

CHINA LAW & PRACTICE

An **ALM** Publication

JULY 18, 2019

Looking to the Future of International ADR; Could an Enforcement Mechanism for Mediated Settlements Be on the Horizon?

By Ranse Howell and Matthew Rushton, JAMS

Like many alternative dispute resolution (ADR) providers, the cross-border caseload at JAMS has grown quickly over the past decade, but of its 12,000 annual mediations, the vast majority are between organisations from the same state. Mediation, some suggest, has never truly left the orbit of the common law courthouse. But all that might be about to change.

On June 25, 2018, the United Nations Commission on International Trade Law (UNCITRAL) approved by consensus of its member states a convention on international settlement agreements resulting from mediation, referred to as the Singapore Convention. The purpose of the Singapore Convention is to provide users with a universal mechanism to enforce mediated settlement agreements in a cross-border context.

To some extent the convention is a response to perceptions that mediation is unsuitable for cross-

border disputes. This would be a surprise to practitioners working in London, for example, where three out of five litigants in the Commercial Court have no material connections to the U.K., but where mediations between parties from different states are now routine. Such mediations are no less successful than the industry average, with a settlement rate of around 80 percent either on the day of the mediation or, increasingly, in the subsequent days and weeks. Nevertheless, these disputes have the common backdrop of English law, English solicitors and the English language. Accordingly, they have a less international character than many international arbitrations seated in London, where parties from around the world work in different languages, with foreign attorneys, under any substantive law agreed by the parties.

The New York Convention (1958) on the recognition and

enforcement of foreign arbitral awards has long facilitated such a process, and its near ubiquity (with close to 160 signatory states) provides a trusted safety net for global trade. However, international arbitration is routinely criticised for heavy demands on cost and time. Mediation, by contrast, usually achieves settlement in a fraction of the time.

Mediation at present does not enjoy the widespread recognition of international arbitration, and in some senses remains a reaction to the excesses of the common law system of justice. Its benefits in civil law jurisdictions, unencumbered by vast document disclosure and the expense and stress of the adversarial system, have been less than fully realised to date. Nevertheless, organizations' increasing demands for speed, certainty and an independent and impartial forum make mediation an attractive option.

Organizations have encountered resistance to mediation proposals in cross-border settings because of the lack of an effective enforcement mechanism. The argument that replacing one breached contract with another leaves too much to trust, and is one with which contract negotiators are all too familiar. Historically, ADR organizations and other proponents of mediation have been dismissive of such arguments, suggesting that because mediated settlements are mutually agreed upon rather than imposed by a third party, compliance naturally follows and such agreements tend to endure. While few would resile from that position, the Singapore Convention has the potential to render the usual objections groundless.

Much of course will depend on rates of adoption. It has taken the New York Convention 60 years to attain its current level of penetration, but many are optimistic that states that recognize the benefits of international arbitration enforcement will greet

the Singapore Convention with equal enthusiasm. Early indications suggest that such arguments are well founded, with states like China already signaling their intention to adopt.

In taking the next evolutionary stride, mediation practices will likely need to converge. At present, practices have emerged with strong local characteristics. Californian businesses, for example, routinely appoint retired judges as mediators; these judges bring some of the gravitas and legal analysis of the courtroom to their practices. The U.K., by contrast, adopts a more facilitative, less interventionist approach to mediation. Italy, one of few civil law jurisdictions with a vibrant mediation market, adapts the process to encompass a sequence of shorter meetings over a period of time, rather than the one- or two-day mediations that have become the norm in the U.S., the U.K. and Australia.

Cross-border mediations demand a common understanding of the process. The Singapore

Convention adopts the following definition from UNCITRAL:

Article 2.3: "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon parties to the dispute.

This is a broad definition that permits a flexible approach tailored to the needs and wants of the parties. Parties will no doubt share a common understanding of the destination—a good settlement—but what the journey will look like is unknown. JAMS feels that finding answers is central to the company's ethos, and as an exciting next chapter in international ADR opens, the solutions to culturally and commercially acceptable dispute resolution will likely result from asking better questions. We look forward to that journey and the dialogue to follow.

