

The New Singapore Convention on Mediation: What Does it Mean for Mediation in the United States?

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THE SUPREME COURT *of* OHIO **2020**
Dispute Resolution
Conference



<https://images.app.goo.gl/SWERPCXun39TJdSj6>

United Nations Convention on International Settlement Agreements Resulting from Mediation = Singapore Convention

- Opened for signature August 2019
- Currently 52 signatories; 2 ratifications

Negotiated by UNCITRAL
(United Nations Commission on International Trade Law)

ENFORCEMENT

The Convention provides a mechanism to enforce and invoke

- *international*
- *mediated* settlement agreements
- reached to resolve *commercial* disputes

- 1) What is your experience with enforcement of mediated agreements?
- 2) Do you think that an enforcement mechanism would be an improvement for mediation?

What do we know about enforcement actions?

- Cases with mediation issues have risen steadily.

1999: 270

2017: 891

- More mediation cases are now brought in federal than state court.

1999-2003: 32% federal

2013-2017: 63% federal

- Enforcement is, by far, the most frequently disputed mediation issue.

1999-2003: 569/1223 cases (47%)

2013-2017: 1668/4319 cases (39%)



James R. Coben, *Evaluating the Singapore Convention through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American State and Federal Courts*, 20 *Cardozo J. Conflict Resol.* 1063 (2019).

What do we know about enforcement when a defense is raised?

- Overall enforcement rate increased between the two time periods.
- This trend was consistent across all case types except estate & probate.

Cases Raising Defenses to Enforcement				
1999-2003: 372 cases			2013-2017: 620 cases	
% of cases	% enforced	Subject Matter	% of cases	% enforced
54%	57%	General Civil	56%	69%
30%	56%	Family	31%	69%
10%	57%	Employment	11%	71%
6%	52%	Estate/Probate	2%	50%

James R. Coben, *Evaluating the Singapore Convention through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American State and Federal Courts*, 20 *Cardozo J. Conflict Resol.* 1063 (2019).

Perspectives of International Mediation Users

- Disincentive to use mediation because settlements are harder to enforce internationally than domestically.
 - Foreign contract law
 - Transform into arbitral award on agreed terms
 - Formalities such as notaries
- Hard to convince business partners to use mediation because lacks international legitimacy comparable to that provided by the New York Convention for arbitration.
- Survey results suggest support for global enforcement framework.



Overview of the Singapore Convention

- Primary Goal = Encourage growth in the use of cross-border mediation
- New sui generis status for mediated agreements:
- Private contract → Instrument entitled to privileged treatment under an international legal framework

Overview of the Singapore Convention

A Pro-Enforcement structure is derived from the New York Convention (on Recognition and Enforcement of Arbitral Awards):

- Nations that are parties to the Convention **shall** enforce settlement agreements that fall under the Convention
- Enforcement may be refused only if the party opposing enforcement proves one of the grounds listed in the Convention

Settlement agreement is null & void
... has been modified
... has been performed

Incapacity
Contrary to public policy

Mediator breach of standards

Limited Scope of the Singapore Convention

- International agreements only
- Commercial disputes only. Agreements are excluded for:
 - Consumer transactions
 - Employment, family, & inheritance issues
- Does not apply to settlement agreements that are:
 - Approved by a court or enforceable as a court judgment
 - Recorded and enforceable as an arbitral award

Scope of the Singapore Convention

MEDIATION is a term of art

“A process . . . whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons . . . lacking the authority to impose a solution on the parties to the dispute.”

Label does not matter

Private or court program

Mandatory or voluntary

Does not matter

Early Neutral Evaluation

Conciliation

Ombuds

Scope of the Singapore Convention

Negotiated Agreements are not covered

A party seeking enforcement shall supply:

- Settlement agreement signed by the parties, and
- Evidence that the settlement agreement resulted from mediation, such as:
 - ❖ Mediator's signature on the agreement
 - ❖ Document signed by the mediator indicating that the mediation was carried out
 - ❖ Attestation by the institution that administered the mediation
 - ❖ Other evidence acceptable to the enforcing authority

Flexibility in the Application of the Convention

Disputing parties can opt-out of Convention coverage in their agreement

- A defense to enforcement is that it would be contrary to the terms of the agreement

Nations can enter two types of reservations:

- The convention doesn't apply to disputes with the government
- It will apply the Convention only if the parties to the dispute opt-in

Controversial Provisions

Do you see any of these as problematic?

- Opt-out of Convention coverage rather than opt-in
- Requirement for proof of mediation
- Provisions on mediators in the grounds to deny enforcement
 - ✓ Serious breach of mediation standards, without which the objecting party would not have entered into the agreement
 - ✓ Failure by the mediator to disclose to the parties' circumstances that raise justifiable doubts as to the mediator's impartiality or independence
 - material impact or undue influence on a party
 - party would not have entered into the agreement

Possible influence of the Convention in the United States

- Encourage mediation in cross-border disputes
- Stimulate domestic legislation on enforcement
 - Perhaps limited to commercial disputes?
- Ohio law will be inconsistent with the Convention
 - It provides for settlement enforcement in international commercial disputes by treating the agreement as an arbitral award

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Selected Resources on the Singapore Convention

United Nations Convention on International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf

Singapore Convention Reference Book, Hal Abramson, *The New Singapore Mediation Convention: The Process and Key Choices*, 20 CARDOZO J. CONFLICT RESOL. (2019).

This volume contains the following articles and more:

James R. Coben, *Evaluating the Singapore Convention Through a U.S.-centric Litigation Lens: Lessons Learned From Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. (2019).

Ellen E. Deason, *What's in a Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. (2019).

Allan Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. (2019).

Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1 (2019).
<https://digitalcommons.pepperdine.edu/drlj/vol19/iss1/1/>

Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, DISP. RESOL. MAG. 32 (Fall 2015).
https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/fall-2015/DRM-Fall-2015-PDF.authcheckdam.pdf

F. Peter Phillips, *Concerns on the New Singapore Convention*, Business Conflict Management Blog (Oct. 9, 2018) (criticizing the requirement for a mediator's signature as inconsistent with Western mediation practice).
<http://www.businessconflictmanagement.com/blog/2018/10/concerns-on-the-new-singapore-convention/>

United Nations Convention on International Settlement Agreements Resulting from Mediation



UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on
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Agreements Resulting
from Mediation



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Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation¹ and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission² recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

¹ Resolution 57/18, annex.

² *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,³

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,⁴

Taking note with satisfaction of the draft convention approved by the Commission,⁵

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the “Singapore Convention on Mediation”;

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

*62nd plenary meeting
20 December 2018*

³ Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

⁴ Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 49.

⁵ Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

- (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - (ii) The State with which the subject matter of the settlement agreement is most closely connected.
- 2. This Convention does not apply to settlement agreements:
 - (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
 - (b) Relating to family, inheritance or employment law.
- 3. This Convention does not apply to:
 - (a) Settlement agreements:
 - (i) That have been approved by a court or concluded in the course of proceedings before a court; and
 - (ii) That are enforceable as a judgment in the State of that court;
 - (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

- 1. For the purposes of article 1, paragraph 1:
 - (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;
 - (b) If a party does not have a place of business, reference is to be made to the party's habitual residence.
- 2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.
- 3. "Mediation" means 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 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.
4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.
5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms;
or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was 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; or

(f) There was a 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.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this 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;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.



