



# THE BEST OF BOTH WORLDS

## in International Commercial Dispute Resolution

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Signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation by 46 countries on August 7, 2019 in Singapore, attracted global attention and marked a historic moment for mediation in the international commercial dispute resolution arena. The final text of the Convention was produced after almost five years of effort of the UNCITRAL Working Group and was adopted by the United Nations General Assembly Resolution 73/198 on 20 December 2018. The signing ceremony and related events during the Singapore Convention Week, 2-8 August 2019, gathered more than 1,500 delegates, including state dignitaries, leading international mediators and mediation providers, lawyers, businesses, and other stakeholders from around the world. The 46 countries that signed the Convention represent an unprecedented number, keeping in mind that the New York Convention on Arbitration, which today smoothly facilitates enforcement of arbitral awards in over 160 countries, was signed by only 10 states in 1958.

*In the future, mediated settlement agreements  
in international commercial disputes will be  
capable of enforcement in any of the countries  
that ratified the Convention.*

## The Signing

The Convention, signed among others by three of the world's largest economies, the U.S., China, and India, as well as Saudi Arabia, Qatar, Singapore, represents a historic moment in the rise of mediation. It will enable cross-border enforcement of mediated settlements, provide businesses with greater certainty and assurance in international commercial transactions, and further facilitate international trade and commerce. The Convention was signed by the European countries of Serbia, Montenegro, North Macedonia, Ukraine and Turkey, while notable absentees included the European Union and all of its member states. On the margins of Singapore Convention discussions, it could be heard that although several EU states were in favor of joining the Convention, the European Commission could not agree on a common position in relation to the 2008 EU Directive on Mediation. Unofficially, it was claimed that after Brexit, the UK would most certainly accept the Convention as well.

This is the first major international treaty named after Singapore, aiming to recognize the contribution of its UNCITRAL Working Group delegates in drafting the Convention. It will reinforce this city-state's position as a neutral international dispute resolution hub and place it alongside other notable international conventions named after cities, such as the Geneva Convention on Human Rights, the Vienna Convention on Diplomatic Relations, the Hague Choice of Court Convention, and the New York Convention on Arbitration.

## The Convention

In the last decades, mediation has become a dominant method of dispute resolution in many developed jurisdictions, most notably in the U.S., where every sizable case passes through mediation at one stage or another, while over 70% are resolved at the first meeting, or shortly thereafter. Notable efforts to increase the application of mediation in Europe and other countries have since taken place with limited success.

*"The Convention fills the missing piece in the international dispute resolution enforcement framework"*  
(K. Shanmugam, Singapore Minister of Law and Home Affairs).

Businesses involved in cross-border disputes are well aware of the benefits of mediation over arbitration. Adjudicative processes, arbitration and litigation, are characterized by strict procedures resulting in final decisions capable of enforcement in cases of non-compliance. However, they usually take years to complete, require tremendous amounts of time and money, and often produce unsatisfactory results for one or both parties. Mediation as a consensual process is quicker, cheaper and ideal for preserving or improving the disputing parties' relationship. However, it can lack finality and is dependent on the will of the disputing parties to ensure implementation.

Unlike arbitration, in cross-border disputes there was no internationally recognized enforcement mechanism for mediated settlements in the event that one of the parties failed to voluntarily honor a settlement agreement. Therefore, most international business disputes today are still resolved by arbitration and only a handful through litigation. Mediation was seldom utilized, mainly due to the parties' concerns over the inability to enforce a cross-border mediated settlement in cases of non-compliance. In rare cases, mediation was attempted as part of the "arb-med-arb" process, since the New York Convention provides for an efficient enforcement of an arbitral consent order.

Trying to fill this gap, in 2015 UNCITRAL Working Group started working on the text of the Convention that would enable cross-border enforcement of mediated settlement agreements. The Convention has a relatively narrow focus. It does not apply to any settlement agreements between commercial entities, but only to international commercial agreements achieved through mediation. It also excludes domestic settlement agreements, or agreements in consumer, family, inheritance or employment disputes. Furthermore, it does not apply to enforcement of court judgments or arbitral awards. The Convention defines the "international" and "resulting from mediation" requirements, and also prescribes grounds for refusing to grant a relief.

In the words of the Singapore Minister of Law and Home Affairs, K. Shanmugam, "the Convention fills the missing piece in the international dispute resolution enforcement framework", alongside the New York Arbitration Convention and the Hague Choice of Court Convention. At the same time, it elevates mediation to an equal standing with litigation and arbitration, which until recently were the two most preferred dispute resolution methods.

### **The Impact**

The drafting process and the final Convention text were not free from controversies. The critics of the Convention argued that mediated settlement agreements, in a great majority of cases, are implemented voluntarily, therefore there is no need for a codified international enforcement mechanism. There were also other objections over certain provisions relating to the "exclusion" section of the Convention, which will be discussed in detail in a separate paper analyzing the practical implementation of the Convention. On the other hand, the proponents emphasized that the uncertainty over cross-border enforcement of a mediated settlement, and absence of an internationally recognized enforcement mechanism, were important factors dramatically reducing the attractiveness of mediation as a primary dispute resolution tool for many international businesses and investors.

*Although its main purpose is to regulate and facilitate enforcement of international settlement agreements resulting from mediation, the new Convention will not bring about more enforcements, but more mediations and voluntarily implemented settlements agreements.*

As in any negotiation, both sides had valid points. While it is true that well over 90% of mediated settlement agreements are complied voluntarily, it is also true that the pure voluntary nature of the compliance and the prospect of another gruesome litigation following one party's refusal to honor its own mediated agreement has forced many businesses and their counsel in international commercial disputes into arbitration over mediation. Clearly, businesses often disregarded the obvious advantages of speed and cost of mediation in favor of the finality and enforceability of arbitration.

The last week's signing of the Singapore Convention on Mediation will bring about the best of both worlds in international commercial dispute resolution, including speed, low cost, control of the outcome and preservation of relationships associated with consensual dispute resolution processes, as well as the finality and enforceability of the adjudicative side of the spectrum.

Although its main purpose is to regulate and facilitate enforcement of international settlement agreements resulting from mediation, somewhat paradoxically, it seems that the new Convention will not bring about more enforcements, but more mediations and voluntarily implemented settlement agreements.