



**Submission to the Australian Attorney-General’s Department
on the Singapore Convention on Mediation**

Thus far, there has been no international mechanism to enforce mediated settlement agreements akin to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") for arbitration. Although mediation is widely used in Australia for domestic disputes, since it is more cost-effective and enables commercial outcomes, it is less used internationally, due primarily to the lack of certainty, finality and enforceability.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") is the missing piece on the international dispute resolution scene and will now take its rightful place alongside the New York Convention and the Hague Conventions¹. It establishes a much-needed harmonized legal framework for the enforcement of settlement agreements resulting from international commercial mediation ('settlement agreements').

Disputes inevitably arise in business relationships and contracts. As Singapore’s Prime Minister Lee Hsien Loong aptly observed in his opening remarks at the signing ceremony of the Singapore Convention on Mediation (the “Singapore Convention” or the “Convention”), disputes “disrupt normal business operations... damage reputations, hurt share prices and make it harder for companies to raise capital. They dampen the confidence and morale of employees, shareholders and other stakeholders. A robust framework to manage such conflicts can prevent such disputes from escalating unnecessarily or causing unintended consequences.”²

The Singapore Convention provides such a framework and it is vital for Australia to become a signatory.

Question 3.1: Should Australia become a Party to the Singapore Convention? Why or why not?

Australia is recognised as a mediation-friendly jurisdiction for domestic disputes and has long been involved with the work of UNCITRAL, including through UNCCA, the first

¹ The Convention of 30 June 2005 on Choice of Court Agreements and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

² 11 PM Lee Hsien Loong, 'Welcoming speech' (Speech delivered at the Singapore Convention Signing Ceremony and Conference, Singapore, 7 August 2019)

<<https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>>.



National Coordination Committee of its kind. Australia now needs to step up to the plate, join the list of signatory countries and set an example for others. Given the extensive business relationships between Australian companies and their commercial partners in the region and globally, being able to resolve disputes in a more cost-effective manner while preserving relationships within the framework of an instrument that affords certainty in enforceability is not only desirable, but necessary.

The Singapore Convention recognises the value of mediation for international trade, along with its growing use as a means of dispute resolution in international and domestic commercial disputes.

Likewise, the introduction to the Consultation Paper states that the Singapore Convention on Mediation “establishes a uniform framework for the recognition and enforcement of mediated settlement agreements across borders” (1.1). Its purpose is to “facilitate international trade and commerce and to promote mediation as an alternative, effective dispute resolution option in the context of cross-border commercial disputes” (1.2).³

The Singapore Convention currently has 53 signatories including the USA, China, India, Malaysia, the Republic of Korea, and Singapore, which countries are 6 of Australia’s top 10 trading partners⁴ and has now been ratified by six countries. This is reason enough why the answer should be a resounding yes and should Australia become a signatory without delay.

Parties generally comply with mediated settlement agreements because mediation is a voluntary process in which they craft their own resolution. This is also the case for arbitral awards. However, for compliance is even for the rare cases when a party doesn’t comply an enforcement framework is necessary. The last thing parties need is to have to relitigate the result of a mediation, particularly if the agreement is seen as a contract in place of enforcement.

It is important not to lose sight of the fact that mediation is voluntary and that failing agreement, parties will have their disputes resolved their disputes by a determinative means such as litigation or international arbitration. However, once they have agreed to a settlement it should be enforceable in the same matter as a judgement or an arbitral award.

Businesses support the Convention, as it makes international commercial mediation viable and certain by providing direct enforcement to settlement agreements and puts mediation among the modes of dispute resolution of choice for international contracts.

The ‘drivers for change’ in the Consultation Paper persuasively describe the potential problems with enforcement, which are significantly more difficult internationally than nationally. This is said to disincentivize the use of mediation in cross-border disputes.⁵

³The Singapore Convention on Mediation Public Consultation Paper October 2020, <https://www.ag.gov.au/legal-system/publications/singapore-convention-mediation-consultation-paper>

⁴ <https://www.dfat.gov.au/sites/default/files/trade-investment-glance-2020.pdf>

⁵ Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, 3; See also Stacie Strong, ‘Realizing Rationality: An Empirical Assessment of International Commercial Mediation’ (2016) 73 *Washington and Lee Law Review* 1973, 2051.



In some countries, such as the US and the UK amongst others, mediated settlement agreements are treated as contracts and if litigation ensues, the party opposing enforcement may raise standard contract defences. This will not be the case under the Singapore convention as the grounds for refusing enforcement are limited.

To avoid this, parties often convert the settlement agreement into a consent award. A number of institutions and arbitration laws do provide for a settlement agreement reached in a mediation to be memorialized as a consent award that should have the same enforceability as an award made following arbitral proceedings.

In addition to being more costly, consent awards are not enforceable in some New York Convention states: if an arbitral tribunal is constituted for the sole purpose of rendering a consent award post-settlement or a mediator changes hats to become the arbitrator, the award may not be enforceable as there can be no dispute once a matter has settled and the existence of a dispute is a requirement under New York Convention. To circumvent this issue, parties commence arbitration, and begin mediation after in order to obtain a consent award. This is more costly and time-consuming. This is precisely what mediation is designed to avoid in the first place.

In a welcome change, parties will no longer have to jump through such hoops and incur the extra costs of converting a settlement agreement into a pseudo arbitral award. For businesses and investors, the ability to resolve disputes reliably and effectively is a necessity when concluding cross-border deals.

The fact that settlement agreements are regularly and for the most part easily enforced in Australia may explain why Australia did not see the need to adhere to the Convention at the signing. But given the volume of Australia's trade, an international framework is required - as is the case for arbitration - to protect Australian businesses despite it being a pro-mediation jurisdiction domestically.

For businesses and investors, the ability to resolve disputes reliably and effectively is a necessity when concluding cross-border deals. Based on a number of surveys conducted over the past decade, executives, in-house counsel and external counsel alike cite lack of enforceability as the key barrier to using mediation for international disputes.

This was the response as far back as 2011 in a CPR survey.⁶ In a 2014 IMI survey, respondents said they would be "much more likely" to mediate a dispute with a party from a State that had ratified a convention for the enforcement of settlement agreements, which would provide greater certainty.⁷

Later surveys and studies also showed that the two main areas for improvement were the creation of an international mechanism to promote the recognition and enforcement of

⁶ International Institute for Conflict Prevention & Resolution, Attitudes toward ADR in the Asia-Pacific Region: A CPR Survey (2011) < <http://www.chinagoabroad.com/en/article/attitudes-toward-adr-in-the-asia-pacific-region-a-cpr-survey>>.

⁷ International Mediation Institute, IMI survey results overview: How users view the proposal for a UN Convention on the Enforcement of Mediated Settlement Agreements (16 January 2017) <<https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/>>.



settlements, including those reached in mediation and protocols for implementing non-adjudicative processes before commencing adjudicative processes.⁸

Parties are often reluctant to settle in mediation for a lesser amount than the original claim, only to have to incur further procedural costs in litigation or arbitration to enforce a settlement agreement in the event of non-performance.

There is no doubt that Australia should sign and ratify the Singapore Convention as soon as possible.

Since Australia is also a Model Law country, it might look to incorporating the Model Law on Mediation in addition to signing the Convention, as a second step. This would give Australian businesses in the future more support and certainty for their international dealings; However most important now is becoming a signatory to an ratifying the Convention.

Question 2: Do you have any concerns about Australia becoming a Party to the Singapore Convention? If so, please provide details.

Absolutely not.

Australia has proved itself to be a desired seat for arbitration due to its skilled ADR practitioners and pro-arbitration stance. It has the ability to do the same internationally, for mediation, which is strongly supported nationally. It is difficult to understand why Australia was not among the initial signatories to the Convention.

Even without being a party to the Singapore Convention, a settlement agreement could be enforced against an Australian entity that doesn't comply or in favour of one enforcing against a foreign company in a signatory country, for example.

The only 'drawback' that seems to be being aired in the literature is that that Australians or Australian businesses will have to comply with their international obligations. This is no different from the situation domestically as settlements resulting from mediation are widely enforced already in Australia.

The benefits far outweigh such concerns, which are somewhat disingenuous.

And at the end of the day, parties tend to comply with settlement agreements as they do with arbitral awards, but even more so, since it is an outcome that they have negotiated.

Question 3.3: What, if any, reservations should Australia make if it was to become a Party to the Singapore Convention?

Article 8 of the Convention sets forth the two exclusive reservations for parties, namely, the exclusion of states and their instrumentalities (Art. 8.1(a)) or the requirement for the parties themselves to agree to or 'opt-in to' the application of the Convention (Art. 8.1(b)).

⁸ Global Pound Conference Series, Global Data Trends and Regional Differences Report (2018) at 14 < <https://www.imimmediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf>>.



Australia should not make any reservations when it becomes a signatory to the Convention. Of the 53 signatories, only 3 have made declarations: the Islamic Republic of Iran under both (a) and (b) and Belarus and Saudi Arabia under (b).⁹ None of Australia's trading partners have deemed necessary to make any such reservations.

With respect to Art. 8.1(a), investor-state disputes fall under the Convention, unless a state has made a declaration specifying a carve out for settlement agreements involving the state or its government instrumentalities, which would then be excluded from enforcement.

I do not believe such a reservation is in the best interest of Australia or Australian businesses or investors. Australia is a member of a number of multi-lateral institutions or treaties that include mediation in the ISDS offering and its principal trade partner signatories to the Convention have not made such declarations. For example, FTAs such as those of Singapore (SAFTA), Malaysia (MAFTA), China (CHAFTA), Brunei/Philippines/Laos (AANZFTA) include mediation and Australia's BITs with Laos, the Philippines and Sri Lanka provide for conciliation under ICSID.

Australia has recently acceded to RCEP (the Regional Comprehensive Economic Partnership), which includes mediation as a form of dispute resolution.¹⁰

In my view, it is preferable for the Convention to apply to commercial matters in trade and investment to provide a more harmonious framework and the certainty that parties require, particularly since mediation is better suited than determinative modes of dispute resolution (such as arbitration or litigation) to achieve the parties' commercial objectives and preserve relationships.

In fact, the recent 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS¹¹ showed that more than half of the respondents thought that mediation was a helpful mechanism to resolve, mitigate or prevent disputes and that it should be mandatory.

With respect to Art. 8.1(b), of the opt-in, my view is that it can lead to confusion and should be avoided. It was included at the behest of some countries, but only as a reservation, not in the articles of the Convention, which otherwise applies by default to all settlement agreements. Even an opt-out clause, similar to that of the CISG¹² can lead to a blanket exclusion of a treaty's protections for want of an understanding of its meaning and scope.

Article 8(1)(b) allows a state to declare that the Convention will only apply if the actual parties to the settlement agreement have agreed to its application or 'opted-in'. Thus, to avail themselves of the Convention's protections, the parties must affirmatively choose to have it apply.

⁹ Article 19.7,

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

¹⁰ <https://rcepsec.org/wp-content/uploads/2020/11/Chapter-19.pdf>

¹¹ <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>

¹² United Nations Convention on Contracts for the International Sale of Goods (1980) (the "CISG") Article 6 also known as the or Vienna Convention.



Australia should follow its partners and allies and sign the Convention with no reservations.

Question 3.4: What are your views on the Singapore Convention's broad definition of mediation (outlined below in 5.3)?

The definition of mediation in the Singapore Convention as outlined in paragraph in 5.3 entitled 'Scope' of the consultation paper (and expanded in the Model Law) is not overly broad.

First of all, mediation is defined in Article 2 of the Convention as a process in which the parties attempt to settle their dispute with the assistance of a third person or persons lacking the authority to impose a solution. This is the only broad aspect of the definition, as its aim is to cover all facilitative processes, including co-mediation, differentiating them for determinative dispute resolution.

Second, the Singapore Convention applies only to international commercial settlement agreements resulting from mediation. It does not apply to:

- domestic settlement agreements resulting from mediation;
- international settlement agreements that are concluded in the course of judicial or arbitral proceedings and which are enforceable as a court judgment or arbitral award; or
- international settlement agreements relating to disputes of a personal, family, or household nature, or family, inheritance or employment law matters.

These are all familiar legal concepts and the same applied in international commercial arbitration (as are the grounds for refusing enforcement).

However, a settlement may not be reached during mediation, but after continued negotiations between the parties post-mediation. In some cases, the mediator may have helped the parties to narrow or better understand the issues in dispute, and they go on to settle at a later date. In this respect, the wording 'resulting from mediation' is broad enough to cover these instances and the Convention would apply.

The settlement agreement must result from a commercial and international mediation, and not be subject to a specific exclusion, as those set forth above. This is similar to the approach the CISG, where commerciality is defined by exclusions rather than inclusions. Article 2(3) of the Convention is amplified by the non-exhaustive list in Model Law Art 1(1), which includes

any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road¹³.

Settlement agreements must be international at the time of their conclusion, which generally means under Article 1(1)(a) that the parties have their places of business in different states. However, if that is not the case, pursuant to Article 1(1)(b), if the state where the substantial part of the obligations is performed or with which the subject matter

¹³ UNCITRAL Model Law on International Commercial Mediation, UN Doc A/RES/73/199



is most closely connected is different to the state where the parties have their businesses then the settlement agreement is considered international.

The purpose of the definition is to be broad enough so as not to exclude genuine mediated settlement agreements yet narrow enough to ensure that there is no overlap with settlement agreements that are enforceable as court judgments or arbitral awards that are also excluded from the scope of the Convention by Articles 1(3) (a) and (b), as that would allow parties to have two bites of the proverbial apple.

Question 3.5: What are your views on the grounds for refusing to enforce a mediated settlement agreement?

The grounds for refusing set out in Article 5 are similar to those in the New York Convention.

The Singapore Convention affords parties the finality that is paramount for extra-judicial dispute resolution and overcomes the issue of enforcing a settlement agreement as a contract and the raising of contractual defences, by limiting the defences to enforcement.

Thus, Articles 5.1(a) through 5.1(d) enable a competent authority to refuse to grant relief or enforcement based on the incapacity of a party, a settlement agreement that is null, inoperative or incapable of being performed, or is not binding, final or has been subsequently modified.

Additional grounds are when a party has already performed its obligations under the settlement agreement, the terms of the settlement agreement are not clear or comprehensible or have been modified after the settlement was reached.

Another ground for refusal is when granting relief would be contrary to the terms of the settlement agreement. One example of this is if the parties exclude the application of the Convention by 'opting-out'.

Article 5.2 closes this exhaustive list, with the public policy exception and what I have termed as 'mediability',¹⁴ that is, the subject matter of the dispute is not capable of settlement by mediation under law.

Finally, Article 3.2 enables a party to invoke a settlement agreement as a defence or shield against a claim to prove that the elements of the claim have been resolved. The conditions for reliance on the settlement agreement as a defence against a claim or for its enforcement are found in Article 4.

Certain formalities must be met for a settlement agreement to be enforced under the Singapore Convention. The key difference with the New York Convention is that the form requirements set out in Article 4 for mediation apply to the settlement agreement or the end result, not the decision to resolve a dispute by mediation prior to its occurrence as is the case regarding the validity of the agreement to arbitration rather than the award.¹⁵ These formalities protect the parties.

¹⁴ Donna Ross, *The Singapore Convention: From a Blizzard, a Convention Blooms*, the arbitrator & mediator, (2020) 39 (1), p.185

¹⁵ This is because the agreement to arbitrate is what first binds the parties whereas in mediation there



The settlement agreement must be signed by the parties to be valid. However, Article 4.2 reflects modern practice by allowing signatures to be in an electronic format. This also supports the growing practice of ODR or on-line dispute resolution, which due to the Covid-19 pandemic, has become the primary means by which disputes are resolved nowadays.

In addition to the grounds previously discussed, Article 5.1(e) and (f) offer two further reasons for refusing relief, namely a serious breach of standards by the mediator and the failure by the mediator to disclose to the parties any circumstances that may raise justifiable doubts as to the mediator's impartiality or independence respectively. To succeed on either of these grounds, it must be proven that the breach or failure had a material impact or undue influence on a party. Enforcement will only be denied if without the breach or failure, a party would not have entered into the settlement agreement, requiring a causal relationship, with the onus on the party opposing enforcement to prove that there has been mediator misconduct and that, but for the mediator's misconduct (or failure to disclose), the party would not have entered into the settlement agreement¹⁶. This high standard is necessary to protect the process against a disgruntled party or one whose circumstances have changed and is seeking a justification for noncompliance with the settlement agreement.

It is useful to look at the law on arbitration in Australia and compare the grounds for refusing to enforce a mediated settlement agreement under the Singapore Convention to those of refusing to recognise or enforce an arbitral award under the New York Convention, the UNCITRAL Model Law and the International Arbitration Act 1974 (the "IAA").¹⁷ One can only see similarities and realise that the Convention is founded on well-established principles that are enshrined in Australian law.

Incapacity. Singapore Convention Article 5 (1)(a); New York Convention Article V(1)(a), Model Law Article 36(1)(a)(i), IAA Section 8(5)(a).

Agreement is null and void. Singapore Convention Article 5(1)(b)(i); New York Convention Article V(1)(a), Model Law 36(1)(a)(i), IAA Section 8(5)(b).

Agreement is not final or binding. Singapore Convention Article 5 (1)(b)(ii); New York Convention Article V (1)(e), Model Law Article 36(1)(a)(v), IAA Section 8(5)(f).

Granting relief would be contrary to the terms of the settlement agreement. Singapore Convention Article 5 (1)(d); New York Convention Article V (1)(c)¹⁸, Model Law Article 36(1)(a)(iii), IAA Section 8(5)(d)).

Mediator misconduct. Singapore Convention Article 5 (1)(e); New York Convention Article V 1(d), Model Law Article 36(1)(a)(ii), IAA Section 8(5)(e). These deal with the composition of the tribunal rather than misconduct *per se*.

is no obligation until the settlement agreement is executed.

¹⁶ See *Tapoohi v Lewenberg* (No 2) [2003] VSC 410 for a rare Australian case in which a mediator's liability and the validity of a settlement agreement were invoked on the grounds he had coerced a party to settle.

¹⁷ <https://www.legislation.gov.au/Details/C2018C00439>, which includes the Model Law in Schedule 2.

¹⁸ The New York Convention refers to matters beyond the scope of the arbitration agreement, but the notion is similar.



Article 5, 1(e) requires a serious breach without which a party would not have entered into the settlement agreement.

Failure to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence. Singapore Convention Article 5 (1)(f): New York Convention Article V (1)(d), Model Law Article 36(1)(a)(ii), Article 12(2), IAA Section 8(5)(e).

Article 12(2) of the Model Law provides the grounds for a challenge and the basis for the language used in the Convention, including 'if circumstances exist that give rise to justifiable doubts as to his impartiality or independence'. The IAA incorporates Article 12(2).

The standard for mediators is slightly lower than for arbitrators as in mediation, it is still the parties' decision, not a final unappealable award. For this reason, Article 5(1)(f) requires a material impact or undue influence.

Contrary to public policy or the public policy exception. Singapore Convention Article 5 (2) (a): New York Convention Article V (2)(b), Model Law Article 36(1)(b)(ii), IAA Section 8(7)(b).

The dispute is not capable of settlement by mediation. Singapore Convention Article 5 (2)(b): New York Convention Article V (2)(a), Model Law Article 36(1)(b)(i), IAA Section 8(7)(a), the latter all referring to arbitration.

The similarities between the grounds under the Singapore Convention and the law on other forms of ADR in Australia, namely international arbitration, testifies to the fact that the grounds for refusing to enforce a mediated settlement agreement are sufficient, well-reasoned and based on existing law.

In conclusion, the benefits far outweigh any perceived disadvantage, and it is high time for Australia to join its international trading partners to promote the most commercial and cost-effective mode of dispute resolution and support Australian companies doing business internationally.