

# The Singapore Convention: From a Blizzard, a Convention Blooms<sup>1</sup>

By Donna Ross<sup>2</sup>

---

## Abstract

*When it enters into force on 12 September 2020, the Singapore Convention will provide a long overdue harmonised legal framework for the enforcement of settlement agreements resulting from international commercial mediation. The Convention is the missing piece in the international enforcement landscape. This article looks at the inception of the Convention and the work leading up to its adoption, as well as key provisions and how they mirror or diverge from the New York Convention.*

The Singapore Convention on Mediation<sup>3</sup> (the Convention) adopted in December 2018 is the missing piece on the international dispute resolution scene. Once the Convention enters into force, it will take its rightful place alongside the New York Convention<sup>4</sup> and the Hague Conventions<sup>5</sup>. It establishes a much-needed harmonized legal framework for the enforcement of settlement agreements resulting from international commercial mediation ('settlement agreements').<sup>6</sup>

The Singapore Convention was opened for signature in Singapore on 7 August 2019<sup>7</sup> during the Singapore Convention Signing Ceremony and Conference, which was attended by some 700 government officials,

---

<sup>1</sup> The Singapore Convention's official logo is in the shape of an orchid. Following the Signing Ceremony, the "Aranda Singapore Convention on Mediation" Orchid was named to mark the historic occasion. <https://www.singaporeconvention.org/logo.html>

<sup>2</sup> The author is an international ADR practitioner and lawyer admitted in Australia and the U.S., an NMAS (and New York) accredited mediator, and LIV Accredited Specialist in Mediation Law, a Fellow of the Chartered Institute of Arbitrators, and teaches mediation, negotiation and arbitration. The author wishes to acknowledge Delcy Lagones de Anglim for her valuable personal insight into Working Group II's deliberations and thank Yuriy Netrosov for his assistance with the cites in this article.

<sup>3</sup> *United Nations Convention on International Settlement Agreements Resulting from Mediation*, GA Res 73/198, UN GAOR, 73rd sess, 62nd plen mtg, Agenda item 80, UN Doc A/RES/73/198 (20 December 2018), ('Singapore Convention' or 'Convention').

<sup>4</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('New York Convention'). See United Nations Commission On International Trade Law, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* <[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2)>.

<sup>5</sup> *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015); *Convention of the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, opened for signature 2 July 2019, (not yet in force), formerly known as the Judgments Project of the Hague Conference on Private International Law. This former only has 32 contracting parties close to 15 years after its entry into force and the latter only 1 signatory to date. See Hague Conference on Private International Law, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements* (4 February 2020) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> and Hague Conference on Private International Law, *Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (3 July 2019) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>>.

<sup>6</sup> While the term mediated settlement agreements or MSAs is used in the surveys and literature, for ease of comprehension the term 'settlement agreements' used in the Convention is used throughout this article.

<sup>7</sup> As per Article 11, open for signature after 7 August 2019 at UN Headquarters.

## RESOLUTION INSTITUTE MARCH 2020

business executives, legal practitioners and academics from 70 countries. It was truly a historic event.<sup>8</sup> 46 countries, including the United States and China, the world's largest economies, as well as major players in Asia, such as India and South Korea, signed the Convention. Compare this to the New York Convention, which, when it was opened for signature in 1958, some sixty years ago only had 10 signatories.<sup>9</sup> Since August, six more countries have signed the Convention and three, including Singapore, have ratified it. With these three ratifications, the Convention will enter into force on 12 September 2020.<sup>10</sup> Unfortunately, Australia is not amongst the signatories.

Where there is trade and commerce, disputes will inevitably arise. As Singapore's Prime Minister Lee Hsien Loong aptly observed in his opening remarks, disputes "disrupt normal business operations. They damage reputations, hurt share prices and make it harder for companies to raise capital. They also dampen the confidence and morale of employees, shareholders and other stakeholders. A robust framework to manage such conflicts can prevent such disputes from escalating unnecessarily or causing unintended consequences."<sup>11</sup> This sentiment was shared by all present.

Thus far, there has been no international mechanism for the enforcement of mediated settlement agreements for international parties<sup>12</sup> akin to the New York Convention.<sup>13</sup> Although widely used globally for domestic disputes, mediation is less established as a mode of dispute resolution internationally, due primarily to the lack of certainty, finality and enforceability.<sup>14</sup>

---

<sup>8</sup> I was fortunate enough to attend the historic Signing Ceremony and Singapore Convention Week as an ADRC (Australasian Dispute Resolution Centre) delegate along with its principal, Delcy Lagones de Anglim, also head of the LawAsia delegation to Working Group II and chair for Mediation for UNCCA Working Group II.

<sup>9</sup> *The New York Convention*, which currently counts 161 signatories, had only 10 when it was first open for signature in 1958.

<sup>10</sup> The list of the signatory countries can be found here:

[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status). See also *Singapore Convention*, art 14.

<sup>11</sup> PM Lee Hsien Loong, 'Welcoming speech' (Speech delivered at the Singapore Convention Signing Ceremony and Conference, Singapore, 7 August 2019) <<https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>>.

<sup>12</sup> Although the *UNCITRAL Model Law on International Commercial Conciliation*, GA Res 57/18, UN GAOR, 57th sess, Agenda item 155, 52nd plen mtg, UN Doc A/RES/57/18 (19 November 2002) ('Model Law on Conciliation') was transposed or adopted in 33 States in a total of 45 jurisdictions, it does not provide an enforcement framework, as Article 14 leaves enforcement up to each State to decide. This is why a new instrument was necessary. No states have enacted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 Amending the Model Law on International Commercial Conciliation, 2002, *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*, GA Res 73/199, UN GAOR, 73d sess, Agenda item 80, 62<sup>nd</sup> plen mtg, UN Doc A/RES/73/199 (20 December 2018).

<sup>13</sup> *New York Convention*.

<sup>14</sup> See also, Dorcas Quek Anderson, 'A coming of age for mediation in Singapore? Mediation Act 2016' (2017) 29 *Singapore Academy of Law Journal* 275, 287 [31].

The Preamble of the Convention references the significant benefit of mediation as an alternative to litigation and the fact that its use is increasing.<sup>15</sup> Commercial mediation is set to increase exponentially in Asia, given the volume of economic activity and the massive infrastructure and related projects of the Belt and Road Initiative. Trade initiatives such as the ASEAN Economic Community and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership to name just two will contribute to the increased need for non-determinative dispute resolution. Mediation centres and institutes throughout Asia are poised to provide mediation.<sup>16</sup>

In his speech at the Singapore Convention Signing Ceremony and Conference, PM Lee shared his view that by using mediation, “businesses will benefit from greater flexibility, efficiency and lower costs, while states can enhance access to justice by facilitating the enforcement of mediated agreements”.<sup>17</sup>

The enforcement of international settlement agreements under the Singapore Convention will facilitate international trade by bringing certainty and stability to the international business community, enabling mediation to take its rightful place as a full-fledged mode of dispute resolution.

## The Current Enforcement Landscape

The main issue with the enforcement of settlement agreements today is that it is country dependent. Some countries and institutions have adopted mechanisms for enforcing settlement agreements, such as in the form of an agreed or consent award, whereas in others they are assimilated to contracts.

Parties’ compliance with settlement agreements is generally greater than with court decisions,<sup>18</sup> since the parties craft their own solution and chose the process. This is also true for compliance with arbitral awards due to party autonomy, but at the end of the day, the key factors are finality and enforceability.

A number of institutions and arbitration laws do provide for a settlement agreement reached in a mediation to be memorialized as a consent award that would have the same enforceability as an award made following arbitral proceedings. Examples of this can be found in Korea, Sweden and in some U.S. states, including

---

<sup>15</sup> *Singapore Convention*, UN Doc A/RES/73/198. That said, mediation is an alternative when successful, but parties must always have a means of finally determining a dispute in the event that it is not.

<sup>16</sup> Eunice Chua, ‘The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution’ (2019) 9(2) *Asian Journal of International Law* 195, 205.

<sup>17</sup> PM Lee Hsien Loong, above n 11.

<sup>18</sup> Edna Sussman, ‘The Final Step: Issues in Enforcing the Mediation Settlement Agreement’ in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Brill Nijhoff, 2009) vol 2, 343, 344, cited in Eunice Chua, ‘Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation’ (2019) 31 *Singapore Academy of Law Journal* 572, 572.

California.<sup>19</sup> However, consent or agreed awards handed down by an arbitral tribunal are not necessarily enforceable under the New York Convention.

For example, in the US and the UK<sup>20</sup> amongst other countries, settlement agreements are contracts and may need to be litigated in which case they may be open to standard contract defences. In such countries if an arbitral tribunal is constituted for the sole purpose of recording a settlement, or a mediator changes hats to become the arbitrator, the award is not enforceable as there can be no dispute once a matter has settled. A consent award made post-settlement may not be considered a valid award.

Conversely, if the parties settle after the commencement of the arbitral proceedings, the award is enforceable. Major arbitral institutions such as ICC, ICSID, LCIA and CIETAC provide for this in their rules. Likewise, Article 30 of the UNCITRAL Model Law on International Commercial Arbitration provides for the recognition of such awards.

The Convention ‘severs the conceptual link to arbitration and establishes a mediated settlement as an international instrument in its own right’.<sup>21</sup> In a welcome change, parties will no longer have to jump through the extra hoops and incur the extra costs of converting a settlement agreement into a pseudo arbitral award.

## **Views on a Harmonised Framework from the International Community and Potential Users**

For businesses and investors, the ability to resolve disputes reliably and effectively is a necessity when concluding cross-border deals.

Based on a number of surveys conducted over the past decade, executives, in-house counsel and external counsel alike cite lack of enforceability as the key barrier to using mediation for international disputes.

According to a survey conducted by CPR in 2011, comprising in-house counsel and external counsel from the Asia-Pacific region, 72% indicated that their company or firm generally had a positive attitude to

---

<sup>19</sup> Korean Commercial Arbitration Board, *Domestic Arbitration Rules* (adopted 2011) art 18.3; The Mediation Institute of the Stockholm Chamber of Commerce, *Mediation Rules* (adopted 1 January 2014) art 14. For a more thorough discussion of this and further examples, see also Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, 9.

<sup>20</sup> *Arbitration Act 1996* (UK) c 23, s 6(1); 9 USC §2.

<sup>21</sup> Schnabel, above n 19. For a complete review of current means of enforcing settlement agreements other than by consent awards see generally Chua, above n 18.

## RESOLUTION INSTITUTE MARCH 2020

mediation (compared to 69% for arbitration) and 78% indicated that their company or clients had used mediation to resolve disputes in the last three years.<sup>22</sup>

Likewise, in the 2014 IMI survey, respondents would be “much more likely” to mediate a dispute with a party from a State that had ratified a convention for the enforcement of settlement agreements, which would provide greater certainty in their business dealings.<sup>23</sup>

A study published by the Singapore Academy of Law in 2016 showed that 71% of public and private sector practitioners and in-house counsel in the region preferred arbitration, 24% litigation and only 5% mediation. Enforceability, confidentiality and fairness were the key factors given for choosing arbitration.<sup>24</sup>

Later surveys and studies also showed that the two main areas for improvement were the creation of an international mechanism to promote the recognition and enforcement of settlements, including those reached in mediation and protocols for implementing non-adjudicative processes before commencing adjudicative processes.<sup>25</sup>

There is also a general perception that enforcement is significantly more difficult for international mediated settlement agreements compared to their domestic counterparts.<sup>26</sup>

Cost and efficiency are also of primary importance. Parties are reluctant to settle in mediation for a lesser amount than the original claim, only to have to incur further procedural costs in litigation or arbitration to enforce a settlement agreement in the event of non-performance. This is precisely what mediation is designed to avoid in the first place. In fact, some delegates participating in Working Group II reported cases of cross-border litigation resulted from a party’s failure to comply with a settlement.<sup>27</sup>

In this respect, a Supreme Court Justice in New Jersey, put it very wisely when he opined that: ‘One of the main purposes of mediation is the expeditious resolution of disputes. Mediation will not always be

---

<sup>22</sup> International Institute for Conflict Prevention & Resolution, *Attitudes toward ADR in the Asia-Pacific Region: A CPR Survey* (2011) <<http://www.chinagoabroad.com/en/article/attitudes-toward-adr-in-the-asia-pacific-region-a-cpr-survey>>.

<sup>23</sup> International Mediation Institute, *IMI survey results overview: How users view the proposal for a UN Convention on the Enforcement of Mediated Settlement Agreements* (16 January 2017) <<https://www.imimmediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/>>.

<sup>24</sup> Singapore Academy of Law, *Study on Governing Law and Jurisdiction Choices in Cross-Border Transactions* (11 January 2016) <<http://www.ciarb.org.sg/singapore-academy-of-law-study-on-governing-law-jurisdiction-choices-in-cross-border-transaction/>>.

<sup>25</sup> Global Pound Conference Series, *Global Data Trends and Regional Differences Report* (2018) at 14 <<https://www.imimmediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf>>.

<sup>26</sup> Stacie Strong, ‘Realizing Rationality: An Empirical Assessment of International Commercial Mediation’ (2016) 73 *Washington and Lee Law Review* 1973, 2051.

<sup>27</sup> Schnabel, above n 19, 4.

successful, but it should not spawn more litigation... Instead of litigating the dispute that was sent to mediation, the mediation became the dispute.’<sup>28</sup>

The Singapore Convention will enable businesses avoid such superfluous litigation or arbitration.

## Initiatives in Australasia Prior to the US Proposal

Starting in 2012, Professor Chang-fa Lo and Professor Winnie Ma presented the iMSA Project on cross-border enforcement of settlement agreements at several conferences<sup>29</sup> and even drafted a “Convention on Cross-Border Enforcement of International Mediated Settlement Agreements,” published in November 2014 in the *Contemporary Asia Arbitration Journal*.<sup>30</sup>

The authors of the iMSA Project also participated in another similar international collaborative endeavor to explore global enforcement of settlement agreements initiated by Laurence Boulle and Bobette Wolski the “MSA Project.”<sup>31</sup>

In July 2014 at the 47<sup>th</sup> session of UNCITRAL’s Working Group II in New York, the United States made a proposal to begin work on a mediation convention.<sup>32</sup>

The resulting treaty was called the Singapore Convention, since Singapore hosted the signing ceremony.<sup>33</sup> However, as noted by Tim Schnabel, the U.S. proposer of the Convention, the choice of the title and location of the signing ceremony reflected the delegates’ appreciation for the Singaporean chair, Natalie Morris-Sharma,<sup>34</sup> who led the negotiations to a successful outcome through a blizzard in New York that shut down the United Nations headquarters on what was to become such a decisive day.

---

<sup>28</sup> *Willingboro Mall Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 71 A.3d 888 at 245 (2013), cited in Edna Sussman and Conna Weiner, ‘Striving for the “Bullet-Proof” Mediation Settlement Agreement’ (2015) 8(1) *New York Dispute Resolution Lawyer* 22. This case is also a reminder that settlement agreements should always be in writing.

<sup>29</sup> Namely, the 2012 and 2013 Taipei International Arbitration and Mediation Conferences. See Rajesh Sharma, ‘The Singapore Convention and Contributions of Academics and Experts From Taiwan’, *Chinese Arbitration Association Newsletter* (online), September 2019 <[http://caa-epaper.arbitration.org.tw/en/paper\\_detail.aspx?ID=1caeb1b3-2cb4-43f6-8688-55dcf6ab41e2](http://caa-epaper.arbitration.org.tw/en/paper_detail.aspx?ID=1caeb1b3-2cb4-43f6-8688-55dcf6ab41e2)>.

<sup>30</sup> *Ibid*.

<sup>31</sup> Chang-fa Lo, ‘A Private Initiative of Codification in International Law—Some Ideas of the Draft Convention on Cross-Border Enforcement of International Mediated Settlement Agreements’ in Ying-jeou Ma (ed), *Chinese (Taiwan) Yearbook of International Law and Affairs* (Brill Nijhoff, 2014) vol 32, 10, 15. The project was presented at the 2014 Taipei International Arbitration and Mediation Conference.

<sup>32</sup> Schnabel, above n 19, 4.

<sup>33</sup> Schnabel, above n 19,1.

<sup>34</sup> *Ibid* 1-2.

## The Making of the Singapore Convention: The Blizzard that Was a Blessing in Disguise

When a breakthrough in the negotiations was imminent in February 2017, a snowstorm caused the closure of the UN.<sup>35</sup> A nearby law firm offered its premises and all interested delegations were able to convene informally. It transpired that those who were the furthest apart on the issues were present. The delegations worked out the details of a “compromise proposal”, which became known as the five-issue package.<sup>36</sup> The five issues were seen as interconnected, and it was the balance between the different concerns and interests that paved the way for a harmonised framework for the enforcement of mediated settlement agreements.<sup>37</sup>

The package was later presented to the formal meeting and agreed as a draft and Working Group II continued its work until the final text was adopted in December 2018.

Before addressing the five issues in the package, it is worthwhile to look at some of the more general aspects of the Convention.

### What is Covered under the Convention and What is Excluded?

First of all, mediation is defined in Article 2 as a process in which the parties attempt to settle their dispute with the assistance of a third person who lacks the authority to impose a solution (‘the mediator’).<sup>38</sup>

The settlement agreement must result from a commercial and international mediation,<sup>39</sup> and not be subject to a specific exclusion. The approach adopted is similar to that in the CISG,<sup>40</sup> where commerciality is defined by exclusions in the Convention, rather than inclusions, which are listed non-exhaustively in the Model Law.<sup>41</sup>

---

<sup>35</sup> Conversations with Delcy Lagones de Anglim; Natalie Y Morris-Sharma, ‘Constructing the Convention on Mediation: The Chairperson’s Perspective’ (2019) 31 *Singapore Academy of Law Journal* 487, 497.

<sup>36</sup> *Ibid* 496 [24]; See also Schnabel, above n 19, 7.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Singapore Convention*, art 2(3). Mediator may refer to one or more neutrals acting together.

<sup>39</sup> *Ibid* art 1.

<sup>40</sup> *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 2(a) (‘CISG’). However, the definition of international in art 1 of the Convention differs somewhat from art 1 of the CISG. See also Schnabel, above n 19, 23.

<sup>41</sup> *UNCITRAL Model Law on International Commercial Mediation*, UN Doc A/RES/73/199. Inclusions are listed in art 1(1): 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; carriage of goods or passengers by air, sea, rail or road.

Thus, the Convention does not apply to settlement agreements relating to transactions of a personal, family or household nature or to family, inheritance or employment law matters. Also excluded from the scope of the Convention are settlement agreements that are enforceable as court judgments or arbitral awards,<sup>42</sup> a significant point that will be addressed with the five-issue package.

Investor-state disputes may also fall under the Convention,<sup>43</sup> unless a state has made a declaration pursuant to Article 8.1(a) specifying that settlement agreements involving said state or its government instrumentalities are excluded from enforcement.

## What's in a Name? Mediation Prevails over Conciliation

Some say that the terms mediation and conciliation are interchangeable. This is neither entirely true nor completely false.

In certain legal cultures and particularly civil law jurisdictions,<sup>44</sup> conciliation can denote mediation without private sessions or even a more formal, quasi-adjudicative or compulsory process where the conciliator is expected to issue written recommendations for settlement as part of the remit or in some cases make a determination. This is the case under certain statutory frameworks in Australia.<sup>45</sup>

Although UNCITRAL has historically preferred to use the term conciliation in past texts,<sup>46</sup> which was also the designation used during the negotiations,<sup>47</sup> in a welcome change, mediation was chosen for both instruments. This better corresponds to commercial and institutional practice and will avoid any confusion with hybrid non-facilitative processes.<sup>48</sup>

---

<sup>42</sup> *Singapore Convention*, art 1(3).

<sup>43</sup> *Ibid* art 8.

<sup>44</sup> Donna Ross, 'Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2012)* (Brill Nijhoff, 2013) vol 6, 352, 355.

<sup>45</sup> For further details see, for example, Australian Human Rights Commission, *Conciliation – how it works* (7 May 2019) <<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>.

<sup>46</sup> *UNCITRAL Model Law on Conciliation*, UN Doc A/RES/57/18. *UNCITRAL Conciliation Rules*, GA Res 32/52, UN GAOR, 35<sup>th</sup> sess, 81<sup>st</sup> plen mtg, UN Doc A/RES/32/52 (4 December 1980).

<sup>47</sup> Schnabel, above n 19, 15.

<sup>48</sup> We also discussed the choice of terminology at the Australian Round Table session held in January 2017 at ADRC (the Australasian Dispute Resolution Centre) in Canberra, part of a series of consultative meetings around the world.



## General Principles and Formal Requirements of Which Parties and Mediators Must Be Aware

First, the Convention will apply even if parties did not have a prior agreement to mediate in their contract or otherwise,<sup>49</sup> as long as they have subsequently mediated the dispute.

Second, choice of law and forum clauses should be carefully crafted, taking into account the location of the parties and assets in the event that enforcement is required for non-compliance. If the choice of law is invalid or inexistent, rules of procedure based on the principles of the private international law of the enforcing state will apply.<sup>50</sup> This is important as one of the grounds for refusing enforcement under Article 5 is if the agreement is void “under the law to which the parties have validly subjected it” or “under the law deemed applicable by the competent authority.”<sup>51</sup> Under the Convention, the competent authority may also be an arbitral tribunal if the settlement agreement provides that any future disputes will be resolved by arbitration.<sup>52</sup>

Mediation being essentially the parties’ process, there is no limitation on what a hypothetical resolution may encompass, including non-monetary obligations or transfers of property. When such property is in the form of shares or real property, then the parties will have to comply with any transfer requirements and formalities of the authorities at the place where the property is located.<sup>53</sup>

Another ground for refusal is when granting relief would be contrary to the terms of the settlement agreement. One example of this is if the parties exclude the application of the Convention by ‘opting-out’.<sup>54</sup> As with the enforcement of an award under the New York Convention, certain formalities must be met for a settlement agreement to be enforced under the Singapore Convention. The key difference is that the form requirements set out in Article 4 apply to the settlement agreement or the end result, not the decision to resolve a dispute by mediation prior to its occurrence.<sup>55</sup> One of the requirements is that it must be signed

---

<sup>49</sup>This is not that different from a *compromis* or submission agreement in arbitration, as it is presumed there will subsequently be a mediation agreement signed with the mediator.

<sup>50</sup> *Singapore Convention*, art 3(1).

<sup>51</sup> *Ibid* art 5(1)(b)(i).

<sup>52</sup> Schnabel, above n 19, 34.

<sup>53</sup> *Singapore Convention*, art 3(1). These same formalities would apply in the case of voluntary compliance. See also Schnabel, above n 19, 12.

<sup>54</sup> *Singapore Convention*, art 5(1)(d). This is similar to Article 6 of the *CISG*. Compare to ‘opt-in’ discussed at pages 9 and 10 below.

<sup>55</sup> In arbitration, the formalities of the New York Convention apply to the initial arbitration agreement, not the award proper. And as stated earlier, no prior agreement to mediate is necessary.

by the parties. In this regard, Article 4.2 reflects modern practice by allowing the ‘signature’ to be in an electronic format.<sup>56</sup> This also supports the growing practice of ODR or on-line dispute resolution.

Article 1.1 of the Convention stipulates that it applies to agreements ‘resulting from mediation’. Determining what evidence could prove that the settlement agreement resulted from mediation was more problematic. Fortunately, a compromise was found offering a palette of alternative options in Article 4.1(b) to establish such proof.<sup>57</sup> They are: (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) other acceptable evidence if none of the above are available.

In many countries, mediators do not and will not sign the parties’ settlement agreement, even if they assist with the drafting or act as a ‘scribe’.<sup>58</sup> Ethical rules preclude mediators from doing this in some jurisdictions and the potential risk of liability and removal of mediator immunity are further deterrents in others.

A better and less problematic option is for the mediator to provide a document stating that the mediation took place. For institutional mediation, a document from the administering institution certifying the mediation took place is an equivalent and preferable option. As for acceptable evidence, an agreement to mediate along with other documents, such as proof that the mediator was paid, can be used to demonstrate that the mediation took place.<sup>59</sup>

Guidelines to assist mediators and parties with these obligations would be welcome. However, providing a standardized form for the document was discussed but not agreed.<sup>60</sup>

## The Five Issues in the Compromise Package that Sealed the Deal

As stated above, the compromise package leading to the adoption of the Convention included five issues, namely: (a) the legal effect of settlement agreements; (b) settlement agreements concluded in the course of judicial or arbitral proceedings; (c) declarations on opt-in by the parties; (d) the impact of the conciliation

---

<sup>56</sup> This provision was included based on the adoption by UNCITRAL of the Model Law on Electronic Commerce and the Model Law on Electronic Signatures. See Rajesh Sharma, ‘The Singapore Convention and Its Impact on Domestic Courts’ (2019) 1(2) *Asian Pacific Mediation Journal* 1, 5-6.

<sup>57</sup> Schnabel, above n 19, 30. Some states that wanted evidence to be required only if a party disputed that the settlement was mediated and others one specific form of evidence (*i.e.*, the mediator’s signature) to be required in all cases.

<sup>58</sup> This is true even where a mediator’s proposal may be used.

<sup>59</sup> Such documents used in an Australian deliberation were considered to be acceptable as other evidence. Rajesh Sharma, above 55, 4-5.

<sup>60</sup> Schnabel, above n 19, 31.

process and of the conduct of conciliators on the enforcement procedure; and (e) the form of the instrument.<sup>61</sup>

Each of these issues will be discussed separately.

## The Legal Effect of Settlement Agreements

The first issue in the compromise package was whether the concept of recognition as well as enforcement should be included as in the New York Convention.

At first glance, this may appear to be a question of terminology. However, recognition differs widely in substance and form across jurisdictions, which is why its inclusion was ultimately avoided in favour of a more creative, functional approach.<sup>62</sup>

The functional approach incorporates the desired legal effect of both concepts: a settlement agreement can be enforced pursuant to Article 3.1 of the Convention, and thereby used as a “sword”<sup>63</sup> or invoked under Article 3.2, which provides a “shield”.<sup>64</sup> The term relief is also used in Article 5 “to encompass both enforcement and that-which-is-not-called recognition”.<sup>65</sup>

A number of the grounds for refusing enforcement or ‘relief’ set out in Article 5 are similar to those in the New York Convention. One of the key differences, related to mediator misconduct, will be addressed hereafter.

Thus, Article 5.1(a) through 5.1(d) enables a competent authority to refuse to grant relief or enforcement based on the incapacity of a party, a settlement agreement that is null, inoperative or incapable of being performed, or is not binding, final or has been subsequently modified. By limiting the defences to enforcement, the Convention affords parties the finality that is paramount for extra-judicial dispute resolution. Additional grounds are if a party’s obligations have already been performed, the terms of the settlement agreement are not clear or comprehensible<sup>66</sup> or if enforcement would be contrary to said terms.

---

<sup>61</sup> Morris-Sharma, above n 35, 497-498 [28].

<sup>62</sup> Schnabel, above n 19, 37.

<sup>63</sup> Morris-Sharma, above n 35, 500-501 [35].

<sup>64</sup> Ibid 503 [40].

<sup>65</sup> Schnabel, above n 19, 38.

<sup>66</sup> In an example from a recent Australian case, *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80, Sauber contended that the decision in the arbitral award, couched in the negative, was not sufficiently precise to be confirmed as a court judgment. The claim was rejected, and the decision upheld on appeal.

Article 5.2 closes this exhaustive list, with the public policy exception and what I have termed as ‘mediability’,<sup>67</sup> that is, the subject matter of the dispute is not capable of settlement by mediation under law.

Finally, Article 3.2 enables a party to invoke a settlement agreement as a defence or shield against a claim to prove that the elements of the claim have been resolved. The conditions for reliance on the settlement agreement as a defence against a claim or for its enforcement are found in Article 4.<sup>68</sup>

### **Settlement Agreements Concluded in the Course of Judicial or Arbitral Proceedings**

The second issue seems to have been the least controversial, insofar as the two-fold aim of the Convention is to close the gap in the enforcement landscape by providing the third piece of the enforcement puzzle — an independent instrument for the enforcement of agreements resulting from mediation - and to avoid overlap with the existing instruments for the enforcement of arbitral awards and judgments.<sup>69</sup>

To achieve this, Article 1.3(a) provides a carve-out for agreements that are approved by or concluded in the course of proceedings before, a court, *and* are enforceable as a judgment. For its part, sub-paragraph (b) excludes those enforceable as an arbitral award. This is a particular important exclusion, as, up until now, one of the principal means of enforcing international settlement agreements has been to convert them into arbitral awards.<sup>70</sup>

The requirement with respect to judgments is nuanced to avoid a situation whereby a settlement agreement is cannot be enforced as a judgment nor in and of itself. So, for example, if a neutral other than the judge (and ostensibly even a different magistrate or referee) successfully mediates an international dispute during the course of litigation,<sup>71</sup> the settlement will be enforceable, as long as it is not converted into a judgment.

Likewise, a settlement may not be reached during mediation, but after continued negotiations between the parties post-mediation. In some cases, the mediator may have helped the parties to narrow or better understand the issues in dispute, but they only settle later on. The Convention would still apply, as the

---

<sup>67</sup> A term that may be used as a concept akin to arbitrability, coined by the author of this article.

<sup>68</sup> See pages 7 and 8 above for a discussion on these conditions.

<sup>69</sup> *The New York Convention* and *the Hague Conventions*. Clearly, Article 1.3 (a) and (b) are intended to prevent parties from getting ‘two bites of the apple’.

<sup>70</sup> As described on pages 2 and 3 above.

<sup>71</sup> Schnabel, above n 19, 17.

definition of ‘resulting from mediation’ is broad enough to cover these instances and ensure there is no gap in enforcement of the outcome of international disputes, irrespective of the form.<sup>72</sup>

### **Declaration by States Requiring Parties to Opt-in to the Convention**

The third issue reflects a compromise on a more controversial question requiring, in some circumstances, parties to ‘opt in’ to the Convention. It differs from the opt-out provisions in the Convention open to parties and to states for their instrumentalities, which are more common in international treaties.

On the contrary, Article 8(1)(b) allows a state to declare that the Convention will only apply if the actual *parties* to the settlement agreement have agreed to its application or ‘opted-in’. Thus, to avail themselves of the Convention’s protections, the parties must affirmatively choose to have it apply.<sup>73</sup>

An opt-out approach would have been the better choice. Article 8(1)(b) might make mediation less attractive than arbitration, as it requires parties to be aware of declarations made by any states that could be called upon to enforce the settlement agreement. However, giving states the option to apply the opposite rule by requiring disputing parties to opt into the Convention’s application—was part of the five-issue compromise.<sup>74</sup>

Although it has been said that this requirement would raise awareness of the question of enforceability for parties,<sup>75</sup> it could also lead to confusion and enable a more sophisticated party to avoid enforcement. Thankfully, these concerns are attenuated by the fact that the default position is that the Convention applies to all mediated settlements unless a state makes a reservation under Article 8(1)(b). It is only in that case that the parties themselves must opt-in. And even with an opt-out option, as with Article 6 the CISG, there is a risk that practitioners reject that with which they are not familiar rather than research what approach may be in their client’s best interest.

And although parties may ‘opt-in’ prior to mediation or settlement either in their contract or agreement to mediate,<sup>76</sup> there are still risks. The prevalence of pathological clauses in arbitration should serve as a

---

<sup>72</sup> And provide, of course, none of the grounds for refusal are applicable.

<sup>73</sup> Schnabel, above n 19, 56.

<sup>74</sup> See, Ibid 56-57.

<sup>75</sup> Morris-Sharma, above n 35, 508 [51].

<sup>76</sup> Schnabel, above n 19, 58.

cautionary tale.<sup>77</sup> For this reason, their intention should be clear and expressed in writing, irrespective of timing.

To a certain extent these options, whether with respect to opting in or out, impose an additional obligation on practitioners and mediators to be aware of such choices made not only by parties, but especially by states. Hopefully, conferences and training on the Convention will help to achieve this and, more importantly, this declaration will not be used too often.

### **The Impact of the Mediation and the Mediator's Conduct on Enforcement**

Grounds for refusing to grant relief related to mediator misconduct was the fourth issue in the package and another tough one to resolve.

In addition to the grounds previously discussed, Article 5.1(e) and (f) offer two further reasons for refusing relief, namely a serious breach of standards by the mediator and the failure by the mediator to disclose to the parties any circumstances that may raise justifiable doubts as to the mediator's impartiality or independence. Significantly, to succeed on either of these grounds, it must be proven that the breach or failure had a material impact or undue influence on a party. Hence, in each of these two circumstances, enforcement will only be denied if without the breach or failure, a party would not have entered into the settlement agreement.

The standard is high, as a causal relationship must be affirmatively established, with the onus on the party opposing enforcement to prove that there has been mediator misconduct and that, but for the mediator's misconduct, the party would not have entered into the settlement agreement.<sup>78</sup>

While there were concerns this could create more litigation, particularly with such grounds cemented in the Convention,<sup>79</sup> at the end of the day, the focus was primarily on the conduct of the parties and the direct impact on them.<sup>80</sup>

Even though all mediators should be aware of their ethical responsibilities, guidelines similar to those of the IBA on conflicts of interest for arbitrators or the IMI Code of Professional Conduct that deals more

---

<sup>77</sup> See Donna Ross, 'Beware the Champagne Clause: When the Effervescence Fades, It May Just Be Pathological' (2019) 20 *Australian Disputes Centre Bulletin* <<https://www.disputescentre.com.au/beware-the-champagne-clause/>>.

<sup>78</sup> Schnabel, above n 19, 53. See also *Tapoohi v Lewenberg (No 2)* [2003] VSC 410 for an Australian case in which a mediator's liability and the validity of a settlement agreement were invoked on the grounds he had coerced a party to settle.

<sup>79</sup> In arbitration, it is the applicable arbitration act, institutional rules, the UNCITRAL Model Law on International Commercial Arbitration or 'soft law' that govern challenges and not the *New York Convention*.

<sup>80</sup> See Morris-Sharma, above n 35, 513-514 [61].

specifically with mediation,<sup>81</sup> would be of assistance to mediators, parties and their legal representatives involved in international contracts and disputes.

### **The Form of the Instrument: Convention, Model Law or Both?**

The fifth and final issue in the compromise package was the form of the instrument.

To those of us familiar with the New York Convention, it seemed self-evident the same approach that has proved itself successful for arbitration for over half a century should be adopted for mediation, and surprising that some delegations had reservations about a convention. Apparently, these states had less experience in international mediation and believed a convention was premature.<sup>82</sup> Yet that was also the case for arbitration when the New York Convention was first adopted.

Developing a model law, even with an enforcement mechanism, would have fallen short of the goal of putting mediation on an equal footing with litigation and arbitration as a means of resolving international disputes. If a model law alone had been sufficient, the 2002 Model Law on International Commercial Conciliation would have been more successful.

Other delegations understood that a binding international convention would pave the way for the certainty of enforcement required by parties to use mediation in international disputes and promote mediation as a full-fledged form of dispute resolution.<sup>83</sup> The spirit of compromise and building of trust — mediation skills in themselves - led to the decision to develop the Convention in parallel, or ‘simultaneously’ with an amended and updated Model Law.<sup>84</sup>

In this way, parties have the option of signing the Singapore Convention or adopting the Amended Model Law simultaneously or consecutively. Adopting the Model Law first may enable some states to implement its enforcement provisions domestically and then take the next step of acceding to the Convention.<sup>85</sup>

The provisions of the Convention and the Model Law mirror each other. Both are designed to be used as standalone instruments. However, even though the Model Law does provide for enforceability, a Convention is preferable, especially in the long run as to ensure certainty and clarity.

---

<sup>81</sup> International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (adopted 23 October 2014), International Mediation Institute, *Code of Professional Conduct* <<https://www.imimediation.org/practitioners/code-professional-conduct/>>.

<sup>82</sup> See Morris-Sharma, above n 35, 516 [68]; Even in Australia, a model law seemed to be the preferred choice of some. This was also discussed at the Canberra inter-sessional meeting.

<sup>83</sup> *Ibid* [69].

<sup>84</sup> *Ibid* 517 [72].

<sup>85</sup> *Ibid* 515 [65]. Neither UNCITRAL nor the UN General Assembly has expressed a preference as to which instrument should be adopted.

The Model Law, like its counterpart on arbitration, affords additional procedural guidance on matters such as appointment, conduct of the mediation, confidentiality and admissibility and the mediator acting as arbitrator. States with a less robust mediation legal framework can implement it in parallel or as a first step to pave the way for adoption of the Convention.

## Where Do We Go From Here? The Next Steps

As PM Lee stated at the signing ceremony, the work does not stop here. He also affirmed Singapore's long-term commitment to ensure that the Convention will enter into force,<sup>86</sup> which required ratification by three signatories.<sup>87</sup> Singapore took the first step in January 2020, when the Ministry of Law tabled the Singapore Convention on Mediation Bill 2020,<sup>88</sup> And true to PM Lee's promise, it has ratified the Convention along with Fiji and thereafter Qatar. With three ratifications, the Singapore Convention will enter into force in September 2020, just over a after the Signing ceremony.

While this is welcome news, more signatories need to accelerate ratification in their countries and those who have not yet signed join this global effort so that commercial parties will be able to use mediation as a means of resolving cross-border disputes with certainty of enforceability the word over.

Australia is recognised as a mediation-friendly jurisdiction for domestic disputes and has long been involved with the work of UNCITRAL, including through UNCCA, the first National Coordination Committee of its kind. Australia now needs to step up to the plate, join the list of signatory countries and set an example for others. Given the extensive business relationships between Australian companies and their commercial partners in the region, being able to resolve those disputes that inevitably arise in a more cost-effective manner, while preserving relationships, within the framework of an instrument that affords certainty in enforceability is not only desirable, but necessary.

Moreover, our profession has a role to play as PM Lee relevantly highlighted in his address: "We must make sure we have the mediators, both local and international, and we have the lawyers who are capable of handling mediation and advising parties and be actively involved."<sup>89</sup>

In conclusion, it is hopeful that all involved will take full advantage of the present momentum and we will see the Singapore Convention promote the use of cross-border mediation. This is even more vital in today's

---

<sup>86</sup> PM Lee Hsien Loong, above n 11.

<sup>87</sup> *Singapore Convention*, art 14.

<sup>88</sup> See Singapore Ministry of Law, 'Singapore Prepares To Be Among The First Countries To Ratify The Singapore Convention On Mediation' (Press Release, 6 January 2020) < <https://www.mlaw.gov.sg/news/press-releases/singapore-prepares-to-be-among-the-first-countries-to-ratify-the-singapore-convention-on-mediation>>.

<sup>89</sup> PM Lee Hsien Loong, above n 11.



## **RESOLUTION INSTITUTE MARCH 2020**

times when companies, from multinationals to mom-and-pop outfits, will have to deal with disputes arising from the loss of business due to measures taken to impede the spread of Covid-19. Mediation, including on-line mediation, will be the choice means of resolving these disputes both nationally and internationally.