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March 2024

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With Japan's Ratification, the Singapore Mediation Convention Gains International Momentum

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I. Overview

On October 1, 2023, Japan became the twelfth nation to ratify the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").[1] Pursuant to Japanese domestic legislation,[2] the Singapore Convention will soon enter into force in Japan on April 1, 2024. This signifies a seminal moment in the Convention's history and the future trajectory of its role in influencing the fabric of international dispute resolution.[3]

From a commercial perspective, Japan's status as one of the world's top five trading nations[4] and the world's fourth largest economy in terms of GDP means that the Singapore Convention will immediately gain increased international visibility upon its entry into force in April 2024. Likewise, Japan's reputation for possessing a sophisticated and credible domestic legal system, which has included a concerted effort to promote alternative dispute resolution mechanisms in recent years,[5] should provide additional legitimacy to the Singapore Convention on the global scale.

This Article first provides a snapshot of the Singapore Convention's current status. Second, it explains the high-level landscape of the dispute resolution options available to parties engaged in international commerce and then examines (in parts three and four) how the Singapore Convention fits within that international legal framework. Finally, this Article sets forth some conclusions as to how Japan's recent ratification, with other global economic powers potentially following suit, may impact the Convention's short-term and long-term future.

II. The Singapore Convention's Current Status

The United Nations General Assembly adopted the Singapore Convention on December 20, 2018 for the stated purpose of "offering a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation."[6] The Singapore Convention's signing ceremony took place on August 7, 2019, and the Convention entered into force on September 12, 2020, six months after the deposit of the ratification by three countries, namely Singapore, Fiji, and Qatar.[7]

Although over 50 countries—including the United States, China, India, South Korea, and the United Kingdom—have signaled their approval of its mission by signing the Convention, only 13 countries have ratified it thus far.[8] Of these, Japan is the most economically-consequential nation to adopt and incorporate the Convention into its domestic legal regime, which it did on October 1, 2023.[9]

As the Convention's drafters had hoped, Japan's decision to ratify the Convention was predicated on its belief that promoting the use of mediation in international commercial disputes will help attract

foreign investment at the domestic level and encourage Japanese companies to expand overseas.[10] These objectives, will, in turn, not only help Japan establish a stronger position in the international community with respect to resolution of international commercial disputes, but potentially help to stimulate Japan's economic development.

III. The International Litigation, Arbitration, and Mediation Landscape

Aside from bilateral settlement negotiations, there are generally three recognized means of resolving commercial disputes between international parties: litigation, arbitration, and mediation. Traditionally, litigation is considered the most compulsory dispute resolution mechanism in that a party may initiate litigation, obtain a court judgment, and proceed to enforce that judgment all without the opposing party's consent. At the other end of the spectrum is mediation, which has long been a dispute resolution procedure that requires both parties' complete consent. As such, the advantages and disadvantages of each dispute resolution mechanism differ significantly.

In Japan, litigation is the most well-known and widely-used means of commercial dispute resolution. Mediation is also relatively familiar to Japanese people, because it is a prerequisite to divorce and some landlord-tenant disputes conducted under the leadership of the Japanese courts. In other words, in the domestic context, there is often perception in Japan that litigation is the typical means of resolving commercial disputes, with arbitration and mediation—so-called "alternative dispute resolution (ADR)"—considered as auxiliary options.

However, in an international business setting, the national court in which a "lawsuit" is filed necessarily belongs to one country and operates solely according to that country's established domestic law. Therefore, disputes between companies based in different countries, parties may desire to avoid resolving their commercial disputes through litigation due to the lack of neutrality and familiarity with local substantive and procedural norms. In addition, many national court systems require that litigation be conducted in open court proceedings, which requires public disclosure of the details of disputes. Furthermore, when enforcing a foreign court judgment, most national courts require parties to proceed through a potentially complex procedure in the country in which the enforcement is to take place (*e.g.*, the country where the property to be enforced is located), but the requirements for that approval[11] vary from country to country, so predictability is often very uneven.

In contrast to national court litigation, international arbitration, which can be described as a trial by private judges appointed by the agreement of the parties, can reduce parties' concerns about predictability, neutrality, confidentiality, and finality. The international legal community has long supported commercial parties' autonomy to resolve disputes through arbitration through the adoption and use of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958 (the "**New York Convention**"). At its core, the New York Convention provides a uniform and streamlined framework for recognizing and enforcing international arbitration agreements and arbitral awards in national courts. With approximately 170 countries ratifying the New York Convention and incorporating its provisions into their domestic law,[12] international arbitration is generally recognized as the preferred dispute resolution mechanism for transnational commercial parties that do not want to avail themselves of national court litigation.

Like arbitration, mediation is fundamentally a creature of party consent and autonomy. With mediation, commercial parties voluntarily engage in settlement discussions with the aim of resolving their disputes harmoniously without the need for protracted and/or costly adversary proceedings. Unlike arbitration, mediation is facilitated by a third party who does not have the authority to impose a final and binding decision on the parties. Although a mediator's recommendation to the parties may contribute to a subsequent consensual settlement agreement, the parties are not compelled to adopt or adhere to the mediator's views. For these reasons, historically, mediation has not been utilized by international commercial parties in the way that arbitration has been.

The Singapore Convention aims to change that dynamic by implementing an international legal framework that augments the use of mediation in the way that the New York Convention has contributed to the widespread use of international arbitration. As discussed below, under the Singapore Convention and the associated domestic laws enacted to implement the Singapore Convention, settlement agreements between international commercial parties that are the byproduct

of mediation will be afforded the same recognition and enforceability by national courts as international arbitral awards.[13]

IV. Expanding the Use of Mediation in International Commercial Disputes

Although arbitration has numerous advantages, including neutrality, procedural flexibility, confidentiality, and portability of enforcement, it is not a panacea for every party for every commercial dispute. For example, as compared to domestic litigation in which national courts' operating costs are largely paid for by public funds, arbitrating parties bear the costs of the arbitrators' fees and costs of administering the arbitration. In recent years, increasing arbitral fees and costs have sometimes become an actual or perceived barrier for certain parties to proceed with arbitration.

One of the recent innovations to reduce arbitration fees and costs and to streamline international arbitration proceedings is an attempt to merge arbitration with mediation procedures. For example, the Singapore International Arbitration Center (SIAC), together with the Singapore International Mediation Center (SIMC), has established an "Arb-Med-Arb" procedure that combines arbitration and mediation. Parties who wish to arbitrate by SIAC can conduct an Arb-Med-Arb procedure by including the following model clause into the dispute resolution clause in their contract.

SIAC-SIMC Arb-Med-Arb Model Clause:

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.[14]

Parties who file a notice of arbitration with SIAC will first attempt mediation with SIMC, and if a settlement is reached there, it will be issued as an arbitral award; if no settlement is reached, the original arbitration proceedings will commence. If a settlement is reached through mediation with SIMC, the parties can save money and time by bypassing the arbitration proceedings. Further, because the settlement is issued, in effect, as an arbitral award, the settlement can be enforced in accordance with the New York Convention.

V. Scope and Application of the Singapore Convention

Recognizing the growing desire from the international legal community for a robust and reliable set of mediation procedures, the drafters of the Singapore Convention set out to create a standardized international legal framework for enforcing settlement agreements concluded via mediation. In doing so, the drafters sought to achieve the success of the New York Convention, which created a globally-recognized framework for recognizing and enforcing arbitral awards concluded via international arbitration.

Before addressing the specific features of the Singapore Convention, it is worth noting what the Singapore Convention does **not** purport to accomplish. Unlike the New York Convention, which allows a party, at the front end of a dispute, to compel the other party to resolve a dispute by arbitration in which there is a valid arbitration clause in the parties' underlying commercial agreement, the Singapore Convention does not provide a mechanism for parties to enforce an otherwise valid mediation clause in a commercial agreement—*i.e.*, one party may not compel a party to mediate, even when there is objective evidence that is what both parties mutually agreed. Rather, the Singapore Convention focuses on providing certainty, predictability, and finality at the back end of a dispute that the parties have voluntarily concluded via mediation.

We set forth below the key features and provisions of the Singapore Convention and a very brief summary of how the Convention is intended to work in practice.

Preamble	The preamble emphasizes the following core principles upon which the Singapore Convention is founded: ▪ Mediation is increasingly used in international and domestic commercial practice as an alternative to litigation. ▪ There is significant value for parties to use mediation to settle international commercial disputes in which the disputing parties voluntarily ask a third party to assist them in amicably settling their dispute. ▪ Establishing a framework for international settlement agreements resulting from mediation that is acceptable to countries with different legal, social, and economic systems will contribute to the development of harmonious international economic relation
Article 1 **Scope of Application**	The Singapore Convention applies to settlement agreements that: (1) result from mediation; (2) are concluded in writing; (3) by parties that wish to resolve a commercial dispute; and (4) which at the time of its conclusion has the characteristic of being "international." To qualify as "international": (a) at least two parties to the settlement agreement must have their places of business in different countries; or (b) the countries in which the parties to the settlement agreement have their places of business is different from either: (i) the country in which a substantial part of the obligations under the settlement is performed; or (ii) the country with which the subject matter of the settlement agreement is most closely connected. The Singapore Convention does **not** apply to settlement agreements that are (1) concluded to resolve a dispute arising from transactions engaged in by one of the parties for non-commercial purposes (*e.g.*, personal, family or household), (2) related to family, inheritance, or employment law, (3) approved by a court in the course of proceedings before a court and are enforceable as a judgment in that country's courts, ***or*** (4) recorded and enforceable as an arbitral award.
Article 4 **Requirements for Reliance on Settlement Agreements**	A party relying on a settlement agreement under the Convention must supply to the national court or other competent authority where relief is sought: (1) the signed settlement agreement; and (2) evidence that the settlement agreement resulted from mediation. Examples of the latter include (a) the mediator's signature on the settlement agreement, (b) a document signed by the mediator indicating that the mediation was carried out, or (c) an attestation by the institution that administered the mediation. Where the necessary requirements are met, the Convention requires the national court considering the requested relief to act "expeditiously."
Article 5 **Grounds for Refusing to Grant Relief**	The national court or competent authority where relief is sought may refuse to grant relief under the Convention if the party against whom relief is sought furnishes proof that: 1. party to the settlement agreement was under some incapacity;

	2. the settlement agreement sought to be relied upon (i) is null and void, inoperative or incapable of being performed under the law to which the parties subjected it; (ii) is not binding, or is not final, according to its terms; or (iii) has been subsequently modified; 3. the obligations in the settlement agreement: (i) have been performed; or (ii) are not clear or comprehensible; 4. granting relief would be contrary to the terms of the settlement agreement; 5. there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or 6. there was a failure by the mediator to disclose to the parties 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 without which failure that party would not have entered into the settlement agreement. A national court or competent authority may also refuse to grant relief if: 1. granting relief would be contrary to the public policy of that country; or 2. the subject matter of the dispute is not capable of settlement by mediation under the laws of that country.

VI. The Singapore Convention's Future Prospects

Although the Singapore Convention in still in its nascent stages and the number of countries that have currently ratified it is small—especially when compared to the New York Convention—Japan's recent ratification may well prove to be a watershed moment in the Singapore Convention's history and an inflection point in the widespread use of mediation as an international commercial dispute resolution mechanism.

With the prospect of thousands of Japanese multinational companies doing business across the globe soon having the opportunity to avail themselves of the Singapore Convention in resolving their international disputes, other global economic powerhouses will soon be compelled to decide if they will follow suit. The speed and degree by which Japanese parties and Japanese courts embrace the Singapore Convention will influence whether, and to what extent, other nations will also choose to ratify the Convention as well.

Consistent with the Singapore Convention's fundamental objective, as the number of ratifying nations continues to grow, so too will the prospects of establishing a reliable and predictable international framework for enforcing settlement agreements reached through mediation. With that legal framework in place, in the not too distant future, mediation may not just be seen as a weak option for international transacting parties to consider in seeking amicable resolution of their commercial disputes, but as another preferred dispute resolution mechanism upon which those parties might confidently rely to help resolve their commercial disputes.

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[1] https://www.mofa.go.jp/press/release/press6e_000501.html.

[2] See the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No. 16 of 2023) (enacted on April 21, 2023 and promulgated on April 28, 2023). (https://www.moj.go.jp/EN/MINJI/m_minji07_00006.html).

[3] https://www.singaporeconvention.org/jurisdictions.

[4] *See* https://data.imf.org/?sk=9d6028d4-f14a-464c-a2f2-59b2cd424b85&sid=1514498232936.

[5] Aside from trying to penetrate the use of mediation, Japan has also placed a lot of effort to promote the use of arbitration in the past years. As part of such an effort, on February 28, 2023, Japan adopted a "Bill to Partially Amend the Arbitration Act" (https://www.moj.go.jp/MINJI/minji07_00320.html).

[6] https://www.singaporeconvention.org/convention/about.

[7] *Id.*

[8] https://www.singaporeconvention.org/jurisdictions.

[9] Since Japan's ratification, Nigeria and Sri Lanka ratified the Singapore Convention, on November 27, 2023 and February 28, 2024, respectively. *See* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

[10] https://www.mofa.go.jp/mofaj/files/100476199.pdf.

[11] See, for example, Article 118 of the Code of Civil Procedure (Act No. 109 of 1996, as amended) regarding recognition of foreign judgments in Japan.

[12] For example, Article 45 of Japan's Arbitration Act (Act No. 138 of 2003, as amended) provides for the recognition of arbitral awards in Japan in accordance with Article 5 of the New York Convention. In the United States, Chapter 2 of the Federal Arbitration Act incorporates the terms of the New York Convention.

[13] With regard to enforcement decisions of international settlement agreements in Japan, Article 5 of the Act on the Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation provides for a binding process for enforcement decisions in Japanese courts, as do Articles 45 and 46 of the Arbitration Act regarding enforcement decisions of arbitral awards. In addition, Article 22 of the Law on Civil Execution (Act No. 4 of 1979, as amended) newly establishes item 6-4, which makes "an international settlement agreement with a final and binding enforcement decision" an enforceable instrument.

[14] https://siac.org.sg/the-singapore-arb-med-arb-clause. This model clause is tailored to SIAC and SIMC proceedings. Parties who wish to invoke similar procedures before other institutions can, of course, do so voluntarily, but should carefully consider how arbitrations and mediations are conducted before that institution in drafting their clause.