New Era for International Dispute Resolution?

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A common issue for New Zealand companies engaging in international trade and dealing with foreign counterparties is how and where to resolve disputes and ensuring payment is received when the dispute is successfully resolved. Parties in cross-border disputes who obtain judgments against the other are often put to the extra time and expense of enforcing the judgment in another jurisdiction in order to recover any judgment sum awarded.

New Zealand companies will usually want New Zealand law and jurisdiction to apply to their commercial agreements, but even if a New Zealand judgment against a foreign counterparty is obtained, they may still have to issue enforcement proceedings in the foreign jurisdiction in which the counterparty is located. Often such proceedings can be difficult to conclude successfully.

In July and August 2019, two new international conventions were adopted by international organisations to address these issues. The Hague Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters (**Judgments Convention**) and the UN Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention on Mediation**) seek to implement a universal regime for the recognition and enforcement of foreign judgments and mediated settlement agreements, replicating the success of the 1958 New York Convention on the enforcement of arbitration awards.

Enforcing Foreign Judgments

If a New Zealand business has a dispute with a foreign counterparty, it has two options: to sue in a New Zealand court, or, to sue in a court in the country in which the other party is resident.[1] A New Zealand court judgment can be enforced:

- In a country with which New Zealand has a reciprocal agreement for enforcement;
- In Australia under the Trans-Tasman Proceedings Act 2010;
- In Commonwealth countries in accordance with their domestic procedural laws; or
- Under the laws of the country in which enforcement is sought.

Consequently, recognition and enforcement of foreign judgments has been the major impediment in cross-border litigation outside of Australia. By comparison, enforcement of international arbitration awards is much easier, due to the wide enforceability of awards among the 160 contracting States under the New York Convention.

To help simplify the process for enforcing judgments across jurisdictions and thereby facilitate multilateral trade, on 2 July 2019, delegates at the 22nd diplomatic session of the Hague Conference on Private International Law (**HCCH**) adopted the Judgments Convention. As the second multilateral treaty under the auspices of the Judgments Project of the HCCH, the Judgments Convention is intended to complement the 2005 Hague Convention on Choice of Court Agreements.

1 Assuming the parties have not agreed to arbitrate disputes.

Key features of the Judgments Convention

Under the Judgments Convention, a judgment given in civil or commercial matters by a court of a contracting State shall in principle be recognised and enforced in another contracting State without any review of the merits.

The judgments that can be enforced are broadly defined as "any decision on the merits given by a court",[2] including both money and non-money judgments. This is an expansion of the common law position, which generally allows enforcement of money judgments only. Arbitration and related proceedings are excluded from the scope of the convention, as are family law matters, wills, carriage of passengers and goods, defamation, privacy, intellectual property and insolvency.[3]

Judgments are eligible for recognition and enforcement under the convention if it can be shown that there is a jurisdictional connection between the person against whom enforcement is sought and the state or the court of origin. By way of example, a judgment will be eligible if:

- That person's habitual residence, principal place of business or branch/agency or establishment is located in the state of origin;
- The place of performance of a contractual obligation or concerned immovable property is located in the state of origin;
- That person being the claimant or counterclaimant; or
- Express consent of that person or the lack of contest to jurisdiction of the court of origin.[4]

The grounds in Article 5 are similar to the jurisdictional requirement that New Zealand courts currently apply under the High Court Rules, r 6.27 on serving proceedings out of New Zealand without leave. However, the grounds in Article 5 are set out in broader terms, meaning that it may be easier to enforce judgments under the convention.

Grounds for refusing relief

Recognition and enforcement of an eligible judgment may be refused only on grounds specified in the convention. These include circumstances where:

- The proceeding was not properly notified to the defendant, unless the defendant entered an appearance without contesting notification in the court of origin;
- The proceeding was notified to the defendant in a manner that is incompatible with fundamental principles of service in that State;
- The recognition or enforcement would be manifestly incompatible with the public policy of the requested State;
- The proceedings in the court of origin were contrary to a choice of court agreement;
- The judgment is inconsistent with other judgments by a court of another State or the requested State between the same parties; and
- Proceedings concerning the same parties and subject matter are pending before a court of the requested state, where a court of the requested State was seized before the court of origin and there is a close connection between the dispute and the requested State.[5]

Mediation

Mediation is a popular alternative to litigation. A requirement to mediate is increasingly drafted into commercial agreements. Often concluded in a day or over a few days, mediation allows parties to save time and costs that would otherwise be incurred over a lengthy litigation or arbitration. Mediation is also known for its flexibility; the mediator's role is not to determine the merits of the case, but to facilitate discussions among parties with the aim of reaching a mutually acceptable solution, which can also be non-monetary.

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2 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Article 3(2).

3 Insolvency is dealt with by the Insolvency (Cross Border) Act 2006 (implementing the UN Model Law on Cross Border Insolvency), which allows foreign insolvency administrators to apply to the New Zealand Courts for recognition of insolvency proceedings commenced overseas.

4 Above n 1, Article 5.

5 Above n 1, Article 7.

Currently, where parties reach settlement as a result of mediation, but a party fails to comply with a mediated settlement agreement, the non-breaching party is left to initiate full court proceedings for breach of contract. This can turn into a lengthy and costly process and, in the case of cross-border disputes, often in a foreign jurisdiction. It is for this reason that mediation has proven to be less appealing than arbitration as a means of resolving cross-border disputes. With the aim of addressing this issue, the UN General Assembly adopted the Singapore Convention on Mediation, which was officially opened for signature on 7 August 2019 and signed by 46 countries.[6]

Key features of the Singapore Convention

The Singapore Convention simplifies enforcement of mediated settlements by streamlining the process, requiring the court in a contracting State to recognise a mediated settlement agreement (with limited exceptions) in a similar manner to enforcing an arbitration award under the New York Convention.

The convention will apply to agreements, concluded in writing, which result from mediation that relates to international commercial disputes. Settlement agreements are considered international where at least two parties to the settlement agreement have their places of business in different states, or where the state in which the parties have their places of business is different to:

- The state in which the substantial part of the obligations under the settlement agreement is performed; or
- The state with which the subject matter of the settlement agreement is most closely connected.[7]

Pursuant to the Singapore Convention, a party seeking enforcement of mediated settlement agreements will need to provide the court of a contracting State with a signed mediated international settlement agreement and evidence that such an agreement resulted from mediation (i.e. attestation by the mediation institution or mediator).[8] The courts in a contracting State will then be required to enforce the terms of the settlement agreement in accordance with the conditions set out in the convention and with its domestic procedural rules. The corresponding UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation assists the contracting States by providing the legal framework and procedures for implementing the convention.

The convention will not apply to settlement agreements that are concluded in the course of judicial or arbitral proceedings and which are enforceable as a court judgment or arbitral award. It will not apply to settlement agreements concluded for personal, family or household purposes or those relating to family, inheritance or employment law.

Grounds for refusing relief

The courts of a contracting State may refuse to grant relief on the grounds set in the Convention, including:

- If a party to the settlement agreement was under incapacity;
- If the settlement agreement is not binding, null and void, inoperative or incapable of being performed under the law which it is subject to;
- If there was a serious breach by the conciliator of standards applicable to the conciliator, without which breach that party would not have entered into the settlement agreement;
- If granting relief would be contrary to the public policy of the contracting party.[9]

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6 UNCITRAL Press Releases <http://www.unis.unvienna.org/unis/en/pressrels/2019/unisl278.html>. New Zealand is not yet a signatory.

7 United Nations on International Settlement Agreements Resulting from Mediation, Article 1.

8 Above n 6, Article 4.

9 Above n 6, Article 5.

Where to now?

Both conventions have been heralded as "game-changers" in international dispute resolution.[10] Whether this is the case will depend on how quickly and sufficiently widespread ratification takes place. To date, only Uruguay has signed up to the Judgments Convention. In contrast, 46 countries have signed up to the Singapore Convention, including economic powerhouses such as the United States, China and India, and it would appear that this is the more attractive of the two.[11] The Judgments Convention will come into force twelve months after ratification by two member States, and the Singapore Convention will come in force six months after it has been ratified by three countries.

New Zealand has taken a cautious approach to international law harmonisation. For example, we have not yet signed the 1965 Service Convention or the 1970 Evidence Convention (although the Law Commission has recommended ratification of both Conventions) and the 2005 Choice of Court Convention. New Zealand is not a signatory to the Judgments Convention, however, the New Zealand Law Commission has considered earlier drafts of the convention and recommended that New Zealand becomes a signatory.[12] States are instinctively reluctant to cede the jurisdiction of their courts and there seems to be less enthusiasm for the Judgments Convention. It is unlikely to be greeted as enthusiastically as the Singapore Convention.

On the other hand, New Zealand is a mediation/ADR-friendly jurisdiction. A number of our trading partners have signed up to the Singapore Convention and it certainly appears likely that it will come into force. For companies doing business internationally, arbitration has prevailed as the default ADR option, but it is not uncommon in certain types of trade for arbitration clauses to have a hybrid option to include mediation. As various member States sign up to the convention, if you are considering a dispute resolution clause you should also consider what may be the best fit for you. Pending wider ratification, exclusive New Zealand law and jurisdiction may not necessarily be the best fit. Accordingly, you should consider whether or not you wish to specify mediation as a step in the dispute resolution process in your contract, and whether an express opt-in or opt-out is desirable.

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10 The Strait Times "Convention a game-changer: Industry players" (7 August 2019) <https://www.straitstimes.com/singapore/convention-a-game-changer-industry-players>; Hague Conference on Private International Law "It's done: the 2019 HCCH Judgments Convention has been adopted!" (8 July 2019) <https://www.hcch.net/en/news-archive/details/?varevent=687>.

11 A full list of the signatories is available here.

12 New Zealand Law Commission "Study Paper 5: International Trade Conventions" <http://www.nzlii.org/nz/other/nzlc/sp/SP5/>.