# The Singapore Convention: a bright new dawn for cross-border dispute resolution?

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## What has happened?

A new legal framework for the enforcement of international commercial settlement agreements resulting from formal mediation (Mediated International Settlement Agreements) is to be adopted by the General Assembly of the United Nations.

This potentially ground-breaking framework, which is modelled on (and intended to work in a similar way to) the New York Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention) will ultimately be known as the Singapore Mediation Convention. It is to be signed in the city-state on 1 August 2019, and will enter into force as soon as at least three member states of the UN have ratified it.

## Why is this development important for commercial parties?

Assuming the Singapore Mediation Convention receives similar international buy-in to the New York Convention (which at last count has 159 signatories) its introduction is likely to represent an important moment in the area of cross-border dispute resolution.

Efficiently run and organised by experienced dispute resolution specialists and professional mediators, mediation can provide parties with a faster, more cost-effective and commercial method of resolving disputes than is offered by litigation and arbitration. At the very least, the Singapore Mediation Convention has the potential to greatly increase the appeal of mediation as a mechanism of resolving commercial disputes with a cross-border dimension (in much the same way as the New York Convention, over time, made international arbitration the pre-eminent process for the resolution of cross-border commercial disputes). It could also create a virtuous cycle: because Mediated International Settlement Agreements will be more enforceable than settlements agreements which have simply been negotiated, commercial parties will be more likely to resort to mediation - and mediation has a higher success rate in forging settlements than straightforward negotiation.

There is currently no international legal framework for the direct enforcement of Mediated International Settlement Agreements. Accordingly, if one party breaches the terms of such an agreement, then generally speaking the non-breaching party's sole remedy is to sue for breach of contract in a fresh legal proceeding - thereby adding significantly increased costs and delay to the process of reaching a final resolution.

However, with the advent of the Singapore Mediation Convention, it may ultimately become possible in certain circumstances (and provided certain formalities have been followed) for a non-breaching party to enforce the terms of a Mediated International Settlement Agreement in the courts with jurisdiction over the breaching party, and that court would be bound (subject to some narrow exceptions) to give effect to the terms of the parties' Mediated International Settlement

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Agreement by way of a judgment in terms.

While enforceability is not nearly as much of an issue for settlement agreements as for arbitral awards or court judgments (as in theory the parties have agreed a resolution to their dispute, rather than having a resolution imposed), it was nevertheless recognised as enough of a problem to warrant a solution. In effect, the Singapore Mediation Convention will soon give Mediated International Settlement Agreements the same status as the New York Convention gives to arbitral awards.

## The details

The overarching legal framework, which has been devised by United Nations (UN) Commission on International Trade Law (UNCITRAL), will be constituted of two separate instruments designed to complement each other: (i) the Singapore Mediation Convention, or the "United Nations Convention on International Settlement Agreements" to give it its full title; and (ii) the model legislative text amending the pre-existing UN Model Law on International Commercial Conciliation (2002) (the Model Law on Mediation).

As with the New York Convention, any country that ultimately chooses to sign the Singapore Mediation Convention (a Contracting State) will likely have to take steps to incorporate its terms into its domestic law. This is where the Model Law on Mediation can play its part: while it covers other aspects of mediation in detail such as the appointment of the mediator, confidentiality and conduct of proceedings, it also incorporates the terms of the Singapore Mediation Convention in their entirety. As a result, countries will be able to bring the Singapore Mediation Convention into effect by adopting the Model Law on Mediation.

Like the New York Convention, the Singapore Convention will contain only very limited opt-outs for Contracting States, and is designed to take precedence over any less favourable domestic legislation.

## What exactly is a Mediated International Settlement Agreement?

The Singapore Mediation Convention applies to "international agreements resulting from mediation" and concluded "in writing" by parties to resolve a "commercial dispute".

A settlement agreement is 'international' if either:

i. two of the parties have their places of business in different States; or
ii. the State to which the settlement agreement is closely connected or to be performed is different from the parties' respective places of business (i.e., a third country)

The Singapore Mediation Convention excludes settlement agreements which:

a. have been approved by a court or have been concluded in the course of court proceedings
b. are enforceable as a judgment in the state of that court; or
c. that have been recorded and are enforceable as an arbitral award

The rationale of the carve out is that there are other widely accepted international instruments such as the New York Convention and the Hague Convention on the Choice of Court Agreements that specifically govern those types of settlement agreements. The Singapore Convention will focus on circumstances where these other instruments are not applicable.

The Singapore Mediation Convention does not contain any restrictions on the types of terms remedies contained within a Mediated International Settlement Agreement. Accordingly, courts in Contracting States will be able to give effect to agreements containing both pecuniary and non-pecuniary remedies.

## What is the process for enforcement?

Pursuant to the Singapore Mediation Convention, parties seeking enforcement of International Mediated Settlement Agreements will need to provide the competent authority of a Contracting State (i.e., a court) with:

(i) a signed Mediated International Settlement Agreement; and (ii) evidence that such an agreement resulted

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from mediation (i.e., attestation by the mediation institution, mediator's signature on the settlement agreement, etc.).
The Contracting State will then be required to enforce the terms of the agreement in accordance the conditions set out in the Convention and with its domestic procedural rules.

## On what grounds can enforcement be refused?

The Singapore Mediation Convention, similarly to the New York Convention, prescribe very limited grounds for the (i) judicial review; or (ii) non-recognition of Mediated International Settlement Agreements.

A court in a Contracting State can refuse to grant relief if it concludes that (i) granting such relief would be contrary to the public policy of that Contracting State; or (ii) the subject matter of the dispute is not capable of settlement by mediation under the law of that Contracting State.

Alternatively, a party against whom such an application is made can request the court of a Contracting State to refuse to grant relief on the following factual grounds:

- A party to the agreement was under some incapacity
- The agreement is null and void, operative or incapable of being performed or the obligations of the agreement have been performed
- The agreement is not binding or final, has subsequently been modified or is conditional so that the obligations have not yet arisen
- The agreement is not capable of being enforced because it is not clear and comprehensible
- There has been a serious breach by the mediator of standards applicable to the mediator or the mediation; or
- There has been a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence

It is worth making the point that some of the stated grounds for resisting enforcement are quite broad on their face, in particular the power of a court in a Contracting State to refuse enforcement if the relevant agreement is "*not clear and comprehensible*" and/or there has been a "*serious breach*" of standards applicable to the mediator or the mediation. In our view, these grounds have the potential to generate substantial litigation. However, the official commentary on the latest drafting process provided by UNCITRAL suggests that this risk has been recognised, so it remains to be seen whether there are any further changes to the text of the document before it is signed in Singapore next year.

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