

## SIGNALEMENTEN

# UN Treaty on Mediation signed in Singapore

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The Singapore Convention on Mediation is a multilateral treaty which offers a legal framework facilitating the circulation of international mediated settlement agreements (iMSAs) across national borders. The Singapore Convention achieves this by elevating iMSAs to the status of a new type of legal instrument recognised in international law: neither a contract nor a consent arbitral award, iMSAs that fall within the scope of, and that satisfy the conditions within, the Singapore Convention enjoy a unique status. As outlined below, the new Convention establishes a system for the recognition and enforcement of commercial iMSAs. This report is a follow up to the authors' previous article analysing the main provision of the Convention in anticipation of its signing.<sup>1</sup>

### Introduction

It is not often that we get to witness history in the making. For mediation professionals around the world the 7 August 2019 will go down in history as the date which launched mediation onto the international stage with the signing of the United Nations (UN) Convention on International Mediated Settlement Agreements Resulting from Mediation, now known as the Singapore Convention on Mediation.

Singapore was the first State to sign on to the Convention, and another 45 States followed. A total of 46 states signed the Convention on 7 August, 2019. In line with typical Singapore tradition, the opening ceremony was also graced with the official unveiling and naming of an orchid after the Convention. This is the first time for the record books that an orchid has been named after an international treaty. The new orchid has been officially named the *Aranda Singapore Convention on Mediation* and it has been planted in the Singapore botanical gardens.

The States that signed the Convention on 7 August in Singapore are listed below in alphabetical order. An asterisk indicates that the relevant State entered a reservation (see discussion below).

This is an unprecedented number, and is arguably the most successful opening of an UNCITRAL (United Nations Commission on International Trade Law) Convention.

1 N. Alexander & S. Chong, *An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore*, TMD 2018/4, p. 37.

<b>1. Afghanistan</b>	<b>17. Iran (Islamic Republic of)*</b>	<b>33. Republic of Korea</b>
2. Belarus*	18. Israel	34. Samoa
3. Benin	19. Jamaica	35. Saudi Arabia
4. Brunei Darussalam	20. Jordan	36. Serbia
5. Chile	21. Kazakhstan	37. Sierra Leone
6. China	22. Lao People's Democratic Republic	38. Singapore
7. Colombia	23. Malaysia	39. Sri Lanka
8. Congo	24. Maldives	40. Timor-Leste
9. Democratic Republic of the Congo	25. Mauritius	41. Turkey
10. Eswatini	26. Montenegro	42. Uganda
11. Fiji	27. Nigeria	43. Ukraine
12. Georgia	28. North Macedonia	44. United States of America
13. Grenada	29. Palau	45. Uruguay
14. Haiti	30. Paraguay	46. Venezuela (Bolivarian Republic of)
15. Honduras	31. The Philippines	
16. India	32. Qatar	

The response to the Singapore Convention is indicative of the global trend to embrace mediation processes in the toolbox of cross-border dispute resolution mechanisms. Before we elaborate further, let us summarise the steps that led to this historic Convention signing.

## Background

After three years of vigorous debate in UNCITRAL Working Group II (Dispute Settlement) with participation by over 90 member States and 35 international governmental and non-governmental organisations, the draft of the UN Convention on International Settlement Agreements Resulting from Mediation (the ‘Convention’) was finalised. At the 51<sup>st</sup> Session of UNCITRAL on 25<sup>th</sup> June 2018, the Convention was recommended for submission to the UN General Assembly for its consideration. A resolution to name the Convention the ‘Singapore Convention on Mediation’ was also approved. The UN General Assembly adopted the Convention on 20<sup>th</sup> December 2018. It was declared open for signing on 7 August 2019 in Singapore at a ceremony attended by 70 official State delegations.

## What is the goal of the Singapore Convention?

The primary goal of the Convention is to advance and encourage the use of mediation for the resolution of cross-border commercial disputes. Mediation is perceived as not only a faster and less expensive form of dispute resolution,<sup>2</sup> but also as a form more likely to promote the preservation commercial relationships.<sup>3</sup> From the preliminary results of an empirical study conducted by the Singapore International Dispute Resolution Academy, the lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of disputants to turn to mediation.<sup>4</sup> A significant amount of time, energy and resources may be spent and exhausted in order to reach an agreement (recorded as a mediated settlement agreement), and if the other party subsequently fails to perform, the party seeking compliance would essentially have to start over in the litigation or arbitration forum. Particularly for the many disputes arising out of alleged breaches of contract, mediation may be less attractive if even a successful mediation would simply result in another contract that would have to be enforced through the usual litigation process.

So the functional goal of the Convention relates to providing an expedited enforcement mechanism for international mediated settlement agreements.<sup>5</sup> At the same time there is a much bigger goal behind this Convention and that is to put mediation on the international dispute resolution map alongside arbitration and litigation.

## How does the Singapore Convention Work?

With its 16 Articles, the drafters of the Singapore Convention intended to create a minimalist and efficient framework for the recognition and enforcement of iMSAs internationally.<sup>6</sup> In most cases, once disputing parties have concluded an iMSA, they comply with their obligations. Where this is not the case, the Convention offers to parties of iMSAs that fall within its scope (Article 1) the possibility to proceed to a relevant court of a State to seek relief (Article 3). The party seeking relief will file an application before that court and submit as evidence the iMSA containing parties' signatures and an attestation by the mediator or media-

2 See N. Alexander, J. Checkley, S. Chong et al., *International Dispute Resolution Survey: Currents of Change* (2019 Preliminary Report), Singapore: Singapore International Dispute Resolution Academy 2019.

3 N. Alexander & S. Chong, *The Singapore Convention on Mediation: A Commentary* (Alphen aan den Rijn: Wolters Kluwer 2019) at para. 0.31; and S. Chong & F. Steffek, *Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective*, (2019) 31 SAclJ 448, at para. 9.

4 Alexander, Checkley et al. 2019 at p. 15.

5 N. Alexander, *Ten Trends in Mediation*, (2019) 31 SAclJ 405, at paras 19-20.

6 For a detailed treatment of the Singapore Convention on Mediation, see Alexander & Chong 2019.

tion institution that the settlement resulted from mediation (Article 4).<sup>7</sup> Provided the iMSA does not fall foul of any the grounds for refusal defined in Article 5, it will be directly enforced.

Alternatively, issues resolved and contained in the iMSA may be administered as a complete defence to the commencement of litigation or arbitral proceedings, where parties seek to contest issues already settled and reflected in the iMSA. Key to the direct enforcement method is that there is no requirement for an iMSA to undergo a review process at the place where it was concluded (the State of origin). In other words, there is no ‘seat’ of mediation in the sense that there is a ‘seat’ of arbitration. Court review in terms of the Convention only occurs in the State of enforcement.

The Singapore Convention provides for limited reservations in Article 8. Adopting states may declare that the Convention shall not be applied to settlement agreements to which it is itself a party or to which any government agency or agent of that state is a party, and adopting states are free to determine the extent of this reservation in the declaration (Article 8(1)(a)). Further, adopting states may declare that the Convention shall apply only to the extent that the parties to the settlement agreement have agreed to be subject to the Convention (Article 8(1)(b)). The latter reservation essentially permits adopting states to create a national opt-in regime for the Convention if they so desire. Reservations may be made at any time, in accordance with Article 8(3). On 7 August 2019 two States declared reservations.

Upon signature, Belarus invoked Article 8(1)(a) and made the following reservation:

In accordance with [A]rticle 8 of the Convention, the Republic of Belarus 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.

Upon signature, The Islamic Republic of Iran, invoking Article 8(1)(a) and 8(1)(b), declared:

“The Government of the Islamic Republic of Iran seizes the opportunity at this moment of signing “the United Nations Convention on International Settlement Agreements Resulting from Mediation”, to place on the record its “understanding” in relation to provisions of the Convention, bearing in mind that the main objective for submitting this declaration is the avoidance of eventual future interpretation of the following articles in a manner incompa-

7 Art. 4 further provides that other forms of suitable evidence may be submitted in the absence of the mediator’s signature on the iMSA or an attestation by the mediator or mediation institution that the settlement agreement resulted from mediation: see commentary to Article 4 in Alexander & Chong 2019.

tible with the original intention and previous positions or in disharmony with national laws and regulations of the Islamic Republic of Iran.

It is the understanding of the Islamic Republic of Iran as well as reservations that:

- [T]he Islamic Republic of Iran has no obligation to 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;
- The Islamic Republic of Iran will apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention;
- The Islamic Republic of Iran may have the choice to make reservations upon ratification;
- The Islamic Republic of Iran, in accordance with the relevant provisions of the Convention, reserves the right to adopt laws and regulations to cooperate with the States.’

### **There is a new Model Law as well**

It is important to remember that UNCITRAL Working Group II did not only draft a Convention. It also amended the existing model law on conciliation of 2002 and renamed it the UNCITRAL Model Law on International Commercial Mediation (2018). The European Union was very much in favour of a revised model law over a Convention, as it was suggested that the latter might conflict with the 2008 EU Directive on Mediation.<sup>8</sup>

However the Directive and the Convention, while both dealing with cross-border mediation outcomes, have different functions and – as Verbist argues persuasively – are not incompatible.<sup>9</sup> The prudent decision to draft both instruments was a result of a compromise within Working Group II.<sup>10</sup> It is the first time ever that an UNCITRAL Working Group has produced two instruments in parallel.<sup>11</sup> The new UNCITRAL Model Law on International Commercial Mediation is particularly helpful for States that have not yet enacted general legislation on mediation, and it provides a useful model and framework in this regard.

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

9 H. Verbist, *United Nations Convention on International Settlement Agreements Resulting from Mediation*, *Belgian Review of Arbitration*, 53(1), 2019, p. 74-77.

10 N.Y. Morris-Sharma, *Constructing the Convention on Mediation – The Chairperson’s Perspective*, (2019) 31 *SaClJ* 487, at paras 64-72; and K. McCormick & S.S.M. Ong, *Through the Looking Glass: An Insider’s Perspective into the Making of the Singapore Convention on Mediation*, (2019) 31 *SaClJ* 520, at paras 64-65.

11 K. McCormick & S.S.M. Ong, *Through the Looking Glass: An Insider’s Perspective into the Making of the Singapore Convention on Mediation* (2019) 31 *SaClJ* 520, at para 65.

### *State delegations signed the Singapore Convention on 7 August 2019*



### **And now?**

Numerous other States have indicated interest in signing the Convention, and they are able to do so at any time from now, in accordance with Article 11.

The Singapore Convention Signing Ceremony and celebrations are over, but the work of ratification and implementation of the Singapore Convention is only just beginning. The coming years are crucial, and they will determine whether this will be the century of international mediation.

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