

## Alternative Dispute Resolution

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# The Singapore Convention: A Path To Advance International Economic Development With Mediation

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The preamble to the Singapore Convention (the Convention) states that “mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,” “the use of mediation results in significant benefits” and “the establishment of a framework for international settlement agreements resulting from mediation ... would contribute to the development of harmonious international economic relations.”

The Convention is not about primacy of mediation over arbitration or litigation. It is about assuring the increasing viability of international commerce. The United Nations Commission on International Trade Law’s (UNCITRAL) working committee crafted the Convention with particular care so as not



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to create a schism within the legal community nor unduly complicate the life of legal practitioners. The end result is a protocol that will increase the range and impact of practitioners’ tools to employ in pursuit of the economic interests of their clients and their commercial relations.

The Convention will have a profound impact on the practice of law in New York, the epicenter of global finance and commerce. This article will provide a primer for New York practitioners on the Convention, including these key insights:

- Takeaways from the global think tank discussion
- Observations regarding the initial and future signatories of and what lessons can be learned from the New York Convention
- How New York transactional attorneys and litigators can prepare for the impact of the Convention
- The Convention’s impact on New York mediations

**Takeaways From the Global Think Tank.** On the day following the signing of the Convention, the Global Mediation Alliance, in partnership with JAMS

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and the Society of Mediation Professionals (Singapore), held an event in Singapore titled “The Singapore Convention: ‘Life After 7 August 2019’ A Global Think Tank.” This event was supported by over 30 institutions throughout the world, attended by 50 prominent figures in mediation worldwide and simulcast for public consumption. The participants generated topics for consideration and previewed how these topics might play out on the global stage.

Among the most engaging topics was the potential controversy regarding the grounds for refusing to grant relief under Article 5, particularly as to §§(e) and (f).

Section 5(e) details grounds for refusing enforcement based on mediator failure to adhere to appropriate standards. The initial challenge here is to determine which standards apply. There are three questions that can provide some guidance:

- Was there an underlying contract clause that specifies which standards apply?
- Did the parties agree to terms of mediation that specify applicable standards?
- Is the mediation administered by an institution that specifies applicable standards in its rules?

Without the guidance on these three questions, determining which standards apply becomes extremely difficult. There are many things to consider, including the jurisdiction of either of the parties to the dispute and that of the mediator, the location of the mediation, the jurisdiction of the governing body (if institutionally administered), the jurisdiction where the agreement is being sought to be enforced and the laws of the jurisdiction that govern the underlying relationship between/among the parties.

Although clarity alone on which standards apply does not necessarily resolve all issues. Further complications could ensue should the applicable standards be ambiguous or if the application of said standards offends the public policy of the jurisdiction in which the settlement is being sought to be enforced.

One solution is to establish universal standards that all mediations/mediators would be subject to follow in the case of attempts to enforce under the Convention. The debate regarding the establishment of universal standards is lively and was previewed at the global think tank. With that being said, its dynamic is too complex to discuss here.

Concluding that the mediator failed to adhere to appropriate standards alone is insufficient to successfully challenge enforcement. In addition,

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it must be established that such failure was both “serious” and engaged in a serious breach of these standards and that “but for the breach, the party seeking the relief to be refused would not have entered into the agreement.” These additional criteria will provide grist for eternal debate on a case-by-case basis.

Much like §(e) of Article 5, §(f) introduces a trio of sticky wickets. In this case, referring to a mediator’s failure to disclose, the tests are the following:

- (1) Whether the failure disclose raises justifiable doubts as to the

mediator’s impartiality: Here, the questions raised are what constitutes a doubt being justifiable; in the absence of a qualifier, whether remotely or conceivably justifiable is sufficient; and whether the standard should be reasonably justifiable.

- (2) That the lack of disclosure had a material impact or undue influence on a party: The application of “material” and “undue” to factual situations will be extremely trying.

- (3) Without which failure that party would not have entered into the settlement agreement: Once again, the “but for” becomes a heady challenge to prove or disprove.

As foreshadowed in the discussion above, one of the principal takeaways from the global think tank is a question of whether the language of the Convention will ultimately invite the overzealous among us to chip away at mediation’s promise of rationality and efficiency through chipping away at its consensual underpinnings in creating a cottage industry of litigating the enforcement of mediated settlements?

The Global Mediation Alliance and JAMS are planning a number of follow-up think tank events over the course of the next years that will address these questions and others in greater depth.

**Observations Regarding Initial and Future Signatories of and What Lessons Can Be Learned From the New York Convention.** In June 2019, there was optimism that the Convention would succeed on August 7 in capturing the minimum of three signatories required for it to progress. Yet there was little promise of any significant additional adherence. As the weeks progressed, rumors abounded that there could be as many as 20 original signatories. But the floodgates opened two weeks before the

convention with the announcement that both China and the United States would be included among the original signatories. Ultimately, 46 countries became original signatories.

On June 10, 1958, there were 24 original signatories to the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention). The progression to the current 160 signatories is dramatic not just in its numeric growth, but in the profound facilitative impact that arbitration has had on international commerce. Prior to the ratification of the New York Convention, parties had no recourse to defend the terms of their agreements outside of simple persuasion and reliance on unfriendly courts in the jurisdictions in which they sought judgment.

It is worthwhile to consider parallels between New York in 1958 and Singapore in 2019. The most poignant of these is that the resonant success of the 1958 arbitration treaty surely will be seen as the model on which the pending success of the 2019 will be built.

This can be illustrated by UNCITRAL's mission: to facilitate global trade and commerce. As this principle required progressive thought in 1958, so it does in 2019. In 1958, the challenge was access to reliable, enforceable justice. In 2019, it is the promise of assuring and broadening that access. It is beyond the scope of this article to debate the comparative advantages of arbitration and mediation. However, it is undisputed that mediation, in the hands of a competent mediator, is a highly effective dispute resolution methodology. Even if it is not appropriately applied to all conflicts, its advantages are manifest, and its scope of application is broad. Even the most ardent champions of

arbitration recognize that mediation can constitute an appropriate occasional alternative and complement to arbitration.

As with the New York Convention, we should expect increasing adherence to the Singapore Convention over time until it becomes a universal standard. It is notable that such mediation-friendly jurisdictions as Canada and Australia have not yet signed on, nor has the European Union. Surely, there have been political complications that did not allow initial approval that will be clarified in these and other jurisdictions soon.

One of the most important considerations is the cascade effect: Once a critical mass is established, most nations will fall into place to support the standard. Arguably, a critical mass has already been achieved.

**How New York Transactional Attorneys and Litigators Can Prepare for the Impact of the Singapore Convention.** New York attorneys, whether specializing in international transactions or commercial litigation, should be gearing up for the impact of the Convention. The good news is that there is time: Article 14 of the Convention states that it will take effect "six months after deposit of the third instrument of ratification, acceptance, approval or accession." As we are awaiting such deposit, attorneys will have at least a six-month ramp-up period.

Yet acceptance of mediation in international conflicts should experience a significant uptick in the near future, and we should be prepared for a steady rise in its use over the coming years. Transactional attorneys should become better familiarized with mediation in order to effectively counsel their clients, and they should be ready to draft dispute resolution clauses that prescribe mediation and/or mixed-

mode dispute resolution coequally with arbitration.

The more difficult transition will be for litigators, who must embrace mediation as being coequal to arbitration in the settlement of cross-border disputes. Clients will demand it, and litigators must be prepared to act in a manner radically different from their training to become their clients' mediation counselors as well as rights defenders. The role of an attorney in mediation is quite different from that of one in litigation or arbitration, requiring a different attitude and broader skill set. Commercial clients will be demanding polyvalence during mediation's ascension, and litigators should be prepared to deliver it.

**The Singapore Convention's Impact on New York Mediations.** The impact of the Convention on New York mediation practitioners will be significant as mediation becomes increasingly mainstream. The legal industry should be prepared for a gold rush of mediations and increased competition and all should familiarize themselves with the terms of the Convention, particularly §§(e) and (f) of Article 5, to assure that they understand the perils of enforceability.