

## Mediated Settlement Agreements: Enhancing Enforcement through the Singapore Convention in Malaysia

Ilylyana Che Rosli<sup>1</sup>, Nur Izati Hanafi<sup>1</sup>, Nur Aqila Abu Hassan<sup>1</sup>,  
Wan Nur Athirah Wan Ahmad Hazim<sup>1</sup>, Mohamad Nurul Hafiz  
Ab Latif<sup>2</sup>, Tengku Chik Abu Bakar Tengku Ibrahim<sup>3</sup>

<sup>1</sup>Faculty of Law and International Relations, University Sultan Zainal Abidin (UniSZA), Gong Badak Campus, 21300 Kuala Nerus, Terengganu, Malaysia, <sup>2</sup>Faculty of Islamic Contemporary Studies, University Sultan Zainal Abidin(UniSZA), Gong Badak Campus, 21300 Kuala Nerus, Terengganu, Malaysia, <sup>3</sup>School of Law, Politics and Sociology, University of Sussex, BN19RH Brighton, East Sussex, United Kingdom

Corresponding Author Email: [ilylyanarosli@unisza.edu.my](mailto:ilylyanarosli@unisza.edu.my)

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### Abstract

This paper examines the enforcement of Mediation Settlement Agreements (MSAs) within Malaysia's legal framework, with a particular focus on the Singapore United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention). The primary objective is to evaluate Malaysia's current regulatory structure, identify legal gaps, and propose measures to strengthen the enforceability of MSAs. The research methodology involves doctrinal legal analysis, which includes reviewing relevant statutory provisions, case law, and comparing international practices. The findings highlight that while Malaysia's Mediation Act 2012 provides a foundational framework for mediation, it lacks sufficient provisions for the robust enforcement of MSAs. In comparison, the Singapore Mediation Convention introduces a globally recognized, standardized approach to MSA enforcement, fostering consistency and cross-border recognition. By adopting the Singapore Mediation Convention, Malaysia could enhance its dispute resolution mechanisms, reduce dependence on prolonged litigation, and promote stronger international commercial relations. This paper makes a significant contribution to legal scholarship by proposing regulatory reforms that align Malaysia's framework with global standards, ensuring the effective enforcement of mediation agreements. The implementation of such reforms would position Malaysia as a more attractive jurisdiction for international dispute resolution, supporting the growth of alternative dispute resolution (ADR) practices in the region. In conclusion, this study advocates for a comprehensive approach to mediation that integrates

international best practices, offering greater legal certainty and promoting a more efficient and accessible dispute resolution environment in Malaysia.

**Keywords:** Mediation, Enforcement of Mediation Settlement Agreements, Singapore Mediation Convention, Alternative Dispute Resolution, Malaysia.

## **Introduction**

Mediation has gained prominence as a preferred method of alternative dispute resolution (ADR) in Malaysia, offering an efficient, cost-effective, and amicable approach to resolving disputes (Rahmat et al., 2022). As defined by Section 3 of the Mediation Act 2012 (MA 2012), mediation is a process where a voluntary mediator facilitates discussion and negotiation between the parties in order to reach an agreement between them about the disputes that are happening between those parties. Mediation offers several advantages, including confidentiality, flexibility, and the potential for preserving relationships between disputing parties, making it particularly preferable for commercial conflicts (Nasir et al., 2018). Recognising these advantages, Malaysia enacted the MA 2012, designed to promote and encourage mediation as a method of alternative dispute resolution (ADR) (Ismail & Osman, 2019). The Act provides a framework for mediation that ensures the process is voluntary, informal, and aimed at facilitating amicable resolutions between disputing parties.

However, despite its strengths, the Mediation Act 2012 has notable limitations, particularly regarding the enforcement of Mediation Settlement Agreements (MSAs) (Safei & Abdullah, 2022). While the Act establishes the procedural foundations of mediation, it does not provide a comprehensive mechanism for the enforcement of MSAs, especially in cross-border disputes. In mediation, a settlement agreement, i.e. the MSA is written as any agreement following a successful mediation between the disputing parties. The parties shall agree on the terms of the settlement, and the settlement agreement operates within the framework of contract law. The crucial issue is the enforcement of the MSAs of parties in cross-border commerce, on whether the winning party in an international dispute may enforce the MSA in another country. This gap presents significant challenges to the efficacy of mediation as a reliable ADR method in an increasingly globalised economy, whereby parties in trade and commerce often involve parties from different countries.

The introduction of the United Nations Convention on International Settlement Agreements Resulting from Mediation, commonly known as the Singapore Convention on Mediation (SCM), marks a transformative development in the international legal landscape. Adopted by the United Nations in 2018, the SCM offers a standardised framework for the recognition and enforcement of mediated settlement agreements across jurisdictions (Siong, 2019). By addressing the complexities inherent in cross-border dispute resolution, the SCM enhances the credibility and effectiveness of mediation as a global dispute resolution tool. Malaysia's potential accession to the SCM presents both opportunities and challenges. On one hand, adopting the SCM could significantly strengthen the enforceability of MSAs within Malaysia, aligning its legal framework with international standards and fostering greater confidence in mediation processes (Tan, 2023).

This paper seeks to critically examine the current regulatory framework governing the enforcement of MSAs in Malaysia, with a particular focus on the potential adoption of the SCM. Through a doctrinal analysis of existing statutes, case law, and international practices,

this study aims to identify the legal gaps within the Mediation Act 2012 and propose reforms that could enhance the efficacy of mediation in Malaysia. The paper is limited to only MSAs arising from disputes involving international commercial matters.

### **Methodology**

This paper adopts a doctrinal legal research methodology to examine the enforcement of the Singapore Convention on Mediation (SCM) in Malaysia, particularly in relation to enhancing the Mediation Act 2012 (MA 2012). Doctrinal legal research, often described as “black-letter” law, focuses on the analysis and interpretation of legal texts to identify, clarify, and consolidate existing legal doctrines, principles, and frameworks. As defined by Hutchinson and Duncan (2013), doctrinal research involves systematic analysis of statutes, case law, and legal precedents to offer a deeper understanding and critical examination of a specific area of law. This methodology is particularly suited to the study of legal reforms and regulatory frameworks, as it allows for the identification of inconsistencies, gaps, and opportunities for legal development.

In this study, doctrinal research is applied to critically review key legal documents, including the Mediation Act 2012 (MA 2012), the Singapore Mediation Convention (SCM 2016), and the Reciprocal Enforcement of Judgments Act 1958 (REJA 1958). These primary legal instruments are central to understanding the current legal framework for mediation and its enforcement in Malaysia. By analyzing statutory provisions, relevant case law, and international conventions, the paper identifies significant gaps in the enforceability of Mediation Settlement Agreements (MSAs) under Malaysia’s current laws.

Additionally, this research highlights the importance of the Singapore Mediation Convention, which Malaysia signed on 7 August 2019 but has yet to ratify. The SCM offers a much-needed global standard for the recognition and enforcement of mediated settlement agreements across borders. By comparing Malaysia’s legal framework with international practices, this study proposes key reforms to align the Mediation Act 2012 with the SCM, strengthening the enforceability of MSAs and enhancing Malaysia’s standing as a jurisdiction that supports effective and reliable mediation mechanisms.

The doctrinal approach facilitates a comprehensive analysis of both domestic and international legal texts, ensuring a nuanced understanding of how the SCM could fill existing gaps and enhance Malaysia’s mediation framework. Through this methodology, the paper aims to offer well-grounded recommendations for legal reforms that promote Malaysia’s alignment with international standards on mediation.

### **Discussion and Findings**

#### *Mediation Act 2012 (MA 2012)*

The paper finds that Sections 13 to 14 of the MA 2012 stipulate the MSA in Malaysia. Section 13 (1) of MA 2012 states that, upon the conclusion of a mediation and the reaching of an agreement by the parties regarding a dispute. Also, Section 13 (2) discussed that the parties shall enter into a settlement agreement. The settlement agreement that has been entered by the parties must be in writing and signed by the parties involved. Section 13(3) discussed how the mediator involved shall authenticate the settlement agreement and furnish a copy of the agreement to the parties. This section particularly discusses how the

parties shall solve the dispute between them with mediation, and the mediation that has been discussed should be agreed upon and signed by both parties in writing; hence, the agreement will be valid.

Section 14 of the MA 2012, this section stipulates that the effect of the MA and the settlement agreement shall be binding on the parties during the settlement agreement. Further, this section also discusses if the proceedings have been discussed in the court, the settlement agreement may be recorded before the court as a consent judgment or judgment of the court. This section explains that the disputes between the disputing parties in Malaysia can be solved by mediation by agreeing on a settlement agreement. Even though this section explains the effect of the settlement agreement, the MA did not provide an equivalent framework for the enforcement of mediated settlements, especially in international cases.

#### *Reciprocal Enforcement of Judgment Act 1958 (REJA 1958)*

The Reciprocal Enforcement of Judgments Act 1958 (REJA) provides a mechanism for registering and enforcing foreign judgments in Malaysia, particularly those from reciprocating countries such as the United Kingdom, Hong Kong, Singapore, and others. However, its scope does not explicitly cover judgments related to Mediated Settlement Agreements (MSAs), thereby rendering challenges to their enforcement within Malaysia's legal framework. Under Section 2 of REJA, a "judgment" encompasses decisions made in civil or criminal proceedings for the payment of compensation or damages. It also includes arbitration awards enforceable as court judgments in the originating jurisdiction. However, MSAs are not explicitly included, leaving a gap in their enforceability under this Act.

Further, Section 3 of REJA provides a pathway to register foreign judgments without initiating new legal proceedings, provided the judgment originates from a reciprocating country, is final, involves a monetary award (excluding penalties or taxes), and meets procedural requirements. Section 4 further clarifies that registration must occur within six years of the judgment's issuance, and registration is barred if the judgment has been satisfied or is unenforceable in the originating court. Section 4(3) addresses judgments involving foreign currency, stipulating that they be converted to Malaysian Ringgit based on the exchange rate at the time of the original judgment. Once registered, the judgment is treated as a domestic Malaysian judgment for enforcement purposes.

The case of *Standard Chartered Bank (Singapore) Ltd v Pioneer Smith (M) Sdn Bhd* [2015] 7 CLJ 677 highlights the practical challenges associated with REJA. In this case, the judgment debtor argued against registration, claiming the foreign judgment was unenforceable in the originating jurisdiction. The court rejected this claim, asserting that the enforceability of the judgment in the original court is a practical, not a legal, issue. The decision highlights the importance of upholding the integrity of cross-border judgments and preventing parties from evading enforcement by relocating assets.

#### **The Singapore Convention on Mediation (SCM)**

The United Nations Convention on International Settlement Agreements Resulting from Mediation, commonly known as the SCM, is an international treaty aimed at facilitating the enforcement of settlement agreements reached through mediation in cross-border disputes. The convention was adopted on December 20, 2018, in Singapore and entered into

force on September 12, 2020. The primary purpose of the Singapore Convention is to promote the use of mediation as a method of resolving international commercial disputes and to provide a framework for the recognition and enforcement of mediated settlement agreements. By adopting the principles of the Singapore Convention, Malaysia can enhance its attractiveness as a destination for foreign investment and international commercial activities. This is because businesses are more likely to engage in mediation if they are confident that their agreements will be upheld in different jurisdictions (Rahman & Ishak, 2022).

A key feature of the Singapore Convention is that it only applies to international commercial mediation. It is established in express terms that the convention tries to settle disputes of a commercial aspect with an international scope while realising the need for considering resolution from a cross-border perspective (Lim, 2019). The international nature of this convention highlights its applicability in the context of today's business deals on a global scale (Deb, 2020). The main requirement under the Singapore Convention for the enforceability of the settlement agreement is that it must be in writing. This can be a separate document or an individual within a broader agreement (Lee, 2021). The written agreement requirement not only makes the terms clear but also creates a tangible and internationally recognized foundation for enforcement across different legal systems (Boulle et al, 2021).

The SCM plays a pivotal role in advancing the harmonisation of MSAs. Its specific provisions contribute to a framework that addresses potential discrepancies and fosters a consistent approach. Articles 3 and 5, outlining conditions for recognition and grounds for refusal, respectively, establish a structured and uniform process for the enforcement of MSAs. Article 4 emphasises party autonomy, recognizing the importance of allowing parties to shape the content of their agreements. This provision aligns with the principle that MSAs when entered voluntarily by informed parties, should be consistently upheld. Moreover, Article 11 encourages signatory states to adopt measures promoting the effective implementation of the Convention. This collaborative approach facilitates harmonisation by encouraging states to align their domestic systems with the Convention's principles, contributing to a more unified landscape for the enforcement of MSAs.

### **Recommendations on Adoption of Relevant Provision in SCM into Malaysian MA 2012**

#### *Applicability to international mediation cases: Comparison to Article 9 of SCM*

The MA 2012 is silent on matters where the judgment is not enforced for international cases. In comparison, Article 9 of the SCM states the effect of settlement agreements. The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned. Hence, the paper proposes to address the enforceability of settlement agreements in international cases.

#### *Legal consequences and enforceability of settlement agreements recorded as consent judgments: Comparison to Article 1 (3) of SCM*

While the MA 2012 mentions that a settlement agreement may be recorded before the court as a consent judgment or judgment of the court if proceedings have been commenced, it does not elaborate on the implications of such recording. There may be gaps in understanding the legal consequences or enforceability of the agreement once recorded in this manner. In comparison, Article 1, paragraph 3 mentioned that a recorded judgment from

a settlement agreement implies that the settlement agreement has been approved by a court or concluded in the course of the proceedings before a court. It also means that the settlement agreement is enforceable as a judgment in the state where the court is located. In other words, the settlement agreement has the same legal effect as a court judgment and can be enforced accordingly. Thus, this paper proposed to introduce a new section under the MA 2012 to explicitly address the legal consequences and enforceability of settlement agreements recorded as consent judgments or judgments of the courts.

More often than not, parties are more likely to accept and comply with the settlement agreement as mediation focuses on and addresses the needs and interests of the parties. However, due to the privacy and confidentiality of the mediation process, any information within the session cannot be disclosed and made known to outsiders other than the parties involved and the mediator himself. Thus, it is quite difficult to analyse the effectiveness of any practised mediation as there is no proof of whatever happens in the session within any records or documentation. Without knowing what transpired, the results of mediation may roughly be presented in the form of success or failure. Although it is not open to the public, the potential impacts on the efficiency and effectiveness of proposed amendments for the lacuna within MA 2012 could be evaluated theoretically.

#### *Electronic communication: Comparison to Article 2 (2) and Article 4 (2) of SCM*

Section 13 of the MA 2012 does not address electronic communication where there are no provisions to ensure the reaffirmation of agreements through this means. Compared to the SCM, this matter is addressed under Article 2 (2) of SCM.

“A settlement agreement is “in writing” if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.” Therefore, the amendment of Section 13 of the MA 2012 is needed to explicitly recognize and address electronic communication for the reaffirmation of mediation agreements. Furthermore, this paper proposed to align the language of the proposed amendment with Article 4 (2) of the SCM for consistency and harmonisation with international standards. Moreover, this amendment should also include guidelines or standards for the secure use of electronic communication in mediation agreements for the purpose of safeguarding the integrity and authenticity of electronic records.

#### *Authentication of MSA: Comparison to Article 4 (b) and Article 4 of SCM*

Section 13 (3) of the MA 2012 mentioned that the mediator shall authenticate the settlement agreement, but it may not explicitly specify the details or specific methods for authentication. The Singapore Convention, on the other hand, provides more explicit criteria, including the mediator’s signature, a document indicating the mediation process, or an attestation by the administering institution. According to Article 4 (b) of the SCM, “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...” Hence, referring to this article, Section 13(3) of the MA 2012 discussed above must be revised to provide more explicit criteria for the authentication of settlement agreements by the mediator.

*Alternative evidence: Comparison to Article 4 (b) (iv) of SCM*

Furthermore, section 13 (3) of the MA 2012 also appears to be less comprehensive. This is because the act did not specify alternative forms of evidence to support a settlement agreement beyond authentication. In comparison, Article 4 (b)(iv) of the SCM states that, “Evidence that the settlement agreement resulted from mediation, such as: inter alia or (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.” Hence, this paper proposed to revise Section 13 (3) to include provisions for alternative forms of evidence for settlement agreements beyond authentication.

*Acceptability of evidence: Comparison to Article 4 (4) and Article 4 (b)(iii) of SCM*

Moreover, section 13 (3) of the MA 2012 lacks the clarification on which authority or criteria will determine the acceptability of evidence. In comparison, Article 4 (4) of the SCM explicitly stated, “The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.”. This provision has clearly indicated that a form of authority must be present along with the requirements of documentation as assistance to verify the evidence’s acceptability. Moreover, Article 4 (b)(iii) also further states that “Evidence that the settlement agreement resulted from mediation, such as: (iii) An attestation by the institution that administered the mediation...” Hence, this paper further proposes to amend and include provisions which explicitly specify the authority or criteria responsible for determining the acceptability of evidence for settlement agreements.

*Grounds to refuse: Comparison to Article 5 (1) of SCM*

Generally, the Malaysia MA 2012 does not specify any grounds on which a party may refuse to grant relief based on a settlement agreement. The absence of clear criteria for refusal in MA 2012 may leave room for uncertainty in certain situations. In contrast to this silence, Article 5, paragraph 1 states that the authority may reject relief under Article 4 if the party against whom relief is sought provides evidence that the settlement agreement is null, void, or incapable of performance under applicable law or not binding, final, has been modified or has been breached as per explained in (e) and (f). Hence, this paper proposed to insert a new section under the MA 2012 to address this matter, by explicitly specifying the grounds on which a party may refuse to grant relief based on settlement agreement.

**Conclusion**

This study underscores the pivotal role of the Singapore Mediation Convention (SCM) in addressing significant gaps within Malaysia’s legal framework regarding the enforcement of Mediation Settlement Agreements (MSAs). Although the Mediation Act 2012 (MA 2012) establishes a foundational legal structure for mediation, it lacks comprehensive provisions for the enforcement of MSAs, especially in international contexts. Similarly, the Reciprocal Enforcement of Judgments Act 1958 (REJA 1958) does not extend its scope to include MSAs, further complicating the enforceability of such agreements in Malaysia. These gaps undermine the efficacy of mediation as a reliable alternative dispute resolution (ADR) mechanism, particularly for cross-border disputes.

The SCM offers a transformative solution to these challenges, providing standardized mechanisms for the recognition and enforcement of MSAs across jurisdictions. By incorporating the SCM into Malaysia’s legal system, the country could address key

deficiencies in the MA 2012, such as the recognition of electronic communications, clear authentication criteria, and well-defined grounds for refusal of relief based on MSAs. Such reforms would not only enhance the enforceability of MSAs but would also align Malaysia's framework with global best practices, improving its position as an attractive destination for international commercial mediation. This would enhance Malaysia's global competitiveness in dispute resolution and strengthen its reputation as a hub for ADR.

The findings of this study highlight the urgent need for targeted legislative reforms to align Malaysia's legal framework with the SCM. Revisions to the MA 2012 should explicitly address the enforceability of MSAs by incorporating provisions on electronic communication, authentication standards, and clear criteria for granting or refusing enforcement. These reforms would foster greater confidence in mediation as a viable and efficient dispute resolution mechanism, particularly in the context of an increasingly globalized economy.

In conclusion, integrating the SCM into Malaysia's legal system offers a significant opportunity to modernize its mediation framework. By ensuring consistency with international standards and facilitating the efficient resolution of cross-border disputes, such reforms would position Malaysia as a leader in international mediation and contribute to the development of a comprehensive, globally recognized legal framework for ADR. This would not only improve Malaysia's ADR landscape but also contribute to the broader international community's efforts to foster more effective, efficient, and accessible dispute resolution systems.

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