

What does the Singapore Convention mean for the future of international sports mediation?



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On 7 August 2019, 46 countries signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (2019 Singapore) (“the **Singapore Convention**”) on the day it opened for signature in Singapore, the text of which can be found [here](#). The Singapore Convention purports to do for mediated settlement agreements what the New York Convention did for international commercial arbitration, creating a treaty-based regime for enforcing agreements resulting from mediation in international disputes. On September 12, 2020, the Singapore Convention comes into effect.

The effect of the Singapore Convention, to recognise mediated agreements, may be less significant to civil practice in common law countries, where mediations are quickly becoming the rule rather than the exception, and where parties routinely comply with such agreements knowing that they can be easily enforced through the courts as matters of contract. Elsewhere, however, it may have great effect.

The tangible benefit of international arbitration as a system of resolving disputes is the international enforceability of the awards as a result of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (“the **New York Convention**” - the text of which can be found [here](#).) In the intervening years, international commercial parties quickly saw the benefits of arbitrating international disputes as a result of the New York Convention. Universal enforceability and relative ease of enforcement are its hallmarks. Comparing that to the fact that outside of Europe there is no international convention on recognizing court judgments, international arbitration found its place as the primary and preferred form of dispute resolution for significant commercial activity.

In the early-to-mid-1990s, sport, as an inherently and increasingly international commercial activity, took advantage of international arbitration, particularly its ability to create a harmonised series of outcomes for sports cases, and used it as the “go to” approach to resolving disputes across a wide range of potential cases, such as doping, sport governance, match fixing/corruption, discipline, employment (particularly in football), events, and sports-related commercial disputes. Every year is seemingly a year on year record for new arbitration filings for the Court of Arbitration for Sport (**CAS**) and no more does anyone blink at the thought of taking their case to CAS for ultimate resolution; it has become the natural and well-accepted final destination for international sports disputes.

Mediation, as an alternative way of resolving disputes, has not been as well accepted in sports. CAS (which despite the name also offers [mediation services](#)) annually has a relatively anemic flow of mediation cases, perhaps only recently emerging from the single into the double digits. CAS is not alone in this; other sport-focused tribunals as a general matter report the same result. It is not because of a lack of infrastructure, appropriate rules, or qualified mediators at CAS or at other arbitration institutions, as they all have those key components in abundance sufficient to ground a successful, well-used mediation program. Perhaps this situation exists because of cultural issues both specific to sport and to how international sport is governed. We will explore some of these issues later in this article, which will look at:

- The Singapore Convention’s key points
- The claimed benefits and detriments of mediation
- Can the Singapore Convention make mediation more popular for sports disputes?
- Will absent signatories hold back development of mediation globally?
- The ideal outcome for the Singapore Convention’s implementation

The Singapore Convention's key points

In August 2019, the Singapore Convention (the text of which may be found [here](#)), was signed by forty six (46) countries. It has since been signed by an additional seven (7) countries, as of the date of this publication. The list of signatories and others can be found [here](#). Notably, the United States, China, India, South Korea, Singapore, much of the Middle East and South America, and several African countries are among the initial signatories. For the Singapore Convention to take effect, it must be ratified by at least three (3) countries; it has met this requirement because four (4) have ratified as of publication. Under Article 14(1), the Singapore Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

Given that today, 12 September 2020, is the six month anniversary since Qatar's ratification, and also the day the Singapore Convention first takes effect in the first of the countries that have ratified, accepted, acceded to, or approved it (Fiji, Qatar, and Singapore), the authors thought this article might provide a timely commentary for parties interested in mediating sports disputes.

A common reason given for not using mediation has been the lack of direct and simple enforceability of its outcomes. To the common law practitioner these statements cause a bit of head scratching. The common law experience has shown that mediated outcomes generally self-enforce. The parties follow their agreements and move on, either to a separate existence apart or to a renewed and often expanded business relationship. Sure, if a mediation agreement is breached or needs to be clarified or enforced, it requires a separate legal action to be filed in the local courts for breach of contract, but at least at a domestic level this is not a significant impediment. For international mediated agreements, however, there is no doubt that the parties would prefer the ability to take their mediated agreement into court and have it directly enforced anywhere in the world in a manner similar to an international commercial arbitration award. Some have said that the inability to enforce mediated agreements abroad is its key detriment. This is where the Singapore Convention offers its practical solution.

“Mediation” is broadly defined in the Singapore Convention and is described as a process whereby “parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute” (Singapore Convention Article 2(3)). There is no requirement that the mediator be accredited by a recognised institution nor that the mediation be administered or adjudicated by or at any dispute resolution institution.

The Singapore Convention applies to settlement agreements resulting from mediation to resolve commercial disputes which are international in nature, in that (Singapore Convention Article 1):

“(a) At least two parties to the agreement have their place of business in different contracting states; or

(b) The state in which the parties . . . have their places of business is different from either:

i. The State in which a substantial part of the obligations under the settlement agreement is performed; or

ii. The State with which the subject matter of the settlement agreement is most closely connected.”

Certain categories of settlement agreements are excluded from the broad scope of the Singapore Convention, such as agreements which:

- result from transactions engaged in by a party for personal, family or household purposes (Singapore Convention Article 1(2)(a));
- relate to family, inheritance or employment law (Singapore Convention Article 1(2)(b));
- have been approved by a court and are enforceable as a judgment (Singapore Convention Article 1(3)(a)); and
- have been recorded and are enforceable as an arbitral award (Singapore Convention Article 1(3)(b)).

A party seeking relief under the Singapore Convention must submit to the court of a signatory country the following (Singapore Convention Article 4(1)):

- the signed settlement agreement; and
- evidence that the settlement agreement was achieved through mediation.

The types of evidence that would be acceptable include (this list, by the terms of the convention, is not meant to be exhaustive):

- the mediator’s signature on the settlement agreement;
- an attestation by the institution which administered the mediation;
- a document signed by the mediator stating that the mediation took place; and
- In the absence of the mediator’s signature or of the document signed by the mediator or of an attestation, the party may rely on other acceptable evidence.

The Singapore Convention sets out the list of grounds upon which a court may refuse to grant relief (Singapore Convention Article 5(1)). Relief may be refused if:

- a party to the agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed under the law chosen by the parties to the settlement agreement or, absent a choice of law, under the law of the country where relief is sought;
- the obligations in the settlement agreement have been performed or are not clear or comprehensible;
- granting relief would be contrary to the terms of the settlement agreement;
- granting relief would be contrary to public policy;
- there was a serious breach by the mediator of standards applicable to the mediator or the mediation;
- there was a failure by the mediator to disclose circumstances that raise justifiable doubts as to the mediator's impartiality and the failure to disclose had a material impact or undue influence on a party without which failure the party would not have entered the settlement agreement;
- the settlement agreement is not binding or final or has been subsequently modified;
- the subject matter of the dispute is not capable of settlement by mediation under the law where the relief is sought.

These grounds for refusing to enforce are familiar to any arbitration practitioner because they are very similar to the grounds for refusing to enforce arbitration awards under the New York Convention.

Given the paucity of mediation in sports disputes, and the well-known potential benefits of mediation, the authors see mediation as a potential growth industry for sports dispute resolution, and sports dispute resolution professionals, and the Singapore Convention has the potential to fuel that growth, though this is not without its challenges.

[The claimed benefits and detriments of mediation](#)

There are many benefits to mediation, and these are well-known to practitioners and include the following. This is not an exhaustive list but exemplary; there are a great many benefits to mediation and in the authors' view relatively few detriments:

- The largest potentials savings in fees, costs and time, avoiding litigation costs and drains on scarce executive/employee and individual time, focus, and attention.

- Parties remain in complete control of the process; no resolution can be had in mediation that is not agreed to by both parties (a mediator has no power to order or award anything).
- In appropriate cases, relationships can be preserved and even enhanced, which can be important in cases where the parties need to deal with each other once the dispute is resolved.
- Confidentiality can more easily be maintained as mediation discussions are not only confidential themselves but are also legally privileged, generally, from disclosure in a future proceeding.
- Mediation is client focused, while arbitration and litigation focus on other things and people (in particular judges, arbitrators and court procedural rules) in the process.
- Mediation is opportunity and future focused, while arbitration and litigation is past facing.
- Informality, creativity, and flexibility is more available as a way to resolve a dispute.
- Mediation can be dramatically faster than arbitration or litigation.
- Access to expertise of the mediator (judges may be experts in the law and the law of procedure, but they generally do not have expertise in an industry or business setting; the parties can select a mediator with this trait to assist them).
- Mediation avoids a win/lose or winner take all outcome.
- Expert mediator can provide a neutral, independent evaluation of a case and offer a dose of reality to lawyers and clients.
- Mediation permits direct communication and reconciliation between the parties which is often practically difficult in an arbitration or litigation.
- Mediation provides an opportunity to influence how the opposing side views their case.
- Even if it is unsuccessful, mediation may offer parties the opportunity to narrow or refine the issues between them with the guidance of an expert in their industry for any proceeding that follows.

Commonly stated perceptions of negative aspects of mediations include:

- Mediation is an additional expense, which can be prohibitive for matters of a certain size.

- Mediation takes time or delays arbitration or litigation and takes focus away from the arbitration or litigation.
- Mediation cannot be used for certain types of cases, particularly those involving discipline and punishment.
- If parties are entrenched in their positions, or there is a legal precedent to be established by one side because they have repeat issues involving other cases, they may not be compelled to negotiate or participate in good faith; successful mediations require the parties' commitment to resolution. Sometimes the party with true authority to resolve a case is not "in the room" which thwarts the settlement efforts at mediation.
- Mediation agreements require court involvement to enforce.

Many of these negative factors can be addressed quite easily; they are not insurmountable issues:

- Programs can be set up to allow for virtual mediation on a limited time duration that cost relatively little.
- Mediation can be structured so that it occurs while the parties are between the time of filing the arbitration demand and the evidentiary hearing when they are not preparing their case every day and have time to spend a few hours, a half day, or a full day mediating. Focusing on mediation is still focusing on the case, albeit at times in different ways.
- Mediation is a natural adjunct to resolving discipline cases. Discipline cases in sport are about resolving issues over the right of association in a non-criminal manner. Even criminal cases permit resolution using plea bargains and negotiating in many jurisdictions, but in sport we are not doing that. Yes, there will be basic principles about wrongdoing and punishment that by rule have to be addressed in a certain way, but there is often ambiguity and uncertainty over the final outcome that can allow for a different resolution than litigating to the end.
- It is true that parties cannot be compelled to mediate in good faith, but systems can be arranged to bring benefits to parties that do negotiate in good faith or penalties to those who do not. For example, much can be done with rules on cost shifting concerning this issue; even if you win you may not be able to recover your costs or you may even be required to pay a contribution to the other side's costs depending on how you approached the mediation suggestion.

- The Singapore Convention solves the issue of enforcement of mediated agreements by making them directly enforceable.

What we have learned during the pandemic is that [virtual mediation works](#),¹ is far less expensive because no one has to travel, is far less formal and even more flexible procedurally because people can appear from wherever they are whenever it is convenient, and while there are challenges with body language messages and truly understanding the parties and mediators through more subtle cues, and it just plain works as well as, or some would say better than, in person mediation. This should make mediation far more accessible to everyone, including those in sports.

The likelihood of success of mediation, particularly in sports, is also a product of the system that is set up for dispute resolution. Dispute systems can be designed to maximise resolutions as cost effectively and quickly as possible. But this approach takes significant forethought and effort up front to ensure that all elements of the dispute resolution system are working together to enhance resolution. Dispute systems design is a very real approach to these issues and has been widely written about. But sports bodies are uniquely organized to maximise this approach because they have the ability to make rules that affect their members directly and comprehensively. For example, large governing bodies could build into their dispute process a highly encouraged, cost effective, early mediation process, run on a similar time frame with their more adversarial dispute resolution process but before any final decision is taken, with perhaps some gentle prodding or encouragement of parties to use it, with possible effects later on in the dispute resolution process.

[Can the Singapore Convention make mediation more popular for sports disputes?](#)

There are many reasons suggested for the lack of adoption of mediation generally by sports parties, including that sports is inherently distributive in nature, with one party achieving success by winning, and all others are losers (i.e. there is little room for a win-win). In addition, international sports is for the most part governed by bodies based in civil law jurisdictions (those of the continent of Europe, particularly Switzerland and Monaco), and represented by civil law-trained and licensed lawyers. In civil law jurisdictions, mediation is less widely taught or practiced than in common law jurisdictions. Perhaps ironically, Roman law, the law upon which most civil law jurisdictions take their historical basis, recognized mediation at least as early as [Justinian's Digest circa 550-553](#).²

¹ Jeffrey Benz, Catherine Pitre, 'How to conduct effective sports dispute resolution & advocacy online', lawinsport.com, 12 June 2020, last accessed 11 Sept 2020, <https://www.lawinsport.com/topics/item/how-to-conduct-effective-sports-dispute-resolution-advocacy-online>

² Social Dispute Resolution Center, 'The history of mediation', socialdrc.com, last accessed 11 Sept 2020, https://www.socialdrc.com/history_of_mediation.htm

Though around for centuries across many different cultures, mediation grew up and matured in the common law systems in modern times, starting primarily in the United States 35+ years ago to deal with severely crowded dockets (reducing time to resolution, strain on judicial resources, and expense), and spreading to England/Wales, Australia, New Zealand, Ireland, and Nigeria. The EU has recognized the benefits of mediation in its Directive 2008 52/EC encouraging the use of mediation in cross-border civil disputes.

As an additional factor, some believe that disciplinary disputes, like doping, match fixing, or other forms of regulatory disputes involving punishment, cannot be mediated; the authors are not alone in thinking that is a short-sighted and formalistic view given that even criminal cases in many jurisdictions can conclude through a negotiated plea bargain but this view persists nonetheless as an impediment to the use of mediation in sports cases. Besides, pursuant to the consistent jurisprudence of the CAS and of the European Convention on Human Rights (**ECHR**), although several principles of criminal law are taken into consideration in sports disciplinary proceedings, such as the principle of legality and proportionality, all criminal law principles do not necessarily apply to violations of a disciplinary nature. In particular, the principle of the presumption of innocence is not applicable to the breach of a sport's disciplinary rules.³ Therefore, it appears that a purported criminal nature of a dispute should not constitute an impediment to recourse to or use of mediation.

Perhaps the Singapore Convention's elevation of the status of mediated agreements to being immediately enforceable worldwide will encourage sports participants to overcome their reluctance to use mediation. This aspect certainly makes mediated agreements appear a lot more like arbitral awards in their fundamental aspect of broad enforceability.

There may be some question as to how Article 12(4) of the Singapore Convention will affect its implementation in member states of regional economic organisations. Article 12(4) provides that the Singapore Convention "shall not prevail over conflicting rules of a regional economic integration organization" if the settlement agreement is sought to be relied on in a member state, and the states involved that make the mediation "international" under Article 1 of the Singapore Convention are member states. Thus, enforcement under the Singapore Convention may be subject any additional preconditions imposed by regional organisations, such as obtaining the counterparty's consent, as required under the EU Directive 2008/52/EC, before a mediated agreement may be enforced.

Article 5(1)(d) of the Singapore Convention has the potential to limit the applicability of the Singapore Convention. Article 5(1)(d) affords a defence if granting relief would be contrary to

³ See for instance Decision 526/18 of the European Convention on Human Rights (ECHR) in the case of *Platini vs Switzerland*.

the terms of the mediated agreement. One view is that parties may be allowed to “contract out” of enforcement of their settlement agreement under the Singapore Convention by providing for that in their settlement agreement. Although Article 5(1)(d) might be limited in effect if courts strictly interpret clauses that purport to contract out of the Singapore Convention, parties are unlikely to face difficulty drafting a sufficiently clear and enforceable clause if they want to get out of the reach of the Singapore Convention.

The effectiveness of a treaty can best be measured by the extent of its adoption. While the Singapore Convention’s initial signatory list of forty-six (46) is nearly double the same initial number of signatories for the New York Convention of twenty-four (24), the Singapore Convention’s current fifty-three (53) signatures, accessions and ratifications list is nowhere close to the New York Convention’s similarly defined number of 161 of the UN’s 194 member states plus the Holy See, Cook Islands, and the State of Palestine (consider also that there are 206 National Olympic Committees (“NOC”) recognized by the International Olympic Committee and breadth of adoption by the countries to which those NOCs have jurisdiction will be important).

Conspicuously absent among the signatories are signatures from any countries in Europe other than Serbia and Montenegro. Especially notably absent are signatories from the other common law countries where mediation is regularly practiced, such as Australia, Canada, Ireland, New Zealand, and the United Kingdom.⁴ Among the missing, the United Kingdom, Switzerland, and Monaco are conspicuous in their absence for anyone interested in sport governance given the number and significance of sport governing bodies based there.

[Will absent signatories hold back development of mediation globally?](#)

The authors think not for several reasons. First, in the common law countries, commercial disputes are regularly resolved by mediation and they are comfortable as a procedural and legal matter with the process of mediation and its enforceability; it is only a short matter of time before the rest of the common law countries Register. Second, the European countries already are required to recognise some form of mediation as result of EU Directive 2008/52/EC, and at least Italy has an active mediation profession and practice for litigated cases, so expect the EU/EEA members to eventually hop aboard. Third, the benefits of mediation, including its relatively low cost, speed, access to expert mediation assistance, and effectiveness, are so compelling that it is unlikely that any of these identified missing key players will be missing for long from the list of signatures, accessions, or ratifications.

⁴ The European Union is yet to sign the Singapore Convention as it has not decided if it has the competence to sign the Singapore Convention itself or whether each member state should sign the Convention individually, and in part because in part because the EU directive does not contemplate direct enforcement of a settlement agreement in another member state. The UK position is unclear amidst the Brexit situation.

In addition, sport governing bodies that commit to using mediation in their processes can also commit to enforcing mediation outcomes throughout their entire area of purview. For example, FIFA and FIBA have rules that state that the outcomes of their internal dispute processes (mainly arbitrations or processes like arbitrations) will be enforced by the international sports federation against any national federation or team; in other words, for example, an athlete who wins in an internal proceeding can go to the international sports federation to have them take sporting sanctions against a party that does not follow the requirements of a decision. Sporting organisations would need to implement similar legislation with respect to mediated agreements to make them similarly internally broadly enforceable with the international sports federation's purview, but the Singapore Convention provisions would provide additional enforcement mechanisms outside of the sporting environment. The enforcement of some settlement agreements reached through mediation, such as employment disputes between players and clubs, for instance, may not, however, by the terms of the Singapore Convention be covered. It would thus be advisable for sport governing bodies to contribute through their disciplinary regulations to the due compliance of settlement agreements, if needed (nothing prevents that).

[The ideal outcome for the Singapore Convention](#)

So, we must ask ourselves what is the likely effect of the Singapore Convention on resolving international sports cases? In the short term, perhaps not much, but in ten (10) years it has the potential to be fundamentally dispute changing. Like what COVID-19 did to thrust online dispute resolution, a unique and rarely used process before, into an everyday occurrence in our legal world, the Singapore Convention has the potential to radically reshape the nature of sports dispute resolution.

Envision a world where disputing international sports parties select from a panoply of dispute resolution options, including federations' internal judicial bodies, arbitration and mediation, viewing them on a continuum, rather than in the alternative. Mediations can avoid more formal proceedings before sports judicial bodies or the CAS, if initiated at the very outset of the dispute resolution process. Mediation can also occur without impact on the sports judicial bodies or arbitration timeline, seamlessly during such more formal processes, after the demand is filed but before the evidentiary hearing. Parties and counsel that experience mediation successfully will have spread the word on this kind of mediation. Mediation will have been introduced into the sports dispute resolution process, including even in internal dispute resolution processes, earlier rather than later, to take advantage of the various benefits of early mediation. CAS and other sports mediation bodies will announce their year on year record number of mediation cases which will compare favourably to the arbitration case numbers. This is a vision to which all of us as sports dispute resolution practitioners should aspire and encourage.

Now, we do not yet have the vision suggested by the prior paragraph, nor are we anywhere near to it. We all can dream. But when mediation agreements become immediately enforceable internationally, with even more force and effect than court judgments, much like arbitration awards, then, as happened with the proliferation of arbitration since the advent of the New York Convention, we are likely to see mediation in sports advance to the prominence of arbitration as a corollary sports dispute resolution alternative and an important part of the sports dispute resolution toolkit.

Conclusion

In a much referenced and simple statement from a Global Pound Conference on mediation presentation in 2016, the Chief Justice of Singapore called for a shift from viewing “ADR” as its common definition of “*alternative* dispute resolution”, to viewing it as “*appropriate* dispute resolution”.⁵ Viewed in this way, mediation becomes just one of other dispute resolution options for parties from which they might choose the best mechanism to resolve their dispute and achieve their desired outcomes. The Singapore Convention strengthens the mediation option and its potential for resolving international disputes, including international sports disputes, efficiently and effectively.

In the long term, the Singapore Convention has the prospect of encouraging greater use of mediation in sports disputes, much like the New York Convention made arbitration the standard. All in all, the entry into force of the Singapore Convention is a development that the sports dispute resolution profession and the participants in the business of sport should welcome and promote so that athletes, governing bodies, sponsors, broadcasters, licensees and others can avoid or exit their disputes effectively and efficiently and get back to the business of sports, the product of which so dramatically captures our imaginations, enthusiasm, hopes and dreams and inspires us unlike any other endeavour.

The authors claim different legal traditions between them, with Jeff, a common law lawyer, admitted as a lawyer in several US states and as a barrister in England and Wales, and Jorge, a civil law lawyer, licensed as a lawyer in Switzerland, are both CEDR Accredited Mediators and have experience as mediators and as advocates in mediation, including in sports disputes.

⁵ The Honourable the Chief Justice Sundaresh Menon, Global Pound Conference Series 2016 – Singapore “Shaping The Future Of Dispute Resolution & Improving Access To Justice”, 17 March 2017, last accessed 12 September 2020, Supreme Court Singapore, <https://www.supremecourt.gov.sg/Data/Editor/Documents/Global%20Pound%20Conference%20Series%202016,%20Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice.pdf>.

About the Authors



[JEFFREY BENZ](#)

Jeff is an accomplished arbitrator, mediator and certified electronic discovery specialist with JAMS in Los Angeles and London and is a Door Tenant at 4 New Square Chambers, London. A Court of Arbitration for Sport arbitrator and mediator for over 20 years (many of his cases would be characterized as leading or high profile cases, particularly in doping-related matters), Jeff has acted as arbitrator or mediator or counsel in a wide variety of sports, including, among others, archery, athletics/track and field, badminton, basketball, biathlon, bobsleigh, boxing, canoe and kayak, cycling, equestrian, figure skating, football/soccer, golf, gymnastics, ice hockey, rowing, rugby, sailing, shooting, skateboarding, skeleton, speedskating, surfing, swimming, table tennis, taekwondo, team handball, tennis, triathlon, volleyball and beach volleyball, water polo, and wrestling, and in cases involving complex disputes and transactions involving sponsorships, film financings and production, technology, licensing, and live events in the sports and entertainment industries.

J.BENZ@4NEWSQUARE.COM



[JORGE IBARROLA](#)

Jorge Ibarrola is a Swiss-qualified attorney-at-law, partner and co-founder of the Swiss law firm Libra Law, whose offices are located at the Maison du Sport International, in Lausanne, where the IOC, the Court of Arbitration for Sport (CAS) and many international sports federations and major companies have their headquarters. Since 2009, Libra Law has specialised in advising and representing clients in the areas of sports and business law. Jorge Ibarrola holds a law degree from the University of Lausanne and an LLM from McGill University. He is also a CEDR-accredited mediator. Jorge Ibarrola is president of the Disciplinary Chamber of Swiss Basketball and a board member of the Swiss Sports Law Association. He chairs the sports law commission of the Bar of Canton de Vaud.

IBARROLA@LIBRA-LAW.CH