**NEWSLETTER N° 5/2021**

Milan, 6 July 2021

## Singapore: The available Alternative Dispute Resolution Methods


Trials are not the only way to resolve a dispute. The legal system of Singapore recognizes the possibility to use Alternative Dispute Resolution ("**ADR**") methods, such as arbitration and mediation, among others, which provide the parties of a controversy with a choice other than litigation.

Such choice is made through a **dispute resolution clause** in a contract or in a **separate agreement**. Usually the dispute resolution provisions include a **multi-layer process**, starting with negotiations between the parties, mediation and then arbitration or litigation. It is also possible to adopt the **Arb-Med-Arb** clause, quite common in Singapore. In the latter case, the dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, the mediated settlement agreement may be recorded as a consent award.

A brief overview of the main features and advantages of the abovementioned ADR methods is offered as follows.

### SUMMARY

**ARBITRATION**

Unlike litigation, arbitration takes place out of a court: the two parties select an impartial third party, known as arbitrator; agree in advance to comply with the arbitrator's award; then participate in a hearing in which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts can rarely reexamine it.

Traditionally, labor and commerce were the two largest areas of arbitration. However, since the mid-1970s, this technique has seen a great expansion.

The type of arbitration which will be considered in this context is arbitration conducted at Singapore International Arbitration Center (SIAC), a non-profit organization, which is one of the leading international arbitration institutions in Asia and in the world.

## The Arbitration Act(s)

Arbitration in Singapore has been developing in line with the country, which has become a financial and legal hub, and consequently one of the major centers for international arbitration in Asia and in the world. Arbitration is governed by two separate legal regimes:

- Domestic arbitration is governed by Arbitration Act (Cap. 10) 2002 **("Arbitration Act"),**
- while international arbitration is governed by the Arbitration Act (Cap. 143A) **("International Arbitration Act")** 2002.

Both the Arbitration Act and the International Arbitration Act are based on the UNCITRAL Model Law on International Commercial Arbitration 1985. The International Arbitration Act enacts and incorporates the UNCITRAL 1985 Model Law as the First Schedule, giving it the force of law in Singapore. The International Arbitration Act applies to both international and non-international arbitrations whenever the parties have agreed in writing that Part II of International Arbitration Act and Model Law shall apply.

The main difference between the two legal regimes is the level of court intervention – in international arbitrations court intervention is rather limited and the court does not have any power to grant an application unless this is explicitly provided by law. Recourse against the award is also limited. To the contrary, in domestic arbitrations, pursuant to Section 49 of Arbitration Act, a party may appeal an award "*on a question of law arising out of an award made in the proceedings* ". Furthermore, pursuant to Section 45 of the Arbitration Act, the Parties may also apply for a court determination of any question of law which arises during arbitration which substantially affects the rights of the parties.

## Seat and language of the proceeding

Regarding the seat and language of the arbitration, neither the International Arbitration Act nor the Arbitration Act provide for a default mechanism for determining them. Ultimately, it is the arbitral tribunal who has discretion to determine these procedural issues, unless the parties decide otherwise.

## Arbitrability of disputes

Concerning the arbitrability of disputes, subject-matter arbitrability is not specifically dealt within the Arbitration Act. In general, any dispute is arbitrable unless arbitration of such a dispute is contrary to the public policy of Singapore or not capable of being settled by arbitration, like disputes concerning a public interest, which include for example citizenship, legitimacy of marriage, trade union disputes, patents, winding up of the companies, etc.

Regarding international arbitration, the International Arbitration Act only provides that the subject matter must arise from "*a relationship of a commercial nature*", however, what is "*commercial*" is not defined even though the footnote to Article 1 of the Model Law can be used as guidance. Which disputes are considered as non-arbitrable has also been developed by the jurisprudence of the Court. For example, the Singapore Court of Appeal held that claims involving an insolvent company are not arbitrable when the substantive rights of creditors are affected (*See Larsen Oil and Gas Limited v Petro prod Ltd [2011] 3 SLR 414*).

## Arbitration proceedings at SIAC

Parties are further free to choose *ad hoc* or institutional arbitration, which can take place at the SIAC.

The SIAC administers arbitrations under its own set of rules, the newest version being the SIAC Rules 2016[1]. The SIAC also administers arbitration under the UNCITRAL Rules of Arbitration and, in exceptional circumstances, under rules of other institutions. Unlike litigation, the parties may be able to choose the arbitrator, therefore they are free to choose an arbitrator who has technical knowledge in a particular field. It is also important to underline that the arbitrator can come from any country.

Finally, in relation to the issue of lawyers they may or may be not be involved in an arbitration (though it is very common for them to be).

## Enforcement of arbitral awards

An arbitration award may be enforced domestically and internationally in over 140 countries pursuant to the New York Convention on Recognition and Enforcement of Foreign Arbitral Award. However, it should be noted that Singapore made the reciprocity reservation set out in Art I(3) of the New York Convention, which is also set out in Part III of the International Arbitration Act.

Regarding the enforcement of arbitral awards, both for domestic and foreign awards, applications are always forwarded to the High Court and must be filed within 6 months as of the date of the issuance of the award.

1. www.siac.org.sg/our-rules/rules/siac-rules-2016

Singapore is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York), which entered into force in November 1986 through the *Arbitration (Foreign Awards) Act* 1986 and *Arbitration* (Foreign Awards) *Bill* No. 16/1986.

**MEDIATION**

The mediation movement in Singapore has grown over the past 20 years, thanks to the role of two organizations that contributed to the promotion and development of this ADR tool: the Singapore Mediation Center (SMC), a non-profit organization funded by the government, and the Center for Dispute Resolution (CDR) at the State Courts[2].

These entities are not the only organizations providing for ADR services. Especially in Singapore, there is a flourishing market of ADR providers operating in the whole South-East Pacific region.

## Definition of "Mediation" and use of the process

There is no univocal definition of the process named mediation, due to its intrinsic flexibility that embraces every aspect of the method, including the laws and regulations around it. Nonetheless, it may be described as a non-adversarial process, based on the consent of the parties involved, who attempt to resolve the dispute through the participation of a neutral third party, the mediator, who actively assists them in negotiating a possible settlement.

Mediation focuses on finding solutions that will meet the parties' interests and needs. The mediator does not make a decision concerning who is at fault in the dispute and does not provide for a decision. If reached by the parties, the settlement agreement is binding and can be enforceable before a court of law.

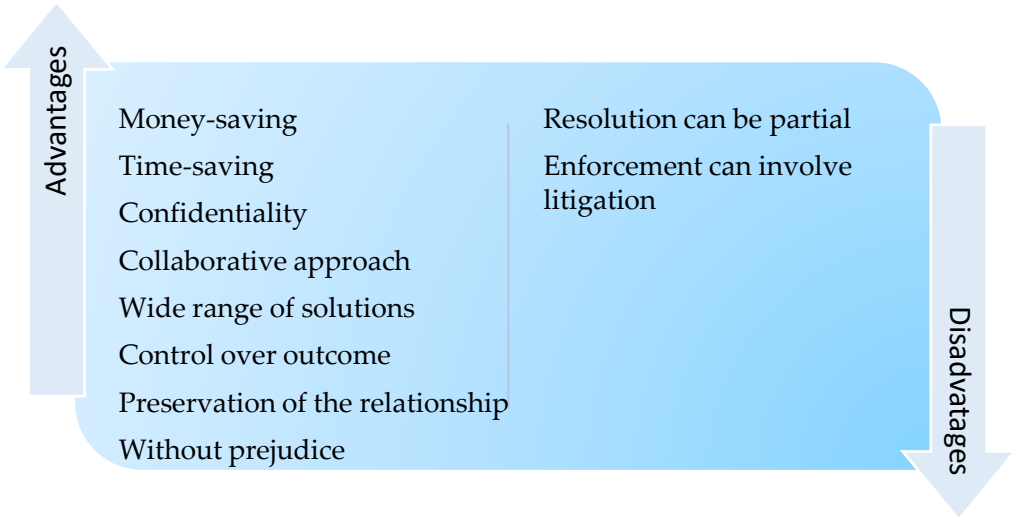
Mediation can be use for all kind of disputes: small claims and large ones with higher-value at stake; it may be very convenient for cross-border cases, which may involve instructing counsel from multiple jurisdictions as well as complex conflict of law issues. There are a few exceptions:

- Criminal cases;
- Cases which require a precedent (e.g. a class action situation);
- Cases where only the courts can give an appropriate remedy (e.g. an injunction or a personal protection order);
- Disputes involving public policies.

Both the SMC and the CDR at the State Courts offers several schemes to adopt mediation. On the one hand, the SMC can be selected by the parties at any stage of the disputes when they decide on their own accord to arbitration/mediation. On the other, the CDR is called upon by the initiative of the courts. It should be noted that the majority of cases filed to go to trial at the State Courts are successfully mediated through the Center.

2. To know more about the State Courts and the Judiciary in Singapore, please download our dedicated Newsletter 4/2021

## Advantages and Disadvantages




## Enforcement of mediated settlement agreements

It may happen that a party to a mediated settlement agreement faces difficulties in ensuring that the other party complies with the terms of the settlement agreement, which has only the effect of a binding contract not directly enforceable in the courts (unless the domestic law provide otherwise in specific cases).

Nowadays, international mediated agreements can be valued differently from a simple contract, subject to specific conditions, thanks to the United Nations Convention on International Settlement Agreements Resulting from Mediation. The so called Singapore Convention is the result of the work undertaken by the UNCITRAL Working Group II (Arbitration and Conciliation) and it is the first multilateral agreement to facilitate the enforcement of mediated settlement agreements across borders. This Convention applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement").

The Convention was adopted by the 73rd United Nations General Assembly in December 2018 and has been open for signature in Singapore since the 1st of August 2019. After two years, as of June 2021, it has 54 signatories, including the U.S., China, India and Brazil, but only six parties (States that have ratified it), i.e., Singapore, Fiji, Qatar, Belarus, Ecuador and Saudi Arabia.

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