The Singapore Convention on Mediated Settlements and New York's CPLR: What Do—or Should—They Have in Common?

By Michael Lampert

Should New York Civil Practice Law and Rules (CPLR) 3213, Summary Judgment in Lieu of Complaint, be amended to allow mediated commercial settlement agreements to be eligible for its expedited treatment? Using the principles of the new Singapore Convention on Mediation ("the Convention") to define eligible mediated settlement agreements, such an amendment seems in order. It will meet client's expectations and support New York's leadership as a commercial center. But before looking at the solution, let's first turn to the problem and then get some context about CPLR 3213 and the Convention.

What's the Problem?

Most clients are surprised to learn that if another party to a settlement agreement doesn't live up to its terms, the standard way to enforce the settlement is to sue for breach of contract. To clients, this approach seems like the movie *Groundhog Day*—starting from the beginning all over again—especially when the first dispute was itself about a contract.

Strategies to expedite remedying a potential breach of a settlement agreement are limited. If the original dispute was already in litigation and the court allows it, the settlement agreement can include a provision that the court retains jurisdiction to hear a motion to enforce and be "so ordered." This allows the non-breaching party to avoid starting an entirely new breach of contract action. But courts may not always accept this continued responsibility. Likewise, when settling a dispute in arbitration, the arbitrators will rarely agree to retain jurisdiction Indeed, arbitrators will not always agree to an agreed award from a settlement in the first place, although they generally are willing to do so. Even if they do, while recent case law in the United States holds that consent awards should be enforced, it is not clear that all courts around the world will do so. For disputes resolved before formal proceedings start—for instance after letter-writing or mediation—there is no court or arbitral panel available to retain jurisdiction.

Sometimes confession of judgment under CPLR 3218 will be available, but amendments adopted by the 2019 legislature limit this section's usefulness. It now requires the confessor be resident in New York at the time of confession or time of default.

As a result, careful counsel may not always be able to expedite enforcement of a settlement agreement after a breach; there are some situations where no expedited process is available.

Some Context: CPLR 3213 and the Singapore Convention

A. CPLR 3213—Summary Judgment in Lieu of Complaint

The CPLR creates a mechanism in New York believed to be unique in the U.S., if not the world. It provides for starting a case not with a complaint or statement of claim, but rather with a motion for summary judgment. The key to using this expedited procedure is that the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR 3213.

The paradigmatic examples of instruments for the payment of money only are promissory notes or (dishonored) checks. But lawyers being lawyers, the case law is rife with attempts to squeeze other things into the expedited procedure. For present purposes we simply note that settlement agreements sometimes qualify and sometimes don't, largely depending on whether they contain an *unconditional* promise to pay. Many settlement agreements do not qualify because both sides have obligations.

B. The Singapore Convention on Mediation

Starting in 2014 the United Nations Commission on International Trade Law (UNCITRAL) (and its Working Group II) discussed what became the Singapore Convention. The goal was a uniform framework for speedy and simple enforcement of international settlement agreements resulting from mediation of commercial disputes by the parties. The results achieved under the 1958 New York Convention on enforcement of arbitral awards provided a goal, and to some degree, a model.

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In July 2018 UNCITRAL approved the proposed text. In December the General Assembly proposed the Convention for adoption by countries. At a ceremony in Singapore in August 2019, 46 countries (including the U.S.) signed the Convention; another 24 sent delegates to the ceremony. Even though the U.S. has signed, until the Senate ratifies (and other formalisms take place) it is not yet a party to the Convention. Other countries have similar processes. As of mid-December 2021, the Convention had eight parties and 55 signatories.

The Singapore Convention aims to facilitate *international* trade and commerce by enabling disputing parties to easily enforce settlement agreements across borders. It does not apply to all settlement agreements—only those that are mediated. The presence of a neutral mediator who meets certain standards set out in the Convention was seen as an appropriate requirement.

The Proposed Solution—Can These Two Threads Be Woven Into a Fabric?

My proposal is that CPLR 3213 be amended to add "mediated settlement agreements" to the list of predicates for its use. Specifically, the current text with this amendment would become subsection (a). A new subsection (b) is proposed to be added defining "mediated settlement agreement," "mediation," and "mediator" using principles (and in some cases words) from the Convention.

The scope of the Convention is international. The proposed CPLR amendment is not even national, but is limited to New York. Yet striving for consistency, where possible, has two possible benefits. First, as described above the Convention has been through an extensive vetting process that may yield important insights. Second, to the extent the texts are consistent, caselaw under one may be considered persuasive authority in the interpretation and understanding of the other.

Here is the proposed new 3213 marked to show changes from the version of text that becomes effective on May 7, 2022 (proposed additions in bold):

> 3213. Motion for summary judgment in lieu of complaint.
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> (a) When an action is based upon an instrument for the payment of money only, **upon a mediated settlement agreement** or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise. The additional notice required by subdivision (j) of rule 3212 shall be applicable to a motion made pursuant to this section in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant.
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> **(b) "Mediated settlement agreement" means an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute. "Mediation" means resulting from a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator"). "Mediator" means a person or persons lacking the authority to impose a solution upon the parties to the dispute, who is impartial or independent of the parties, and who has acted in accord with any applicable professional standards.**

The proposed section is not a panacea. It is meant to be another tool of New York, as a global commercial capital, to achieve the goal of settling parties—to reach a final resolution by settlement and one that, if violated, does not require all of the expensive and time-consuming steps of ordinary litigation.