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THE SINGAPORE CONVENTION: A POTENTIAL CORNERSTONE OF MEDIATION

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In the past few decades, with international trade and commerce on a rise, there has been a significant increase in commercial disputes amongst parties from different states. These transboundary disputes have led to the growth and evolution of the international legal regime. The success of the 1958 New York Convention, considered as the cornerstone of the legal regime for international arbitration, is a testament to the willingness of parties to resolve transboundary disputes through alternative dispute resolution mechanisms. While arbitration has been a preferred means of resolution of international disputes, with the increasing complexity thereof, it is necessary for parties to have access to multiple avenues for dispute resolution. Mediation is one such international alternative dispute resolution mechanism which is gaining popularity. As such, mediation is a method for settling commercial disputes in which the "parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute".

Background

The first step towards formulating a universal enforcement mechanism for mediation was taken by the United States. In May 2014, it put forth a proposal to develop a multilateral convention on enforceability of international commercial settlement agreements before the United National Commission on International Trade Law (UNCITRAL) Working Group II. Since then, over six UNCITRAL Working Group II sessions, with participation from 85 Member States and 35 non-governmental organizations have undertaken deliberations and negotiations on drafting a convention pertaining to mediation settlement agreements.

A recent survey on the enforceability of mediated settlements, conducted in order to aid the workings of the UNCITRAL, concluded that the biggest reason behind parties not opting for mediation is the lack of knowledge amongst the stakeholders. It is interesting to note that the second reason given by stakeholders for not opting for mediation was the absence of a universal enforcement mechanism. These stakeholders also stated that they would include a mediation clause and/or opt for mediation as a dispute resolution mechanism if there were to be a universal enforcement mechanism in force for the same.

The results of such surveys have led to UNCITRAL recognizing the increasing use of mediation in resolution of international disputes. Hence, UNCITRAL at its 51st session on 25 June 2018, approved by consensus of its Member States a "United Nations Convention on International Settlement Agreements Resulting from Mediation"

(Convention). It is to be informally referred to as the "Singapore Convention". On 20 December 2018, the United Nations General Assembly passed a resolution adopting the Convention and called upon Member States to consider becoming a party to the Convention. It is scheduled to be signed on 1 August 2019 and will enter into force 6 months after the ratification of atleast 3 United Nations Member States.

The preamble of the Convention lists the benefits of mediation, such as "reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by states". The Convention has been modelled after the New York Convention and has a total of 16 articles.

Key Provisions

The Convention applies to international settlement agreements. The international nature of a settlement agreement shall be determined on the basis of the place of business of the parties as well as the place where a substantial part of the obligations under the settlement agreement are performed or the place where the subject matter of the settlement agreement is closely connected. However, the Convention is not applicable to personal disputes including disputes related to "family, inheritance or employment law". The Convention further restricts its scope by excluding settlement agreements that have been court approved, that are enforceable as judgements and that are enforceable as arbitral awards. The rationale behind restricting the scope of the Convention is to ensure that there is no overlap of other regimes like the New York Convention or the Hague Choice of Court Convention. However, it is not clear as to why an overlap of regimes would be an issue. On the contrary, severe restriction of the scope of the Convention renders a possibility of certain settlement agreements not being covered by any international legal regime.

In addition to the international nature of the settlement agreement, the Convention lays down two requirements for a settlement agreement to be reliable: (i) it requires the settlement agreement to be signed by the parties; and (ii) it requires parties to produce evidence acceptable to the competent authority to show that the settlement agreement is a result of a mediation. The evidence to show occurrence of a mediation, *inter alia*, could be "the mediator's signature on the settlement agreement, a document signed by the mediator stating that a mediation was carried out or an attestation by the institution that administered the mediation". While this may be a helpful provision to parties and the competent authority, it is yet to be seen how comfortable the mediators will be in signing or attesting to the settlement agreement or any other document. There is also a possibility of the confidentiality of the mediation getting compromised.

The Convention then goes on to provide various grounds for refusal to grant relief. These grounds include incapacity of a party, relief that is contrary to the terms of the settlement agreement, relief that is contrary to public policy and the subject matter not being capable of settlement by mediation. It is pertinent to note that the ground that relief cannot be granted due to an arbitration agreement / settlement agreement being null and void, inoperative or incapable of being performed is a common ground between the New York Convention and the Singapore Convention. Another common ground is that of independence and impartiality of the arbitrator / mediator. However, it is interesting to note that this ground has a higher threshold in the Singapore Convention which requires the absence of such impartiality or independence of the mediator to *have a material impact or undue influence on a party*. The rationale behind incorporating a higher threshold for mediation stems from the fact that parties might not want to appoint a complete stranger as their mediator.

The Convention also provides an exhaustive list of reservations that a Contracting State may declare, differentiating the Singapore Convention from the New York Convention. A Contracting State signing the Convention is allowed to exclude its application to

settlement agreements to which the Contracting State is a party. The Contracting States are also allowed to declare that the Convention will apply only to the extent that the parties to the settlement agreement have agreed to its application. The Convention allowed the Contracting States to make such reservations at any time.

The Convention shall enter into force 6 months after the third instrument of ratification by a Member State. It shall become applicable to the settlement agreements concluded after the date when the Convention or reservations enters into force for that Contracting State.

The Convention extends its applicability to regional economic integration organizations constituted by sovereign states having competence over mediation. Such organizations can, *inter alia*, sign, ratify or accede to the Convention, giving them the rights and obligations conferred on a Contracting State. However, when the number of parties to the Convention is relevant, the regional economic integration organization shall not count as a party to the convention in addition to its Contracting State that is a party to the Convention.

While some of the abovementioned key provisions are modelled on the New York Convention, there are provisions which are entirely new and specific to the process of mediation. Such specific provisions, encapsulating the essence and spirit of the Convention, aim to increase awareness regarding mediation and encourage parties to choose mediation as their dispute resolution mechanism.

Mediation in India

In India, mediation as a method of dispute resolution has been around for centuries. The roots of mediation in India can be traced back to the "Gram Panchayats" which were prevalent in the rural areas of India. These Panchayats, headed by a respected senior member of the community called the "Panchayat Sarpanch", would resolve the dispute after hearing both sides of the matter. Mediation as a dispute resolution mechanism also existed within the tribal communities of India. The tribes would appoint "panchas" who would attempt to work out a settlement after hearing the grievances of both parties. Hence, mediation in India is not a new form of dispute resolution.

However, mediation was introduced in the formal legal system of India with the enactment of the Arbitration and Conciliation Act 1996.The Arbitration Act 1996 provides for mediation as a potential avenue for settling disputes. An amendment in 1999 to the Code of Civil Procedure 1908 added a provision which listed mediation as a potential alternative method for dispute resolution. However, these provisions did not gain much popularity and it was only in 2005 that the Supreme Court in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India* ((2005) 6 SCC 344) upheld the validity of the amendment which introduced mediation as a method of alternative dispute resolution in the Code of Civil Procedure 1908.

More recently, in 2018, an amendment to the Commercial Courts Act 2015 has made it compulsory for parties to refer the dispute to mediation before initiating court proceedings under the Commercial Courts Act 2015. Further, on 8 March 2019, the Supreme Court directed the Ayodhya case to be mediated. The Supreme Court of India formed a 3-member panel for mediation of the decades old Ayodhya dispute, with the hope that the parties may come up with a settlement agreement. These instances showcase the confidence and belief that the legislature and the judiciary of India reposes in mediation as a dispute resolution mechanism.

In furtherance to the steps taken by the legislature and the judiciary towards promoting mediation, the Union Cabinet, on 31 July 2019, has taken a significant step by approving the signing of the Convention by India. This should result in the creation of a sustainable environment for the acceptance of mediation as the preferred method for dispute

resolution by Indian parties. This is likely to push the legislature to enact a specific legislation for mediation, hence bringing it into the fold of the Indian statutory regime.

Conclusion

With more and more parties opting for mediation, the successful signing of the Convention will be an important moment in the evolution of the international legal regime. Mediation is unique in the sense that it is non-adversarial and that at the end of the dispute resolution process, the parties have a higher sense of closure and satisfaction with its outcome. This increases the chances of survival of existing commercial relationships. It will also lead to fewer instances of contracts being terminated, resulting in lower legal and commercial costs to parties. Hence, a universal enforcement mechanism for mediation is going to be beneficial to all stakeholders in international trade and commerce.

With India having agreed to sign the Convention, this will be an important moment for the Indian legal regime as well, since India would have to enact a domestic legislation in line with the Convention. Such a legislation will have a significant impact on the legal landscape of India since more parties will start opting for mediation. This will, in turn, contribute to reducing the backlog of pending cases before Indian courts.

While the perusal of the bare text of the Convention may raise some questions and may have certain loopholes, it remains to be seen how the parties relying on the Convention to resolve their international disputes will apply these provisions. Further, it is yet to be seen how the international legal community reacts to the Convention. In any case, the Convention is a giant step towards establishing mediation as an acceptable form of resolution of international disputes.

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