Law Council
OF AUSTRALIA

Singapore Convention on Mediation – Consultation Paper

Commonwealth Attorney-General's Department

8 December 2020

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the International Arbitration Committee of its International Law Section, the ADR Committee of its Federal Litigation and Dispute Resolution Section, the Bar Association of South Australia, the Law Society of South Australia, the New South Wales Bar Association and the Queensland Law Society for assisting with the preparation of this submission.

Executive Summary

1. The Law Council of Australia appreciates the opportunity to provide a submission to the Commonwealth Attorney-General's Department in relation to its Consultation Paper on the United Nations Convention on International Settlement Agreements Resulting from Mediation.

2. The purpose of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention on Mediation (the **Convention**), is noted on the United Nations Commission on International Trade Law website in the following terms:

> *The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.*[1]

3. At the signing ceremony, Singapore Prime Minister Lee Hsien Loong described the Convention as the "missing third piece" in the international dispute resolution enforcement framework:

> *Today, for cross border disputes, many businesses rely either on arbitration, enforced via the New York Convention, or on litigation. The Singapore Convention on Mediation is the missing third piece in the international dispute resolution enforcement framework. Businesses will benefit from greater flexibility, efficiency and lower costs, while states can enhance access to justice by facilitating the enforcement of mediated agreements.*[2]

4. The Convention was adopted by consensus by the United Nations on 20 December 2018 and signed in Singapore on 7 August 2019. The Convention entered into force on 12 September 2020. It is to be noted that the Convention is the result of negotiation and compromise amongst State representatives which occurred over a period of five years. Any resulting anomalies may be cured by future domestic legislation or the adoption of a modified Model Law.[3]

5. The Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve an international commercial dispute.[4] The Convention does not apply to settlement agreements concluded to resolve personal, family or household disputes or disputes involving inheritance or employment law. Importantly, the Convention does not apply to settlement agreements that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable

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[1] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")' *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements>.

[2] 'Speech by PM Lee Hsien Loong at Singapore Convention Signing Ceremony and Conference' *Prime Minister's Office Singapore* (7 August 2019) <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>. ('***Speech by PM Lee Hsein Loong'***)

[3] *Report of the United Nations Commission on International Trade Law 51st Session (25 June-13 July 2018)* , UN GAOR 73rd sess, Supp No 17, UN Doc A/73/17 (31 July 2018) Annex II, 56 <https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf> ('***UNCITRAL Report – Annex II – UNCITRAL Model Law'***).

[4] The term "commercial" has a wide interpretation so as to cover matters arising from all relationships of a commercial nature; see Article 1 UNCITRAL Model Law; *UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its Sixty-fourth session (New York, 1-5 February 2016),* UN GAOR, 49th sess, UN Doc A/CN.9/867 (10 February 2016) at 110 ('***UNCITRAL Working Group II Report'***).

as a judgment in the State of that court or settlement agreements that have been recorded and are enforceable as an arbitral award.[5]

6. The Law Council supports Australia signing the Convention and provides background and identifies relevant issues but raises no specific concerns which would preclude Australia becoming a signatory to and ratifying the Convention. The Law Council does not suggest that any reservations be made pursuant to Article 8 of the Convention.

Background[6]

7. The Convention entered into force on 12 September 2020.[7] In the absence of a cross-border enforcement framework, a settlement agreement reached at the conclusion of a mediation (a **Mediated Settlement Agreement** or "**MSA**") will generally be enforced through the mechanisms available for the enforcement of a contract. The Convention provides new mechanisms for the enforcement of settlement agreements which fall within the terms of the Convention and for disputes which arise concerning matters which have been resolved in a settlement agreement reached in mediation reducing the ambit of controversy.[8] The Convention has been developed to achieve a harmonised mechanism for the enforcement of international settlement agreements resulting from a mediation process. The rationale is to reduce the impact of the cumbersome nature of available enforcement mechanisms and to provide an alternative which supports international trade and commerce.

8. The United Nations General Assembly adopted the Convention on 20 December 2018.[9] The Convention was signed on 7 August 2019 in Singapore by 46 States including The People's Republic of China, India and the United States of America.[10] As at 1 December 2020 there are 53 signatories to the Convention and 6 States have ratified the Convention. The Convention is in force in the following countries: Fiji (12 September 2020), Qatar (12 September 2020), and Singapore (12 September 2020).[11] The Convention will come into force in Belarus (15 January 2021), Ecuador (9 March 2021) and Saudi Arabia (5 November 2020) on the dates specified.[12]

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[5] *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019 (entered into force 12 September 2020) ('***Singapore Convention on Mediation*')** Article 1 – Scope of Application <https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf> 19.

[6] M.Walker, "The United Nations Convention on International Settlement Agreements Resulting from Mediation", Bar News, pp.72-73, Autumn Special Edition 2020, New South Wales Bar Association.

[7] Pursuant to Article 14, the Convention shall enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession. Singapore and Fiji ratified the Convention on 25 February 2020 and Qatar on 12 March 2020.

[8] *Singapore Convention on Mediation* Article 3 – General Principles.

[9] Above n 1.

[10] 'United Nations Convention on International Settlement Agreements Resulting from Mediation' *United Nations Treaty Depositary* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>. See also '46 States signed new international treaty on mediation' *Singapore Convention on Mediation* (7 August 2019) <https://www.singaporeconvention.org/>.

[11] Belarus made a reservation upon signing the Convention noting that the Convention shall not apply to settlement agreements to which it is a Party or to which any governmental agencies or any person acting on behalf of a government agency is a Party.[11] The Islamic Republic of Iran noted that the Republic has no obligation to apply the Convention to settlement agreements to which it is a Party or to which any governmental agencies or any person acting on behalf of a government agency is a Party, to the extent specified in the declaration and reserved its rights to make reservations upon ratification or to adopt laws and regulations to co-operate with States; above n 9.

[12] Above n 9.

9. In referring to the adoption of the Convention, the United Nations Commission on International Trade Law (**UNCITRAL**), noted that:

> *Until the adoption of the Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonized framework for cross-border enforcement of settlement agreements resulting from mediation. In response to this need, the Convention has been developed and adopted by the General Assembly.*
>
> *The Convention ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure. The Convention provides a uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign arbitral awards.*[13]

10. The Convention is modelled on the Recognition and Enforcement of Foreign Arbitral Awards (1958), (**New York Convention**), however it is intended to stand alone. The Convention provides for the ability to enforce international mediated settlement agreements to resolve international commercial disputes and encapsulates the right for a Party to invoke a settlement agreement as a defence against a claim.[14] It was clarified in the discussion at the time of the finalisation and approval of the draft Convention that the notions of "enforcement" and "enforceability" covered both the process of issuing an enforceable title and the enforcement of the title.[15]

11. A narrative is being expressed by some dispute resolution practitioners envisaging mediation under the Convention to be within the paradigm of international arbitration. Although one can argue that the New York Convention is one of the most successful treaties in commercial law which has been ratified by more than 150 countries,[16] mediation ought not be considered within the shadow of arbitration. As noted in the Executive Summary, Singapore Prime Minister Lee Hsien Loong at the signing ceremony described the Convention as the "missing third piece" in the international dispute resolution enforcement framework.[17]

12. The New York Convention formed the basis of the international framework for the development of the Convention. UNCITRAL does not differentiate between the terms "mediation" and "conciliation" in its instruments.[18] The UNCITRAL Model Law on International Commercial and International Settlement Agreements Resulting from Mediation 2018 (**Model Law**), in amending the UNCITRAL Model Law on International Commercial Conciliation 2002 noted at 1.3 that for the purposes of the Model Law:

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[13] 'General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation' *UNCITRAL* **(**Media Release**)** <https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting>.
[14] *UNCITRAL Report – Annex II – UNCITRAL Model Law* Article 17.2, Article 18.1. See also commentary by Natalie Y Morris-Sharma, 'The Singapore Convention is Live, and Multilateralism, Alive!' in *Singapore Mediation Convention Reference Book* (2019) 20(4) *Cardozo Journal of Conflict Resolution* 1009 <https://cardozojcr.com/wp-content/uploads/2020/01/Singapore-Mediation-Convention-Reference-Book.pdf>.
[15] Ibid.1015-1016.
[16] Rekha Rangachari and Kabir A N Duggal 'Case studies from Canada and the United States, How two signatory states implement the New York Convention' 25(4) *American Bar Association Dispute Resolution Magazine*, (12 September 2019) 16. < https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-case-studies/>
[17] *Speech by PM Lee Hsein Loong;* see also *Singapore Convention on Mediation* Article 1.3(b).
[18] Corinne Montineri, 'The United Nations Commission on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation' in *Singapore Mediation Convention Reference Book* (2019) 20(4) *Cardozo Journal of Conflict Resolution* at 1023 <https://cardozojcr.com/wp-content/uploads/2020/01/Singapore-Mediation-Convention-Reference-Book.pdf>.

…"mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.[19]

13. The definition is broad and allows for use across jurisdictions and differing cultural contexts. Professor S.I Strong in *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*,[20] outlines the empirical data which was influential in the development of the Convention.[21] The analysis involved a mixed qualitative-quantitative study focusing on the use and perception of international commercial mediation in the international legal and business communities.[22] The study involved a survey of 221 participants in 51 countries which included private practitioners and neutrals (judges, arbitrators, mediators and conciliators).[23] The study focused on two goals, one to discover and describe current behaviours and attitudes relating to international commercial mediation, the other to discover normative issues such as perceptions of the future of international commercial mediation and the need for and the shape of an international convention. Strong stated that:

    This line of enquiry not only identified the difficulties associated with enforcing settlement agreements arising from international commercial mediation in the then-existing legal regime, it also provided evidence indicating that the international legal community strongly supported the adoption of an international treaty *concerning the enforcement of settlement agreements arising out of commercial mediation (noting 74% of respondents supported a convention to enforce mediated settlement agreements with only 8% or respondents taking a contrary view)*.[24]

14. UNCITRAL Working Group II (Arbitration and Conciliation) Report of its Sixty-fourth Session records the discussions resulting in the compromises found in the Convention.[25] The Preamble to the Convention identifies the incentives for its development. In signing the Convention, States are:

    Recognizing *the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,*

    Noting *that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,*

    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*

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[19] *UNCITRAL Report – Annex II – UNCITRAL Model Law* 56.
[20] S.I. Strong '*Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*' (2014) 45 *Washington University Journal of Law & Policy* 11, note 39 at 1998-9.
[21] S.I Strong's research was provided to the UNCITRAL Secretariat prior to Working Group II deliberations in February 2015.
[22] Above n 20.
[23] S.I. Strong, *The Role of Empirical Research and Dispute System Design in Proposing and Developing International Treaties: A Case Study of the Singapore Convention on Mediation,* in *Singapore Mediation Convention Reference Book* (2019) 20(4) *Cardozo Journal of Conflict Resolution* 1103.
[24] Ibid., 1103. See also 'Summary of Launch of the Singapore International Dispute Resolution Academy's IDR Survey 2020 Final Report' *Singapore International Dispute Resolution Academy* (15 July 2020) <https://sidra.smu.edu.sg/summary-launch-singapore-international-dispute-resolution-academys-idr-survey-2020-final-report>.
[25] *UNCITRAL Working Group II Report* [90]–[192].

commercial parties and producing savings in the administration of justice by States, [and]

***Convinced** that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.*

15. On the basis of the general intent outlined in the Preamble to the Convention and the matters raised above, the Law Council considers it beneficial for Australia to become a signatory to and ratify the Convention.

Reservations or other notifications

16. Article 8 of the Convention allows the making of two specific reservations. Contracting Parties may declare that:

    (a) It shall not apply the Convention to settlement agreements to which it or any governmental agency or any person acting on behalf of a governmental agency is a party; and

    (b) It shall only apply the Convention on an opt-in basis.[26]

17. To date, three countries have signed with reservations: Belarus (as to (a)), the Islamic Republic of Iran (as to (a) and (b) with additional qualifications); and Saudi Arabia (as to (a) to the extent specified in the declaration).[27]

18. Some concerns have been raised regarding the value of declaring a reservation within the terms of Article 8.1(b) (i.e. that the Convention applies only to the extent that the parties to the MSA have agreed to the application of the Convention). The Law Council notes that this is consistent with the concept of self-determination in the process of mediation. It also notes that Section 2, Article 4 of the Model Law allows for variation by agreement and self-determination by the parties – "Except for the provisions of Article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section".[28]

19. A second concern that has been raised is the perception that the provisions of the Convention will capture a wide range of agreements reached in a variety of contexts. The Law Council notes that the Model Law allows only for Section 2 to apply to international commercial mediation, while Section 3 allows for a State to consider enacting a section to apply to dispute settlement agreements, irrespective of whether they resulted from mediation. Domestic adjustments may be made through enacted domestic legislation or to the Model Law (if adopted) to avoid unwanted application.[29]

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[26] *Singapore Convention on Mediation* Article 8.
[27] United Nations Convention on International Settlement Agreements Resulting from Mediation' *United Nations Treaty Depositary* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>.
[28] Section 2 – *International Commercial Mediation* is the operative section of the Model Law. Section 2 Article 7.3 notes that: "In any case, in conducting the proceedings, the mediator shall seek to maintain the fair treatment of the parties and, in so doing, shall take into account the circumstances of the case".
[29] See *UNCITRAL Report – Annex II – UNCITRAL Model Law* n 5-7.

Operative articles of the Convention[30]

20. The operative articles of the Convention are Articles 1-5: Article 1 outlines the scope of the application of the Convention; Article 2 notes the definitions (see Article 2.3); Article 3 identifies the general principles; Article 4 notes the requirements for reliance on settlement agreements; and Article 5 identifies the grounds for refusing to grant relief.

21. Article 1 identifies the scope of the application of the Convention which applies to an agreement resulting from a mediated international commercial dispute concluded in writing by the parties.[31] To be designated as an "international" commercial dispute, the dispute must involve at least two parties to the settlement agreement having their places of business in different States (Article 1.1(a)) or as specified in Article 1.1.(b).[32]

22. The Convention has broad application but does not apply to settlement agreements concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or disputes relating to inheritance or employment law (Article 1.2).[33] The Convention also does not apply to settlement agreements that have been approved by a court or concluded in the course of proceedings before a court that are (a) enforceable as a judgment in the State of that court; or (b) settlement agreements that have been recorded and are enforceable as an arbitral award (Article 1.3).[34]

23. Footnote 1 to Article 1 of the UNICTRAL Model Law[35] notes that:

> *The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether commercial or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.*

24. It is likely that investor-state disputes will fall within the terms of the Convention. During discussions at the UNCITRAL Working Group II Sixty-fourth Session, it was suggested that if a settlement agreement between a government entity and an investor was considered to be of a commercial nature under the applicable law, such an agreement should fall within the scope of the instrument.[36]

25. Article 3 contains two separate obligations: enforcement and recognition. Article 3.1 requires each State, which is a party to the Convention, to enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Enforcement is not limited to an order for the payment of a monetary amount. This restriction was considered during negotiations but was rejected, leaving

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[30] M.Walker, op.cit.,
[31] *Singapore Convention on Mediation* Article 1.
[32] *Singapore Convention on Mediation* Article 1.1.(b): the State in which the parties to the settlement agreement 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. See also *Singapore Convention on Mediation* Article 1.
[33] *Singapore Convention on Mediation* Article 1.2.
[34] *Singapore Convention on Mediation* Article 1.3.
[35] *UNCITRAL Report – Annex II – UNCITRAL Model Law* 56.
[36] *UNCITRAL Working Group II Report* [110].

some complexity in the application of domestic rules of procedure.[37] Deferring to a State's existing rules of procedure and remaining silent on issues regarding execution, mirrors the approach taken in the New York Convention and allows for expedient implementation of the Convention.[38]

26. Regarding requirements necessary for reliance on an MSA under the Convention, Article 4.1 of the Convention states that a party relying on an MSA under the Convention shall supply to the competent authority of the State Party to the Convention where relief is sought:

    (a) The settlement agreement signed by the parties;

    (b) Evidence that the settlement agreement resulted from mediation, such as:

        (i) The mediator's signature on the settlement agreement;

        (ii) A document signed by the mediator indicating that the mediation was carried out;

        (iii) An attestation by the institution that administered the mediation; or

        (iv) In the absence of (i), (ii), (iii), any other evidence acceptable to the competent authority.

27. When signing MSAs pursuant to the terms of the Convention, is the mediator merely evidencing a mediation has been held or something more? Where Article 4.1 (b)(i), (ii) and (iii) are absent, Article 4.1(b)(iv) is engaged. Also, the competent authority may require the production of any necessary document in order to verify compliance with the requirements of the Convention Article 4.4.[39] Presumably, the personal or business records of the mediator or recorded observations retained by mediators may be brought into evidence as may any reports mediators had provided to institutions appointing them as mediators of the dispute. Mediators may be called as witnesses to give evidence in any subsequent proceedings engaging Article 4.[40] It appears that in some circumstances, evidence examined in proceedings engaging Article 4 may also be evidence which may be brought pursuant to a challenge within the terms of Article 5.

28. Grounds for refusing relief under the Convention are outlined in Article 5:

    1. The competent authority of the Party to the Convention where relief is sought under Article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

    (a) A party to the settlement agreement was under some incapacity;

    (b) 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 have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under Article 4;

        (ii) Is not binding, or is not final, according to its terms; or

[37] Timothy Schnabel, 'Recognition by any other name: Article 3 of the Singapore Convention on Mediation' in *Singapore Mediation Convention Reference Book* (2019) 20(4) *Cardozo Journal of Conflict Resolution* 1182.
[38] Ibid 1181.
[39] *Singapore Convention on Mediation* Article 4.4.
[40] *Singapore Convention on Mediation* Article 4.1(b)(iv).

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(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; or

(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.

2. The competent authority of the Party to the Convention where relief is sought under Article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.[41]

29. The grounds relating to the conduct of the mediator in Article 5(1)(e) and (f) are novel in the sense that the mediator's conduct can affect the enforceability of a settlement agreement. Such failure noted in Article 5 (1)(e) must be a serious breach without which the complaining party would not have entered into the settlement agreement. Ascertaining if there is a "serious breach" by the mediator "of standards applicable to the mediator or the mediation" may not be straightforward if the parties have not identified the standards in the first instance and recorded them in the agreement engaging the mediator and the mediation process. In this context, jurisdictional sensitivities or requirements of any enforcement regime need also be considered. Moreover, if no standard is identified, it is not yet clear whether standards or guidelines available in relevant jurisdictions may be adopted for this purpose, and the sufficient nexus to the dispute in question. There is a risk that if there is remorse after a mediation by one of the parties as to any term of an MSA an attempt to involve the mediator under the terms of Article 5 may be an easier path than attempting to challenge a term of the MSA.

30. A key feature of mediation is the confidential nature of the process which allows candour in negotiations and the ability to raise controversial issues that otherwise would not be discussed. There is considerable difference between domestic rules regulating the conduct of mediations within the shadow of the courts.[42] An examination of an alleged breach by a mediator of a relevant standard will, in most instances, require an examination of the conduct of a mediator during the course of a mediation. The applicable rules of confidentiality and privilege vary between jurisdictions and are often reliant on evidentiary rules and domestic statutes. Some jurisdictions regard mediation

[41] *Singapore Convention on Mediation* Article 5.
[42] Michel Kallipetis QC FCIArb, 'Singapore Convention Defences Based on Mediator's Misconduct: Articles 5.1(e) & (f)' in *Singapore Mediation Convention Reference Book* (2019) 20(4) *Cardozo Journal of Conflict Resolution* 1203.

as an assisted, without prejudice negotiation, while others have created a separate statutory mediation regime and yet others recognise the privilege which permits courts to admit evidence in the interests of justice or the public interest.[43] Commentators lament at the divergence of approaches that are likely to be followed.[44] The Law Council notes that this situation exists with or without the adoption of the Convention.

31. Article 5.1(f) has the potential to raise issues relating to a mediator's prior dealings and circumstances of engagement. The issue of mediator immunity also arises in this context. Claims and lawsuits against mediators and other ADR professionals occur in some jurisdictions.[45] Contractual immunity may not be adequate in these circumstances. State disciplinary and grievance procedures may also be enlivened if an allegation of this nature is made. These are matters which can be alleviated by education and professional rules and guidelines. The Law Council of Australia has promulgated a *Trilogy of Ethical Guidelines* for mediators, lawyers and parties in mediations which have been adopted broadly by legal institutions and ADR bodies domestically and internationally.[46] The *Ethical Guidelines for Mediators* is most relevant for the purposes of the Convention.[47]

Model Law

32. In view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial mediation practice, UNCITRAL has recommended that all States give favourable consideration to the enactment of the UNCITRAL Model Law when States enact or revise their domestic laws. [48]

33. The process of adoption of the Convention and the Model Law has begun. Each Party to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.[49]

34. UNCITRAL notes on its website that:

> *The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). This approach is intended to provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the*

[43] Ibid.
[44] Ibid 1207.
[45] Robert A Badgely, *Mediator Liability Claims: A Survey of Recent Developments* (Locke Lord, 2013).
[46] Law Council of Australia 'Ethical Guidelines for Mediators' (April 2018) <https://www.lawcouncil.asn.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical%20Guidelines%20for%20Mediators_Final%202018.pdf>; Law Council of Australia 'Guidelines for Lawyers in Mediations' (May 2019) <https://www.lawcouncil.asn.au/publicassets/39a0c218-0994-ea11-9434-005056be13b5/Guidelines%20for%20Lawyers%20in%20Mediations%20Final%2016%20May%202019.pdf> Law Council of Australia 'Guidelines for Participants in Mediations' (April 2018) <https://www.lawcouncil.asn.au/docs/f1e28ab6-34d8-e911-9400-005056be13b5/Guidelines%20for%20Parties%20in%20Mediations_Final%202018.pdf>.
[47] *Singapore Convention on Mediation* Article 5.1(e) and (f).
[48] *Report of the United Nations Commission on International Trade Law 51st Session (25 June-13 July 2018)* , UN GAOR 73rd sess, Supp No 17, UN Doc A/73/17 (31 July 2018) 12.
[49] Ibid 11.

Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation.[50]

35. Article 1 of the Model Law outlines the scope of the application of the law which applies to international commercial mediation and to international settlement agreements. The definition of mediation is broad in order to encompass cultural and practical differences. Mediation is differentiated from other ADR processes by specifying that "the mediator does not have the authority to impose upon the parties a solution to the dispute", however the definition implies that it includes not only the facilitative method of mediation but also evaluative, settlement and transformative models of mediation. Importantly, Article 4 (*Variation by Agreement*) allows for parties to agree to exclude or vary any of the provisions of Section 2 (operative section of the Model Law) other than Article 7, paragraph 3 (fair treatment in the conduct of the mediation) noted above. Also, a notation to *Section 3 – International Settlement Agreements* at footnote 5 indicates that "[a] State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation…" and at footnote 6 "[a] State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application." This illustrates that Section 3 of the Model Law is intended to be non-binding.

Specific responses

36. The following includes responses received from Law Council Constituent Bodies to the Consultation Paper.

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

The Law Council considers that Australia should become a Party to the Convention and makes the following comments:

- If there is an inability or perceived inability to efficiently enforce an MSA, the Convention will assist by increasing certainty, encouraging cross-border mediation and lending legitimacy to the mediation process thereby encouraging negotiated agreements in international trade and commerce.
- Mediation is a dispute resolution process which is adaptable and can facilitate varying cultural factors which govern the conduct of the parties in dispute and thereby enhance the prospects of achieving an MSA. Encapsulating mediation within an international convention increases knowledge of and use of the process across jurisdictions.
- An important factor for commercial entities is the fact that the rate of non-compliance with MSAs is generally low. Parties invest time and effort in negotiating an MSA during mediations. Having invested in a negotiated outcome enhances the durability of an MSA. This, in addition to self-determination are some of the benefits found in mediation which are attractive to commercial entities.
- Australia is a world leader in the development of mediator standards and ethical codes of conduct. The legal profession has been at the forefront of the development of mediation and its role has been an integral part of the mediation movement in Australia. As a result, the profession has been intimately involved in the development, refinement and promotion of mediator

[50] Above n 1.

standards and is likely to easily adopt the intention and purpose of the Convention.

- Signing the Convention will enhance the capacity for Australia to develop and promote a regional dispute resolution hub for South East Asia and the Pacific. Australia has been disadvantaged by not signing the Convention. With an expected decrease in activity in Hong Kong, Singapore will be advantaged by its proactive approach to international and cross border dispute resolution services. Singapore has received a promotional and marketing advantage by the naming of the Convention. Australia has many highly qualified lawyer mediators who have conducted multiple mediations due to the Court rules in Australian civil jurisdictions mandating mediation in most matters before Federal, State and Territory Courts. Australian lawyers have the skills and capacity to compete on an international stage.
- In the context of international trade and commerce, the Convention will assist the capacity of those engaged in international trade and commerce to have access to a dispute resolution process which can reduce cost and delay and maximise the opportunity to retain business relationships with confidence that any agreement reached at the conclusion of a mediation can be enforced pursuant to the terms of the Convention.

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

   No. The effect is to provide an additional mechanism for enforcement of international commercial disputes. Please see discussion above including concerns raised.

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

   The majority of the constituent bodies of the Law Council which responded to the consultation process have indicated that no reservations should be made. Please see discussion above including concerns raised.

4. What are your views on the Singapore Convention's broad definition of mediation (outlined below in 5.3)?

   - Like all Conventions, the document is the result of negotiation and compromise which has been approved by the current signatories. A broad definition allows flexibility and the ability of the Convention to be utilised across many commercial forums and in differing cultural settings.
   - The Convention contains a mechanism which facilitates international trade and commerce and is intended to remove legal obstacles to the enforcement of negotiated agreements through mediation. The mechanism is an instrument developed for the efficient resolution of disputes without recourse to contested litigation. A broad definition of mediation will assist in the facilitation of dispute resolution in this context.
   - Whilst views may differ, the definition is the result of compromise and has been approved by the present 53 signatories. See comments above.

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

   Please see discussion regarding Articles 4 and 5 of the Convention above.

Conclusion

37. A Convention which provides access to uniform or accepted modes of engagement for mediation in an international context with an enforcement mechanism for MSA's can only enhance Australia's participation in international trade and commerce. The Law Council of Australia encourages Australia to become a signatory to and ratify the Convention.