On January 6, Singapore took the next step in effectuating an international enforcement regime for mediated settlement agreements by introducing legislation to become the first nation to ratify the Singapore Convention. The Convention, which was signed by 51 nations in 2019, will take effect six months after three of those signatories ratify or accede to the Convention.

Most international law practitioners are familiar with the New York Convention, which requires signatory states to recognize agreements to arbitrate and to enforce awards rendered in an international arbitration. The New York Convention was a landmark treaty that revolutionized the manner in which many international commercial disputes are resolved. The Singapore Convention attempts to do the same for international mediated settlement agreements. Under the Singapore Convention, signatory nations must recognize and
enforce mediated settlement agreements, similar to the enforcement process for international arbitral awards. Although the Singapore Convention has not yet entered into force, parties who may find themselves in an international dispute should be prepared to take advantage of the Convention’s enforcement provisions when it does take effect:

1. If you are crafting a mediated settlement agreement after the Convention takes effect, you should ensure that the agreement meets all the criteria for enforceability set forth in the Singapore Convention, such as being in writing, signed by the parties, and signed or certified by the mediator.

2. If you have been hesitant to mediate an ongoing dispute or include a mediation clause in a prospective contract, you may want to reconsider for future disputes in light of the Convention’s promising system for enforcement and recognition of mediated settlement agreements.

**Background**

After many years of development within UNCITRAL, the United Nations Convention on International Settlement Agreements Resulting from Mediation (available at: https://unctral.un.org/sites/uncitr.al.un.org/files/singapore_convention_eng.pdf) (commonly referred to as the “Singapore Convention”) was adopted by the UN General Assembly in December 2018. It was signed on August 7, 2019 by the first 46 nations, including the United States, China, South Korea, India and Saudi Arabia. By November, five more countries had signed the Singapore Convention, bringing the total number of signatories to 51. Comparatively, there were 24 original signatories to the New York Convention in 1958.

The Singapore Convention creates an enforcement regime for mediated settlement agreements, which is intended to function much like the efficient system of recognition and enforcement of international arbitral awards under the New York Convention. The Singapore Convention was created to address concerns that parties were unwilling to consider mediation for fear that a resulting agreement would only lead to further litigation over the terms of the settlement agreement itself, thus defeating the purpose of mediation. Although most parties comply with the terms of mediated settlement agreements, the risk that a recalcitrant party would agree to a settlement, get a dismissal of the dispute, and then force the opposing party to litigate in a different country to enforce the agreement discouraged many from “risking” the expense of a mediation without the surety of quick and efficient enforcement. The Singapore Convention attempts to address this concern.
What Types of Agreements Are Covered?

The Singapore Convention applies to international mediated settlement agreements. The most basic question then is how are “international” agreements defined. Under Article 1, Section 1, an agreement is international when the parties have their places of business (1) in different states or (2) in the same state, but the subject matter or obligations of the agreement are in different states. The term “place of business” does not always mean the entity’s headquarters. Instead, Article 2 provides that, if a business has multiple offices, the place of business is in the state that “has the closest relationship to the dispute resolved by the settlement agreement.” There are also some general exclusions, including consumer, family and employment settlements, as well as agreements obtained through court or arbitral proceedings. See Article 1, Secs. 2, 3. Some of these general exclusions have been criticized as overly broad or vague. For instance, if a large corporation is family-owned, internal disputes over corporate governance arguably could be considered “family disputes” that do not fall under the Singapore Convention, even if they relate entirely to corporate affairs.

The Convention defines “mediation” broadly. Under the Convention, “Mediation” is defined as “a process, irrespective of the expression used or the basis upon which the process is carried out, 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.” Thus, regardless of the style — e.g., facilitative or evaluative —or the name given to the process, as long as the parties resolve their dispute with the assistance of a third party who is not the ultimate decision-maker, the agreement will likely fall under the purview of the Convention.

How Will Agreements Be Enforced?

Like the New York Convention, the Singapore Convention does not describe what enforcement proceedings must look like. Instead, the jurisdiction of enforcement determines the form of enforcement proceedings. The only two substantive requirements for enforcement under the Convention are (1) an agreement signed by the parties and (2) evidence that the agreement resulted from mediation. Art. 4, Secs. 1-2.

One concern that many have raised with the Convention is that it “requires” the mediator to sign the agreement. Common practice in many jurisdictions, including the United States and the U.K., is that a mediator should not sign any resulting agreement because
the mediator is neither a party nor witness to the settlement. Although there can be language to make clear that the mediator is signing solely to certify that the mediation took place, the Convention actually allows other evidence that the settlement resulted from mediation, such as a statement certifying the mediation signed by the mediator that is separate and distinct from the agreement or an attestation by the institution that administered the mediation, such as the London Court of International Arbitration. The party seeking enforcement may also submit “any other evidence acceptable to the competent authority.” Art. 4, Sec. 1(b)(iv).

**Are There Exceptions to Enforcement?**

Although the Singapore Convention is intended to create a quick and efficient enforcement regime, the right to enforce an award is not absolute. Article 5 sets forth six grounds on which a competent authority of the enforcing jurisdiction may refuse to enforce an agreement:

1. incapacity of a party to the agreement

2. the agreement is not final and binding, or is incapable of being performed

3. the obligations of the agreement have been performed or are not comprehensible

4. the settlement agreement expressly prohibits enforcement

5. there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach a party would not have entered into the settlement agreement

6. the mediator failed to disclose “circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party.”

The Convention also provides an exception for agreements that are against public policy of the enforcing jurisdiction, including if the laws of that jurisdiction proscribe mediation of the subject matter of the settlement, such as a law against mediation of intellectual property disputes.
These exceptions, although intended to be narrow, may present some challenges. Although it is unlikely that an agreement would be “vacated” if it does not legitimately fall within an exception, the language of the Convention may give rise to litigation that could delay enforcement. For example, there could be factual arguments about whether an agreement is “incapable of being performed” or challenges to whether an agreement is “comprehensible.” Even if these challenges were not ultimately fruitful, it would defeat the purpose of the Convention to require full-fledged litigation to enforce the terms of the agreement. Additionally, there is not a universally accepted mediator “code of conduct.” Thus, acceptable mediator conduct in one jurisdiction may be unacceptable in another, which could lead to challenges as a “serious breach” without which a party would not have agreed to the settlement.

The Convention authorizes signatories to make two reservations under the Convention: A signatory may (1) exempt agreements with governmental parties and (2) require enforcement of awards only “to the extent that the parties to the settlement agreement have agreed to the application of the Convention.” Art. 8, Sec. 1. Additionally, under Article 9, the Convention does not have retroactive effect to agreements that were executed prior to the date the Convention enters into force.

**When Will the Convention Be In Force?**

Parties will have some time before they must ensure that their agreements conform to the Singapore Convention’s requirements. The Convention enters into force six months after the third signatory ratifies the convention. As of the date of this article, no signatories have ratified the Convention, although many expect that it will be in force by the end of 2020. On January 6, 2020, Singapore took the first step in giving effect to the Convention by introducing the “Singapore Convention on Mediation Bill” to the Singapore Parliament. The Bill will implement the Convention in domestic Singapore law and will be the first of the three ratifications required to bring the Convention into force.

Two significant omissions so far from the Convention signatories are the EU and the U.K. No EU country has signed the Convention, although it is unclear whether the EU would vote as a whole to accede or as individual states. Moreover, there is no indication that the EU or the U.K. oppose the Convention or would not sign in the future, although it is unclear when either will sign or ratify the Convention.
What Should Parties Consider Now and After the Convention Is Effective?

Although the Convention is not yet in force, parties who may face international disputes should be aware of states that ratify the Convention in the coming months and should take certain steps when the Convention does enter into force to ensure that they are able to take advantage of the enforcement mechanisms under the Convention:

1. After the Convention takes effect, mediation clauses in a contract should specify that any mediated settlement agreement must be in writing, signed by the parties and the mediator.

2. Parties should amend form settlement agreements to meet the criteria for enforceability under the Convention and include clear language that the mediator is certifying that the mediation took place, but that the mediator is not a witness or a party to the agreement.

3. Parties should also analyze whether they are “international” under the Convention definition to ensure that an agreement is not subject to challenge as a “domestic” agreement outside the bounds of the Convention.

For more information on the Singapore Convention, listen to “Resolutions,” a podcast produced by the ABA’s Section of Dispute Resolution. In a recent episode, Adam Martin, co-author of this article, spoke with Danny McFadden, managing director of CEDR Asia Pacific, about the Convention. Listen at https://www.americanbar.org/groups/dispute_resolution/resources/resolutions-a-podcast-about-dispute-resolution-and-prevention/resolutions-podcast-danny-mcfadden/.

Jeremy Heep and Adam R. Martin are members of the firm’s Trial and Dispute Resolution Practice Group, a seasoned and trial-ready team of advocates who help clients analyze and solve their most emergent and complex problems through negotiation, arbitration and litigation.