreement to mediate. Contrary to this solution, it was pointed out that *(i)* parties to international mediation might expect the settlement agreement resulting from that process to be subject to enforcement under section 3 of the Mediation Model Law and, thus, it might be unadvisable to entirely disconnect the internationality of the settlement agreement from the mediation process itself and that *(ii)* referring to the agreement to mediate would also make it possible to determine the applicability of the law at the time the mediation was initiated, thereby providing more legal certainty to the parties.

Despite the aforesaid, one might challenge the true convenience of these documents considering the limited percentage of non-compliance of mediated settlements, which are by definition freely and willingly chosen by the parties based on their trues interests. However, even if this is true, the approval

of these documents represents an important investment by the Uncitral and will undoubtedly add credibility and awareness to international commercial mediation.

It is curious to note that, besides highlighting the numerous benefits of commercial mediation and its rising use in international and domestic commercial practice, the Preamble to the draft Convention clearly states that this treaty goes far beyond the promotion of international commercial mediation itself. Most importantly, this is intended to be a relevant step towards "the development of harmonious international economic relations" as a result of mediation.

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[1] Excluded from the scope of application of this Convention are *(a)* settlement agreements related to personal, family, inheritance or employment matters, or *(b)* settlement agreements enforceable as a judgement or arbitral award – see draft Singapore Mediation Convention, Article 1(2) and (3) (Uncitral document A/CN.9/942).

[2] See draft Singapore Mediation Convention, Article 2(3) (Uncitral document A/CN.9/942). The same definition is adopted in Article 1(3) of the draft Mediation Model Law (Uncitral document A/CN.9/943).

[3] In particular, how can a mediator obtain the parties' confidence in a caucus session, for instance if the parties know that the confidential information shared with the mediator within that session can end up being used or at least pondered (even if unintentionally) by that same mediator once he puts on the arbitrator hat?

[4] See draft Singapore Mediation Convention, Article 3(1) and (2) (Uncitral document A/CN.9/942).

[5] See draft Singapore Mediation Convention, Article 5(1) and (2) (Uncitral document A/CN.9/942).

[6] See Uncitral document A/CN.9/934 – Report of the 51st session of the Working Group II.

[7] With reference to the notion of public policy, the Working Group agreed that it would be up to each Contracting State to determine the content of "public policy" and, as such, in certain cases, this could

include issues relating to national security or national interest (see Uncitral document A/CN.9/934 – Report of the 51st session of the Working Group).

[8] See Uncitral document A/CN.9/WG.II/WP.205/Add.1.

[9] As occurred in the 2002 Model Law on International Commercial Conciliation and as occurs in the 1985 Uncitral Model Law on International Commercial Arbitration, amended in 2006.

[10] As set forth in the Singapore Mediation Convention, Article 1(1) (Uncitral document A/CN.9/942).

Mariana Soares David
Senior Lawyer