

The new Singapore Convention: some practical issues to consider now

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The [Singapore Convention](#) (Convention) has received widespread attention since it was [signed](#) on 7 August 2019. Not only did its tally of 46 first-day signatories break the record for any United Nations trade convention, it also included the world's two largest economies, China and the US.

Most practitioners will now be aware of at least the basic thrust of the Convention, more formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation. Essentially, it establishes a regime under which contracting states will be obliged (except in limited circumstances) to recognise [settlement](#) agreements that result from [mediation](#) in international commercial disputes, either to enforce the agreement or allow it to be invoked as a defence to a claim.

Given the enthusiastic initial response, it is feasible that the Convention could be in operation as early as the first half of next year (it will enter into force six months after ratification by at least three signatory states). Importantly, as discussed below, as soon as it enters into force, it will apply to mediations conducted anywhere in the world, not just within jurisdictions that have ratified it.

This blog post will not seek to summarise the provisions of the Convention or comment on its potential to increase the attractiveness of mediation, both of which have been covered widely. Rather, it identifies a number of practical issues emerging from the Convention which practitioners involved in mediations now should be considering.

I noted in an [earlier post](#) that, in practice, failure to honour settlement agreements reached through mediation is in fact relatively uncommon, at least compared to court judgments and [arbitral awards](#). However, given that there will soon be an enforcement regime in place, parties would be well advised to give thought to how they can best position themselves to take advantage of it should the need arise. Some of the issues raised below do not lend themselves to clear answers at this stage, and may need to be judicially clarified, but should

be borne in mind when arranging and conducting mediations and, most importantly, documenting any resulting settlement.

Don't assume it won't apply to your mediation

The UK and other EU states have not yet signed the Convention. The EU is apparently still deliberating whether it may sign as a regional economic entity or whether member states need to join individually.

Some readers based in the UK and elsewhere in Europe may have therefore postponed engaging with the Convention on an assumption that it will not have any relevance for them unless and until their own jurisdiction signs and ratifies it. But that is not the case.

A key point that is not widely appreciated is the fact that the Convention does not operate on the basis of reciprocity between member states. Unlike most other multilateral enforcement regimes such as the New York Convention, the [Hague Choice of Court Convention 2005](#) and the [Brussels regime](#), it is not limited to enforcement amongst member states.

Under the Singapore Convention, a member state's obligation to enforce mediated settlement agreements is not limited to agreements that emanate from another Convention member state in some respect, such as the location of the mediation or where the agreement was signed. Unlike court judgments and arbitral awards, settlement agreements under the new regime do not have any "nationality". As long as a settlement is international and results from mediation, then (unless it falls within an excluded category) it will qualify for enforcement under the Convention, regardless of its place of origin.

Accordingly, even if the UK never signs and ratifies the Convention, international settlement agreements resulting from UK mediations will be able to be enforced under the Convention (or relied on as a defence) in any state that has ratified it.

Depending on which states ratify the Convention, this could prove very significant for cross-border dispute resolution. Given that the US has still not ratified the [Hague Convention on Choice of Court Agreements](#) (despite having signed it in 2009), if it ratifies the Singapore Convention this will mean that a party holding a mediated settlement agreement is likely to be better placed to enforce in the US than it would be with an English or other EU court judgment. The same of course applies to the majority of the other 46 signatories, who are also not Hague Convention states (including China, who has signed but not yet ratified Hague).

It is therefore advisable for all mediating parties, regardless of whether their home state has ratified the Convention, to factor into their mediation procedures the potential for the Convention to be relied on should enforcement become necessary.

Should you expressly opt in to the new regime?

The default position under the Convention is that, where it applies, it will do so automatically, without the need for the parties to “opt in” to it. However, it does include (in Article 8(1)(a)) a reservation provision, which allows member states to declare that they will apply it only to the extent that the parties to the relevant settlement agreement have agreed that the Convention will apply. (For more on this reservation, see [my previous blog post](#)).

There are no provisions as to how or when the parties must have indicated their agreement to the Convention applying, and this will be determined by the courts of the state where enforcement is sought. However, it seems likely that the best form of such agreement would be an express statement within the settlement agreement itself.

Of the 46 initial signatories, one (Iran) has so far indicated an intention to exercise the reservation. However, any of the other states may do so when they ratify it, or indeed at any time after ratification.

Parties will therefore want to avoid the (albeit small) risk of finding themselves in a position where the state in which they ultimately need to enforce an agreement has exercised this reservation and they are unable to prove the necessary opt in to the Convention. Given that the place(s) where enforcement may be required will not always be clear at the time the agreement is signed, there would seem to be merit in routinely seeking to include in all mediated settlement agreements a statement confirming that the parties agree

to the application of the Convention. Even if that agreement is not ultimately required, or the Convention is not applicable for some reason, there would appear to be no downside in including such a provision. If one of the parties was from a jurisdiction that had exercised the opt-in reservation, this would represent a compromise on its part, but it is difficult to see how an objection to such a provision could be justified in the context of parties documenting a negotiated settlement.

In any case, at least for a period while parties may be still unfamiliar with the Convention, it may be worthwhile flagging to a counterparty during the preparations for the mediation the intention to include such an agreement in any settlement, so that this does not hold up the drafting of the settlement agreement at the end of a long mediation day.

How will you secure the mediator’s confirmation?

Article 4 of the Convention sets out the basic evidence to be provided to the enforcing court. Unsurprisingly, this includes a copy (translated if necessary) of the settlement agreement.

However, it also includes a requirement for evidence that the settlement agreement “resulted from mediation”.

The examples given of what could constitute such evidence are “the mediator’s signature on the settlement agreement” or “a document signed by the mediator indicating that the mediation was carried out”. If the mediation was organised through an [alternative dispute resolution](#) institution, the evidence may take the form of an attestation by that institution. In the absence of such forms of evidence, “any other evidence acceptable to the [enforcing court]” may be relied on.

While it appears that such confirmation could technically be obtained from the mediator at a subsequent date, only once it became apparent that there was a need to enforce under the Convention, it seems clearly preferable that it be obtained at the time the settlement agreement is signed.

While this evidentiary requirement is understandable given the scope of the Convention, the need for the mediator to make some form of attestation, to be put before a court as proof of the facts stated, is potentially problematic. In most jurisdictions where mediation is well entrenched, the fundamental principle of mediation confidentiality is underpinned by a well-accepted principle that the parties may

not call a mediator to give evidence in relation to a mediation. This is frequently recorded in the mediation agreement between the mediator and the parties and, in some jurisdictions (including England and Wales), is also enshrined in statute or court rules. Concerns have been expressed within the mediation community that this new evidentiary requirement introduced by the Convention could erode that established position, if for example the counterparty or even the enforcing court itself sought to call the mediator to confirm or expand on their written confirmation.

A mediator signing a document in the manner described in the Convention is of a course not the same as providing a [witness statement](#) for use in court proceedings or otherwise agreeing to give evidence to a court (particularly in a foreign jurisdiction). Given the limited nature of the confirmation contemplated by the Convention, it seems unlikely that it could be relied on to justify a departure from the established position. However, as the requirement does represent a change to current practice in mediations, and that there is scope for uncertainty as to precisely what wording will satisfy the Convention's requirement, it could be expected that some mediators may have concerns in this regard.

It would seem strongly advisable for practitioners to raise this issue with the mediator during the mediation preparation period, so that any concerns can be addressed and the format of the mediator's confirmation, should the dispute settle, be agreed in advance. Depending on the outcome of those discussions, it may be something that should be addressed in the mediation agreement (perhaps as a qualification to the provisions confirming that the mediator will not be required to give evidence). Again, this issue has the potential to create an undesirable distraction if raised for the first time when the settlement agreement is being signed.

In addition, apart from the practical issues described above, the requirement to prove that a settlement resulted from mediation also highlights a more substantive issue regarding the scope of the Convention. It is very common for disputes that are not able to be settled on the day of a mediation to settle in the days or even weeks afterward, with or without the continued assistance of the mediator. In many such cases, the bulk of the negotiation has occurred at the mediation, with only peripheral issues requiring further discussion, and the parties would subjectively consider the settlement to have resulted from the mediation. However, it is not clear whether the Convention extends to such

circumstances and, if so, how an enforcing court would assess whether in any particular case there was a sufficient connection between the mediation and the settlement.

If such post-mediation settlements are potentially covered by the Convention, it seems likely that a party seeking enforcement would be in a stronger position where the mediator had remained involved. In any case, the mediator's confirmation would be likely to take on particular importance in such circumstances. While the likely attitude of an enforcing court in such cases may be difficult to predict, at least until the issue has been judicially considered, parties can put themselves in the best position by liaising with the mediator to ensure that the necessary confirmation is obtained if that is justifiable in the particular case.

Anticipating grounds for refusal to enforce

The Convention sets out (in Article 50) a list of grounds upon which a member state can refuse to recognise and enforce a settlement agreement. Many of these are unsurprising and are familiar from other enforcement regimes such as the New York Convention.

Many of the listed factors are matters that could justify a domestic court refusing to enforce an agreement, and so should already be in practitioners' minds when drawing up mediated settlement agreements. These include party incapacity, the agreement not being clearly final and binding, the terms not being clear and comprehensible and the matter not being one capable of being mediated under the applicable law.

However, the introduction of the Convention adds a new dimension in the sense that, if it becomes necessary to enforce the agreement abroad, the foreign court will be considering these matters directly, rather than via an application to enforce another court's judgment. Depending on the state involved, that assessment might be conducted against the backdrop of a very different legal framework to that in which the settlement agreement was drawn up, underpinned by different legal norms and public policies.

This underscores the need, when documenting the mediation arrangements and any settlement, to do so with an eye to how a foreign court might view the provisions (ideally by reference to the particular state(s) where enforcement would be required, if that is ascertainable at the time). In particular,

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consider any steps that can be taken to minimise the risk of an enforcing court taking objection to a settlement on the following grounds:

- The mediator's serious and material breach of applicable standards or material failure to disclose conflicts. Unlike the position with arbitrators, there is no broadly accepted international code or body of judicial authority on mediator standards and conflicts, and so potentially greater scope for courts in different jurisdictions to take differing views of the same conduct. This underlines the importance of the relevant provisions in the mediation agreement accurately reflecting the mediator's obligations in this regard and any disclosures regarding conflicts being fully documented.
- That enforcement would be contrary to the public policy of the enforcing state. As in other enforcement regimes such as the New York

Convention, this ground is intended to be applied very narrowly, only where a state's most basic and fundamental legal norms would be offended. These obviously differ state to state but examples include rules against punitive damages, contractual penalties and unreasonable restraints of trade. If there is an unavoidable risk of some of the agreed terms falling foul of such rules, consider including in the agreement severability provisions, to support an argument that the offending terms not prevent the enforceability of other terms in the agreement.

In many cases, risk minimisation in this regard may simply involve erring on the side of including greater detail and explanation in the mediation and settlement documents on any issue where there is any scope for ambiguity, rather than assuming that a reader will know and apply principles that are well established and understood in your home jurisdiction.

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