

THE SINGAPORE CONVENTION ON MEDIATION: AN OVERVIEW OF THE KEY FEATURES AND A REVIEW OF CRITIQUES TO DATE

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I. INTRODUCTION

The approval of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (more commonly known as the “Singapore Convention on Mediation” or simply the “Singapore Convention”) by the United Nations Commission on International Trade Law in June of 2018 was arguably the most exciting development in international dispute resolution in 2018. Once the Singapore Convention will enter into force in August 2019, assuming there are at least three ratifying member states, it will in principle deliver a uniform enforcement and recognition mechanism for international mediated settlement agreements – a mechanism that doesn’t exist to date.

The Singapore Convention has been widely received very positively. Many see it as the missing piece of the puzzle to make mediation a true alternative to other forms of dispute resolution, and there are high hopes that the Singapore Convention can achieve for mediation what the New York Convention¹ has achieved for international arbitration. The criticism was scarce and appears to not be given much attention.

In this article, I will first give an overview of the key features of the Singapore Convention. I will then turn to the reception of the Singapore Convention, and address the praise and criticism the Singapore Convention has received, before finally providing for a conclusion.

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The views expressed here are solely those of the author.

¹ UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> (last accessed on 2019-02-01).

II. KEY FEATURES OF THE SINGAPORE CONVENTION

It would go beyond the scope of this paper to discuss all provisions of the Singapore Convention in full detail. For this reason, this paper is limited to a discussion of only the most important provisions, in particular, having in mind the promise of enforcement.

The Singapore Convention is very simple and only consists of 16 Articles on six pages.² Its scope, as set forth in Article 1, is to cover any mediated³ settlement agreement that is

- (i) in writing;⁴
- (ii) international⁵ in nature at the time of its conclusion;
and
- (iii) commercial in nature.⁶

The Singapore Convention further clarifies that mediated settlement agreements that

- (a) have been approved by a court or concluded in the course of proceedings before a court or are enforceable as a judgment in the State of that court; or
- (b) have been recorded and are enforceable as an arbitral award, are excluded.

To avoid doubt, only mediated settlement agreements are covered, not any type of settlement agreements. Therefore, unless the parties resolve their dispute in the course of mediation

² For the full text of the Singapore Convention, see UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation, available at http://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_I.pdf (last accessed on 2019-02-04).

³ The definition given to “mediation” is broad. According to Article 2, mediation is “a process [...] 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.”

⁴ As clarified in Article 2, this also includes various electronic forms of electronic communication.

⁵ The determination of internationality is primarily based on the place of business of the parties, as is defined in Article 1 and further clarified in Article 2

⁶ Transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family inheritance or employment law.

proceedings, enforcement under the Singapore Convention is not an option.⁷

The enforcement method was chosen to provide flexibility and autonomy to the States that have ratified the Singapore Convention. As set forth in Article 4, there is no specific mode of enforcement; instead, enforcement is “*in accordance with [a State’s] rules of procedure and under the conditions laid down in this Convention.*” While the New York Convention leaves procedural issues to be governed and determined by the law of the seat, the Singapore Convention instead determines that procedural issues are to be governed by the State of enforcement.

A party seeking to enforce a mediated settlement agreement must furnish the following to the competent authority where enforcement is sought:

- (i) the mediated settlement agreement, signed by the parties to the mediation; and
- (ii) evidence⁸ that the mediated settlement agreement resulted from mediation.

The counterpart to Article 4 is Article 5, listing the grounds for refusing to grant relief. The competent authority in the state where enforcement is sought may refuse relief if the party opposing enforcement or recognition of a mediated settlement agreement furnishes proof that any of the below grounds is met:⁹

⁷ It is noteworthy that the Model Law on International Commercial Mediation proposes in its footnote 5 that “[a] State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.” It would go beyond the scope of this paper to discuss such consideration. For details, see UNCITRAL, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), available at http://www.uncitral.org/pdf/english/commissionersessions/51st-session/Annex_II.pdf (last accessed on 2019-02-01).

⁸ The Singapore Convention is very flexible with respect to the required evidence. There can be a confirmation by (a) the mediator, either through (i) the mediator’s signature on the settlement agreement or (ii) a formal confirmation that mediation was carried out or (b) by the institution that administered the mediation. However, when no such evidence can be provided, “*any other evidence acceptable to the competent authority*” may be furnished.

⁹ The below table is only provided for ease of reference. The Singapore Convention provides a list of grounds. The table is a variation of *Sussman’s* table in *Sussman, Edna, The Singapore Convention. Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC Dispute

Category	Explanation
Substantive grounds	(a) incapacity of a party; ¹⁰ or (b) the settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it. ¹¹
Grounds pertaining to the terms of the mediated settlement agreement	(a) the settlement agreement is not binding or is not final, according to its terms; ¹² (b) the settlement agreement has been subsequently modified; ¹³ (c) the obligations in the settlement agreement have already been performed or are not clear or comprehensible; ¹⁴ or (d) granting relief would be contrary to the terms of the mediated settlement agreement. ¹⁵
Grounds pertaining to the mediator's conduct and the process of the mediation as such	(a) existence of a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; ¹⁶ or (b) failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement. ¹⁷
Grounds the competent State authority may invoke <i>sua sponte/suo motu</i> based on its own law	(a) granting relief would be contrary to the public policy of the State where enforcement or recognition is sought; ¹⁸ or (b) the subject matter of the dispute is not capable of settlement by mediation under the law of the State where enforcement or recognition is sought. ¹⁹

Resolution Bulletin, 2018, Issue 3, p. 52.

¹⁰ Article 5(1)(a).

¹¹ Article 5(1)(b)(i); this provision further specifies that "failing any indication [on the law], under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under [A]rticle 4."

¹² Article 5(1)(b)(ii).

¹³ Article 5(1)(b)(iii).

¹⁴ Article 5(1)(c).

¹⁵ Article 5(1)(d).

¹⁶ Article 5(1)(e).

¹⁷ Article 5(1)(f).

¹⁸ Article 5(2)(a).

¹⁹ Article 5(2)(b).

In case of a parallel application or claim, for instance to a court or an arbitral tribunal, if such application or claim may affect the relief sought, the competent authority may adjourn the decision and/or order security. This applies both for enforcement or recognition and when a mediated settlement agreement is invoked as a defense.²⁰

Article 8 allows a State to make reservations by declaring that it

- (a) “*shall not apply [the Singapore] Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;*” or
- (b) “*shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.*”

III. RECEPTION OF THE SINGAPORE CONVENTION

A. Positive Reception

The Singapore Convention has generally been received very well. Most commentators drew a correlation between the New York Convention and the Singapore Convention and predict that – as is the case with the New York Convention – the Singapore Convention will also be successful.

For instance, *Sussman* states that the Singapore Convention and the Model Law on International Commercial Mediation “*promise to provide parties with a clear, uniform framework for the enforcement and recognition of international mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.*”²¹

Ostrove takes the position that “[e]fficiently run and organised

²⁰ Article 6.

²¹ *Sussman*, Edna, *The Singapore Convention. Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC Dispute Resolution Bulletin, 2018, Issue 3, p.52.

*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)."*²²

Singaporean mediation powerhouse *George Lim*, who is also the Deputy Chair of the Singapore International Mediation Centre and was part of the UNCITRAL Working Group II, which worked on the draft of the Singapore Convention, took the view that 2019 *"will be the next game-changer in the field of international dispute resolution [... as o]nce enforcement becomes possible under an international Convention, mediation will gain better traction with businesses."*²³

Another observer saw the Singapore Convention as *"good news for businesses"*²⁴ and stated that *"[s]ince the New York Convention is widely seen as a success, it is expected that the Singapore Conventional on Mediation will be widely endorsed."*²⁵

The International Mediation Institute ("IMI") takes the view that ratifying the Singapore Convention will *"add to the signatory's attractiveness as a place for doing business and contribute to the economy"*²⁶ and that *"[c]ountries who sign up to*

²² Ostrove, Michael, *The Singapore Convention: a bright new dawn for cross-border dispute resolution?*, DLA Piper Publications, 1st October 2018, available at <https://www.dlapiper.com/en/uk/insights/publications/2018/10/the-singapore-convention/> (last accessed on 2019-02-06).

²³ Singapore International Mediation Centre, *The Singapore Convention: A milestone in mediation*, 25 July 2018, available at <http://simc.com.sg/2018/07/25/singapore-convention-milestone-mediation/> (last accessed on 2019-02-23).

²⁴ Kingsley, Patrick R., *The Singapore Convention on Mediation: Good News for Businesses*, 9th January 2019, available at <https://www.law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/?slreturn=20190108221138> (last accessed on 2019-02-04).

²⁵ *Ibid.*

²⁶ International Mediation Institute, *United Nations Convention on International Settlement Agreements Resulting from Mediation*, International Mediation Institute Briefing Paper, available at <https://www.imimediation.org/2018/11/28/new-imi-briefing-paper-un-convention-on-international-settlement-agreements-resulting-from-mediation/> (last accessed on 2019-02-10).

*the Convention will be well positioned to be a first mover to take advantage of the potential benefits the Convention can bring to their economies and business.”*²⁷

The Singaporean government, jubilant that the name of the treaty will be the Singapore Convention, observed in a press release that “[b]usinesses can have greater assurance that mediation can be relied on to settle cross-border commercial disputes, because mediated settlement agreements can be enforced more readily by the courts of jurisdictions that are contracting parties to the Convention”²⁸ and predicted that “[t]his will facilitate the growth of international commerce and promote the use of mediation around the world.”²⁹

B. Criticism

There was criticism surrounding the Singapore Convention, although it was less prominent than the positive reception. For instance, *O'Neill* questioned whether the scope of the Singapore Convention was too limited because of the exclusion of settlement agreements that have been recorded and are enforceable as arbitral awards, as well as agreements that have been approved by a court or concluded in the course of court proceedings and are enforceable as a judgement in the State of that Court. She takes the view that there is some uncertainty; making reference to the EU and the legal situation following the implementation of the EU Mediation Directive,³⁰ she opines that such exclusion could also include those mediated settlement agreements, which are not “*immediately enforceable per se, [but where] there is a right for the parties to apply to a court for an order that it be enforceable.*”³¹ *O'Neill* also takes the view that the reason to

²⁷ *Ibid.*

²⁸ Ministry of Law, Singapore, Singapore clinches bid for UN Convention on Mediation to be named after Singapore, 21st December 2018, available at <https://www.minlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html> (last accessed on 2019-02-05).

²⁹ *Ibid.*

³⁰ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0052> (last accessed on 2019-09-05).

³¹ *O'Neill*, Jan, The new Singapore Convention: will it be the New York Convention for mediation?, Thomson Reuters Dispute Resolution Blog, 19th

make such exclusion –the concern of an overlap of different international legal instruments – is “*not immediately apparent*.”³²

Calling it “[p]erhaps the feature of the Convention that presents the greatest challenge to it achieving a wide application,”³³ O’Neill is also rather sceptical about the possibility of States to make reservations. This “*has the potential to result in an imbalance between parties if an agreement was enforceable against one party because its home jurisdiction (or wherever its relevant assets were) did not apply the opt-in, but unenforceable against the other because its home jurisdiction did*.”³⁴

However, O’Neill’s bigger concern is the risk that because of the possibility to make reservations, the Singapore Convention will be “*applied in a patch fashion, contrary to the basic objective of establishing a comprehensive regime under which mediated settlements are widely enforceable*.”³⁵ Indeed, she doubts “*whether the New York Convention would have achieved what it has for the status of international arbitration if it only applied where parties had specifically opted in to the regime*.”³⁶

Phillips considered the requirement confirming that the mediation actually took place troublesome. With respect to the possibility that such confirmation is given by the mediator, he was concerned that many mediators conscientiously refuse to sign a settlement agreement. According to him, most American mediators follow the practice that, consistent with their mediation agreements providing that they not be subpoenaed as a witness, they neither draft nor execute any written memorial that may be interpreted as witnessing its execution or – even worse – including them as a party to the rights and obligations set forth therein.³⁷

He further points to the ground for refusal “[t]here was a serious breach by the mediator of standards applicable to the

November 2018, available at <http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/> (last accessed on 2019-02-05).

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Phillips, Peter F., Concerns on the New Singapore Convention, Mediate.com, October 2018, available at <https://www.mediate.com/articles/phillips-concerns-singapore.cfm> (last accessed on 2019-02-06).

*mediator or the mediation without which breach that party would not have entered into the settlement agreement”*³⁸ and is concerned that “[t]his provision can be interpreted as a map for counsel to relieve its client of its obligations under a settlement agreement, by focusing on the conduct of the mediator.”³⁹ Phillips takes the view that this provision is likely to give rise to “mini-trials,” including arguments as to what standards are applicable, what conduct constituted a violation of such standards, and who may be called to testify. It would also lead to a weakening of confidentiality provisions.⁴⁰

Finally, *Phillips* takes the view that the “enforceability of mediated settlement agreements” as a concept such should be questioned. To put it in his words, “[t]here is also the more holistic concerns about the entire idea that an agreement arising from mediation is ‘enforceable.’ Arbitrations result in awards – drafted by tribunals with authority – imposing obligations on the ‘losing’ party that can certainly be enforced by their terms. By contrast, settlements (whether mediated or not) result in agreements, with mutual obligations whose authority derives from the parties’ consent, and often they are incapable on their face of being merely ‘enforced.’”⁴¹

He considers situations where the mediated settlement agreement states that one party will supply to the other side such quantity of material as the latter party “may reasonably require” in a “commercially reasonable period of time after notice.” This would raise numerous questions regarding enforceability.⁴²

IV. CONCLUSION

It is generally accepted that mediation offers numerous advantages over other forms of dispute resolution and it is somewhat incomprehensible that it is not used more widely for commercial disputes, given its many advantages and its success rate. One can only speculate about the reasons, but if one takes the

³⁸ Article 5(1)(e).

³⁹ Phillips, *supra* at FN 37.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

view that enforcement of mediated settlement agreements is necessary, the Singapore Convention is certainly a right step.

This is not to say that it is without flaws - a multilateral treaty that meets everyone's expectations. Any multilateral treaty can be criticised for the compromises that ultimately need to be taken. Indeed, *Schnabel*, who provides a meticulous overview of the drafting history, mentions the term "compromise" 18 times in his paper.⁴³

Without compromise, the Singapore Convention could not be ratified in August 2019. It would still be in the discussion stage and there would hardly be a complete draft available. This, indeed, was the expectation at the outset of the process.⁴⁴ In reality, the Singapore Convention could be completed within only a few years and this is, without any doubt, an outstanding feat that everyone involved must be praised for.

The success of the Singapore Convention will ultimately depend on whether a sufficient number of States ratify it. If there are only a handful of countries, the promise of worldwide enforcement of mediated settlement agreements cannot be met. At this point in time, it is still completely impossible to predict which countries will likely sign the Singapore Convention and which countries will not; the only information that is publicly available as at the time of drafting this paper is speculation that Singapore will be among the first signatories.⁴⁵

As this author has encountered in his own practice, mediation – where it is possible⁴⁶ – is a formidable process to resolve commercial⁴⁷ disputes. Its key benefits,⁴⁸ such as maintenance or

⁴³ Schnabel, T., *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 18th September 2018, available at: <https://ssrn.com/abstract=3239527> (last accessed on 2019-02-08).

⁴⁴ *Ibid.*, p.4.

⁴⁵ Strait Times, United Nations passes resolution for new treaty on mediation named after Singapore, 21st December 2018, available at <https://www.straitstimes.com/politics/united-nations-passes-resolution-for-new-treaty-on-mediation-named-after-singapore> (last accessed on 2019-02-08).

⁴⁶ Mediation is not always possible. The most apparent cases are those, where one party simply doesn't want to participate.

⁴⁷ This is not to say that it is not a formidable process to resolve other disputes; in the context of the Singapore Convention, however, only commercial disputes are at question.

⁴⁸ For additional benefits, see Mediate.com, *Benefits of Mediation*, August

even improvement of the business relationship and the parties' joint solution of the dispute instead of that of a third party judge or arbitrator, easily outweigh the shortcomings.

Mediation is beneficial for society as a whole. Any project that promotes mediation and ultimately leads to an increase in the use of mediation should therefore be welcome. This applies, in particular, if such promotion takes place on a global scale, to a larger extent than ever in the history of mediation. If enforcement is the missing piece of the puzzle for mediation to thrive, as some argue, the Singapore Convention has the potential to not only be "*the next game-changer in the field of international dispute resolution*;"⁴⁹ it could become the best development in dispute resolution of the 21st century.

1998, available at <https://www.mediate.com/articles/benefits.cfm> (last accessed on 2019-02-08).

⁴⁹ Lim, *supra* at FN 23.