

## INTERNATIONAL ARBITRATION

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*The Singapore Convention is an important tool to encourage the use of mediation within the international arena. Enforcement of settlement agreements, reached through mediation, may be done in a more expedited manner under the Convention. This article provides a discussion on the main points of the Convention.*

## The Singapore Convention on Mediation: Facilitating the Cross-Border Enforcement of Mediated Settlement Agreements in International Commercial Disputes

### ABOUT THE AUTHORS



**Mauricio Gomm Santos**, FCI Arb, is a partner at GST LLP, a boutique firm specializing in international dispute resolution. Mauricio Gomm Santos has over 30 years of experience as a senior-level attorney in international matters. He is licensed to practice in Brazil, New York, and is certified as a Florida Foreign Legal Consultant. Mr. Gomm Santos has served in a number of roles, including offering expert testimony in common and civil law jurisdictions, serving as an emergency arbitrator, and acting as an arbitrator, and mediator before major arbitral institutions. He can be reached at [mauricio.gomm@gstillp.com](mailto:mauricio.gomm@gstillp.com).



**Katherine Sanoja** is an associate at GST LLP and has been acting as counsel for parties in both international commercial arbitration as well as state-investor arbitrations. She has also served as tribunal secretary in numerous international arbitrations. Ms. Sanoja is licensed in Florida and the District of Columbia. She currently serves as chair of the CLE committee for the International Law Section of the Florida Bar. She can be reached at [katherine.sanoja@gstillp.com](mailto:katherine.sanoja@gstillp.com).

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**Anton G. Maurer**  
Vice Chair of Newsletter  
Anton Maurer International Legal Services  
[Anton.maurer@am-legal.com](mailto:Anton.maurer@am-legal.com)

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The official signing ceremony of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Convention”) was held on August 7, 2019 during the Singapore Convention Roundtable.<sup>1</sup> Forty-six countries signed on to the Convention, including the United States of America, China, and several Latin American and Caribbean countries.<sup>2</sup> The aim of the Convention is to ensure the cross-border enforcement of mediated settlement agreements (“MSAs”) in any of the Convention<sup>3</sup> countries (the “Contracting States”), without requiring the MSA to first be turned into a judgment.<sup>4</sup>

### Requirements for the Applicability of the Convention

Many parallels can be drawn between the Convention and the New York Convention, except that the former applies in the context of MSA’s rather than arbitral awards. First, the Convention much like the New York Convention only applies to *international commercial* disputes, rather than domestic commercial disputes.<sup>5</sup> The Convention’s

scope is specifically circumscribed in Article 1. Article 1 requires that the settlement agreement be the result of a mediation and excludes the Convention’s application in mediations reached in personal, family, and household disputes, in addition to excluding matters of inheritance and employment law.<sup>6</sup> It also is inapplicable to settlement agreements reached through court proceedings or settlement agreements that are already enforceable as a judgment.<sup>7</sup> Second, similar to the New York Convention, there is a writing requirement.<sup>8</sup> The Convention will only enforce written MSAs. Article 2 of the Convention appears to take a flexible approach in this regard, requiring only that the settlement be recorded in some written form, including electronic format.<sup>9</sup> Article 3, which addresses the general principles to be followed by Contracting States, also mirrors much of the text of the New York Convention, but in the context of MSAs. Under Article 3, each Contracting State undertakes the obligation to “enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in ...[the] Convention.”<sup>10</sup>

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<sup>1</sup> <https://www.singaporeconvention.org/>

<sup>2</sup> *Id.* A

<sup>3</sup> Convention, Art. 14.1 “This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.”

<sup>4</sup> Convention, Art. 5.

<sup>5</sup> Convention, Art. 1(1) defines “international” for purposes of the Convention to require: “(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:

<sup>6</sup> Convention, Art. 1(2). Article 2 which deals with the definitions of certain terms used in the Convention does not define “household” and thus this term is left up for interpretation. One thing seems certain: a

textual interpretation appears to indicate that the drafters meant to make it mean something more than “personal” and “family” matters, which are included and mentioned separately in the article, as any other result would render the term redundant. The term household may therefore encompass other matters such as consumer disputes.

<sup>7</sup> Convention, Art. 1(3).

<sup>8</sup> *See*, New York Convention, Art. 2 which addresses the written requirement of an arbitral agreement.

<sup>9</sup> Convention, Art. 2 states that the MSA is enforceable “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.

<sup>10</sup> Convention, Art. 3(1).

## Enforcement Mechanism under the Convention

Following the format of the New York Convention, Article 4 details the requirements that must be met by the party that seeks to enforce the settlement agreement in one of the Contracting States. In essence the party seeking enforcement needs to have a copy of the signed settlement agreement and provide evidence that the settlement agreement resulted from a mediation, which generally is satisfied when the settlement agreement is also signed by the mediator, although the Convention provides for other ways to satisfy this requirement.<sup>11</sup> Article 4 also addresses other requirements that may be imposed by the competent authority of the country where enforcement is sought. And in keeping with the aim to facilitate the resolution of international disputes, Article 4 imposes an express requirement on the competent authority to act “expeditiously.”<sup>12</sup> It will be interesting to see how the obligation to act expeditiously will be enforced as this is an obligation to be undertaken by the competent authority rather than the parties to the MSAs.

## Exceptions to Enforcement

Article 5 of the Convention, much like Article 5 of the New York Convention, outlines the

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<sup>11</sup> Convention, Art. 4 (1) (b) (i)-(ii). 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

scenarios under which enforcement may be refused. Out of the nine listed scenarios, one of the exceptions to enforcement includes where granting relief would be contrary to the terms of the settlement agreement.<sup>13</sup> Presumably, this means that parties could opt out of the Convention in their own agreements and in doing so expressly avoid enforcement of their settlement via the Convention. Another interesting scenario that may render the MSA unenforceable is where there is a failure of the mediator to disclose to the parties circumstances that raise justifiable doubts as to the impartiality or independence of the mediator where such failure had a material impact on the party (i.e. without the failure, the party would not have otherwise entered into the agreement).<sup>14</sup> This ground appears to require a party to show a “but for” causation in order to succeed. In sum, and following the spirit and scope of the New York Convention, the burden of proof lies on the party against whom the enforcement is sought. It is therefore presumed that the listed grounds for refusing enforcement will likely be as challenging to demonstrate as those under the New York Convention have in practice shown to be.

## Impact of Convention

Although not yet in force,<sup>15</sup> the Convention has the potential to have a significant impact

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

<sup>12</sup> Convention, Art. 4(5).

<sup>13</sup> Convention, Art. 5(1)(d).

<sup>14</sup> Convention, Art. 5 (1)(f).

<sup>15</sup> Convention, Art. 14 (1).

in how international commercial disputes are resolved, especially should it gather wider adoption by the acceptance and ratification of other States. Parties who have chosen to settle their arbitration disputes, have generally had the opportunity to request that the tribunal issue an award on agreed terms. In that scenario, the parties would enforce the award (which reflects the settlement) via the New York Convention. But in cases where parties opt to mediate their disputes, this Convention now provides them with a certainty in the process by providing a framework for the enforcement of cross-border MSAs in any of the Contracting States without having to engage in the arbitral process. Specifically, the Convention will make enforcement of settlement agreements

easier, especially where a party may be able to enforce the settlement agreement in an expedited manner in cases where one of the parties has assets in one of the Contracting States. Facilitating the enforcement of a settlement reached through mediation will likely only encourage the use of mediation by international commercial parties in the Contracting States, including a potential for an increase in the use of multi-tiered arbitration clauses.

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