

Stradley Ronon Stevens & Young, LLP  
2005 Market Street  
Suite 2600  
Philadelphia, PA 19103-7018  
215.564.8000 Telephone  
215.564.8120 Facsimile  
[www.stradley.com](http://www.stradley.com)

With other offices in:  
Washington, D.C.  
New York  
New Jersey  
Illinois  
Delaware



Patrick R. Kingsley  
215.564.8029  
[pkingsley@stradley.com](mailto:pkingsley@stradley.com)



[www.meritas.org](http://www.meritas.org)

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## The Singapore Convention on Mediation: Good News for Businesses

*by Patrick R. Kingsley*

On June 26, 2018, the United Nations Commission on International Trade Law (UNCITRAL) approved the final draft of the Convention on the Enforcement of International Settlement Agreements and its associated Model Law. This resolution is now known as “The Singapore Mediation Convention.” Its approval follows three years of intense deliberation among the 85 member states and 35 international governmental and nongovernmental entities comprising the commission. The convention takes effect once three member states ratify it.

Until now, there was no procedure for the direct enforcement of mediated settlements. This is a problem given the increasingly global economy. The Singapore Convention aims to change that. If successful, the Singapore Convention will have a significant positive effect on the recognition and enforceability of international controversies which have been settled through mediations. It is modeled roughly on the New York Arbitration Convention, which has been quite successful.

### The Earlier New York Convention on Arbitration

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations at the United Nations conference on June 10, 1958, and entered into force on June 7, 1959. It is commonly referred to as the “New York Convention.” The convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. The New York Convention has been regarded as extremely successful in managing international controversies. There are currently 159 state parties to the convention, which makes its effect extremely widespread. International arbitration has become an increasingly popular means of alternative dispute resolutions for commercial controversies that extend across borders. This is due in no small part to the New York Convention. Thanks to the New York Convention, arbitration awards are now often easier to enforce than a decision from the courts of another country.

### The New Singapore Convention’s Purpose

The Singapore Convention facilitates the enforcement of international commercial settlement agreements that result from mediation. Prior to the convention, if an international disputant settled a case through mediation, it would usually be required to enforce that settlement agreement as it would any other contract: by bringing a brand-new action in the contractual counterparty’s own country. Thus, the aggrieved party would have to institute an action (by complaint or otherwise), obtain a judgment or award on the contract (i.e., the mediated settlement agreement) and then seek to enforce the award. That was a lot of litigation to enforce a settlement that was probably designed, at least in part, to avoid litigation in the first place.

The Singapore Convention endeavors to allow the party seeking to enforce a mediated settlement agreement to skip the step of litigation and go right to the enforcement. The

convention provides a method for settling parties to directly enforce their mediated settlement agreements.

### **The Convention's Procedure and Requirements**

Although the procedural efficiencies provided by the Singapore Convention are significant, the scope of the convention is focused only on international commercial disputes resolved by mediation. Mediated international commercial disputes involve: at least two parties to the settlement agreement operating in different countries; or where the country in which the parties to the settlement conduct business is different from the country where the settlement agreement is to be performed; or the country where the parties conduct business is different from the country most closely connected to the settlement agreement.

The convention excludes settlements which: have been concluded in the course of a court proceeding or have been approved by a court; are enforceable as a judgment in the country of that court; and have been recorded and/or are enforceable as an arbitral award. These circumstances are excepted because there are other generally accepted international conventions which cover these situations (i.e., the Hague Convention and the New York Convention).

The Singapore Convention provides great flexibility to the signatory countries in the enforcement of mediated settlement agreements. Instead of describing a specific mode of enforcement, the convention provides that the mediated settlement agreement will be enforced "in accordance with its (the signing country's) rules of procedure." The convention instead lists conditions to be fulfilled in order for a signing country to enforce a settlement agreement.

A party wishing to enforce a mediated settlement agreement must supply to the competent authority the signed settlement agreement and evidence that the settlement resulted from mediation. Proof that the settlement agreement was negotiated through mediation might include the following:

- The mediator's signature on the settlement agreement.
- A document signed by the mediator confirming the mediation was carried out.
- A confirmation by the institute administering the mediation.
- Any other evidence that is acceptable to the competent authority.

It is worth noting that mediators frequently do not like being involved in enforcement procedures once the mediation is over. In the United States, mediators typically do not sign

settlement agreements even if they are part of the mediation. Therefore, it is probably wise when resolving an international mediation to obtain the mediator's attestation on a separate document, which merely confirms that a contemporaneous settlement agreement (which the mediator is not signing) is, in fact, the result of the mediation.

### **The Convention's Numerous Exceptions**

The Singapore Convention provides several grounds under which a signing state may refuse to enforce a mediated settlement agreement. These include:

- Incapacity of a party to the settlement agreement.
- The settlement agreement is incapable of being performed under applicable law.
- The settlement agreement is not final or binding according to its own terms.
- The settlement agreement has been subsequently modified.
- The obligations in the settlement agreement have been performed.
- The obligations in the settlement agreement are not clear or comprehensible.
- Granting relief would be contrary to the terms of the settlement agreement.
- There was a "serious breach" by the mediator of mediation standards.
- There was a failure by the mediator to disclose facts and circumstances, creating justifiable doubts as to the mediator's impartiality or independence.
- The relief is contrary to the public policy of the signing state in which enforcement is sought.
- The subject matter of the dispute is not capable of settlement by mediation under the law of the signatory state.

### **Conclusion**

The New York Convention paved the way for an expansion in the resolution of international disputes through arbitration proceedings. Since the New York Convention is widely seen as a success, it is expected that the Singapore Convention on mediation will be widely endorsed. If so, the Singapore Convention will create significant momentum in favor of the use and recognition of the mediation of international disputes just as the New York Convention led to a rise in the use and recognition of arbitration. Only time will tell. But if history is any indicator, the Singapore Convention is very good news for businesses looking to resolve controversies expeditiously.

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