THE SINGAPORE CONVENTION AND ITS BENEFITS FOR BRAZIL

1. WHAT THE CONVENTION IS AND DOES

The United Nations Convention on International Settlement Agreements Resulting from Mediation, known more succinctly as the "Singapore Convention", is designed to enable cross-border enforcement in signatory countries of settlement agreements *reached via* ***mediation***, of ***international commercial*** disputes. The heart of the Convention is expressed in its article 3.1 which embodies this provision.

The full official text of the Convention in English is available at: https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf

A translation of the Convention text into Portuguese is available on the IMI website at: https://www.imimediation.org/2019/11/29/singapore-convention-text-in-portuguese/

2. MEDIATION AND ITS FEATURES

In its Article 3 (3), the Convention defines "Mediation" as follows: "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out,

[1] International Counsel, Arbitrator and Mediator, and first International Mediation Institute Certified Mediator in Brazil (www.IMImediation.org). Mr. Mason has served as Mediator, Arbitrator and Advocate in numerous international commercial disputes, many involving Brazilian companies, and testified on behalf of the IMI at the Brazilian Senate Commission session drafting Brazilian Mediation legislation. He participated as a delegate at the signing events for the Singapore Convention in August 2019. He is former Director for Legal & Government Affairs/Latin America, Russia and Canada at Digital Equipment, Oracle, and 3Com. See www.paulemason.info for more details.

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.

Mediation refers to the engagement of a third-party mediator to assist parties in a dispute.[2] The mediator, who is impartial as to the parties and neutral on the issues in the dispute, facilitates their communication and negotiation, exploring their differences and reasons therefor, seeking common interests, and helps the parties develop options on which the parties may reach a settlement of these differences. In mediation, the mediator looks to explore the parties' commercial or private *interests*, as opposed to determining who is right or wrong based on their legal positions.

The mediator, different from other third-party intervenors, is neutral as to the merits of the case and impartial with respect to the parties in the mediation.[3] He or she helps the parties to negotiate but cannot impose a binding decision. Mediation has advantages of speed, flexibility, low cost, confidentiality, and possibility of preserving business relationships. In many countries, cases in court as well as outside of the courts can be mediated, but bear in mind that mediation is, by its very nature, always a private process where the parties have the absolute power to decide the merits and control the outcome—including when one of the parties to the settlement agreement is a public entity. It is not in itself a process of public interest. The Convention is about executing the outcome, not the process itself. The mediation we are talking about here is *not connected* in any way with what in Brazil is practiced as "Judicial Mediation". It is mediation to help companies in international commercial disputes involving many different business sectors.

As a flexible process, mediation can take place before, during, or after a court or arbitration proceeding dealing with the same conflict.[4] Parties can contract for mediation in their original business agreement or later, after a dispute arises.

---

[2] For more information about the fundamental principles and types of mediation, please see the book *Mediação: Uma Solução Judiciosa para Conflitos* by Profa. Dra. Maria de Nazareth Serpa, Editora DelRey, 2018. This is an update and expansion of the very first book in Brazil about mediation *Teoria e Prática da Mediação de Conflitos* (Editora Lumen Juris, 1999).
[3] *Ibid.*, at p. 165.
[4] Ibid.

In a classical mediation which one would normally encounter in international business, the parties themselves have the autonomy to choose their mediator, often based on the mediator's experience in their particular industry, among other things. They can also choose how, when and where the mediation is to be conducted.

Arbitration, in contrast, refers to a private dispute resolution mechanism whereby an impartial, neutral third party ("the arbitrator") conducts a formal proceeding to hear arguments and evidence presented by the parties in order to reach a decision ("award") which is binding on the parties. Arbitration has advantages of party autonomy to choose their governing law, country/city of hearing, their arbitrator(s), availability of industry experts to decide the cases, relative speed compared to national courts, some confidentiality, and international enforceability of awards via the New York Convention or otherwise. Arbitration is regulated in Brazil by Law 9.307/1996 as amended by Law 13.129/2015 which authorizes public entities to use it. It is a creature of agreement between the parties whereby they contract for these services either through an independent arbitration center or directly on occasion. Normally parties provide for arbitration as part of their original business agreement, although they can also do so later, after a dispute arises.

3. SCOPE OF APPLICATION OF THE SINGAPORE CONVENTION

The Convention applies only to "commercial" disputes which are defined very broadly. It specifically excludes consumer, employment, and family-related matters. To fall under the Convention, the commercial disputes must be international in nature as defined more precisely in Article 1(1). Settlement agreements approved by a court and recorded as enforceable judgments in the State of that court, or recorded as enforceable arbitral awards, are also explicitly outside the scope of the Convention, under Articles 3 and 4 respectively.[5]

[5] Therefore, so-called "judicial mediations" in Brazil as authorized by the Brazil Mediation Law 13.140 of 26 June 2015 are excluded from the ambit of the Convention.

We must also bear in mind that the Convention does not touch the mediation process itself. Rather, it only deals with post-mediation effects, namely the enforceability across national borders of mediated settlement agreements for international commercial disputes.

4. BENEFITS TO BRAZIL OF SIGNING AND RATIFYING THE SINGAPORE CONVENTION

A—*The Convention will help Brazil's international trade & commerce* by facilitating flow of goods & services out of and into Brazil in the wide variety of sectors where Brazil plays a prominent role, such as agriculture, mining, finance, aviation, manufacturing, technology, etc. The Convention will reduce/remove commercial disputes as obstacles to trade flows by encouraging companies engaged in international trade to use mediation[6] to resolve them—mediation the results of which will be enforceable across borders. Without the Convention, mediated settlement agreements between parties from different countries are treated as mere domestic contracts which are rarely enforceable across borders.

Even if they are in principle enforceable as mere contracts, it may take a very long time for the local courts to hear the cases. This would not be acceptable in many disputes involving agribusiness, for example, where the perishability of products requires speedy execution of agreements. Mediation offers speed, flexibility, low cost and confidentiality to the parties. For example, this author mediated the settlement of a business dispute in real time between a Russian importer of thousands of metric tons of frozen chicken and a U.S. shipper. The cargo was sitting in ships offshore and would have spoiled absent a fast settlement of the parties' dispute. He mediated another one involving large quantities of tropical fruit between Brazilian and Central American companies. The products would have spoiled causing large financial losses if one party had refused to comply with terms of their settlement agreement and the other party would have had to go to court and wait many months, even years, for a court ruling to execute its mediated settlement agreement as a mere foreign contract, rather than as an imperative, highly prioritized international treaty obligation.

Reliable sources report that agricultural products represented some 43.2% of all Brazilian exports in 2019.[7] Although the number of agricultural export disputes over shipment, produce quality, payment, etc. is not readily available, in part because many are kept private, there must be a relatively large number of these. Some may involve large amounts of produce and money. The ones with which this author has experience involved several million dollars each. So any efficient way to reduce or eliminate these kinds of disputes would surely help the flow of Brazilian agricultural exports.

Note also that international agribusiness and commodity disputes affecting Brazilian companies with Chinese customers and suppliers may become even more common with the outbreak of the coronavirus.[8]

Not only the agribusiness sector, but many other Brazilian industries involved in international commerce will also benefit from the Convention's provisions to make mediation of disputes more effective.

B - ***We have witnessed similar positive results from international commercial arbitration resulting from the signing and subsequent ratification of the New York Convention*** by 161 countries (as of September 2019), including Brazil in 2002. As a result of Brazil's ratifying the New York Convention, Brazilian international trade and investment have grown significantly, as foreign parties have been much more positive in their commercial dealings with Brazil with international arbitration as a viable alternative to domestic courts to resolve business disputes.

The adoption of the New York Convention along with the transfer from the STF (Supreme Federal Tribunal, Brazil's highest court primarily dealing with constitutional matters) to the STJ (Superior Court of Justice, Brazil's highest court dealing with non-constitutional matters) in 2004 of responsibility for all cases relating to arbitration, represented giant leaps forward by Brazil in the use of arbitration, which in turn helped stimulate large investments in

[7] "Brazilian Agribusiness Export Revenue Reached US$ 96.8 Billion in 2019", citing data from the Secretariat of Trade and International Relations, Ministry of Agriculture, Livestock and Supply, from *The Rio Times* online, 12 January 2020.
[8] See "China Exacerbates Chaos by Claiming Force Majeure in Commodity Deals", from *The Rio Times* online, 8 February 2020.

the Brazilian economy by investors looking for reliable and enforceable means of resolving any disputes that could arise concerning their investments.

C—*Fifty two countries have already signed the Convention, including Brazil's main trading partners*.

The Convention was signed in Singapore on August 7, 2019 by 46 countries including major trading nations such as the U.S., China, South Korea, also India, Saudi Arabia, Israel and most countries in the Middle East. As of February 1, 2020, six more countries have signed. An updated map of the signatory countries can be found here—
https://my.visme.co/projects/9079q918-singapore-convention-signees-and-ratifications

One noticeable absence is the EU countries. The EU has its own Mediation Directive scheme and so proposed at the drafting stage that soft law in the form of a Model Law be approved instead of a convention. The decision was taken to give each country both options, giving birth to both this brand new Convention and a Model Law.

This author was informed by a reliable source that Russia was willing to sign, however there is an internal dispute between the Justice Ministry and the Economics Ministry as to which would take the lead in implementing the Convention.

5. COMING INTO FORCE OF THE CONVENTION

Under its Article 14(1), the Convention comes into force six months following deposit of the third instrument of ratification, acceptance, approval or accession. A country signing the Convention (usually by its executive power) is one thing, and ratification (usually by its legislature) is another. Ratification usually means that the ratified convention or treaty becomes part of the ratifying country's domestic law, and for some countries a treaty is considered "the supreme law of the land".[9]

[9] See for example, Article VI of the U.S. Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

As of March 14, the Convention has been ratified by three countries, the number necessary to bring it into force. [10] Therefore, it is set to come into force on September 12, 2020.

Several countries had expressed doubts about signing the Convention because they said they had no process in place to implement its provisions. However, a persuasive counter-argument was made that: (1) no country has such a process in place for this Convention yet; and (2) if the will is there, the best step would be to sign now and ratify later once an implementation procedure is developed. Every signatory country will have to develop its own route or methods for implementing the Convention in their courts. Some may be the same as or similar to that taken for the NY Convention, others perhaps different.

6. DEFENSES TO APPLICATION OF THE CONVENTION

Article 5 ("Grounds for refusing to grant relief") enumerates several of these which can be invoked in a court of a nation Party to the Convention:

- party incapacity;
- nullity of the settlement agreement under applicable law;
- the agreement is not binding or final
- the agreement has been subsequently modified
- the obligations in the agreement have been performed or are not clear or comprehensible
- granting relief would be contrary to the terms of the settlement agreement;
- a serious breach by the mediator of ethical or other professional standards, without which breach the parties would not have entered into the settlement agreement;
- failure by the mediator to disclose circumstances raising justifiable doubts about the mediator's impartiality or independence, without which breach the parties would not have entered into the settlement agreement;
- granting relief would be contrary to the public policy of the enforcing jurisdiction; or

[10] Singapore and Fiji are the first two countries to ratify the Convention, followed by Qatar, see https://news.un.org/en/story/2020/02/1058031 and http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl293.html

- the matter in dispute was not capable of being settled by mediation under the law of the enforcing jurisdiction.

7. SIMPLER TO IMPLEMENT THAN THE NEW YORK CONVENTION FOR ARBITRATION

The UN Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was ratified by Brazil in 2002.

While some of the Singapore Convention defenses listed in section 6 above look similar to those in the New York Convention, the Singapore Convention is much simpler and easier to apply than the New York Convention in at least three major respects:

(1) Unlike the New York Convention, the Singapore Convention does not require formal "recognition" of the instrument (settlement agreement in the case of the Singapore Convention), either in the country where it was signed or where enforcement is sought. All that is required is evidence of the settlement agreement in writing (including electronic format under prescribed conditions) and the fact that it was a *mediated* one, which can be shown in several ways: the mediator can sign it; or (s)he can sign a separate statement confirming the settlement agreement was reached via mediation; or any institution involved in the mediation (such as a chamber of commerce or other arbitration & mediation center that administered the case) can produce such a statement.

(2) Unlike the New York Convention, the instrument/settlement agreement need ***not be signed*** in a country which is a Party to the Convention—meaning the mediated settlement agreement can be entered into *anywhere in the world* to be eligible for cross-border enforcement *in any country that has ratified* the Convention.

(3) Unlike the NY Convention, the Singapore Convention ***does not require reciprocity***, in the sense that the party to the dispute invoking enforcement of the Convention does not have to come from, be based in, or be a citizen of one of the countries which have ratified the Singapore Convention.

Signing and ratifying the Convention by a country is what governs **enforcement in that country** of the mediated settlement agreement. Enforcement would usually involve

freezing/transferring of assets in that country belonging to the party defaulting or failing to comply with the terms of that settlement agreement. This would normally be done judicially, with precedence given in the order of court cases to matters arising under international conventions like this one. Thus, similar to the provisions of the New York Convention on Foreign Arbitral Awards, subject to the Convention defenses described above, an aggrieved party to a settlement agreement can go to the courts in ***any*** Convention country to take measures to enforce it.

8. LIMITED RESERVATIONS AVAILABLE

Unlike many more open-ended treaties, Article 8 permits only two types of reservations to be requested by a state Party that signs the Convention:

a) The Convention shall not apply to that state or any of its government agencies; and/or
b) For the Convention to apply in that state, it shall apply only to parties to a settlement agreement which have agreed to that effect

To the authors' knowledge, so far Iran is the only state that has signed the Convention with a reservation—that the Convention shall not apply to the state or its instrumentalities.

9. SOME CHALLENGES WITH THE CONVENTION

No treaty, convention or agreement is perfect. In the case of the Singapore Convention, we see at least two challenges. While they are important, we believe it will be in the country's best interest to take the approach taken by China—having the President sign the Convention as soon as possible, while at the same time working on how to implement it prior to ratifying it in the Congress.

A principal challenge will be how to implement the Convention in the Brazilian courts. They are already very full with millions of cases in backlog and are also being asked to assume other responsibilities. The authors suggest using the STJ approach as realized for arbitration cases. The STJ as final decision-maker has worked exceptionally well to resolve, speed up the disposition of all cases relating to arbitration. Many of these also involve underlying disputes

over international commerce, making the STJ seem a logical choice to be the final authority over Singapore Convention related enforcement cases.

The second challenge may occur in a relatively few number of cases where the mediated settlement agreement calls not for monetary payment but for a specific action to be taken or not taken by one or more parties in dispute. It is easier for courts in one country to freeze/transfer assets of a party violating that agreement, than to order that party to do or refrain from doing something—especially if that party is a foreign party without any presence in the country or if the objects of the settlement agreement are not located there. Of course, the enforcement court could order performing or refraining from performing a specific activity on penalty of monetary fines or even criminal penalties in severe cases, but this would be an additional measure to work out on a country-by-country basis.

10. CONCLUSION

Whether or not many enforcement actions are necessary, the primary effect and benefits of this Convention for Brazilian international business look to be more proactive than reactive. Gaining elevated cross-border enforcement status for mediated international commercial settlement agreements is designed to produce effects similar to those of foreign arbitral awards under the New York Convention. When a sufficient number of countries ratify the Singapore Convention, this will raise the status bar considerably for mediation. In these countries, mediated international commercial settlement agreements will no longer be considered as mere contracts—foreign ones at that—to be enforced slowly if at all. Rather, they will gain a higher ranking and become enforceable on their own with priority, under this Convention. Article 4, paragraph 2, subparagraph 5 states: "When considering the request for relief, the competent authority shall act expeditiously."

Over time, this should generate more confidence in the use of mediation by businesspeople and lawyers preparing contracts for Brazilian companies doing international business, leading to more mediation clauses in international commercial agreements. This will sow the seeds for mediation. Parties in dispute can choose to mediate after the fact, but experience shows that mediation of these international commercial contract disputes occurs much more frequently when already provided for in the parties' business agreement. When successful, mediation almost always reduces cost, time, energy and stress expended in disputes.

And by facilitating party communication, mediation also offers the possibility to preserve parties' commercial and trading relationships when appropriate. There is very little downside to mediation, if any.

It may take some time to gain full force. By comparison, the New York Convention was first signed in 1958 by only 10 or 11 countries and now there are 161 signatory states.[11] Brazil ratified it only in 2002, 48 years later, soon after which international commercial arbitration boomed in Brazil, helping bring about significant growth in international commerce. As compared to 1958, 46 signatories in Singapore in 2019 was a very good start on opening day, and as of February 26, 2020 there are 51. Let Brazil take its rightful place among the world's top trading nations by signing and then ratifying the Singapore Convention so as to harvest its commercial and other benefits as soon as possible.

[11] Of course, there are many more nation-states in the world now than in 1958, with the breakup of the former Soviet Union and former Yugoslavia, independent African states, etc.