

The Singapore Mediation Convention: Will It Enhance Mediation's Effectiveness?

The Convention, which entered into force this month, should allow courts in the jurisdiction of enforcement to recognize and enforce settlement agreements directly.

Settling a dispute via mediation is one of the most time- and cost-effective approaches a party can take to resolve contentious issues. Mediation — a confidential amicable negotiation process facilitated by a third-party independent mediator — can be a very useful tool in the right circumstances.

Mediation's effectiveness as a dispute resolution mechanism has been somewhat enhanced by the 2018 Convention on International Settlement Agreements Resulting from Mediation (known as the Singapore Convention on Mediation), which entered into force on 12 September 2020.

The process of mediation in an English law context, and the impact of the Singapore Convention on Mediation, are discussed below.

The nature of mediation

Unlike litigation, mediation is not about winning or losing legal issues. The neutral mediator will not make a ruling (although the parties may jointly request that the mediator give an informal, non-binding opinion on the merits of the parties' positions). Instead, the mediator will help the parties reach a settlement of their disputes.

The mediation typically takes place "without prejudice" and is confidential, meaning that the parties' oral and written submissions cannot be disclosed to the court or tribunal (and no formal record is kept). The parties control the process. They can end the mediation at any time and have no obligation to agree to any settlement on offer.

English courts expect parties to be open to attempts to settle their disputes using mediation (or some other form of alternative dispute resolution). Failure to agree to mediation when proposed can result in a court imposing costs sanctions on the party who refuses the offer. If mediation is considered inappropriate by one party to a dispute, that party must provide a very good explanation to the court detailing why it does not wish to participate. Bearing all this in mind, unless there are particular extenuating circumstances, giving serious consideration to mediation is almost always a sensible approach to take.

The mediator

Parties normally choose a mediator either directly by agreement or by reference to a mediation body such as the London-based Centre for Effective Dispute Resolution (which can also assist with the administration of the mediation) or the US-based JAMS. Often the parties will provide each other with the names of possible mediators and choose a single candidate from the names submitted.

One significant consideration in choosing a mediator should normally be experience in the conduct of mediation, with prior knowledge or experience of the business area or technical issues concerned in the dispute being another consideration. In substantial commercial disputes, mediators are usually lawyers by training.

Before the mediation

There are no formal rules as to what the parties must provide to the mediator in advance of the mediation. The parties and mediator decide what to provide in each case (sometimes at a preliminary meeting to discuss the procedural aspects of the mediation but sometimes simply through correspondence).

Parties often exchange a written summary of their case (a “position statement”) in advance of the mediation. Each summary will typically explain the background, give a chronology of events, summarise the issues and the party’s position on them and describe the proceedings and any settlement discussions to date.

The parties sometimes agree upon a small bundle of relevant documents to be provided to the mediator and cross-referenced to the parties’ position statements. A party may also wish provide the mediator with documents that are to be kept confidential from the other party (for example, a counsel’s opinion or a draft expert report).

The pre-mediation preparation helps the mediator understand the issues and also potentially assists the parties in understanding the key strengths and weaknesses in their respective positions, assisting them to consider an appropriate settlement.

The form of the mediation

Timing and venue

Mediation can take place anywhere and at any stage of a dispute. Ideally mediation will allow parties to avoid the full cost and inconvenience of formal dispute resolution proceedings, allow the parties to achieve an early settlement, and permit the parties to maintain a strong commercial relationship.

Traditionally, a mediation is often held at a neutral location, such as the offices of the mediation body or mediator or at a hotel, but can also be held at the offices of one of the parties’ lawyers or, in the current environment, virtually.

When a mediation is held in person, three rooms are usually required: one for joint meetings with the mediator and one for each of the parties (together with refreshment facilities).

Length

Most disputes can be mediated in a day, however no rule exists. Parties should not underestimate the time needed during a mediation to digest and develop their responses to moves in settlement position by the other party.

Attendees

Each party's external lawyers normally attend, together with one or more representatives from each party (who should have authority to negotiate and settle the case, preferably without the need to seek further clearance from others not present). It is sometimes helpful, although not essential, if the representative is removed to some degree from the substantive business area in which the problem arose, so that he or she is not so personally involved in the underlying dispute.

The mediator may also bring an assistant or pupil. Some mediation bodies want a pupil mediator to be present, both to support the mediator behind the scenes in a typically intense process and to enable the pupil to gain experience. The mediation body might choose the pupil because of his or her specialist or technical knowledge of the subject-matter of the dispute, so that the pupil can complement the mediator's expertise.

Procedure

A mediation generally commences with a meeting of all attendees at which time the mediator introduces themselves, repeats that the process is confidential, confirms the absence of any conflict of interest, and explains the next steps in the mediation.

Each party then provides short introductory presentations (10 minutes or so) in the presence of the other party and the mediator. Either the lawyer(s), the party, or both can make the presentation.

The parties then generally move to separate rooms and the mediator spends time with each of them (shuttling back and forth between them) on a confidential basis, "caucusing" to try to bring about a settlement.

The mediator will ask the parties to provide any information relevant to facilitate a settlement. The mediator will ask what the respective parties are seeking to achieve out of the mediation and what they would be prepared to accept by way of settlement. However, the mediator will only reveal to either party what the respective parties have permitted the mediator to disclose.

A mediator, not being limited to a consideration of the legal rights and wrongs of the dispute, may explore (if appropriate) the possibility of an ongoing business solution (that is, a solution by which the parties might work together on future transactions on mutually satisfactory terms), which at the same time addresses the problems of the past.

The mediator often probes the strength of each side's case and seeks to clarify the consequences for the parties in terms of damages/costs/time/reputation should they lose.

The mediator may also call the sides back together, before any settlement has been reached, to review progress.

The settlement

If successful, the mediation will result in a settlement, which is often (but does not have to be) documented in a settlement agreement there and then. The settlement can take a wide variety of forms and is not limited to a decision along the lines that a court could impose. The decision can, for example, reflect "no admissions" of liability.

No settlement can be imposed upon a party. Any settlement requires the parties to agree to its terms.

The cost

A mediation's costs include:

- Parties' lawyer fees for preparing for and attending the mediation
- Mediator's fees for preparation time and for the mediation day(s) itself (a daily rate for a good mediator is likely to be around £7,500 to £10,000)
- Administrative costs of any mediation body that assists with the appointment of the mediator and any logistical and administrative arrangements
- Any travel and accommodation costs for those attending the mediation
- Out-of-pocket expenses, primarily room hire

Parties normally initially bear their own mediation costs and share equally the common costs (such as those of the mediator and venue).

Singapore Convention on Mediation

The purpose of the Singapore Convention on Mediation is to facilitate the cross-border enforcement of settlement agreements concluded as a result of a mediation process. To that end, Article 3 of the Convention provides that:

- “1. *Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.*
2. *If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.*”

Hopefully, the Convention will allow courts in the relevant jurisdictions of enforcement to recognize and enforce settlement agreements directly, without the need for litigation over the alleged breach of those agreements (which may involve lengthy, expensive, and inefficient procedures, as well as complex questions of evidence).

Although the Singapore Convention on Mediation is undoubtedly a positive step in the context of promoting resolution of disputes by mediation, it is still early days. The Convention has only been ratified by six countries — Singapore, Fiji, Qatar, Saudi Arabia, Belarus, and Ecuador — but counts 53 signatories including the US, China, India, Malaysia, Philippines, South Korea, and most of the Middle East (a greater expression of interest than was initially the case with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). As yet, countries in the EU, Australia, and the UK have not signed the Singapore Convention on Mediation. This means that there is still quite some distance to travel before the Convention gains traction and becomes a useful part of the dispute resolution landscape.

The lack of uptake of the Singapore Mediation Convention in the EU may be because Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of

mediation in civil and commercial matters (the European Mediation Directive) attempts to achieve a similar outcome to the Convention within the EU. Among other things, the European Mediation Directive required EU Member States to “ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable”.

The requirements of the European Mediation Directive were implemented in the UK via the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133) and the 55th Update to the Civil Procedure Rules, which took effect on 6 April 2011, but Brexit is likely to impede further work in this regard.

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