Strengthening international enforceability of settlement agreements resulting from mediation and judgements of national courts

SINGAPORE CONVENTION ENTERED INTO FORCE AND AN AGREEMENT REACHED ON THE TEXT OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Executive Summary

- Two important milestones in international enforceability have now been reached. With Singapore Convention a uniform framework for the international enforceability of settlement agreements resulting from mediation has now been created. The Convention emphasises mediation as an effective dispute resolution mechanism for international trade disputes.
- Less than a year after the agreement was formally signed by 46 Contracting States in Singapore, the Singapore Convention has now entered into force on 12 September 2020.
- The success of the Convention will be judged by whether internationally operating companies will fully engage in consensual mediation.
- Especially now, in times of the Corona crisis, mediation can certainly be an efficient and effective solution for the resolution of disputes of international trading parties.
- The cross-border enforceability of court judgments in civil and commercial matters has also experienced an important breakthrough in recent years. Parallel to the preparations for the signing of the Singapore Convention, agreement was reached on the text of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

The enforceability of international arbitral awards is one of the main advantages of arbitration. In comparison, the decisive disadvantage of mediation is the difficulty in enforcing settlement agreements resulting from mediation. In such circumstances, in which one party does not (or no longer) adhere to an agreement reached voluntarily, it is mandatory to proceed at state courts or at the agreed arbitration courts to enforce the settlement agreement resulted from mediation. This is about to change due to the Singapore Convention.

1. The means to strengthen mediation

On 7 August 2019, 46 Contracting States signed the *United Nations Convention on International Settlement Agreements Resulting from Mediation* ("Singapore Convention").

The signing ceremony in Singapore marked the end of a good five-year finding process that had been initiated by the USA. Following the example of the successful United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), an international framework for mediated settlement agreements should now be created. The Singapore Convention was subsequently drafted by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by the UN General Assembly in December 2018.

On 7 August 2019, the signatories included, among others, the United States of America, China and India.[1] Germany and the European Union have not yet signed the Convention. This is, however, not so much due to the lack of approval regarding the Convention, but rather due to the fact that the European Union is currently examining whether it has the necessary powers to sign the Singapore Convention. However, in Germany, the German Federal Bar Association (*Bundesrechtsanwaltskammer*) welcomed the Convention and strongly supported the signing of the Convention by the Federal Republic of Germany in its statement of February 2019.

On 25 February 2020, the Singapore Convention was ratified by the first two Contracting States, Singapore and the Republic of Fiji, on 12 March 2020 by the third Contracting State, Qatar, so that the Singapore Convention entered into force six months later, on 12 September 2020, in accordance with its Article 14 (1).[2] Three more states, namely Saudi Arabia, Belarus and Ecuador, have recently ratified the Convention.

2. Strengthening the enforceability of court judgments

The cross-border enforceability of foreign court judgments in civil and commercial matters has also improved enormously in recent years. The preparations for signing the Singapore Convention took place in parallel with the proceedings of the Hague Conference on Private International Law on the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[3] ("HCCH 2019 Judgments Convention").

The HCCH 2019 Judgments Convention is the result of the so called *"Judgments Project"* of the Hague Conference on Private International Law, which started in 2016. The aim of the states participating in the project was to simplify the access to justice and make cross-border enforcement in civil and commercial matters more effective. In particular, the current obstacles to the enforcement of foreign judgments should be reduced and the prerequisites for cross-border recognition and enforcement of foreign judgments should be created. To this date, the applied principle is, that without an international treaty stipulating the enforceability of foreign court judgments, no state is obliged to recognise and enforce foreign judgments. Such international treaties have so far existed either only in a few special areas or within the European Union in the form of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

In July 2019, the states participating in the Judgments Project agreed on the current treaty text of the HCCH 2019 Judgments Convention. Whereas, the European Union, which has been involved in the project from the very beginning, has also played a leading role in negotiating the content of the contract.

For example, Article 4 (1) of the HCCH 2019 Judgments Convention provides that judgments of the signatory states are automatically recognised and enforceable in other contracting states without any further intermediate steps. Exceptions to this can only be based on the reasons exhaustively listed in the HCCH 2019 Judgments Convention.

Uruguay and Ukraine were the first countries to sign the HCCH 2019 Judgments Convention on 2 July 2019 and 4 March 2020 respectively.[4] The European Commission has announced that it will begin preparations for the

[1] The complete list of the States which signed on 7 August 2019 includes: Afghanistan, Benin, Belarus, Brunei Darussalam, Belarus, Chile, China, Colombia, Congo, Georgia, Grenada, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, East Timor, Palau, Paraguay, Philippines, Qatar, Republic of Korea, Republic of Fiji, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Swaziland, Turkey, Uganda, Ukraine, United States of America, Uruguay and Venezuela. Following the ceremony on 7 August 2019, Armenia, the Republic of Chad, Ecuador, Gabon, Guinea-Bissau and Rwanda signed the agreement.

[2] More information on the current status of the Convention can be found here: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last accessed on 27 November 2020).

[3] The full text of the agreement is available at: https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf (last accessed on 27 November 2020).

[4] For more information on the current status: https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last accessed on 27 November 2020).

accession of the European Union to the HCCH 2019 Judgments Convention as soon as possible. To this end, the Commission launched a public consultation in February 2020 on the signature and ratification of the HCCH 2019 Judgments Convention, with a deadline of 9 March 2020 for comments. It remains to be seen whether the European Commission will actually sign the HCCH 2019 Judgments Convention.

3. Content and scope of the Singapore Convention

The means of promoting the use of mediation to resolve cross-border trade disputes is already acknowledged from the New York Convention: The mediated settlement concluded between the parties should, as it is also the case with arbitral awards, be recognised and enforced under simple conditions.

According to its Article 1 (1), the new UNCITRAL regime applies to a mediated settlement agreement which has been concluded in writing and is of an international character at the time of its conclusion.

The term mediation is to be understood very broadly in the sense of the Singapore Convention and, according to the legal definition of Article 2 (3) of the Convention, includes a process in which the parties seek to reach an amicable settlement of a dispute with the assistance of at least one other person. The mediator, however, must not have the power to impose on the parties a particular solution to the dispute. Whether the parties use a term other than mediation is irrelevant, as is the technical basis on which the amicable settlement of the dispute is reached.

According to Article 1 (1) lit. a) and lit. b) of the Singapore Convention, the mandatory international qualification of the settlement agreement is given if at least two parties to the settlement agreement have their place of business in different states, or if either the state in which the principal place of performance of the settlement obligations is located or the state with which the subject matter of mediation is most closely connected is different from the state in which the place of business of the two parties is located.

The Convention does not apply to settlement agreements which have been concluded before a national court or an arbitral tribunal and are enforceable, Article 1 (3) Singapore Convention. For the new UNCITRAL regime it is intended to intensify mediation, but under no circumstances should the scope of other established multilateral instruments, such as the New York Convention, be affected.

4. Conditions for the enforceability of the mediated settlement agreement

According to Article 3 of the Singapore Convention, each Contracting State should enforce a settlement agreement that meets the requirements of the Convention in line with national procedural rules. Similarly, a party in the Contracting State to the Convention should be able to avoid a new dispute of identical content by relying on a settlement agreement that has been concluded.

The formal requirements for a party's request for enforcement under Article 4 of the Singapore Convention are also relatively low and are met if a signed settlement agreement is submitted to the competent authority and proof is provided that mediation has been conducted in advance. For the latter, it is sufficient if the mediator's signature is on the agreement itself or if it is clear from a document transmitted that the mediation has been conducted. In addition, the Singapore Convention also contains a catch-all provision according to which the evidence of mediation can also be provided by any other evidence accepted by the competent national enforcement body, Article 4 (1) lit. b) (iv) Singapore Convention.

An examination of the conditions of a request for enforcement should be carried out *"expeditiously "* by the competent authority, as stated in Article 4 (5) of the Singapore Convention.

Article 5 of the Singapore Convention contains the possibility, also known from Article 5 of the New York Convention, of refusing the request for enforcement. The grounds for refusal to proceed under Article 5 (1) of the Singapore Convention to be considered at the request of a party include, inter alia, the party's defence of legal

incapacity or grounds for invalidity or deficiencies relating to the settlement agreement. A ground for refusal should also be relevant in cases where enforcement would jeopardise the meaning and purpose of the agreement or where enforcement has already been carried out. Ultimately, complaints can also be made about deficiencies in the mediation process or erroneous behaviour on the part of the mediator. The competent enforcement body must also consider ex officio whether the enforcement would be contrary to public policy or ordre public referred to in Article 5 (2) of the Singapore Convention.

5. Conclusion and outlook

The Singapore Convention is intended to promote the use of mediation in international trade. Whether the desired long-term effects will be achieved through the now possible enforceability of international mediated agreements will become apparent in the course of the next few years. This is because the cross-border enforceability of settlement agreements depends on the question in how many cases of amicable dispute settlement through mediation a (compulsory) enforcement becomes necessary at all.

At the present time, two factors play an important role in the successful development of the Singapore Convention: On the one hand, the scope of the Singapore Convention will depend on how many states ratify the Convention without reservation or will accede to it. On the other hand, the success of the convention will be measured by whether globally operating companies, as protagonists of international trade disputes, actually engage in consensual mediation.

Considering the advantages mediation can bring in comparison to ordinary court proceedings or arbitration court proceedings, there is some evidence that mediation can be an interesting and effective alternative. By carrying out mediation, international companies can quickly and cost-effectively agree on a settlement and thus avoid an often lengthy and possibly more expensive state procedure or arbitration. This solution-oriented approach can also be an important aspect for a decision on mediation in view of the challenges posed by the COVID 19 pandemic to state courts and also to arbitration courts.

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