

UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

WRITTEN ANALYSIS

1.0 INTRODUCTION

- 1.1 The United Nations Convention on International Settlement Agreements Resulting from Mediation (Convention) was adopted by the United Nations General Assembly by Resolution 73/198 on 20 December 2018.
- 1.2 The Convention will open for signature at a signing ceremony to be held on 7 August 2019 in Singapore and will be known as the Singapore Convention on Mediation. The Convention will come into force upon ratification by at least three contracting States.
- 1.3 The Convention seeks to facilitate international trade and promote mediation as an alternative and effective method of resolving international commercial disputes. It obliges contracting States (except in specified limited circumstances) to recognise international settlement agreements resulting from mediation in commercial disputes by either enforcing the agreement or allowing it to be invoked as a defence to a claim.
- 1.4 The Convention operationalises an alternative international enforcement mechanism for dispute resolution, allowing parties to settle a dispute without the need to commence proceedings for breach of contract in the appropriate national court and then try to enforce the resulting judgment internationally or to have the agreement recorded as an arbitral award and enforced as such.
- 1.5 The Fijian Government has continually supported the development of alternative dispute resolution (ADR) mechanisms in Fiji. Mediation is increasingly utilised as an ADR mechanism in Fiji and is provided by the Consumer Council of Fiji, the Fijian Competition and Consumer Commission and the Reserve Bank of Fiji.
- 1.6 By becoming a Party to the Convention, Fiji consents to apply the Convention to international settlement agreements resulting from mediation.

2.0 SUMMARY OF THE CONVENTION

- 2.1 Article 1 of the Convention provides for the scope of application of the Convention. Under this Article, the Convention does not apply to settlement agreements concluded to resolve a dispute arising from transactions engaged in by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law. Settlement agreements that are approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgment or as an arbitral award are also excluded from the scope of the Convention.
- 2.2 Article 2 of the Convention provides for the necessary definitions of terms used in the Convention. This provides clarity for situations where a party has multiple places of business or no place of business at all and for a more comprehensive understanding of the term "in writing" and "mediation".
- 2.3 Article 3 of the Convention lays out the general principles of the Convention whereby each Party to the Convention is to enforce a settlement agreement in accordance with its rules of procedure and the conditions laid down in the Convention. This Article also mandates the recognition of a settlement agreement as proof that a particular dispute being raised was already previously resolved.
- 2.4 Article 4 of the Convention lists the requirements for reliance on settlement agreements. It includes submission of a settlement agreement signed by the parties and evidence that the settlement agreement resulted from mediation. Evidence includes a mediator's signature on the settlement agreement, a document signed by the mediator or an attestation by the institution administering the mediation. If such proof is unavailable, Article 4 allows a party to submit "other evidence" acceptable or required by a competent authority of the member State where relief is sought. Article 4 also allows for the signing of settlement agreements by electronic communication and the translation of settlement agreements where the settlement agreement is not in the official language of the Party to the Convention.
- 2.5 Article 5 of the Convention provides the grounds when a competent authority may refuse to grant enforcement. These include:

- (i) incapacity of a party;
- (ii) where the settlement agreement is null and void, inoperative or incapable of being performed; not binding or not final or was subsequently modified;
- (iii) where obligations were already performed or are not clear or comprehensible;
- (iv) where granting relief would be contrary to terms of the settlement agreement or contrary to public policy;
- (v) where there is a serious breach by the mediator of standards applicable to the mediator or the failure by the mediator to disclose to the parties' circumstances as to the mediator's impartiality or independence; and
- (vi) where the subject matter is not capable of settlement by mediation under the law of that Party.

2.6 Article 6 provides for parallel applications or claims. Under this Article, a court, an arbitral tribunal or any other competent authority of a Party may adjourn its decision relating to settlement agreements where relief is sought under the Convention.

2.7 Article 7 also allows flexibility to an interested party to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where the settlement agreement is sought to be relied upon.

2.8 Article 8 allows for two reservations when ratifying the Convention. The first reservation allows a Party to exclude the scope of the Convention on settlement agreements to which it is a party or to which any other governmental agencies are a party. The second reservation allows for a declaration that the Convention applies only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

- 2.9 Article 9 clarifies that the settlement agreements encompassed by the Convention include those concluded after entry into force of the Convention, related reservations, or withdrawals by the Party to the Convention.
- 2.10 Article 10 of the Convention designates the Secretary-General of the United Nations as the depository of the Convention.
- 2.11 Article 11 of the Convention governs the signature, ratification, acceptance, approval and accession to the Convention.
- 2.12 Article 12 allows regional economic integration organisations that are made up of sovereign States and have competence over matters governed by the Convention to sign, ratify, accept, approve or accede to the Convention and thus gain the rights and obligations of a Party to the Convention.
- 2.13 Article 13 governs the applicability of the Convention for Parties that may have non-unified legal systems. This article is not applicable to Fiji as Fiji does not have two or more territorial units with different systems of applicable law.
- 2.14 Articles 14, 15 and 16 govern the entry into force, amendments and denunciations in relation to the Convention.

3.0 REQUIREMENTS FOR IMPLEMENTATION

- 3.1 The Convention is open for signature in Singapore on 7 August 2019 and thereafter at the United Nations Headquarters in New York.
- 3.2 Under established international practice, only Heads of State, Heads of Government or Ministers for Foreign Affairs are empowered, by virtue of their functions, to sign multilateral treaties on behalf of States without having to produce full powers to that effect.
- 3.3 In accordance with article 14(1) of the Convention, the Convention will enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession. For States that accede to the Convention at any time after the third instrument is deposited, the Convention will enter into force six months after the date on which the State has deposited its instrument of ratification.

- 3.4 There is no specific requirement under the Convention to implement the provisions of the Convention by domestic law. However, to give effect to the Convention, it is envisaged that an International Mediation Law incorporating the relevant provisions of the Convention will need to be enacted in Fiji.

4.0 IMPACT OF THE CONVENTION

- 4.1 The intention of the convention is to facilitate international trade and promote mediation as an alternative and effective method of resolving international commercial disputes. It ensures that a settlement agreement reached by parties becomes binding and enforceable in accordance with a streamlined and abridged procedure. As such, the Convention contributes to the development of a mature, rule-based global commercial system.
- 4.2 Mediation is increasingly utilised as an ADR mechanism in Fiji. By becoming a Party to the Convention, Fiji consents to apply the Convention to international settlement agreements resulting from mediation. This in effect would contribute to strengthening access to justice and the rule of law in Fiji.
- 4.3 Being a Party to the Convention will make it easier for businesses in Fiji to enforce mediated settlement agreements with their cross-border counterparts. The Convention will allow the enforcing party to go directly to a court in a State where enforcement is sought instead of first obtaining a court judgment for breach of contract. That court must then enforce the settlement agreement in accordance with the State's rules of procedure and under the conditions laid down in the Convention.
- 4.4 The use of mediation results in significant benefits such as facilitating the administration of international transactions by commercial parties; and producing savings in the administration of justice by Parties.
- 4.5 Being a binding international instrument, it will bring added assurance of certainty and stability to this framework, thereby contributing to Sustainable Development Goals, in particular SDG 16. As such, this aligns with the Government strategy to further enhance Fiji's hub status.

- 4.6 There are no financial implications for Fiji in becoming a Party to the Convention and there is no dedicated institution required for the administration of this Convention at the domestic level. Further, there are no mandatory reporting requirements arising from ratifying the Convention.

5.0 RECOMMENDATION

- 5.1 It is recommended that Fiji sign and ratify the Convention.