

## United Nations Convention on International Settlement Agreements Resulting from Mediation

1 This paper sets out the aims of the United Nations (“UN”) Convention on International Settlement Agreements Resulting from Mediation (“the Convention”); how it will benefit businesses; what countries stand to gain from signing the Convention; as well as what signing the Convention may entail.

### **The Convention**

2 Mediation has been growing in popularity as a means to resolve cross-border commercial disputes. Mediation is an effective mode of alternative dispute resolution that involves parties requesting a third person(s), the mediator(s), to assist them in reaching an amicable settlement of their disputes. It can be used for almost all types of disputes, regardless of size of claim and geographical reach, and is an alternative to litigation in the courts or arbitration before a tribunal, which are the other main modes of resolving cross-border disputes.

3 A successful mediation results in a settlement agreement. Currently, however, a party may face difficulties in ensuring that the other party complies with the terms of the settlement agreement, which is only binding contractually and therefore not directly enforceable in the courts. This has posed an obstacle to the international growth of mediation. Thus far, there has been no international mechanism for the efficient enforcement of such settlement agreements for international commercial parties.

4 The Convention will be the first multilateral agreement to facilitate the enforcement of mediated settlement agreements across borders. It is the result of work undertaken by a Working Group of the United Nations Commission on International Trade Law (“UNCITRAL”)<sup>1</sup>, and is expected to be adopted by the 73<sup>rd</sup> United Nations General Assembly in December 2018. The Convention will be open for signature in Singapore in August 2019.

### **Benefits of Mediation**

5 By addressing an oft-cited weakness of mediation, the Convention will promote the use and acceptability of mediation as an option for businesses to resolve their disputes. Where there is trade and commerce, it is inevitable that there will be disputes. The advantages for businesses which choose to use mediation to resolve these disputes include:

- a. **Cost and time savings.** Mediations can be organised within weeks, and concluded in a day or two, and therefore incur less costs than court proceedings or arbitrations. Around 70% of disputes mediated globally are settled within one day.
- b. **Control over outcome.** Parties are responsible for, and jointly determine the terms of the settlement, with the mediator facilitating the resolution. This gives parties ownership over the outcome, and allows more creative ways of resolving the dispute. This is unlike litigation or arbitration, where the outcome is decided by the judge(s) or arbitrator(s), for the parties.

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<sup>1</sup> The United Nations Commission on International Trade Law is the core body of the United Nations working on the harmonisation and modernisation of international trade law.

- c. **Preservation of relationship.** Mediation is non-confrontational and facilitated by the mediator, whereas litigation and arbitration are more adversarial forms of dispute resolution. Mediation may be more suitable where parties wish to preserve and avoid affecting long-term commercial relationships.
- d. **Confidentiality.** Mediation is a confidential process where what was discussed or agreed in private would not be disclosed to a third party without the consent of the Parties. Even if the mediation does not result in an agreement, the parties can still proceed to arbitration or litigation, and what went on at the mediation remains confidential and will not be disclosed or used at the arbitration or court hearing.

### **Benefits of Signing the Convention**

6 The positive results of signing the Convention are expected to reinforce the efforts of governments to grow the economy in order to bring benefits to its citizens. For businesses, quick and cheaper forms of resolving disputes mean more profits. Ultimately, the consumer will benefit.

7 First, signing the Convention will add to the signatory's attractiveness as a place for doing business, and contribute to the economy.

- a. Businesses and investors will have greater assurance that they can use mediation to resolve any disputes that arise, with the benefit of cross-border enforceability.
  - i. This is especially important as the number of cross-border commercial transactions that entities are involved in is set to increase, in line with: the growing contribution of investment to GDP; efforts to grow foreign and private investments in key sectors such as infrastructure, tourism, and manufacturing; and the modernisation of investment laws and regulations to bring them in line with international standards.
  - ii. The ability to resolve disputes reliably and effectively is a key consideration for businesses and investors when they enter into commercial relationships across borders. A survey found that the majority of potential corporate disputants would be "much more likely" to mediate a dispute with a party from another State that had ratified a Convention providing for the cross-border enforcement of mediated settlement agreements.<sup>2</sup> This would provide them with greater certainty when conducting business with parties from that State.
- b. For countries which are in the process of building up the physical infrastructure to support their economic growth, mediation can prove particularly useful, allowing disputes to be resolved in a timely and cost-efficient manner without jeopardising the entire project, given that infrastructure projects tend to be complex, long-term, and high-value ones.

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<sup>2</sup> International Mediation Institute, "IMI survey results overview: How users view the proposal for a UN Convention on the Enforcement of Mediated Settlement Agreements" (16 January 2017). The survey was conducted in October and November 2014.

- c. The benefits to businesses and investors will grow over time, as the number of signatories to the Convention increases. This is akin to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which today has 159 contracting parties<sup>3</sup>.

8 Second, being among the first signatories of the Convention will cement a signatory's status. Signatories will be among the first to offer commercial parties the ability to mediate with the advantage of cross-border enforceability.

9 Third, being among the first signatories of a ground-breaking Convention on international trade law would strengthen the signatories' stature in the international community. Signatories can position themselves as active leaders in the international community (particularly in the area of international trade law) by associating themselves with the Convention.

### **Signing the Convention**

10 It may be necessary to create a legislative framework to implement the obligations under the Convention. This may entail passing an Act and amending the procedural rules of the courts to give effect to the Convention. Singapore will be happy to assist in training and technical assistance.

11 The key features of the Convention are set out below, with references to the articles of the latest text (as at 25 June 2018), which may be found at Annex A.

- a. Article 1, read with the definitions in Article 2, sets out the scope of the Convention, namely that it will apply to international commercial settlement agreements resulting from mediation.
- b. Article 3 and 4 set out the principles of application of the Convention, i.e. that each Party will be expected to enforce a settlement agreement which falls under the scope of the Convention, in accordance with its own rules of procedure, and under the conditions laid down in the Convention. To implement these obligations, a court will have to be appointed as the competent authority to handle applications under the Convention. The rules of the court will need to provide for this.
- c. Article 5 sets out the grounds for the competent authority of a Party to refuse to enforce a settlement agreement, e.g. if granting relief would be contrary to public policy.
- d. Article 8 allows a Party to declare that it will not apply the Convention to settlement agreements to which it, any governmental agencies or any person acting on behalf of a government agency, is a party, to the extent specified in the declaration. A Party can also declare that it shall apply the Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention. The

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<sup>3</sup> As at April 2018.

reservations can be made at any time, including after the time of signature. The reservations can also be withdrawn at any time.

e. Article 11 states that the Convention is open to all States in Singapore in August 2019.

f. Article 14 states that the Convention will enter into force six months after ratification by three States.

12 After signing the Convention, a signatory may deposit its instrument of ratification with the Secretary-General of the United Nations. The Convention shall enter into force for the signatory six months after the date of the deposit of its instrument of ratification.

### **Conclusion**

13 Countries who sign up to the Convention will be well positioned to be a first mover to take advantage of the potential benefits the Convention can bring to their economies and business.

**Annex I****United Nations Convention on International Settlement Agreements Resulting from Mediation****Preamble**

*The Parties to this Convention,*

*Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

*Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

*Considering* that the use of mediation results in significant benefits, 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,

*Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

*Have agreed* as follows:

**Article 1. Scope of application**

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:
  - (a) At least two parties to the settlement agreement have their places of business in different States; or
  - (b) The State in which the parties to the settlement agreement have their places of business is different from either:
    - (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
    - (ii) The State with which the subject matter of the settlement agreement is most closely connected.
2. This Convention does not apply to settlement agreements:
  - (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
  - (b) Relating to family, inheritance or employment law.
3. This Convention does not apply to:
  - (a) Settlement agreements:
    - (i) That have been approved by a court or concluded in the course of proceedings before a court; and
    - (ii) That are enforceable as a judgment in the State of that court;
  - (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

## **Article 2. Definitions**

1. For the purposes of article 1, paragraph 1:
  - (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;
  - (b) If a party does not have a place of business, reference is to be made to the party's habitual residence.
2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.
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 the parties to the dispute.

## **Article 3. General principles**

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.

## **Article 4. Requirements for reliance on settlement agreements**

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:
  - (a) The settlement agreement signed by the parties;
  - (b) Evidence that the settlement agreement resulted from mediation, such as:
    - (i) The mediator's signature on the settlement agreement;
    - (ii) A document signed by the mediator indicating that the mediation was carried out;
    - (iii) An attestation by the institution that administered the mediation; or
    - (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.
2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:
  - (a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and
  - (b) The method used is either:
    - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
    - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.
4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.
5. When considering the request for relief, the competent authority shall act expeditiously.

#### **Article 5. Grounds for refusing to grant relief**

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:
  - (a) A party to the settlement agreement was under some incapacity;
  - (b) The settlement agreement sought to be relied upon:
    - (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;
    - (ii) Is not binding, or is not final, according to its terms; or
    - (iii) Has been subsequently modified;
  - (c) The obligations in the settlement agreement:
    - (i) Have been performed; or
    - (ii) Are not clear or comprehensible;
  - (d) Granting relief would be contrary to the terms of the settlement agreement;
  - (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
  - (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.
2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:
  - (a) Granting relief would be contrary to the public policy of that Party; or
  - (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

#### **Article 6. Parallel applications or claims**

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

#### **Article 7. Other laws or treaties**

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by

the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

#### **Article 8. Reservations**

1. A Party to the Convention may declare that:
  - (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
  - (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
2. No reservations are permitted except those expressly authorized in this article.
3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.
4. Reservations and their confirmations shall be deposited with the depositary.
5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

#### **Article 9. Effect on settlement agreements**

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

#### **Article 10. Depositary**

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

#### **Article 11. Signature, ratification, acceptance, approval, accession**

1. This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.
3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

#### **Article 12. Participation by regional economic integration organizations**

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over



matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

#### **Article 13. Non-unified legal systems**

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

#### **Article 14. Entry into force**

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

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### Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.
3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.
4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.
5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

### Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE at ---- this [X] day of [X] -----, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.