

Cross-Border Disputes in the Spotlight After the Singapore Convention

By KIMBERLY TAYLOR

Just a few years ago, the notion that the world economy was inevitably becoming globalized and borderless was widely accepted. Today, as Brexit looms, politicians and pundits are leaning toward protectionism, there are concerns about trade wars and a global recession, and talk in some circles is turning to localization and a retreat from globalization as the prudent business strategy.

However, on August 7, 2019, 46 countries, including the United States, China and India, joined Singapore in recognition that the shift toward a global economy, dependent on cross-border business transactions, can and should be embraced. Despite the prospects of tariffs and trade wars, those countries recognize that companies are increasingly doing business across borders and the resulting transactions may lead to business conflicts.

Mediation—which provides parties greater control over the outcome, has the opportunity to preserve relationships, maintains confidentiality and offers efficiency and cost savings—has long been a favored method of dispute resolution in the United States and other countries. It became more prevalent after the Pound Conference in 1976, where Harvard law professor Frank Sander urged a group of legal scholars and judges to adopt alternative methods of dispute resolution besides traditional litigation. A few years later, many ADR providers began offering mediation services more widely. Last year JAMS mediators handled over 10,000 matters in the United States and abroad. Most surveys report that 70 to 80% of disputes that are mediated are settled outside of court.

Recognizing the benefits of mediation to resolve cross-border disputes, the United Nations Commission on Inter-



national Trade Law (UNCITRAL) convened its Working Group II approximately five years ago to consider the creation of an instrument that would ensure that these cross-border mediated settlements would be enforceable across jurisdictions. Following multiple Working Group sessions over several years, in December 2018 the United Nations General Assembly adopted the United Nations

Convention on International Settlement Agreements Resulting from Mediation, now known as the Singapore Convention. More than 1,500 delegates from around the world, including business and political leaders, lawyers, mediators and representatives of alternative dispute resolution providers such as JAMS, convened in Singapore in early August 2019 to witness the momentous occasion of 46 countries signing on to the Convention.

More than 60 years ago, in 1958, UNCITRAL adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. At the time of its adoption, only 10 countries agreed to join. Today, 160 countries participate in the Convention, which has made arbitration a regular method of dispute resolution for cross-border business conflicts among companies doing business in those signatory countries. The New York Convention provides a reliable framework to resolve international disputes by arbitration, with certainty about the ability to enforce an arbitration award across jurisdictions. The Singapore Convention, which allows a party seeking to enforce a settlement agreement to apply directly to the courts for enforcement without the need for

a new action, is a natural complement to the New York Convention.

Going forward, efforts will be made to persuade others, such as the United Kingdom, European Union, Mexico, Canada and Australia, that they should join the Singapore Convention. Other issues must be resolved as well. Following the signing ceremony events, JAMS and the Society of Mediation Professionals (Singapore) organized an interactive think tank discussion titled “Singapore Convention on Mediation: Life After 7 August 2019.” The discussion, which was live streamed to hundreds of people around the world, featured a series of panel discussions about the practicalities of adoption and integration of cross-border mediation as an effective dispute resolution mechanism, with a particular focus on regional perceptions. Issues such as resolving cultural differences concerning the definition of mediation; whether the creation of uniform mediation standards and training guidelines is desirable and practical; the need to accommodate diversity in its many forms; the heavy weight of regulations; how to ensure that whatever standards or practices are developed have the end user’s interests top of mind; maintaining confidentiality, including indemnifying the mediator from being

called to testify; the role of the Convention in investor-state mediation; and the need to link the Convention to local laws were discussed.

It remains to be seen whether other countries will sign on to the Singapore Convention and over what time frame. There are now 160 parties to the New York Convention, but it has taken decades to get there. In the meantime, the Singapore Convention has sparked a useful conversation about the value of mediation, and it will hopefully lead to the same kind of paradigm shift that followed the adoption of the New York Convention.

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