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# The Singapore Convention: A Viable Method To Enforce Settlement Agreements?

**A discussion of whether the United Nations Convention on International Settlement Agreements Resulting from Mediation, informally known as the "Singapore Mediation Convention," is meeting its goal of promoting mediation as a viable alternative to litigation of cross-border trade disputes by creating an effective process for enforcing a resulting settlement agreement.**

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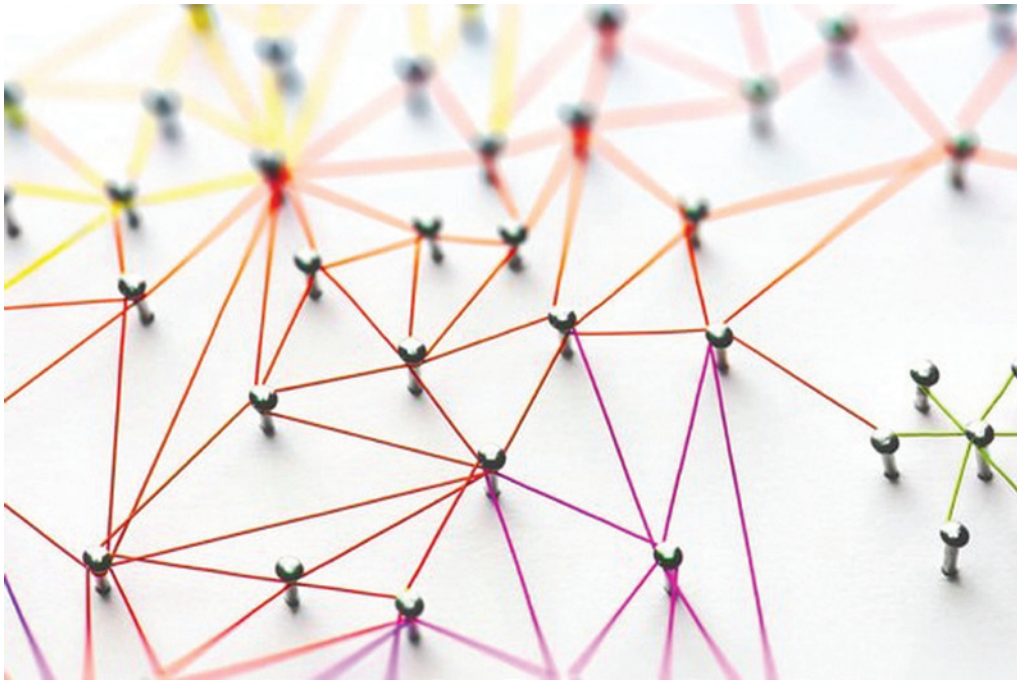

The United Nations Convention on International Settlement Agreements Resulting from Mediation, informally known as the "Singapore Mediation Convention" (the convention), originally adopted by the United Nations General Assembly in December 2018, applies to settlement agreements resulting from mediation of international (cross border) disputes (settlement agreement(s)). The convention's goal is to promote mediation as a viable alternative to litigation of cross-border trade disputes by creating an effective process for enforcing a resulting settlement agreement.

The intent is to provide parties in an international dispute confidence that if they choose to mediate; any settlement agreement will be recognized and capable of enforcement by the courts of a signatory state, without the need to resort to further litigation. Currently, the convention is more aspirational than operational, given its exclusions and carve-outs, and the fact that it been ratified by only one country and several key nations have failed to sign it.

As a preliminary matter, there certainly is no doubt that if mediation of cross-border disputes is going to gain traction as a viable alternative, enforcement of settlement agreements is the key. At present, enforcement of a settlement agreement through a pre-determined dispute resolution process is straightforward when all of the parties and the enforcement process are in the same jurisdiction; it is more complex for cross-border settlement agreements. For example, the parties may have agreed to court proceedings in one jurisdiction to enforce the terms of a settlement agreement, but the

court's judgment may then need to be enforced in another jurisdiction, even assuming enforcement is permitted for a foreign agreement. In the past, parties have been hesitant to utilize mediation as a means to resolve cross-border disputes. This problem led to the creation of the convention. To date, there are other constructs out there, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Mediation and International settlement agreements resulting from Mediation (2018), however these "models" are simply not a binding construct.

**Status of Ratification**

The first problem is that while the convention is open for signature by states (i.e. countries/nations) and regional economic integration organizations (collectively referred to as parties), signature is simply not the same as ratification. The convention, which was signed by 51 states in 2019, will only go into effect six months after three of these signatory States ratify the convention. However, while certain major world players (the United States, China, and India) have signed the convention, to date only one State, Singapore, has actually ratified the convention—while neither the European Union nor the United Kingdom, have not even signed the convention.

**Requirements for Agreements To Be Covered by the Convention**

There are several requirements to enforce a mediated settlement agreement under the convention: the agreement must be in writing, signed by the parties and certified or signed by the mediator. While this seems simple enough, as discussed later, not only does this last proviso create issues, but numerous exceptions and carve outs that follow these "simple" requirements further dilute the impact of the convention. The convention specifically excludes from coverage the following agreements: those relating to consumer transactions, family, inheritance or employment law. So as some critics of the convention note, by excluding family related settlements, disputes involving a family-owned business may be excluded. Additional exclusions include settlement agreements enforceable as a judgment or as an arbitral award. (This exclusion is intended to avoid overlap with other governing rules, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on Choice of Court Agreements (2005) and/or the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019)).

The convention specifically provides that it "shall not prevail over conflicting rules of a regional economic integration organization," so the enforcement of settlement agreements will be subject to any additional preconditions imposed by regional organizations, such as obtaining the counterparty's consent, as required under the EU Directive on Mediation. Significantly, the convention even permits States to make two prescribed reservations at the time that they ratify; specifically, a contracting state may declare that: (1) it will not apply the convention to settlement agreements to which the State is a party; and a State may further extend this reservation to settlement agreements entered into by government agencies or agents of government agencies; and (2) the convention will only apply to the extent that parties to the settlement agreement have agreed to the application of the convention. Effectively, a State can ratify and at the same time, opt out.

Moreover, while the convention is intended to cover mediated disputes, the convention defines mediation as "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') lacking the authority to impose a solution upon the parties to the dispute." Article 1, Convention. As a result, any settlement agreement resolved with the assistance of a third party, who is not the ultimate decision-maker, would appear to be covered by the convention; this is a very broad definition which may cover situations beyond the scope of what a State might otherwise determine to be a mediated dispute and which perhaps do not have the proper underpinnings of process to warrant enforcement.

**Does the Convention Really Provide an Enforcement Mechanism?**

Ultimately, however one of the biggest concerns is that the convention fails to provide a means to enforce international mediated settlement

agreements as it does not create or set forth the actual means of enforcement. Enforcement is left to the jurisdiction where the parties choose to enforce the settlement agreement. In addition to all of the carve outs and exceptions identified above, the convention will not allow enforcement of an agreement if: (1) the agreement is not final and binding; (2) the agreement is incapable of being performed; (3) the obligations of the agreement have already been performed or are not comprehensible; (4) the agreement is against public policy of the enforcing jurisdiction; or (5) there was a serious breach by the mediator of standards applicable to the mediator or the mediation absent which a party would not have entered into the settlement agreement. Any or all of these exceptions could lead to challenges which could defeat the very purpose of the convention by forcing the parties to litigate such issues.

### The Convention Is at Odds With Some Fundamental Recognized Principles

With respect to the last exception, a state may refuse to enforce a settlement agreement arising from mediation if an objecting party furnishes proof that "[t]here was a serious breach by the mediator of standards." However, the convention contains no definition as to what standards are to be applied to the conduct of the mediator. There is no universal code governing the conduct of a mediator; rather it is governed by each jurisdiction.

Further, how would a party establish this breach before a governing body? Would witnesses need to be called? If so, this raises a concern that a mediator could be subpoenaed to defend his/her actions and then be faced with violating the confidentiality of the entire process—a bedrock principle of mediation. In fact, most jurisdictions have specific rules providing that a mediator cannot be subpoenaed or compelled to testify, and most mediation agreements often contain provisos.

By including a specific provision opening the door for a mediator's conduct to be challenged, the convention codifies a construct that is fundamentally at odds with commercial mediation as currently implemented in the United States and the United Kingdom, among other countries.

Additionally, the convention's requirement that the mediator sign or verify the settlement agreement directly conflicts with the common practice in many jurisdictions that a mediator will not sign any resulting agreement. There are a variety of reasons mediators will not sign agreements: sustaining the confidentiality of the process, to avoid being subpoenaed as a witness to the execution of the agreement, and/or to avoid being considered to be a party to the rights and obligations set forth in the settlement agreement. In fact, many mediators will not even draft a settlement agreement for the parties.

Therefore, consideration must be given to how this requirement can be satisfied without compromising or impacting the integrity of the mediator's role in the process. (A work around could be simply including language in any settlement agreement clarifying that the mediator is merely affixing a signature to verify/confirm that a mediation took place, or perhaps creating a separate certification page for the mediator to sign that that states that the mediation took place to comply with the convention's requirement.

If the certification requirement is revised, so that the certification is more akin to the kind of report that a mediator provides to a court at the conclusion of the mediation, then this requirement is no longer concerning. It should be noted that a certification by the institution that administered the mediation, if one was involved would be acceptable as an alternative).

Given that the UNCITRAL has not published any instruments of ratification or reservations by contracting states, the evolving path of the convention seems even more uncertain. The convention is an aspirational step toward establishing a diversified range of dispute resolution options for parties to international disputes. But, it is premature to consider whether the convention will be universally adopted and if it is, whether it will encourage parties to utilize mediation to resolve cross-border disputes given all of the open items and concerns.

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