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INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

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Hong Kong Convention
and Exhibition Centre

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The Singapore Convention-Finishing Unfinished Work-The Research Report

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Our Research Begins where The Singapore Convention Stops

Aims

- To give a jump start to implementation of the Convention
- Not to wait for another 60 years (unlike NY Convention)
- To create awareness about the Singapore Convention among current and future users (students)
- To add Singapore Convention in the package deal for the Commercial law development, investment and ADR regime in a country
- To develop a consistent approach towards applying rules of the Singapore Convention
- To finish the unfinished work related to the Singapore Convention

Current Level of Awareness

- Users, Professionals, Judiciary, business communities are not aware of the Singapore Convention
- This situation is true in Australia, India and other small countries in Asia, and Oceania
- Now discussion has started about the impact of the Singapore Convention on the court procedure
- This may delay in making decision to sign the Singapore Convention
- In Hong Kong this discussion started in 2015 with the progress of the drafting of the Singapore Convention- mainly due to good co-ordination between delegates and local professionals
- Same approach should have been followed by other delegates or promotional activities may be organised

Current Level of Awareness-Action Required

- Promotional activities may be organized
- Protocol of signing may be advised
- Technical assistance should be given to interested countries
- Countries which are considering signing of NY Convention may also be encouraged to sign the Singapore Convention
- A package approach may be used:
 1. The NY Convention
 2. Model Law on Arbitration
 3. Model Law on Mediation
 4. The Singapore Convention
 5. The Convention on International Sale of Goods (CISG)
- Add it as a topic in ADR curriculum

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Specific Action-from Start to Finish

At the beginning of the Enforcement Process

- **Court Requires following Documents:**

1. Settlement Agreement: (Art.4)

Signed by the parties

Evidence of Mediation eg.

Mediator's signature,
document signed by mediator,

(Electronic Signature permitted)

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Specific Action-from Start to Finish

At the Beginning of the Enforcement Process

- **Court Requires following Documents:**

Attestation from institution,

or any other document acceptable to courts as evidence of mediation

Translation in official language of the court (if not in original language) – **Translation both in Form and Substance**

Any necessary document may be asked by the enforcing court/authority – **must not intrude confidentiality**

Another concern – Court process in Camera/close court as an option

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In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide

Article 5

(a). A party under some Incapacity (no reference to applicable law)

General Assumption – If a party has capacity to mediate or agree then he/she has required capacity

BUT—enforcing court needs to be satisfied.

In absence of any applicable law as fall back rule may create confusion so a guideline should developed.

In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide

(b) Settlement Agreement

i. "null and void, inoperative, incapable of being performed"

(either under **Party's law** or **deemed law** decided by the court/authority)

- **Based on Model Law on Arbitration**
- **Not enough case law/example available on this ground**
- **Concerns- How to determine "deemed law"?-Needs guidelines**

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In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

(b) Settlement Agreement

- ii. Not binding or not final
- iii. Subsequently modified

- No major concerns on these grounds
- Courts may determine on facts
- Non-party eg Group of Company, Parent company etc may argue “non-binding” on them

In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

(c) Obligations in the Settlement Agreement:

- i. Have been performed
 - ii. Are **not clear or comprehensible**
- Puts Mediator's drafting of agreement under scanner
 - What if it is caused by translation?
 - How to guarantee content and context of translation?
 - What court should do? Should it ask mediator? Or Translator?

In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

(d) Granting Relief would be contrary to settlement agreement

- Factual and Contextual
- Non-monetary relief may be an issue eg apology, letter to certify
- Concern- Would granting of non-monetary relief would be contrary to the settlement agreement
- Needs Guidelines

In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

(e) Serious breach of mediator or mediation standards

Concerns :

- No universally accepted mediator and mediation standards
- Every Institution has its own rules
- Culture and tradition has impact on those rules
- Eg. “Meeting of mediator and a party in a restaurant?”

Needs – Profession has to come up with universally acceptable standards for Mediator and Mediation

In the Middle of the Enforcement Process

Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

(f) Conflict of Interests of mediator

- No universally accepted guidelines for Conflict of Interests of Mediator
- There is an IBA Guidelines for Arbitrators
- This may not be suitable for mediator: example barristers and solicitors conflict
- Mediation Profession needs to develop this guidelines
- IBA (group of lawyer) may not be the right group to do this.

In the Middle of the Enforcement Process Grounds to Challenge: Lawyer's Job and Courts to decide-Contd.

Courts/Authority may also refuse enforcement if

1. Against **Public Policy**
2. Subject matter of dispute not capable of settlement by mediation = **"Mediability"**
 - Needs to develop guidelines of **"Public Policy"**
 - In 60 years under NY Convention this ground is still controversial
 - **"Mediability"** – should be listed in the law but be flexible to accommodate new developments
 - Eg **"Restorative Justice"** –partly criminal issues involved- mediable and non- mediable issues should be separated by courts

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HK Mediation Centre and RMIT Research

All these concerns and issues are identified

Through joint research:

- Drafting History of the Convention is being drafted
- It will help courts to interpret provisions in light of drafter's intent
- Guidelines for:
 - How to determine “null and void, inoperative and Incapable of being performed” by courts
 - How to determining “deemed law”
 - How to determining “Incapacity”
 - How to grant relief without contradicting the settlement agreements (re-non monetary relief)

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HK Mediation Centre and RMIT Joint Research-Contd.

Guidelines for:

- **“Non-binding” on the Group of Companies or non-party to the original mediation, parent company and subsidiaries**
- **Universal Standards of Mediation and Mediator**
- **Conflict of Interests for Mediator**
- **Public Policy**
- **Mediability**
- **Translation rules –Content, context, and form**

What Next?

For Governments:

- Sign, ratify, accept or approve the Convention
- Declare the application of the Convention is all parts of territory including where different legal systems are in place
- REIOS –do the same
- No Declaration of non application of the Convention
- Don't take any Reservation
- Create rules in Court for enforcement

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What Next?

For Users:

- Get familiar with the Convention
- Be prepared to use the Convention, figured out strategy to applicable laws or rules, deemed law,
- Take part in finishing the unfinished business-share your concerns and issues
- Get future users learn about this Convention during their study, training

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Conclusion

- Drafting of Text is finished
- Implementation, creating awareness and further works are still pending

Miles to Go before I (we) Sleep !