

August 22, 2019

## THE SINGAPORE CONVENTION ON MEDIATION AND THE PATH AHEAD

To Our Clients and Friends:

On August 7, 2019, forty-six State Parties, including the United States, China, India, and South Korea,[1] signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the “Singapore Convention on Mediation.”[2] The Convention aims to promote the use of mediation to resolve cross-border commercial disputes by enhancing the enforceability of international mediated settlement agreements.

Mediation can be an effective means for disputing parties to resolve their dispute efficiently and creatively. It seeks to achieve a practical outcome based on the disputing parties’ underlying motivations.

Historically, there has been one significant barrier to settling international disputes through mediation: if a party to a mediated settlement agreement defaults on its obligations, the non-defaulting party must turn to litigation, arbitration, or any other method contemplated by the settlement agreement to enforce the agreement like it would any other contractual obligation. This can be costly and time-intensive, particularly if enforcement requires cross-border proceedings or the defaulting party has acted to obstruct the enforcement process. For example, a settlement agreement may require litigation in a particular jurisdiction, but the defaulting party may have transferred its assets to another jurisdiction after signing the settlement. In this situation, the non-defaulting party will need to pursue litigation in multiple jurisdictions.

The Convention aims to resolve issues with cross-border enforcement by making mediated settlement agreements directly enforceable by the courts of all State Parties to the Convention.[3] Specifically, the Convention allows parties to the settlement agreement to invoke those agreements before the courts of State Parties to establish that the matter has already been resolved via mediation.[4] Once a court in a State Party is presented with a request, it must “act expeditiously” to enforce the settlement agreement.[5]

### **Settlement Agreements Covered by the Singapore Convention on Mediation**

The Convention applies to any settlement agreement that: (i) resulted from mediation;[6] (ii) is related to a “commercial” dispute;[7] (iii) is in writing;[8] and (iv) is “international” in character.

In order for the settlement agreement to be “international,” at least two parties to the settlement agreement must have their places of business in different countries, **or** the State Party with which the settlement agreement is most closely connected, or in which it must be performed, must be different

from the parties' places of business.[9] Notably, the parties to the settlement agreement do not need to be nationals of, or have their places of business in, the State Parties to the Convention.

The Convention does not apply if a settlement agreement (i) has been concluded or approved in the course of a court proceeding and is enforceable as a judgment in that State; or (ii) is enforceable as an arbitral award.[10]

State Parties may also restrict the Convention's applicability by entering two types of reservations. First, a State Party may exclude application to settlement agreements to which the State Party or its governmental agencies are party.[11] Second, a State Party may restrict application of the Convention to settlement agreements only to the extent parties have expressly agreed to apply it.[12] Thus, when negotiating a mediated settlement agreement, it may be prudent to expressly agree to the Convention's application.[13]

## **Enforcement of Settlement Agreements under the Singapore Convention on Mediation**

In order to enforce a settlement agreement under the Convention, a party must provide to the court with jurisdiction the signed settlement agreement and evidence that the settlement agreement resulted from mediation.[14] Such evidence could include the mediator's signature on the agreement or a document signed by the mediator confirming there was a mediation.[15]

State Parties to the Convention may refuse to enforce mediated settlement agreements on the following limited, prescribed grounds: (i) a party to the agreement was under some incapacity; (ii) the agreement is null and void, inoperative or incapable of being performed under the law that governs it; (iii) the agreement is not binding or is not final; (iv) the agreement has been subsequently modified; (v) the obligations under the agreement have been performed, or are not clear or comprehensible; (vi) granting relief would be contrary to the terms of the settlement agreement; (vii) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach the party resisting enforcement would not have entered into the settlement agreement; (viii) the mediator failed to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence, and this had a material impact or unduly influenced one of the parties to enter into the settlement agreement; (ix) granting relief would be contrary to the public policy of the State Party; or (x) the subject matter of the dispute is not capable of settlement by mediation under the law of the State Party.[16]

In practice, parties objecting to the enforcement of a settlement agreement may seek to interpret these grounds broadly. For example, the Convention does not define what qualifies as a "serious breach" of standards applicable to the mediator or mediation.[17] However, these grounds are similar to those in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[18] which seek to preserve procedural propriety and prevent abuse. Courts have generally construed the New York Convention grounds for challenging arbitral awards narrowly, and we would expect them to take a similar approach with respect to settlement agreements subject to scrutiny under the Singapore Convention on Mediation.[19]

## **Current Status of the Singapore Convention on Mediation**

The Convention will enter into force six months after three signatories deposit instruments of ratification with the United Nations.[20] This will likely be achieved relatively soon given that forty-six countries have already signed the Convention. Its terms will then apply to qualifying settlement agreements concluded after its entry into force in the State Party where enforcement is sought.[21]

A United Nations Commission on International Trade Law (“UNCITRAL”) working group has also issued a corresponding Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.[22] The Model Law is intended to assist State Parties with legislation to implement the Convention, much like UNCITRAL’s Model Law on International Commercial Arbitration aimed to bolster the implementation of the New York Convention.

## **Implications for Cross-Border Dispute Resolution**

Mediation is generally faster and less expensive than other forms of dispute resolution. It also tends to preserve commercial relationships to a greater degree than other forms of dispute resolution where there are clear winners and losers. Proponents of the Singapore Convention on Mediation hope that, by offering increased certainty with respect to enforcement of mediated settlement agreements, the Convention will provide the same boost to mediation that the New York Convention provided to arbitration.

As parties gain confidence in the increased enforceability of mediated settlement agreements as a result of the Singapore Convention on Mediation, they should consider mediation as an alternative or supplement to other forms of dispute resolution. And mediation can be used as an effective tool at any stage of a dispute. For example, mediation may be appropriate for parties in bifurcated proceedings after a merits award is issued but before the remedies have been determined. In this context, mediation would offer the parties a mechanism for agreeing upon a remedy that is acceptable to all involved.

In short, the Singapore Convention on Mediation gives companies an additional reason to consider the role of mediation in an overall dispute resolution strategy. And in the event of a successful mediation, companies must structure their mediated settlement agreements to take full advantage of the Convention.

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Gibson Dunn lawyers have extensive experience advising clients on international dispute resolution, including international mediation processes. If you have any questions about how your company is impacted by or could take advantage of the Singapore Convention on Mediation, we would be pleased to assist you.

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[1] The complete list of signatories is available here: [https://treaties.un.org/Pages/showDetails.aspx?objid=080000028054826c&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=080000028054826c&clang=_en). It includes Afghanistan, Belarus, Benin, Brunei, Chile, China, Colombia, Congo, Democratic Republic of Congo, Eswatini, Fiji, Georgia, Grenada, Haiti, Honduras,

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India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, Republic of Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor-Leste, Turkey, Uganda, Ukraine, USA, Uruguay, and Venezuela.

[2] The complete text of the Singapore Convention on Mediation is available here: [https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf).

[3] *See* Singapore Convention on Mediation, Article 3(1).

[4] *See* Singapore Convention on Mediation, Article 3(2).

[5] *See* Singapore Convention on Mediation, Article 4(5).

[6] Under the Convention, “mediation” is defined broadly to encompass any 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 upon the parties to the dispute.” Singapore Convention on Mediation, Article 2(3).

[7] The Convention specifically excludes from its scope disputes arising from transactions entered into for “personal, family or household purposes,” or if the settlement agreements relate to “family, inheritance or employment law.” Singapore Convention on Mediation, Article 1(2).

[8] A settlement agreement will be in writing under the Convention if “its content is recorded in any form,” including “electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.” Singapore Convention on Mediation, Article 2(2).

[9] *See* Singapore Convention on Mediation, Article 1(1). Under the Convention, “[i]f 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.” Alternatively, “[i]f a party does not have a place of business, reference is to be made to the party’s habitual residence.” Singapore Convention on Mediation, Article 2(1).

[10] *See* Singapore Convention on Mediation, Article 1(3).

[11] *See* Singapore Convention on Mediation, Article 8(1)(a).

[12] *See* Singapore Convention on Mediation, Article 8(1)(b).

[13] The Convention also permits parties to opt-out by expressly stipulating this in their settlement agreement. *See* Singapore Convention on Mediation, Article 5(1)(d).

[14] *See* Singapore Convention on Mediation, Article 4(1).

[15] *See* Singapore Convention on Mediation, Article 4(1)(b).

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- [16] *See* Singapore Convention on Mediation, Article 5.
- [17] Singapore Convention on Mediation, Article 5(1)(e).
- [18] *See* New York Convention, Article 5.
- [19] *See* Gary Born, *International Arbitration: Cases and Materials* 3427 (2d ed. 2015).
- [20] *See* Singapore Convention on Mediation, Article 14(1).
- [21] *See* Singapore Convention on Mediation, Article 9.
- [22] Available here: <https://undocs.org/en/A/RES/73/199>.



*Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration practice group, or the following:*

*Cyrus Benson - London (+44 (0) 20 7071 4239, [cbenson@gibsondunn.com](mailto:cbenson@gibsondunn.com))*  
*Penny Madden - London (+44 (0) 20 7071 4226, [pmadden@gibsondunn.com](mailto:pmadden@gibsondunn.com))*  
*Jeffrey Sullivan - London (+44 (0) 20 7071 4231, [jeffrey.sullivan@gibsondunn.com](mailto:jeffrey.sullivan@gibsondunn.com))*  
*Rahim Moloo - New York (+1 212-351-2413, [rmoloo@gibsondunn.com](mailto:rmoloo@gibsondunn.com))*  
*Charline O. Yim - New York (+1 212-351-2316, [cyim@gibsondunn.com](mailto:cyim@gibsondunn.com))*  
*Zachary A. Kady - New York (+1 212-351-5305, [zkady@gibsondunn.com](mailto:zkady@gibsondunn.com))*  
*Marryum Kahloon - New York (+1 212-351-3867, [mkahloon@gibsondunn.com](mailto:mkahloon@gibsondunn.com))*  
*Ankita Ritwik - Washington, D.C. (+1 202-887-3715, [aritwik@gibsondunn.com](mailto:aritwik@gibsondunn.com))*

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