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SIAC – SIMC's Arb-Med-Arb Protocol

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"Singapore … refers to a brand of dispute resolution"

"Singapore's Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution"

1. Introduction to the AMA Protocol

In conjunction with its launch on 5 November 2014, the Singapore International Mediation Centre (SIMC), in collaboration with the Singapore International Arbitration Centre (SIAC), introduced the Arbitration-Mediation-Arbitration (Arb-Med-Arb) Protocol (the AMA Protocol), a process that aims at combining the benefits of these two most prominent alternative dispute resolution tools.

As its name suggests, the AMA Protocol may be broadly divided into three different stages, beginning with the initiation of arbitration proceedings under the auspices of SIAC.[1] Once the arbitral tribunal has been constituted, it will then stay the arbitration and SIAC will automatically refer the case to mediation at SIMC.[2] The mediation is to be completed within 8 weeks after the referral. The progression to the final stage depends on the outcome of the mediation: if the parties successfully settle their dispute at mediation, they may then request the arbitral tribunal to issue a consent award following the terms of their settlement.[3] However, if the

[1] AMA Protocol, para. 2.
[2] *Ibid.*, para. 5.
[3] *Ibid*, para. 9.

dispute is not settled in mediation, the stay of the arbitration proceedings may then be lifted and the arbitral tribunal will resume arbitral proceedings.[4]

Parties can choose to adopt the Protocol at any time, meaning they may even do so after the dispute arises or after other dispute resolution processes are underway.[5] Compared to the Med-Arb model, the Arb-Med-Arb model has its advantage in circumstances where mediation results in a settlement that the parties wish to record as a consent arbitral award as it removes ambiguities over whether a dispute is in existence when arbitration is commenced. Further once parties agree to the AMA Protocol, commencement of mediation is an automatic step in the dispute whereas mediation typically requires the consent of both parties.[6]

2. Context of the Protocol:

(a) What gap does it fill? How does it make a difference?

In Singapore, the Protocol fits snugly within a pro-mediation ecosystem with robust cross-border enforcement. From an institutional perspective, the Protocol involves two service providers, the SIAC and the SIMC, in complementing existing domestic enforcement legislation and jurisprudence, such as the Choice of Court Agreements Act 2016 (CCAA) (implementing the Hague Convention on the Choice of Court Agreements) and the International Arbitration Act (IAA) (implementing the New York Convention). The SIMC Mediation Rules enforce writing requirements, which facilitates judicial enforcement. From a judicial perspective, the Protocol is supported by the Mediation Act 2017 (MA), under which a mediated settlement agreement (MSA) may be recorded as an order of court and enforced in other jurisdictions via, for example, the CCAA or IAA. The requirements to be met of an MSA

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[4] *Ibid*, para. 8.
[5] Should parties wish to include the AMA Protocol into their contractual dispute resolution clause, SIMC provides a model dispute resolution clause, the Singapore Arb-Med-Arb Clause, on its website: http://simc.com.sg/model-clauses/the-singapore-arb-med-arb-clause.
[6] Joseph Tan and Joanna Poh, Notes from the Bar: Arb-Med-Arb or Med-Arb – What is the difference?, November 2017, Kennedys Law LLP

(i.e. that the MSA was administered by a designated service provider or conducted by a certified mediator) introduces a direct link between private sector mediation and the courts. From the practitioners' perspective, under the Rules of Court and the Supreme Court Practice Directions, lawyers are obliged to advise their clients on alternative dispute resolution (ADR) and adverse costs orders may be made if parties are found to have unreasonably refused to engage in ADR. International and specialist mediators and arbitrators are readily accessible in courts such as the Singapore International Commercial Court (SICC), in institutions such as SIAC and SIMC, and in law firms. Mediation infrastructure and services in Singapore, such as those provided by Maxwell Chambers, are highly regarded globally. Notably, parties are able to conduct a 'Singaporean' mediation out of Singapore; for the purposes of the AMA Protocol, 'Singapore' no longer refers to merely geography – it refers to a brand of dispute resolution.

3. Main advantages

(a) Enforceability

As mentioned earlier, the Protocol sits within a robust cross-border enforcement system in Singapore. An international MSA (iMSA) under the Protocol may be enforced as an order of court under the MA by courts such as the SICC, which has an international bench. Similarly, an arbitral award under the Protocol may be enforced as an order of court under the New York Convention, IAA and/or the CCAA. Moreover, there are expected to be new developments in the realm of cross-border enforcement. UNCITRAL Working Group II, chaired by Singapore, is currently working on the proposed UNCITRAL Convention on International Settlement Agreements. The Convention, once in force, will provide contracting states the mechanism for the cross-border enforcement of iMSAs. Further, SICC and the Singapore Supreme Court are members of the Standing International Forum of Commercial Courts (SIFOCC), marked by a consensus for a multilateral memorandum of understanding to enforce judgments of commercial courts across a wide range of jurisdictions. As of July 2018, it has 32 participating courts across 23 jurisdictions.

(b) Additional panels and institutional support

In addition to SIMC's primary mediator panel, there are two other panels that have been established to support SIMC's services. The panel of technical experts maintained by SIMC and SIAC[7], comprising independent consultants and key personnel of well-established companies from diverse sectors of industry,[8] makes for another distinct advantage of the Protocol. SIMC's and SIAC's ability to offer this type of institutional support seems especially valuable given that cross-border commercial disputes in recent decades have become increasingly complex. With an expert panel at the parties' disposal, technical questions that may arise during the course of the mediation requiring profound industry knowledge no longer have to stand in the way of parties concluding an MSA. In 2018 SIMC established a specialist mediator panel comprising mediators with specific cultural, linguistic and other expertise.[9] Furthermore, administrative and case management support services by the SIMC and SIAC on the whole ensure efficient, reliable and user-friendly organisation of the dispute resolution process. The support extends to the two institutions assisting the parties by appointing suitable high-quality arbitrators and mediators.

(c) Smooth transitioning

What truly sets SIAC and SIMC apart from other dispute resolution service providers is their close collaboration. It reduces administrative burden for mediating in the midst of arbitration and thereby helps to avoid redundant costs: the Protocol is set into motion simply by one party filing a notice for arbitration with the Registrar of the SIAC. Later, the parties do not have to take any additional steps to ensure that the case is transferred to SIMC; SIAC takes care of all that.[10] Also, SIAC is solely responsible for collecting all fees connected to the Protocol so that the parties do not have to make separate payments to both institutions.[11]

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[7] http://simc.com.sg/why-a-panel-of-technical-experts/
[8] George Lim & Eunice Chua, 4-8. Research Collection SMU School of Law 2015, 1 (3).
[9] http://simc.com.sg/specialist-mediators/
[10] *Ibid.,* para. 5.
[11] *Ibid.,* para. 10-15.

Finally, process integrity in the form of a seamless transition between arbitration and mediation (and vice versa) is promoted by the fact that both Centres are located in the same building, Maxwell Chambers. The Protocol offers a robust and reliable framework whilst incorporating flexibility to allow parties to tailor the process according to the specific characteristics of the dispute.

4. Opportunities and risks

(a) Expedited timelines

The Protocol makes no provision for expedited enforcement or interim measures. Under the Protocol, either the SIAC Arbitration Rules (SIAC Rules) or the UNCITRAL Arbitration Rules apply to the arbitration, and the SIMC Mediation Rules (SIMC Rules) apply to the mediation. While the SIAC Rules make provision for both expedited enforcement and interim measures and the UNCITRAL Rules make provision for interim measures, the SIMC Rules are silent on both these fronts. This means that once the mediation has commenced, should parties require interim measures or expedited procedures, the application for this will have to be made in the arbitration (which is stayed for the mediation). The Protocol is silent on whether, under such circumstances, how the timelines under the Protocol may be adjusted or whether parties may return to the mediation process once such measures or procedures are triggered in the arbitration.[12] In practice, this may not be an issue as most mediations under the Protocol are completed within 1 – 2 days (although eight weeks is set aside for the mediation phase)[13] so parties are unlikely to make such applications within that narrow window. Regardless, they would not be hindered from seeking such measures, if necessary, in the arbitration. Furthermore, the Protocol's silence on this issue gives parties the flexibility to adjust the Protocol (whether by agreement or application) to respond to the needs of the dispute.

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[12] See, for example, Paul Tan and Kevin Tan, *Kinks in the SIAC-SIMC Arb-Med-Arb Protocol* (Singapore Law Gazette, January 2018) and Cameron Ford, *Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol* (Singapore Law Gazette, June 2018)

[13] This period of eight weeks may however be extended by the Registrar of SIAC in consultation with the SIMC; see AMA Protocol, para. 6.

(b) Arbitrator / mediator double-hatting

The Protocol does not prohibit parties from appointing the arbitrator to double-hat as the mediator for the mediation stage of the process. Under the SIMC Rules, parties "may" nominate a mediator for confirmation by SIMC and "may [but need not] do so from SIMC's Panel of Mediators" (Clause 4). However, SIMC generally encourages appointing different individuals.[14] It considers it preferable to use different practitioners as mediator and arbitrator to maintain the integrity and confidentiality of both processes and comply with natural justice rules.[15] Again, the Protocol, in leaving appointment open to parties, does not impose Singapore's legal norms on other cultures, rather it encourages practices that meet international standards to ensure the integrity, recognition and enforceability of iMSAs in the form of consent arbitral awards in as many jurisdictions as possible throughout the world.

(c) Structuring a flexible, rules-based hybrid model

In a typical ad hoc hybrid model, parties would have the flexibility to decide when is the best time to commence which ADR process. Under the Protocol, parties proceed to the mediation stage once the Response to Arbitration is filed, which is either 14 or 30 days after the Notice of Arbitration is filed.[16] The benefit of this is the dispute is structured with set timelines and gives parties more certainty that the dispute progresses apace. This is significant because, in practice, the ad hoc model is typically subject to abuse in the form of delays. Given that the Protocol attempts to provide structure to what is essentially a flexible and fluid process, it may be argued that the ambiguity in the Protocol is necessary to balance the two competing aims. Bearing in mind that the Protocol is essentially a contract between parties who are typically advised by legal counsel, should parties agree on the need to re-attempt mediation later in the dispute resolution process when the issues may have further crystallised, they are free to do so.

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[14] http://simc.com.sg/arb-med-arb/
[15] Nadja Alexander, *Global Trends in Mediation*, in Mediation und Konfliktmanagement, 2017
[16] The deadline is 14 days under the SIAC Rules, Rule 4.1 and 30 days under the UNCITRAL Arbitration Rules, Article 4(1).

(d) Outcomes: Potential clash between arbitral awards and iMSAs?

Hybrid dispute resolution processes generally prompt another potential issue: the inconvertibility of a MSA into an arbitral award. In mediation, the parties are free to agree on their settlement terms which may include arrangements for the future and are not limited by the types of remedies a court or tribunal might be able to provide. Conversely, in an arbitration, the arbitral tribunal is required to issue awards consistent with the substantive law governing the dispute and the powers of the tribunal to grant remedy under the arbitration agreement, arbitration rules and/or applicable arbitration law. Arbitral awards typically grant monetary or injunctive relief, or specific performance orders, since any other result would likely lack legal basis. On the face of it, this suggests that an arbitral tribunal may conceivably not be able to record as an arbitral consent award a settlement agreement in its entirety made during the mediation phase, thereby affecting enforceability under the New York Convention.[17]

In Singapore the Protocol places the focus back on party autonomy in relation to this potential issue. It is ultimately up to the parties to decide which aspects of their settlement they would like the tribunal to record as a consent arbitral award and which (if any) they wish to keep in contractual form. However, one should acknowledge that the Protocol is mainly directed at parties involved in cross-border commercial disputes[18], the resolution of which, to date, has involved terms suitable to be recorded as a consent award. Thus, it seems that a "clash of outcomes" will rarely occur.

(e) How has the Protocol fared thus far?

SIMC was officially launched in November 2014. Since then, it has administered more than 50 cases, of which approximately one-fifth utilized the Protocol. 80% of the parties who use SIMC's services are from Asia. As of 2017, SIMC has a settlement rate of 85%.

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[17] See also: Edmund Wan & Alex Ma, Singapore Arb-Med-Arb Clause - A Viable Alternative?, King & Wood Mallesons Newsletter, November 2017.

[18] Christopher Boog, The New SIAC/SIMC AMA-Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored to the User's Needs, Asian Dispute Review (Apr 2015), 91 (95).

5. Conclusion

The establishment of SIMC represents a significant development in the practice of international mediation, particularly in Asia. Singapore's Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution and the role of mediation in it.

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