

## **The opportunities and challenges created by the United Nations Convention on International Mediation Settlement Agreements**

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## **Abstract**

In December 2018, the United Nations General Assembly adopted “United Nations Convention on International Settlement Agreements Resulting from Mediation” (a.k.a. “Singapore Convention”). The key feature of this Convention is to render disputing parties to enforce and invoke settlement agreements easily with different signatory states. This paper intends to investigate the possible effects exerted from the ratification of the Convention to dispute resolution practice in the Hong Kong construction sector. The authors conducted questionnaires and interviews with experienced construction mediators in Hong Kong.

According to the data collected, it is found that the Convention will be beneficial to the promotion of construction mediation, development of mediation in Hong Kong and Hong Kong’s mediation status in global mediation. Meanwhile, it will also pose a certain degree of threat to the status of Hong Kong as a mediation centre, such as higher competitiveness of other countries in serving as an international mediation seat and difficulties encountered by the Hong Kong mediators in claiming relief under the Convention. Due to the conservative attitude of the construction industry and unpopularity of mediation in cross-border construction projects, it is expected that both pros and cons brought by the Singapore Convention will be in a confined extent.

**Keywords**

Contracts & Law/ Disputes & Arbitration/ Project management

## 1 **Introduction**

2 Since mediation was introduced to Hong Kong in 1984, it has been adopting to resolve disputes  
3 in the construction industry. Throughout these 36 years, there had been a series of schemes to  
4 help to promote mediation in the construction sector (Sihombing, To & Chiu, 2014). In 2006, a  
5 pilot scheme for the use of mediation in construction was introduced by the Hong Kong Judiciary.  
6 Moreover, starting from April 2009, voluntary mediation was included as a part of the Construction  
7 and Arbitration List under Practice Direction 6.1. It promotes mediation as a “cost-effective means  
8 of resolving disputes” to the parties and states that refusals to mediate with no reasonable  
9 explanation would lead to cost sanctions by the court. In addition to the court-connected mediation  
10 construction process, a scheme for the low-value construction disputes (up to HK\$3 million) was  
11 introduced by the Hong Kong Mediation Council from 2007 to 2009 (Sihombing, To & Chiu, 2014).

12

13 There are several advantages exerted by mediation in the construction context. Mediation can  
14 render the dispute resolution process to commence before the completion of the construction  
15 project, and this enables the parties to resolve their dispute and to continue to work cooperatively  
16 on the project at the same time. Moreover, there is evidence showing that mediation is less time-  
17 consuming and expensive than arbitration or litigation. Mediation was described as “very effective  
18 in resolving claims” between the Government and its contractors” in accordance with the  
19 Secretary of Justice in 2006 (Sihombing, To & Chiu, 2014).

20 However, the enforceability of settlement agreements has been questioned for a long time  
21 because it may contain vague and uncertain terms. It may be formed under misrepresentation,  
22 undue influence and duress, as well as fraud; the parties may not have the legal capacity to enter  
23 into the settlement agreement; and it may lack the required formality. These concerns listed above  
24 are some of the challenges that hinder the enforceability of a settlement agreement. Unlike the  
25 arbitral award awarded in arbitration, there is no legal framework to support the enforceability of  
26 a settlement agreement until the new Convention comes into play.

27

28 The “United Nations Convention on International Settlement Agreements Resulting from  
29 Mediation”, which is also known as the “Singapore Convention”, was signed by 46 countries,  
30 including the People’s Republic of China, on 7th August 2019 in order to consolidate the role  
31 played by mediation in cross-border disputes (Herbert Smith Freehills LLP, 2019). The Singapore  
32 Convention applies to settlement agreements arising from mediations address cross-border  
33 commercial disputes. It provides a standardized and practical framework for the enforcement of  
34 settlement agreement among the states who signed the Convention, similar to the New York  
35 Convention for Arbitral Awards.

36

37 The Singapore Convention enables the recognition of the enforceability of the settlement  
38 agreements if specific criteria are met. This would help the enforcement against assets located in

39 those signatory states and the discharge of other remedies, for example, specific performance  
40 and injunctions. Furthermore, providing that a dispute arises in one of the signatory states and a  
41 party claims the dispute has already been addressed under the settlement agreement, that party  
42 can invoke that agreement to demonstrate that agreed terms has already agreed in the resolution  
43 of the dispute.

44

45 For parties who engage in international transactions, the Convention provides greater certainty in  
46 the enforceability of the settlement in resolving the dispute when they reach agreement through  
47 mediation.

48

49 Given the fact that Hong Kong is an international city and its construction projects involve  
50 increasing foreign investment and international cooperation, ratification of the Singapore  
51 Convention in Hong Kong can further enhance the effectiveness of mediation in Hong Kong and  
52 its surrounding areas. E.g. the Pearl River Delta. In view of this, this paper aims to offer readers  
53 an empirical study on the opportunities and challenges brought by the Singapore Convention to  
54 construction disputes resolution in Hong Kong through reviewing various publications regarding  
55 the Convention and collecting data from the experienced mediators in the construction industry.

56

57 **Literature Review**

58

59 This section illustrates the views of different scholars and stakeholders in Hong Kong  
60 construction sector towards the provisions and possible effects of the Singapore Convention.

61

62 Scholars pointed out that the Working Group II of UNCITRAL has strived to minimize the  
63 requirements stated in the scope and formality, allowed for a high degree of autonomy for the  
64 signatory states to enforce the Convention in the way they preferred, in order to encourage the  
65 ratification of the Convention in different states and promote the enforcement of settlement  
66 agreement by the Convention (Schnabel, 2018). It is generally expected that the Convention is  
67 effective in enhancing the usage of international mediation through creating a uniform and  
68 simple platform for the enforcing settlement agreements resulting from mediation  
69 (Silvestri ,2019)

70

71 On the other hand, another group of researchers found the provisions under the Convention is  
72 ambiguous and vague, which may lead to difficulties in enforcing the mediation settlement  
73 agreements. The grounds for refusal of “serious breach by the mediator of standards applicable  
74 to the mediator or the mediation” under Article 5(2) would lead to uncertainties (To, 2019), as  
75 the word “standard” denotes “a level of quality or attainment” as assessing a mediator’s quality

76 can be hardly conducted. The perspectives of the disputants in considering the conduct of the  
77 mediator may vary greatly, as subjectivity is involved in their feelings and judgments. Moreover,  
78 there is no universal standard applicable for mediators worldwide.

79

80 In addition, some researchers conceived that the introduction of the Convention establishes a  
81 new source of international law. As the mediated settlement which is enforceable under the  
82 regime of the Convention is generally subject to conditions laid down in the Convention, but not  
83 subject to domestic law requirements, except that the state is permitted to apply internal  
84 procedures such as the enforcement of the settlement under Article 3 (Schnabel, 2018).

85 Consequently, the Convention will override the domestic provisions which are not compatible  
86 with the scope of application of the Convention. This will also exert a beneficial influence on  
87 domestic mediation regimes by assisting the states that do not have a national enforcement  
88 regime to refer to uniform and simple rules under the Convention for enforcement of the  
89 mediation settlement (Wojtowicz & Gevaerd, 2020).

90

91 Scholars generally agreed that the Convention is effective in promoting the use of mediation for  
92 the resolution of cross-border commercial disputes. Before the introduction of the Convention, the  
93 lack of an international regime for giving legal recognition and enforcement to mediated settlement  
94 is deemed as the primary deterrent for companies to use mediation (Schnabel, 2018). The



95 hesitation of adopting mediation can be explained by the complex enforcement process of cross-  
96 border settlement agreement as the settlement may be subject to different jurisdictions (Delaney,  
97 2020). Therefore, the Convention, which poses a uniform procedure for enforcement of mediated  
98 settlement, can render the parties to obtain enforcement of settlement easily, quickly and raise  
99 the overall credibility of the mediation process. In this way, companies involved in cross-border  
100 projects and transactions are encouraged to consider mediation as the dispute resolution method.  
101 According to a 2017 survey done by International Mediation Institute regarding the potential users'  
102 view to the proposal of the Convention, more 90% of the responders (92.5%) expressed their  
103 willingness to mediate a dispute after the ratification of the Convention, while nearly 90% of the  
104 responders (87.8%) states that they will come to mediation in the first place for dispute resolution  
105 if the Convention is widely ratified (International Mediation Institute, 2017). Conceivably, the  
106 Convention will play an essential role in promoting the use and development of cross-border  
107 mediation globally.

108

109 However, there are also concerns regarding the effectiveness of the Convention in the promotion  
110 of mediation. For one thing, there are still uncertainties in operation of the Convention as it is still  
111 in its infancy. For another, there is a lack of national laws on mediation under most jurisdictions.  
112 Compared with the New York Convention of 1958, which is adequately supported by the tested  
113 and trailed arbitration laws by its signatory states, the UNCITRAL Model Law on Mediation is still

114 at its early stage of development (Ray, 2019). Admittedly, the Convention is still new to its  
115 signatory states. However, it is said that the Convention can encourage states which lacks a  
116 national enforcement regime for mediation settlement to take steps to implement one  
117 (Zukauskaite, 2019).

118

### 119 **Data and Methodology**

120 Based on the literature review regarding the Convention, an investigation towards the effect of  
121 the Convention exerted to dispute resolutions in the Hong Kong construction sector was carried  
122 out by adopting a mixed research method. Both quantitative and qualitative approaches of data  
123 collection will be used in the research.

124

125 In the quantitative approach, a group of measurable data regarding the frequency of using  
126 mediation in international construction disputes and its effectiveness would be collected. Thus,  
127 an online questionnaire would be designed and distributed to the mediators in practice who have  
128 engaged in the construction disputes in Hong Kong.

129 On the other hand, in the qualitative approach, there will be an in-depth examination regarding  
130 the industry's view towards the Convention and its implication to the Hong Kong construction  
131 sector. Interviews will be conducted in a comprehensive manner which aims to capture the first-

132 hand experience and acquire in-depth opinions from practicing mediators.

133

134 As mentioned by Wisdom and Creswell (2013), this kind of mixed research method can lead to a  
135 more “complete and synergistic utilization of data collected” rather than a separate collection and  
136 analysis of quantitative and qualitative data. While the quantitative approach can measure the  
137 behaviors and views from a broad view for the research to identify the patterns, the qualitative  
138 approach allows the paper to focus in-depth opinions and specific cases from a narrower  
139 perspective. The combination of the two research methods enables the conclusion of the paper  
140 to be drawn onto a more comprehensive picture.

141

142 In addition to the complementary nature of the two approaches, another benefit of using the mixed  
143 research method is that it can help to cross-check the data collected under different approaches,  
144 in order to identify contradiction between them, if any. Hence, the reliability of the data and the  
145 result of research can be enhanced, and the contradiction between the data may result in the  
146 discovery of thought-provoking matters in this research.

147

148 In this paper, the questionnaire will first be designed and distributed to the target group, while the  
149 interviews will take place after the collection and analysis of data of the questionnaire. For  
150 questionnaires, a total number of 531 invitation emails were sent with the link on the online

151 questionnaire to the practicing mediators, while there are only 39 returned questionnaires.

152 Meanwhile, among the 39 respondents of the questionnaire, 7 of them showed their interested in

153 interviewing this research, and eventually, these seven mediators are successfully contacted and

154 interviewed.

155

156 First, the questionnaire is brought up to gather the general views of practicing mediators towards

157 the Convention and the common practices of dispute resolution in the construction sector. On one

158 hand, there is question renders respondents to rate their extent of agreement to potential

159 advantages, brought by the Convention in the Hong Kong construction industry, which are: (i)

160 promoting the development of mediation; (ii) rendering mediation substitute other types of dispute

161 resolution method; (iii) supporting Hong Kong as an accessible mediation seat; (iv) allowing

162 mediators and lawyers to take advantage of the increasing usage of mediation. On the other hand,

163 there is also question requires the expression on the extent of recognition on the possible

164 challenges posed by the Convention to the Hong Kong construction sector from the respondents.

165 The proposed challenges are: (i) diminishing the competitiveness of Hong Kong in using

166 mediation, (ii) inadequate knowledge to the Convention of Hong Kong mediators and lawyers, (iii)

167 technical issues in the enforcement of settlement agreements under the Convention, (iv) inability

168 of Hong Kong to remain its international status in mediation. It is expected that the questionnaire

169 can reveal the overall trend of construction dispute resolution and general views from mediators

170 towards the Convention.

171

172 Second, the interviews are conducted to gather in-depth opinions from the mediators. The

173 interview questions will be designed partly based on the findings from the returned questionnaires.

174 With reference to the general trend of adopting different dispute resolution methods in the

175 construction sector, the interviews can focus on the identification of the reasons behind the trend

176 and explore the more profound implications of the Convention to the Hong Kong construction

177 sector. It is hoped that the data collected in the interviews enable this paper to produce a

178 comprehensive and detailed conclusion on how the Convention affect the industry.

179

180 Finally, data from quantitative and qualitative methods will be gathered for investigation and

181 further discussion. Other than the designated outcome from the questionnaire and interviews, this

182 paper will also include the first-hand experience and innovative ideas collected from the

183 interviewees regarding their mediation works in the construction industry.

184

185 **Summary of Major Findings**

186 The tables in the Section of “Table” demonstrate the major findings in this research. Table 1 is  
187 about the possible opportunities brought by the Singapore Convention, while Table 2 is about  
188 the possible challenges brought by the Singapore Convention.

189 **Other Findings**

190 Besides the possible opportunities and challenges brought by the Convention, it is found that  
191 there are limiting factors of the effects derived from the Convention. These factors are shown in  
192 the Table 3 in the Section of “Table” below.

193 **Analysis and Discussion**

194 Given the outcome from the surveys and interviews with the practicing mediators in the  
195 construction sector, below is the in-depth discussion on the ability of Hong Kong to maintain its  
196 competitiveness and status in settling international construction conflicts under the Singapore  
197 Convention.

198

199 Mediators commonly conceive that Hong Kong remains competitive in the mediation industry  
200 upon the ratification of Singapore Convention. However, there are still a host of possible  
201 challenges towards the status of Hong Kong as a global mediation centre.

202

203 (i) Competitive Aspects of Hong Kong as an International Mediation Seat

204

205 Several of them suggested that Hong Kong will perform well as the place for conducting  
206 international mediation in terms of existence of various mediation institutions, legal framework  
207 and social development, and it has an advantage over other cities in the geographical region.

208

209 In Hong Kong, a variety of mediation institutions, such as the Hong Kong International Arbitration  
210 Centre, Hong Kong Mediation Alliance and others, provides various specialized training to both  
211 newcomers to mediation and accredited mediators. At the same time, the Hong Kong Mediation  
212 Accreditation Association Limited (HKMAAL) is the mediator's accreditation body promoting  
213 professionalism and standardizing the quality of mediators in Hong Kong. Such a combination  
214 between training and accreditation enables Hong Kong's mediators to be competitive and  
215 competent in the global market. Hence, it is believed that promotional and training works related  
216 to the Singapore Convention can be done efficiently through the effort of different mediation  
217 institutions. As a result, Hong Kong mediators will be well-informed with the application of the  
218 Convention and also be well-prepared for the increasing demand for international construction  
219 mediation after the ratification of the Singapore Convention in most of the signatory states.

220

221 Second, there is a well-established legal framework in governing and minimizing the intervention

222 from the court to mediation in Hong Kong. At present, there are four laws governing mediation in  
223 Hong Kong which are Rules of the High Court (CAP 4A), Practice Direction 31, Mediation Code  
224 of Conduct and Mediation Ordinance (CAP 620). Rules of the High Court (CAP 4A) enable the  
225 court to encourage the parties to enter in mediation to solve their disputes; Practice Direction 31  
226 is a legal framework that aids in encouraging as well as facilitating the parties to resolve their  
227 disputes by mediation in Hong Kong; a legal framework that aids in encouraging as well as  
228 facilitating the parties to resolve their disputes by mediation in Hong Kong; Mediation Code  
229 outlines the responsibilities of the mediator in different aspects; and Mediation Ordinance (CAP  
230 620) enhance the confidentiality of the mediation process. Therefore, most of the respondents  
231 proclaim that Hong Kong will enact a series of legal provisions for the application of the Singapore  
232 Convention and mechanism for disputants to request for the relief on the mediated settlement  
233 agreements. Thus, Hong Kong can take the advantage of the ratification of Convention at its early  
234 stage, when comparing with other signatory states which need more time for mediation-related  
235 legislation.

236

237 Third, the high level of social development in terms of infrastructure and safety also make Hong  
238 Kong an ideal seat for cross-border mediation. On the one hand, due to the well-developed traffic  
239 network within Hong Kong, locations conducting mediation in Hong Kong can be easily accessed.  
240 On the other hand, the supporting facilities in Hong Kong are also in high quality, for example,



241 disputing parties visiting Hong Kong can live in comfortable accommodation and communicate  
242 with external parties online with a high-speed communication network. On top of that, Hong Kong  
243 is a city with the sophisticated level of safety, which means that parties in disputes choosing Hong  
244 Kong as mediation seat need not worry about problems regarding personal safety, theft or murder.  
245 These all make Hong Kong a desirable location for international dispute resolution. With the  
246 surging number of international construction mediation cases under the ratification of the  
247 Singapore Convention, Hong Kong will increasingly benefit by being chosen as the mediation  
248 seat.

249

250 Finally, Hong Kong enjoys its geographical location advantage. A few interviewees mentioned that  
251 as Hong Kong has close proximity to Mainland China, international disputes arising from Chinese  
252 construction projects are frequently resolved in Hong Kong. With the Belt-and-Road Initiative and  
253 the development of the Greater Bay Area in recent years, it is expected that Hong Kong will benefit  
254 as an international mediation seat to resolve conflicts emerging from these projects. One  
255 interviewee compared Hong Kong with Singapore, saying that although Singapore is a well-  
256 developed city and a mediation hub, Hong Kong still has the edge over Singapore because  
257 Singapore is detached from the region of Greater China. Under this line of thinking, closeness to  
258 Mainland China can keep Hong Kong's position in international mediation.

259

260 (ii) Challenges to Hong Kong's status as the International Mediation Centre

261

262 The possible challenges which may hamper Hong Kong's competitiveness as the international  
263 mediation seat are two-fold.

264

265 First, some of the mediators put forward the idea that the Convention can foster the development  
266 of mediation in the participant countries. Following the signature of the Convention, these  
267 countries have to prepare relevant provisions or law to guide business companies in applying the  
268 Singapore Convention in their commercial contracts. Moreover, mediation institutions in the  
269 signatory states will conduct more training to their mediators in resolving cross-border disputes.  
270 With an improvement of mediation-related legal framework and standard of mediators, the  
271 competitiveness of these signatory states will be enhanced quickly. If Hong Kong does not attempt  
272 to promote its development of mediation further, it may eventually become less competitive in the  
273 international mediation market.

274

275 Second, one interviewee criticized that Hong Kong is too passive in promoting cross-border  
276 mediation as one of the mediation hubs in the world, and he took Singapore as comparable to  
277 Hong Kong. The name of the Convention – "Singapore Convention" reflected that Singapore  
278 had made a significant contribution in encouraging international mediation and the

279 establishment of the Convention for the enforcement of settlement agreements. He said that the  
280 Singaporean Government provided the practitioners in mediation sector with abundant  
281 resources and encouraged them to involve in the drafting of the Convention. Contrary to far-  
282 sighted Singaporean Government, Hong Kong Government allocated limited resources to  
283 encourage international mediation or encourage Hong Kong mediators to join meetings  
284 regarding the Convention. Otherwise, Hong Kong would lose its edge over other countries in  
285 international dispute resolution if it remains passive and indifferent towards the global  
286 mediation-related events or legislation.

287

## 288 **Conclusion**

289

290 This paper aims to investigate the potential advantageous and disadvantageous effects of the  
291 United Nations Convention on International Settlement Agreements Resulting from Mediation  
292 exerting on the status of Hong Kong as the International Construction Mediation Hub, through  
293 both quantitative and qualitative methods. From the findings of the surveys and interviews  
294 conducted with construction mediators, a series of opportunities caused by the Convention are  
295 identified in terms of the promotion of construction dispute resolution by mediation, development  
296 of mediation in Hong Kong and Hong Kong's status in global mediation market. Meanwhile,

297 there are some challenging aspects, such as higher competitiveness of other countries in  
298 serving as an international mediation seat and difficulties encountered by the Hong Kong  
299 mediators in claiming relief and procedures required on the Convention. It is noted that majority  
300 of the respondents proclaim that these effects brought by the Singapore Convention are limited  
301 due to the unfamiliarity of countries to the Convention and the conservative attitude of the Hong  
302 Kong construction industry. In the discussion section, it is concluded that Hong Kong would be  
303 able to maintain its status as international mediation hub due to its well-trained mediators and  
304 law experts, well-established legal framework, high level of social development and proximity to  
305 the Mainland China and extended to the Belt and Road countries. Although there are chances  
306 for Hong Kong to lose its competitiveness, it can be avoided as long as Hong Kong pays more  
307 attention to the further development of the Singapore Convention in different countries and be  
308 more active in global mediation activities.  
309

310 **Data Availability Section**

311 All data, models, and code generated or used during the study appear in the submitted article.

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365 **Table 1: Possible Opportunities Brought by the Singapore Convention**

Possible Opportunities Brought by the Singapore Convention	
Area	Descriptions
A. Resolution of International Construction Disputes	<ol style="list-style-type: none"> <li>1. There is a higher opportunity for resolution of disputes by mediation</li> <li>2. The expectations about the future conduct of and relationship between the parties using mediation will be improved</li> <li>3. The willingness of disputants to accept an offer of settlement agreement resulting from mediation will be increased</li> </ol>
B. Development of Mediation	<ol style="list-style-type: none"> <li>4. The Singapore Convention can promote mediation-related legislation in Hong Kong</li> <li>5. Mediation will be adopted more often as dispute resolution method after the ratification of the Singapore Convention in Hong Kong</li> </ol>
C. Status of Hong Kong as International Mediation Hub	<ol style="list-style-type: none"> <li>6. Hong Kong will be chosen as the mediation seat for resolving international construction disputes more often</li> <li>7. Hong Kong mediators and lawyers will be well-placed to take advantage of an anticipated rise in cross-border construction mediation</li> </ol>

366 **Table 2: Possible Challenges Brought by the Singapore Convention**

Possible Challenges Brought by the Singapore Convention	
Area	Descriptions
A. Status of Hong Kong as International Mediation Hub	<ol style="list-style-type: none"> <li>1. Competitiveness of participant countries in construction dispute resolutions will be enhanced</li> </ol>
B. Application of the Singapore Convention	<ol style="list-style-type: none"> <li>2. Hong Kong mediators and lawyers will encounter technical challenges in applying the Convention in dispute resolution</li> </ol>

367 **Table 3: Other Findings – Limiting Factors of Opportunities and Challenges Brought by**

368 **the Singapore Convention**

Limiting Factors of Opportunities and Challenges Brought by the Singapore Convention	
Area	Descriptions
A. The Singapore Convention	<ol style="list-style-type: none"> <li>1. Some of the provisions under the Convention is too restrictive, and this thus confines the effectiveness of the Convention</li> <li>2. Some of the provisions under the Convention is unclear and ambiguous, making the disputants difficult to enforce the mediated settlement agreement under the mechanisms of the Convention</li> <li>3. The Convention is new to different signatory countries, only a small number of them have ratified the Convention in their countries at the moment</li> </ol>
B. The Construction Industry	<ol style="list-style-type: none"> <li>4. Limited number of international construction projects are taking place in Hong Kong, cross-border construction companies are regarded as local firms as most of them registered their branches in Hong Kong</li> <li>5. The Hong Kong construction industry is conservative and unwilling to change, it takes time for the industry to be aware of the Convention</li> <li>6. Most of the international projects adopt the standard forms of construction contract, such as FIDIC and NEC, which do not include mediation clauses, and this leads to a lower usage of mediation in the industry</li> </ol>