Resolution Institute

Singapore Convention on Mediation 2020

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Resolution Institute Submission

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About Resolution Institute

Resolution Institute is the largest membership organisation of alternative dispute resolution (ADR) professionals within Australia and New Zealand. Being both a Mediator Standards Board (MSB) approved accreditor as well as a nominator of third-party mediators is an important aspect of Resolution Institute's work as a not-for-profit membership organisation that promotes and facilitates the development and use of dispute resolution.

Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 ADR professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family. Resolution Institute focusses on excellence in standards of ADR practice, support services to members and developing an environment in which ADR services are frequently used, aligned to our vision of *'enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation'*.

Resolution Institute is committed to promoting and supporting the use of ADR through education, training and accreditation of professionals, to contribute to the provision of quality ADR services.

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation.

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Executive Summary

Resolution Institute appreciates the opportunity to respond to the Attorney General's consultation paper on the United Nations Convention on International Settlement Agreements Resulting from Mediation, better known as the Singapore Convention.

Resolution Institute's strongly held position, as well as that of its members, is that Australia should join the 53 other nations who have already signed on to the Singapore Convention. Indeed, the support for signing on to the convention was so unanimous within the membership that the only question was whether Australia should have signed on to the convention before it came into effect on 12 September 2020. Further, the Convention should be joined with none of the reservations available in Article 8(1).

The main reasons that Australia should become a Party to the Convention are as follows. Joining the Convention will smooth trade relations by bringing Australia up to par with four of its six largest trading partners, including China and the USA, who have also signed on to the Convention. Further, mediation has been shown, through polling and legislative trends, to be far more compatible with Asian sensibilities and culture. The Convention will greatly help Australia maintain and even grow its position in the ASEAN region.

Apart from international reasoning, international mediation is worthy of support on its own merits. The Convention introduces greatly increased certainty in the use of mediation for international commercial disputes, by increasing the efficiency of dispute resolution and enforceability of mediated awards. This allows the inherent advantages of mediation, including its cost effectiveness, flexibility, and delivering greater compliance to shine through. Strong international mediation is especially important for government agencies because of the privacy of mediated agreements and the promise of continued amicable relations after disputes are resolved.

Finally, Resolution Institute acknowledges that a legislative process will have to go into ratifying the convention and integrating it into Australian law. Resolution Institute is well positioned to provide assistance in this process as appropriate and we have included some initial thoughts in the answer to question 2 of the paper.

Detailed Feedback and Consultation Paper Questions:

There has been rare consensus, shared across scholarly literature, international business and the community of nations more generally, that the Singapore Convention should be signed. Resolution Institute and our members believe that becoming a party to the convention brings Australia up to par with many of its leading trading partners, making Australia a far more attractive candidate for international trading relationships.

Question 1: Should Australia become a Party to the Singapore Convention? Why or why not?

As mentioned in the introduction, it is the firm position of both Resolution Institute and that of its members that Australia should become a party to the Singapore Convention. There are three main reasons why Resolution Institute believes that Australia should become a party to the Singapore Convention.

1.1 Increased legitimacy and cost savings in international mediation:

The Singapore Convention takes its place next to the New York Convention on Arbitration and the Hague Conventions[1] as a central instrument for the resolution of international disputes. The Convention itself makes great strides towards greater efficiency and enforceability of awards reached through mediation. At its core, the Convention's ability to bind local courts to enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention is its greatest strength. This enforcement mechanism lifts a significant barrier to using mediation as a form of international dispute resolution in practical terms.[2] Additionally, the fact that the Convention allows a party to invoke their mediation settlement agreement (MSA) in accordance with its rules of procedure, in order to prove that the matter was already resolved by the settlement agreement is invaluable in increasing confidence in the strength of MSA's and avoiding costly re-trials of disputes.

By severing the conceptual link between mediation and arbitration, whose rules and processes are enshrined in instruments such as the New York Convention, the Singapore Convention establishes a mediated settlement as a viable international instrument in its own right.[3] This

[1] *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015); *Convention of the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, opened for signature 2 July 2019, (not yet in force), formerly known as the Judgments Project of the Hague Conference on Private International Law.

[2] UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, September 12–23, 2016), U.N. Doc. A/CN.9/896, at 24 (Sept. 30, 2016)

[3] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepperdine Dispute Resolution Law Journal 1, 9.

has been achieved not only by virtue of the benefits inherent in widely accepted and consistent procedural and enforcement rules, but also allowing flexibility and local court discretion in edge cases. While this provides a great symbolic victory for international mediation, adding legitimacy to the process in the eyes of the world, this also creates some questions as to the specifics of Australia's implementation process, as will be discussed in the answer to Question 2.

1.2 Promotion of mediation for its own sake:

Above and beyond refining and improving international mediation, the Singapore Convention undoubtedly encourages and promotes international mediation over other dispute resolution procedures, a goal that should be celebrated for its own sake. The benefits of mediation as a form of alternative dispute resolution are acknowledged in the preambular paragraphs of the Singapore Convention. The third paragraph of the preamble, for example, states:

> *Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States*.

Indeed, the benefits and advantages of mediation over other forms of dispute resolution, namely the fact that it is more cost effective, flexible and more likely to be complied with, is mirrored, and even magnified, on an international scale. The flexibility of mediation also eliminates many of the hurdles which hamper international arbitrations, including the bypassing of disclosure and helping preserve the parties' commercial relationship. Most importantly, mediation by its very nature is based on the interests of each party and as a result there is likely to be increased buy in to both the process itself as well as the outcome.

An example of an international mediation agreement which has yielded such results is Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters. In paragraph 6 of the preamble,[4] it states:

> *Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.*

This description has widely been seen as accurate by scholars when studying the impact of the directive.[5]

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[4] Directive 2008/52/EC of the European Parliament and of the Council of 12 May 2008 on certain aspects of mediation in civil and commercial matters, OFF. J. EUR. UNION L. 136/3,

[5] Chang-Fa, L. 'Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements' (2014) *Contemporary Asia Arbitration Journal* 7(1), 119-138.

This magnification of the increased efficiency and continued amity of the parties arising out of mediation is especially relevant in Investor-State Dispute Settlement (ISDS). Many parties within the EU and Canada have pointed out the frustrations with the current arbitral model, including the significant cost and time, lack of consistency and predictability.[6]

International mediation could therefore emerge as a mechanism to address some frustrations associated with both commercial and investment arbitration, since the Singapore Convention potentially extends to investment disputes so long as they relate to a commercial matter, such as an expropriation of a real estate development or mine.[7] At a basic level, the promotion of the Singapore Convention and mediation more generally could encourage parties to better utilize the cooling off periods provided under many investment treaties. In many instances, by the time the relevant notice of dispute has been transmitted to the appropriate ministry and been vetted, the negotiation period has lapsed. Once a request for Arbitration has been made public, the position of the parties often hardens as it has spilled out into the public and may even become a political issue. An enforceable period for amicable negotiation would therefore serve as a powerful tool ensuring both parties can achieve a good outcome.

1.3 Global advantages of entering into the Singapore Convention:

The Singapore Convention itself is the manifestation of a broader desire for greater legitimacy and ease of mediation by the broader global community.[8] Not only will signing the convention give Australian businesses a much-needed tool for the enforcement of international MSA's, and thus help stimulate global trade, it may also smooth trade relations with some of Australia's largest international partners, especially in the ASEAN region.

Prior to the creation of the Singapore Convention, there was consensus that mediation, as a tool for the resolution of international commercial disputes was being held back by the lack of an international enforcement mechanism. Indeed, a survey of corporations published in 2017 by the International Mediation Institute found that 92.5% of corporations stated that they would be more likely to mediate disputes with parties from a country that had signed and ratified convention, like the Singapore Convention, which covered the enforcement of awards.[9] 52.4% stated that they would be "much more likely" to mediate under such circumstances.

[6] Lee M. Caplan, ISDS Reform and the Proposal for a Multilateral Investment Court, 46 ECOLOGY L. Q. 53, 37 BERKELEY J. INT'L L. 207 (2019).
[7] European Commission, Trade Policy Committee (Services and Investment), UNCITRAL Working Group III, at 1, WK 3675/2018 INIT (Mar. 26, 2018).
[8] S.I. Strong, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation 45 (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, 2014).
[9] International Mediation Institute, IMI survey results overview: How users view the proposal for a UN Convention on the Enforcement of Mediated Settlement Agreements (16 January 2017) <https ://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/> accessed 24/09/20.

Indeed, the same study found that 90.5% stated that the lack of such a convention was a significant factor hampering the growth of international mediation.

The enthusiasm of the business community is mirrored by the enthusiasm with which the international community has taken up the Singapore Convention. The Singapore Convention, alongside a model law, was adopted soon after its finalisation by the United Nations General Assembly.[10] The uptake of the Convention has been similarly broad, with 53 nations signing on.[11] The signatories to this convention are also of great significance, with four of Australia's six largest trading partners, China, India, Korea and the United States of America having signed on.[12] Indeed, the United States' Secretary of State Michael Pompeo praised the Singapore Convention, stating, that it would significantly "mitigate risk when entering into a commercial relationship with businesses in foreign markets and [raise] the standards of fair trade globally."[13]

It should be noted here that apart from Australia's major trade partners, the treaty has had a broad uptake in the Asia region, which is most clearly illustrated by the fact that it was signed in Singapore. With trade initiatives such as the ASEAN Economic Community, China's Belt and Road Initiative, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership becoming increasingly important in the area, the need for efficient and cost-effective dispute resolution, with enforceable cross-border Mediated Settlement Agreements, is more vital than ever. Indeed, mediation is an especially important tool to have in the region, as the format is generally viewed to be more "consistent with Asian sensibilities and culture."[14]

This is illustrated by the International Institute for Conflict Prevention's 2011 survey of 122 in-house counsel and external counsel from the Asia-Pacific region. Of the respondents, 72% indicated that their company or firm generally had a positive attitude to mediation (compared to 69% for arbitration) and 78% indicated that their company or clients had used mediation to resolve disputes in the past three years.[15]

Many Asian countries have even put mediation at the forefront of dispute resolution in recent times. Prominent examples include Article 122 of the 2012 amendment to China's Civil Procedure Law, which adopted the principle of "mediation first": the Malaysian *Mediation Act*

[10] G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018). With respect to the Model Law, see G. A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law (Dec. 20, 2018).

[11] United Nations Treaty Collection: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (accessed 28/09/20).

[12] Workman, D. *Australia's Top Trading Partners* http://www.worldstopexports.com/australias-top-import-partners/ (accessed 28/09/20).

[13] USCIB Supports Singapore Convention on Mediation available at https://www.uscib.org/uscib-supports-singapore-convention-on-mediation/

[14] Chua, E. 'The Singapore convention on mediation - A brighter future for Asian dispute resolution.' (2019) *Asian Journal of International Law*, 9.

[15] International Institute for Conflict Prevention and Resolution, "Attitudes Toward ADR In the AsiaPacific Region: A CPR Survey" (2011), online: CPRADR <https://www.cpradr.org/programs/international-initiatives/asia/asia/_res/id=Attachments/index=0/asia-pacific-survey.pdf >.

2012, Hong Kong's *Mediation Ordinance 2013*, and Singapore's *Mediation Act* 2017. All of these legislative amendments were made with the goal of establishing and promoting frameworks to provide certainty in the use of mediation. Further examples of this trend include China's launch of an International Commercial Expert Committee in 2018 to support the settlement of international commercial disputes through mediation and other avenues. Hong Kong has similarly introduced the Hong Kong Mediation Accreditation Association Ltd in 2012 to consolidate the accreditation process of mediators under a single professional body and as part of a wider effort to raise the image of mediation as a form of dispute resolution.

Question 2: Do you have any concerns about Australia becoming a Party to the Singapore Convention? If so, please provide details.

By contrast to the first question, Resolution Institute and its members have few concerns about Australia becoming a Party to the Singapore Convention per se. Instead, much of the response to this question revolves around issues tangential and can be broken into 2 main groups:

2.1 Explaining Australia's delay

Much of the feedback Resolution Institute received on this question dealt with concerns that Australia's international reputation in the field may have been harmed by the fact that it waited so long to become a party to the Singapore Convention. Indeed, it has been pointed out that this lateness stands directly at odds with the fact that Australia and Australian mediators contributed significantly to the UNCITRAL working group which created the Convention. The fact that there were prominent Australian mediators present at the signing of the Convention in Singapore makes Australia's failure to join as a party even more conspicuous.

There is therefore some concern that Australia joining only after the Convention has entered into force, without any major changes to its substance is indicative of an *a priori* lack of faith in the Convention which grew out of a dissatisfaction with its final form. Alternatively, and more concerning, Australia's lateness in becoming a party was also viewed as a lack of care on behalf of the Australian executive branch regarding mediation. This could have an adverse impact on countries' perception of Australia as a place where international mediations are enforced, undoing some of the positive impacts of the Convention.

2.2 Implementation and Ratification

The second concern raised in regard to becoming a party to the Singapore Convention is its interactions with and integration into existing Australian law. There are 2 related concerns on this point:

1. There is no mention or process in the Convention which deals with how to implement and integrate the Convention into Australian law. Although this does not change the fact that Australia should become a party, it should be noted that a lot more work must be done to ratify and integrate the Convention after signing. Resolution Institute is well placed to partner with Government to ensure Australia has the foundations in place required for the ratification and integration of the Convention into practice.

2. In Australia, a settlement that was entered into under a cloud of misleading or deceptive conduct may give rise to statutory relief. This could extend to a declaration that the settlement agreement is null and void under s 18 of the Australian Consumer Law. However, under the Convention, a claim based on such conduct would not of itself appear to prevent the enforcement of the Mediated Settlement Agreement. It should be made clear that such statutory defences and arguments would be taken into account when enforcing an agreement.

Further, the text of the Convention also makes no mention of any equitable defences, such as estoppel, or any rectification defences available in the common law. If a settlement is brought before an Australian court, it is unclear whether the governing law of the contract, the "seat" of the mediation (i.e. the law of the place where the mediation was convened) or the law of the court would determine the defences available. Such lack of clarity would only be magnified by principles such as *renvoi* which as yet are somewhat unclear even at the High Court level. Unlike arbitration, in mediation, the 'seat' does not trigger application of the law of the seat and the 'seat' concept was removed from the Singapore Convention.

Question 3: What, if any, reservations should Australia make if it was to become a Party to the Singapore Convention?

Resolution Institute believes that neither of the permissible reservations in this Convention contained in Article 8(1)(a) and (b) should be enforced.

3.1 Article 8(1)(a)

As mentioned above, the Convention would provide a benefit to government agencies looking to avoid some of the perceived pitfalls of arbitration. It would therefore be detrimental, in Resolution Institute's opinion, to exempt them from MSA's.

3.2 Article 8(1)(b)

Implementing the Convention as an "opt-in" system instead of an "opt-out" system would greatly diminish the uptake of the Convention by Australian disputants. Reduction of the

uptake would only be beneficial if the proposition was either niche or detrimental in aggregate. As the Singapore Convention is neither of these things, the reservation should not be exercised.

Question 4: What are your views on the Singapore Convention's broad definition of mediation?

Although Resolution Institute takes no issue with the broad definition of mediation, this question does bring to the fore the fact there is no unified definition of mediation in Australia. Nonetheless, the definition in the Convention is in the same spirit as can be found in the National Mediation Accreditation Standards (NMAS) and others such as the National Alternative Dispute Resolution Advisory Council (NADRAC) definition, and should be endorsed, subject to a unified definition within Australia being agreed upon. As mediation is an ever-growing discipline one of whose main strengths is its flexibility, a broad definition is necessary.

Article 1 clearly states that the scope of the Convention only covers commercial disputes. Resolution Institute believes that this is appropriate. It should also be noted that Article 1(3) resolves previously unresolved legal issues around court ordered mediations and is a strong reason to enter into the Convention in its own right.

Question 5: What are your views on the grounds for refusing to enforce a mediated settlement agreement?

Resolution Institute broadly supports the various grounds for refusing to enforce a mediated settlement agreement contained in Article 5 of the Singapore Convention. The grounds contained in 5(1)(a)-(d) are all reasonable, although it should be noted that ground 5(1)(b)(i) raises the same jurisdictional issues as was raised in section 2.2 of this paper. Articles 5(1)(e) and (f), however, may be subject to some ambiguity.

Article 5(1)(e): 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.

Australia has National Mediator Accreditation Standards (NMAS), which NMAS accredited mediators are required to comply with. Other jurisdictions that have more lax or lower standards, or even merely different standards may pose an issue for Australian parties in regard to the conduct of non-Australian mediators where over-riding the ground for refusal to grant relief may put an Australian party at a disadvantage.

Furthermore, this ground may be used to attempt to avoid enforcement and drawing mediators into prolonged legal battles. The effect of this kind of reasoning can already be seen in MSA's between parties solely within Australia, namely that mediators are less likely to take risks or innovate. This trepidation is antithetical to the open and flexible atmosphere mediations, and prolonged court battles may have undue impact on mediators, even if they are vindicated in the end.

Article 5 (1)(f): 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.

'Impartiality' and 'independence' have fairly clear definitions in a domestic context. These aspects are fundamental to the safe and fair conduct of a mediation. Essentially, depending upon the operation of dispute resolution in various jurisdictions, what is recognised as 'impartiality' and 'independence' and the lack thereof may differ in other jurisdictions. Moving forward, it may be useful for international bodies to develop guidelines that provide direction on these aspects for global use, similar to the International Bar Association Guidelines that are well respected in the arbitration arena.

Although these two grounds may be of concern, it is recognised that foreign Courts may well be in a position to adjudicate on these matters. The only concern here is that Australian parties may be disadvantaged by these differing standards. The sophistication and development of foreign legal systems may impact upon whether this ground will be effectively used.