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MANAGING EDITOR'S NOTE

It is with great enthusiasm that we are now entering the second year of publication of the Asia Pacific Mediation Journal (APMJ)! As a testament to our rapid success, in fact, we now have an editorial board of nearly a dozen academics and legal practitioners from various parts of the Asia Pacific Region, as well as an even more diverse advisory board of renowned academics and practitioners from Asia, Australia, North America and Europe. It is with deep gratitude that we acknowledge the contributions of these individuals to the growing success of the APMJ, and we also are humbled by the considerable interest and support extended to us by many more persons and institutions and, of course, our rapidly increasing number of readers.

Perhaps at the top of our list of those to whom we owe our deepest appreciation are the many authors who have submitted their valuable work for us to consider and publish in last year's Volume 1 and this year's Volume 2 of the APMJ. With the signing in Singapore last August of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"), we have entered a new era in the use of international mediation as a method for amicably settling international commercial disputes. As we enter this new era, we are privileged to have articles in this issue of the APMJ written by authors from not only Asia Pacific but also the EU and Central North Africa, who have been for many years at the forefront of international commercial mediation in their respective jurisdictions and beyond.

Setting the scene regarding the scope and application of the Singapore Convention and why it was needed, we lead this issue with an introductory article by Hong Kong based mediator **Danny McFadden**, who has been a Director of the Centre for Effective Dispute Resolution (CEDR) since 2004 and is the Managing Director of CEDR Asia Pacific. Following on that introduction, professional commercial mediator and mediation trainer **Giovanni Matteucci** then provides a more in-depth discussion of where the Singapore Convention fits in the landscape of international commercial mediation (and whether it is even needed); and,

importantly, Matteucci addresses some of the concerns that are being raised as arguably arbitration becomes the new litigation and, in turn, mediation may become the new arbitration with some of the same techniques simply being transferred (and, as some fear, greater "lawyerization of mediation"). As Matteucci reminds us, "adequate knowledge is the basis for every activity": qualified training, of course, is important to the success of international commercial mediation. The remaining articles provide valuable overviews of the development and future of commercial mediation, especially as it may impact the Belt and Road Initiatives (Assistant Professor **Carrie Shu Shang** and ADR specialist lawyer **Ziyi Huang**); the development of mediation, and the need for effective enforcement of settlement agreements, in Russia (Associate Professor and Vice-Chairman of the Panel of Mediators at the Russian Chamber of Commerce and Industry, **Dmitry Davydenko**); the unique cultural specificities in which amicable settlements have evolved – and the diverse paths of the revival of mediation – in the Central North African Countries of Algeria, Morocco and Tunisia (Assistant Professor **Salma Ben Ayed**); a very interesting look at the conspicuous absence of the EU and all its Member States from the signatories to the Singapore Convention, whether this will diminish the global impact of the Convention, and the current state of the art of mediation in Italy and the EU notwithstanding the slow path to their signing the Convention (IMI-Certified Mediator and lawyer **Francesca Francese**); and finally, an insider's perspective on last year's new mediation law in Greece, the struggles to achieve support for the law in the face of such strong criticism as meditation being contrary to Greek culture, and how the new law will be applied (mediator and lawyer **Olga Tsiptse**).

We anticipate you will enjoy reading these wonderful articles and gain as much valuable insight from them as we did!

Andrew White
Managing Editor

About the Korean Society of Mediation Studies

The Korean Society of Mediation Studies is Korea's foremost scholarly and professional association of academics, lawyers, mediation practitioners, and research scholars dedicated to the development of mediation in Korea.

ASIA PACIFIC MEDIATION JOURNAL

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THE SINGAPORE CONVENTION [*]

DANNY MCFADDEN[**]

With much fanfare and high expectations in some quarters, *"a game changer" "mediation will now have teeth"*[1], on the 7thAugust 2019 at the official signing ceremony in Singapore the United Nations Convention on International Settlement Agreements Resulting from Mediation (Convention), was signed by 46 States (now 51), including the US, Singapore, China, India, Malaysia, the Philippines and South Korea, The Convention will enter into force 6 months after 3 States have acceded or ratified the Convention. Currently Singapore is the only country that has ratified the Convention but others are expected to follow.

The creation of an enforcement mechanism for international mediation, similar to arbitration's New York Convention, has been discussed at mediation conferences and other forums for many years. Consequently 5 years ago the United Nations Commission on International Trade Law's (UNCITRAL) began investigating ways to enhance enforcement. The UN states that the reason it supported the Convention was because it:

Recognized the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations

Was convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations.[2]

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[*] Please note parts of this article were previously published by the American Bar Association, International Committee in November 2019.

[**] Director of the Centre for Effective Dispute Resolution (CEDR), Solicitor

[1] George Lim, Chairman of the Singapore International Mediation Centre, (SIMC)

[2] Article 5 Grounds for refusing to grant relief.

I. BACKGROUND

Currently in most jurisdictions if parties enter into a settlement agreement (Agreement) following mediation the Agreement document is in effect a contract. So generally there is no difference between a normal contract and such an Agreement in terms of legal enforceability. Should any signatory not honor the Agreement's terms then the other parties may take the recalcitrant party to court to enforce the Agreement. The court will then focus on the interpretation of the terms of the mediation Agreement instead of rehearing once again the complete background and the nature of the original dispute, thus saving time and legal costs.

II. NEED FOR THE CONVENTION

In many jurisdictions some might ask "What problem is the Singapore Convention trying to solve?" This is simply because in countries like the US, UK and Australia in domestic mediation cases noncompliance with a mediation settlement agreement is rarely a problem. The parties reach the negotiated settlement voluntarily, they feel they have spent time and money in a tough but good faith negotiation arriving at a solution both parties can claim ownership of and live with commercially. It is in neither party's interest to not honor the Agreement. Thus the vast majority of domestic commercial mediation cases even those involving an overseas party have no problems around voluntary self-enforcement.

However enforcement is more complex for cross-border settlement agreements in other jurisdictions. One problem is that parties may agree to mediation and court proceedings in one jurisdiction but the mediation settlement agreement or the court's judgment may need to be enforced in another country where, for example, assets are located. So this can be a disadvantage because in the absence of a universally recognized enforcement mechanism, the agreement is not internationally binding.

Another problem is that in countries where parties experience or fear non-compliance with mediation settlements, there is very little faith in an agreement which can only be enforced as a new

contract.[3] In Asia parties often raise the issue of the effective enforcement of mediation settlement agreements.[4] Parties fear that mediation will only add extra costs and could be used as a delaying tactic by the other side.

So in Asian countries like Japan, China and Korea a judicial confirmation of the enforceability of the mediation agreement is likely to be highly valued. Some commentators believe that this is one of the Conventions great strengths:

- "The Singapore Convention lends mediation the regulatory legitimacy needed to become a major player in international dispute resolution practice.[5]
- "Just the existence of a global enforcement regime will go a long way to reassuring parties less familiar with the process that it's a reliable dispute resolution option, which courts around the world will recognize."[6]

III. SCOPE AND APPLICATION OF THE CONVENTION

The Convention applies to 'international' settlement agreements resulting from mediation which have been concluded in writing by the parties. It is considered 'international' if either:

- at least two parties to the settlement agreement have their places of business in different countries; or
- the country to which the settlement agreement is closely connected to, or to be performed, is different from the respective parties' places of business.

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[3] Danny McFadden, "Mediation in Greater China; The new frontier for commercial mediation" Kluwer Law, Hong Kong, 2013, p.200.

[4] Richard Wigley and Xu Jing King and Wood, "Supreme People's Court provides a Guideline Case for Court Enforcement of Settlement Agreements", China Law Insight, 25 April 2012, https://www.chinalawinsight.com/2012/04/articles/dispute-resolution.

[5] Nadja Alexander and Shouyu Chong, "The New UN Convention on Mediation (aka the 'Singapore Convention') – Why it's Important for Hong Kong" Hong Kong Lawyer April 2019

[6] Jan O'Neill, Herbert Smiths, quoted in article by Bruce Love, Financial Times, August 5, 2019.

The Convention excludes settlement agreements which:

- have been concluded or approved in the course of a court proceeding;
- are enforceable as a judgement; or
- are enforceable as an arbitral award; or
- apply to settlement agreements concluded for personal, family or household purposes, or relating to family, inheritance or employment law.

These exclusions are to prevent parties from forum shopping and potentially trying to have two bites of the same apple.

DEFINITION OF MEDIATION

Mediation is defined very broadly to allow for the fact that there are differences in mediation models worldwide:

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute."[7]

Such a broad almost generic definition, should make it easier for jurisdictions; where the mediation process maybe given another name such as conciliation and where the mediator uses a model which might be regarded as evaluative rather than facilitative, to embrace the Convention.

It is worth noting that unlike arbitration there is no requirement for a 'seat' so this allows parties to self-regulate using the laws and rules that they have chosen. This is intended to promote party autonomy and flexibility.

[7] Article 2 Definitions, United Nations A/RES/73/198 General Assembly Distr.: General 11 January 2019,18-22460 (E) 150119 *1822460*, Seventy-third session, Agenda item 80,Resolution adopted by the General Assembly on 20 December 2018.

IV. Mode of Enforcement

The Convention does not prescribe the mode of enforcement, but leaves it to each Contracting State to do so "in accordance with its rules of procedure and under the conditions laid down in this Convention"

It remains to be seen how national courts will respond to applications for enforcement of international settlement agreements, if for example, the agreements are inconsistent with domestic practices in the Enforcement State. Also in some countries mediation isn't fully integrated into the domestic legal system. For any country in this situation it is not enough simply to sign the Convention, a signing State would require a supporting legal platform to implement it. If the State has no domestic equivalent framework for regulating mediation and enforcing the mediated settlements in their legal system they could adopt UNCITRAL's Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ("Model Law") as the legal basis for their domestic meditation.

The Model Law was developed by UNCITRAL's Working Group II simultaneously with the Convention, in order to specify the procedural requirements for mediation. So in effect it is an off the shelf Act which could serve as the basis of a domestic legal platform for the operation of mediation and enforcement of the mediated settlement agreements. Hopefully this will make it easier and faster for most countries to pass a domestic framework supporting the Convention.

V. Convention Enforcement Requirements [8] Article 4:[9]

4 (i) (a) A party relying on a settlement agreement under the Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

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

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

[8] Article 4 Requirements for reliance on settlement agreements.
[9] Ibid.

(ii) A document signed by the mediator indicating that the mediation was carried out;
(iii) An attestation by the institution that administered the mediation; or
(iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

This requirement for the authentication of a mediation settlement agreement is alien territory for most commercial mediators. Potentially problematical is the requirement for the mediator's signature to be on the settlement agreement. As Philips points out in the US:

"Many mediators conscientiously refuse to sign a settlement agreement. Most American mediators neither follow the practice that, consistent with their mediation agreements providing that they not be subpoenaed as a witness, they draft nor execute any written memorial that may be interpreted as witnesses its execution or – even worse – including them as a party to the rights and obligations set forth therein."[10]

The UK and Hong Kong, for example, follow US practice, in commercial cases it is the responsibility of the parties' lawyers to draft the final settlement agreement and for the parties or their legal representatives sign it. Mediators do not sign because they are not a party to the agreement, merely neutrals that facilitate the parties to reach settlement. So it is possible in the future some mediators may refuse to take a case because they do not intend to sign or the parties may have to accept the risk that the settlement agreement may not pass the Article 4 enforcement requirements.

That is of course if the only acceptable evidence required is the mediator's signature. If the enforcing authority is happy to accept other evidence such as the administering organisation confirming the mediation was carried out then the mediator's signature is not needed. It is submitted that many institution would be comfortable, if they have all parties' consent, with advising an enforcing authority that the mediation took place and that they acted as the administrating body. Furthermore 4 (b) (iv) gives the competent

[10] Peter Phillips," Concerns on the New Singapore Convention", Online Mediators Dotcom, October 2018 https://www.mediate.com/articles/phillips-concerns-singapore.cfm

authority a wide discretion as to what it will accept as evidence and one would hope that this will be used proactively.

VI. GROUNDS FOR REFUSING TO GRANT RELIEF

The relevant authority may refuse enforcement in limited circumstances, these include if the Agreement:[11] Article 5:

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

In practice, it is not always possible to finalize a settlement agreement at or immediately or shortly after the conclusion of mediation, particularly if the dispute is extremely complex. Therefore potentially enforcing a non-standard or 'unusual' mediation outcome may be problematic.

(iii) Has been subsequently modified;

Some practical issues may have to be addressed regarding subsequent modification of the agreement. What if both parties realize that circumstances have changed or a slight amendment to the agreement would be in both parties interests? If both parties agree to modify the terms of the agreement before it is submitted for enforcement should that be a problem?

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

The grounds for refusing to grant enforcement are generally uncontroversial, for example, if a party was under some incapacity.

However refusing enforcement on the grounds that there has been a serious breach by the mediator of standards applicable to the mediator could create uncertainty. The problem is that

[11] Article 5 Grounds for refusing to grant relief.

currently internationally there is no collective agreement as to what 'mediation standards' are, this could pave the way for legal arguments about 'standards'.[12] Also the Convention does not define what constitutes a 'serious breach' of standards.

So there is the possibility that after mediation one party suffering from buyer's remorse[13] might ask their legal advisers to try to find a possible way to get them out of the agreement. Taking a cynical view some lawyers may decide that if no other grounds exit then 'let's attack the mediator 'on mediator standards grounds. This could result in time wasting challenges to mediation settlement agreements and the danger of the lawyerisation of dispute resolution.

VII. THE UK AND THE EUROPEAN UNION HAVE NOT YET SIGNED

At the signing ceremony the Singapore Minister for Law explained that the reason for the European Union not signing was because it needs to determine whether it has to sign the treaty as a whole, or if its member states should sign it individually.

Given the ongoing Brexit discussions, it is likely that the United Kingdom will wait until after the Brexit arrangements are finalised before considering signing. Initially the EU was in favour of a softer instrument rather than a full Convention but later EU representatives participated fully in the Convention drafting meetings

VIII. CONCLUSION

Overall the response to the Convention has been very positive and many believe it is destined to impact all areas of dispute resolution including litigation and arbitration. The ultimate

[12] On a country by country basis, generally accepted mediator standards do exist, for example, the US has the Uniform Mediation Act; Model Standards of Conduct for Mediators (Model Standards) which were adopted in August 2005 by the American Bar Association (ABA) and the American Arbitration Association (AAA). In the UK courts would likely look to the Mediator Standards and Code of Conduct of the Centre for Effective Dispute Resolution (CEDR) which is the leading authoritative mediation organisation in that jurisdiction.

[13] Wikipedia, Buyer's remorse is the sense of regret after having made a purchase.

success of the Convention will of course depend on the extent to which it is accepted and ratified by States. Expectations will have to be managed, mediation industry bodies like CEDR and JAMS have rightly cautioned that although the Convention should lead to a gradual increase in cross border mediation cases it will not a be flood,[14] [15] It is hoped that in countries unfamiliar with modern mediation practice, especially those which currently prefer an authority backed approach to dispute resolution outcomes, having the support of an international Convention will provide some assurance. Internationally it is anticipated the Convention will raise commercial mediation's profile and status.[16]

[14] JAMS, "Singapore Convention Brings Big Changes for Litigators and Arbitrators", https://www.jdsupra.com/legalnews/singapore-convention-brings-big-changes-88709/

[15] James South, "Singapore Convention a Mediation Milestone", 29 July 2019 https://www.cedr.com/articles/?item=The-Singapore-Convention-a-mediation-milestone

[16] E.g. Hong Kong Practice Direction 31, 2010 and Australia The Civil Dispute Resolution Act 2011 (Cth).

ENFORCEABILITY OF INTERNATIONAL COMMERCIAL MEDIATION AGREEMENTS, THE SINGAPORE CONVENTION

GIOVANNI MATTEUCCI[*]

ABSTRACT

*The United Nations Convention on International Settlement Agreements Resulting from Mediation (better known as the Singapore Convention on Mediation - **SCM**), undersigned in Singapore on 7.8.2019, reads as follows:* "Each party to the Convention shall enforce a settlement agreement in accordance with its rule of procedure and under the conditions laid down in this Convention". *This is the most important innovation in the **SCM**, which will bring benefits (and, at the beginning, many more problems to be solved) to international commercial mediation.*

*The **SMC** has received a high degree of support (46 signatory Countries on 7.8.2019 and another 5 on 27.9.2019) and a big, so far new, player will be critical: China and its BRI project. Therefore, it is likely to portend a global rise of the number of mediation proceedings, a widespread use of the Online Dispute Resolution process (likely connected with blockchain and smart contracts) and a reshuffle of mixed ADR.*

But mediation is not the panacea *of dispute resolution -- enforceability may be* a chimera *-- and **SCM** is not the panacea of international commercial mediation. It will not be easy to realize a common standard of conduct for mediators and mediation proceedings, given the huge differences in cultures and in ADR techniques in different states (and continents). Most lawyers will shift from arbitration to mediation, just using the same techniques. Enforceability could change the real nature of mediation, making it adversarial.*

*The main fear is the "*lawyerization*" of mediation: proceedings "*will last longer, … will become more costly … and success rates will drop substantially*". This is just what happened in Italy, because of an insufficient basic training (only 50 hours) and the introduction in 2013 of the compulsory assistance of lawyers to the parties in mediation. The Italian experience could be instructive on how to avoid these problems.*

[*] JD, B&ED, Diploma in Economics, IAPMMHJMC, professional commercial mediator and trainer in mediation;advisor in small/medium firm financial crisis prevention; giovannimatteucci@alice.it

A lot of work will be necessary, mainly based on high qualified training.

Key words - ADR, mediation, arbitration, dispute resolution, agreement, commercial, international, enforcement, international commercial mediation agreement enforceability, cross-border, mediation standard, BRI, Belt Road Initiative, Singapore.

I. THE SINGAPORE CONVENTION ON MEDIATION - SCM

There are four alternatives to manage conflicts: negotiation, mediation, arbitration, and litigation. In negotiation, the conflicting parties try to find a solution by themselves. In mediation, a neutral third party facilitates the communication between / among the disputing parties, but does not have the power to impose a solution. In arbitration, a private judge, chosen by the conflicting parties, finds and imposes a solution. In litigation, a public court finds and imposes a solution.[1]

There is a problem in international disputes: the enforceability of the solution. In other words, how to compel the other party to comply? A judgment of a court, which is usually enforceable in the Country in which it was issued, may not be recognised in another State; it is significantly more difficult in relation to an agreement reached between / among private parties.

The rules for the recognition and enforcement of a foreign judgment in civil and commercial matters of international litigation are laid down by the Hague Convention.[2]

The rules for international arbitration are written in the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (better known as *The New York Convention*), signed in New York in 1958[3], and in the *Uncitral*

[1] SIDRA (Singapore International Dispute Resolution Academy), International Dispute Resolution Survey: Currents of Change 2019, Preliminary Report, 23.9.2019, at https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf

[2] Hague Choice of Court Convention at https://www.hcch.net/en/states/hcch-members .

[3] UN, The New York Arbitration Convention, 1958, art. 1 - *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of*

Model Law on International Commercial Arbitration[4], approved in 1985. Initially, there were only 10 signatories to the New York Convention (by the time the convention came into force there were 24 signatories)[5] and it took time for it to take-off.[6] Later, international arbitration gained momentum, and in September of 2019 there were 161 signatory States. The main reasons for the success were the confidentiality and flexibility of arbitration, the underlying nature of the arbitration proceeding (inherent in the training and activity of lawyers) and the enforceability of the arbitration awards.

The *Conciliation Rules* were approved in 1980[7] and the *Model Law on International Commercial Conciliation* in 2002 [8] (amended in 2018)[9] by UNICTRAL.

Arbitration has played the leading role in out-of-court international commercial solutions, but over time it has become

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such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", at http://www.newyorkconvention.org/english

[4] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

[5] UN, New York Arbitration Convention, contracting States, at http://www.newyorkconvention.org/list+of+contracting+states

[6] Bruce Love – *"Matthew Skinner, partner at law firm Jones Day in Singapore, notes that the New York Convention's value in establishing the legitimacy of arbitration was not realised for decades. 'It was a slow burn,' he says*", in 'New UN Singapore Convention drives shift to mediation of trade disputes', Financial Times 5.9.2019, at https://www.ft.com/content/6e1df030-9e6f-11e9-9c06-a4640c9feebb

[7] UNCITRAL Conciliation Rules 1980, Art. 1 –" *(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply. (2) The parties may agree to exclude or vary any of these Rules at any time. (3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails*", at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf

[8] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, at https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

[9] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCINTRAL Model law on International Commercial Conciliation, 2002), at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf

too expensive and too cumbersome to provide effective solutions (despite "*fast track*" proceedings).[10]

In disputes where "*time is money*" or it is necessary to have ongoing business relationships survive, the conciliation / mediation (the two words are almost interchangeable) procedures started to be used more often (even if they still have a long way to

[10] Goh Joon Seng - " … *25-Some of these points can be illustrated by reference to the famous, or perhaps more correctly, the notorious, arbitration concerning'The Solitaire'. The 'Solitaire arbitration' was, at least at that time, the largest maritime arbitration ever to take place in London. It spanned nearly a decade. The dispute itself arose when Allseas, a major offshore pipelay and subsea construction company, unilaterally terminated a $230 million shipbuilding contract two years after it had awarded the contract to a Singapore company, Sembawang Corporation ("SembCorp") in 1993, for the conversion of one of its bulk carriers, the 'Solitaire', into a pipe-laying vessel. Allseas alleged that SembCorp had failed to make adequate progress in carrying out the works while SembCorp counterclaimed that Allseas's termination of the shipbuilding contract was wrongful.*

26-Arbitrators were appointed in October 1996 and the arbitration hearings commenced in London in January 1997. By the conclusion of the first stage of the arbitration in 2002, by which time one arbitrator had resigned and another had passed away, nine awards concerning liability had been rendered following four major hearings, five minor hearings and four appeals to the English Commercial Court. Scores of lawyers and experts had been involved. A total of two million documents and 24,000 drawings had been referred to and parties incurred legal fees that amounted to tens of millions of pounds.

27-As the arbitration trudged along, with further applications to appeal to the English Commercial Court, the insurers withdrew cover for legal expenses after it was discovered that legal fees had accumulated to some £50 million for each party by July 2004. To put this in context, SembCorp's counterclaim at that point, of £56.3 million, was only slightly more than the legal fees it had incurred. Its counterclaims were heard in another tranche of hearings in 2005. In 2006, a decade after the commencement of an arbitration that must have exerted an immense toll on the parties including their senior management, the parties concluded a full and final settlement of all their disputes" in 'The future of maritime dispute resolution', Singapore Mediation Center, 23.10.2015, at http://www.mediation.com.sg/news-and-views/news-and-speeches/the-future-of-maritime-dispute-resolution/

Bruno Zeller and Leon Trakman - "*Already in 2008, Chief Justice of New South Wales James Spigelman stated in a speech: 'Arbitration is no longer fulfilling need of business customers for early and effective resolution of disputes. We are increasingly turning elesewhere to mediation and other forms of ADR*" in 'Mediation and arbitration: the process of enforcement*'* 2019, page 8, University of New South Wales Faculty of Law Reseach Series, at

http://www.austlii.edu.au/au/journals/UNSWLRS/2019/43.html

Daniel Pàez-Salgado and Natalia Zuleta - "*After 11 years and more than US$ 89 million in costs, an international tribunal rendered a final decision awarding damages in the* Perenco v. Ecuador saga" in 'Perenco v Ecuador : an example of a Lengthy, complex, multi-faced, hard fought and very expensive investment arbitration ?', Kluwer Arbitration Blog, 14.11.2019, at http://arbitrationblog.kluwerarbitration.com/2019/11/14/perenco-v-ecuador-an-example-of-a-lengthy-complex-multi-faceted-hard-fought-and-very-expensive-investment-arbitration/

go): they are confidential, very flexible, quick and cheap.[11] But until 7.8.2019, the enforceability of mediation agreements was not guaranteed.

In 2014, the UN Commission considered a proposal by the United States to undertake preparatory work for a convention on the enforceability of international conciliation settlement agreements.[12] On 20.12.2018, the United Nations General

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[11] Ricardo J. Cata - "*According to a 2010 chart on comparative costs between arbitration and mediation provided by the International Chamber of Commerce (ICC) … in US$25 million disputes … the average total costs of a commercial mediation represent less than five per-cent (5%) of the total average cost of an arbitration … and commercial mediations are usually concluded within two - three months*" in 'International commercial mediation: a supplement to international arbitration' UWWM 2015, at http://www.uww-adr.com/zupload/wp-content/uploads/2015/03/International-Mediation.pdf

Ai-Lien Chang : "*A trial can easily drag on for weeks and cost each party $100,000 or more in legal fees and hiring expert witnesses … and, after all that, the decision may not go your way. Mediation, on the other hand, usually costs less than $10,000 … . The conventional wisdom is that going to court is the lawyer's lifeline, but now the tide is turning. The reality is that the parties often cannot pay you the legal costs commensurate with the time and effort you put in. It is better to close the file and move on. … By going through mediation … people can achieve finality and peace by having control over the outcome rather than surrendering the decision to a judge*" in 'More choosing mediation over court' (Asiaone, 24.12.2013) at http://www.asiaone.com/singapore/more-choosing-mediation-over-court

Mrs Morris-Sharma chairperson of the UNCITRAL Working Group II of Dispute Settlement, 23.7.2018 : "*Cheaper not just because of the dispute resolution process itself, but a lot of the time today, the uncertainty of the outcome of a dispute resolution process is imputed in the costs upstream. So when you can ascertain with a bit more foresight how you think your dispute resolution process is going to go, it allows you to approach things with a lot more certainty. So that's one avenue of the costs savings*" in 'UN mediation treaty to be signed and named after Singapore in 2019', Channel News Asia 23.7.2018 at https://www.channelnewsasia.com/news/singapore/un-mediation-treaty-to-be-signed-in-and-named-after-singapore-10554862?cid=FBcna

Herman Verbist, *Current answers to the growing need for mediation as a method to settle international trade and investment diputes*, International Dispute Resolution Conference 17.4.2019, Hong Kong, at http://www.mediationcentre.org.hk/uploadfiles/News/Attachment/278/S1_4_Dr._Herman_VERBIST_PPT.pdf

Alfred Chan, *Satisfyng the increasing demands of high-quality international dispute resolution services*, International Dispute Resolution Conference 7.4.2019, Hong Kong, at http://www.mediationcentre.org.hk/uploadfiles/News/Attachment/278/S2_3_Mr._Alfred_CHAN_Ho_Man_PPT.pdf

[12] United Nations, General Assembly, 2.3.2018, at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/009/44/PDF/V1800944.pdf?OpenElement

Strong, S.I., *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and*

Assembly, seventy-third session, adopted resolution 73/199: "MODEL LAW *on International Commercial Mediation and International Settlement Agreements resulting from Mediation of the United Nations Commission on International Trade Law*", including "*consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation*".[13]

The Convention was signed in Singapore on 7.8.2019[14], and was named the Singapore Convention on Mediation (**SCM**). Forty-six countries signed it, including the United States, China, India, South Korea and Saudi Arabia. Russia, Japan[15] and the European Union[16] did not sign it. The **SCM** will enter into force six months after three States have ratified it.

Conciliation, 17.11.2014, University of Missouri School of Law Legal Studies Research Paper No. 2014-28, at
SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302
Strong, S.I., *Realizing Rationality: An Empirical Assessment of International Commercial Mediation* (24.2.2016). Washington and Lee Law Review, 2016 (Forthcoming); University of Missouri School of Law Legal Studies Research Paper No. 2016-07, at
SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737462

[13] United Nations, General Assembly, 3.1.2019, *Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation of the United Nations Commission on International Trade Law*, at https://undocs.org/en/A/RES/73/199

[14] The **SMC** official web https://www.singaporeconvention.org/index.html ; the UNCITRAL official web https://uncitral.un.org ; more material on the Singapore Convention in all 6 UN languages can be found at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements the status of the treaties table on the Singapore Convention UNCITRAL website at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

[15] Dmitry Davydenko, *Russia and the UNCITRAL instruments on enforcement of international commercial settlement agreements resulting from mediation*, in 'CIS Arbitration Forum', 6.6.2018 at http://www.cisarbitration.com/2018/06/06/russia-and-the-uncitral-instruments-on-enforcement-of-international-commercial-settlement-agreements/

Olivia Sommerville, *Singapore Convention Series – Strategies of China, Japan, Korea and Russia*, in Kluwer Mediation Blog, 16.9.2019, at http://mediationblog.kluwerarbitration.com/2019/09/16/singapore-convention-series-strategies-of-china-japan-korea-and-russia/

[16] Timothy Schnabel - Hostility of the EU to the SMC *' The only strong opposition to authorizing work on the topic came from the European Union and some of its member States. The European Union stated that it saw non evident need for harmonization on the topic and opined that finding agreement on a harmonized approach beyond the model law's decision to leave the issue of enforcement to domestic law was unrealistic*", in 'The Singapore Convention on Mediation: A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements' (27.8.2018). Schnabel also refers to the intervention of the European Union in Audio Recording: U.N. Comm'n on Int'l Trade, 48th Session

Given such a high degree of support for the **SCM**, it is reasonable to believe that Singapore and some other countries will be fairly quick to ratify the convention and it might come in force before the middle of 2020.

The **SCM** and the Model Law, together, provide an international regulatory framework that is a good reference for States interested in giving more efficiency to the solution of international trade disputes. A quick insight into the main principles in the **SCM**:

1- *international commercial mediation*

1.1. *mediation* - a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute (*article 2.3*);

1.2. *commercial disputes* – related to commercial trade and financial operations; they are excluded disputes where one of the parties is a consumer or an employee (they may have unequal bargaining power) or disputes related to personal, family or inheritance matter (*art. 1.2*);[17]

1.3. *international* - at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties of the settlement agreement have

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(United Nations 2015), 2.7.2015, 9:30 12:30. Quoted by Bruno Zeller, Leon Trakman, *Mediation and arbitration: the process of enforcement* (2019), University of New South Wales, Faculty of Law Reseach Series at http://www.austlii.edu.au/au/journals/UNSWLRS/2019/43.html , Uniform L. Rev., at https://doi.org/10.1093/ulr/unz020 page 7.

"*This attitude of the EU to a harmonized approach to mediation agreements is unsurprising. Indeed, Directive 2/EC of the European Parliament and the European Council of 21 may 2008 expressly disapproves of applying enforcement mechanism to mediation, other than as provided for under the domestic law of the enforcing State"*.

Stanley Satire – "*Beyond specific excluded areas of law, the Convention also excludes settlement agreements that have been approved by a court and are enforceable as a judgment in the State of that court. Though this type of situation will most likely be rare, it was a significant issue for the European Union during negotiations preceding the final Convention draft. The EU was concerned with possible overlap of the Singapore Convention and the Hague choice of court convention (formally known as the Convention of 30 June 2005 on Choice of Court Agreements). Although this exclusion was included to entice the European Union to sign the Singapore Convention, neither the EU nor any EU member states have yet done so*" in 'New Horizon for International Commercial Mediation: The Singapore Convention', Mediate.com, December 2019, at https://www.mediate.com/articles/satire-new-day-dawning.cfm

[17] They are also excluded agreements already approved by a court or otherwise enforceable as a court judgment or an arbitral award, in order to avoid overlap with the New York Convention on arbitration and the Hague Choice of Court Convention on court judgements.

their places of business is different from either; or the State in which a substantial part of the obligations under the settlement agreement is performed; or the State with which the subject matter of the settlement agreement is most closely connected (*art. 1.1*);

2 - *agreement* – may be recorded in any form in writing (*art. 2.2*) – electronic form included[18] - signed by the parties and the mediator, with a certificate by the institution that administered the mediation (*art. 4.1*);

3 - *enforcement* - each party of the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention (*art.3.1*);

4 - *refusal to enforce the agreem*ent - if it is proved that a party was under some incapacity, or the agreement is contrary to the law that should govern it, or the mediator did not comply with the standards of the proceeding (*art.5*), or the agreement has already been approved by a court *(art. 1.1.3*).

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[18] There will be a lot of room for the Online Dispute Resolution, as long as there will be protocols for signature authentication shared at an international level. The block-chain will be useful.

The European consumer online dispute resolution platform is already working (but, up to now, it is very underused) https://ec.europa.eu/consumers/odr/main/?event=main.trader.register . Hong Kong is establishing an online dispute resolution platform, eBRAM.hk; the Secretary for Justice of the HKSAR, Ms Teresa Cheng - "*Innovative technology has greatly helped the development of dispute resolution services. I believe the establishment of a safe, reliable and credible platform to provide enterprises in various economies along the Belt and Road with convenient and cost-effective online dispute resolution will become a new trend*" in Dpt of Justice, the Government of the HKSAR, 16.5.2018, at https://www.doj.gov.hk/eng/public/pr/20180516_pr3.html

Derric Yeoh **,** *Is online resolution the future of alternative dispute resolution ?*, in Kluwer Arbitration Blog, 29.3.2018 at http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/

Chen Zhi, *The path for online arbitration: a perspective on Guangzhou arbitration commission's practice*, in Kluwer Arbitrtion Blog, 2.3.2019, at http://arbitrationblog.kluwerarbitration.com/2019/03/04/the-path-for-online-arbitration-a-perspective-on-guangzhou-arbitration-commissions-practice/

Ihab Amro, *Online arbitration in Theory and in practice: a comparative study in Common Law and Civil Law Countries*, in Kluwer Arbitratin Blog, 11.4.2019 at http://arbitrationblog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/

Zbynek Loebl, *Can a robojudge be fair?*, in Kluwer Arbitration Blog, 16.12.2019 at http://arbitrationblog.kluwerarbitration.com/2019/12/16/can-a-robojudge-be-fair/

II. CONCERNS

The **SCM** received strong support from many countries. Nevertheless, there are many concerns and criticisms (understandable, given the complexity of the subject and its likely application through the world).[19]

First, according to many practitioners, enforcement should not be necessary, because the parties usually comply with a settlement once it is reached.[20]

Among the **SCM** principles, an agreement must be recorded in writing, signed by the parties and the mediator. However, according to F. Peter Phillips, because of the confidenciality of the mediation proceeding, "*many mediators conscientiously refuse to sign a settlement agreement*". Also, an agreement could be unenforceable if the party furnishes proof that "*[t]here was a serious breach by the mediator of standards applicable ... to the mediation*" -- but what standards are applicable to that proceeding?[21]

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[19] Eric Van Ginkel, *The UNCITRAL Law on International Commercial Conciliation, A Critical Appraisal*, in Journal of International Arbitration, 2004, at
https://www.academia.edu/39218888/The_UNCITRAL_Law_on_International_Commercial_Conciliation_A_Critical_Appraisal

[20] Wei Sun - " … *according to Zhang Wei, Director of the Shanghai Commercial Mediation Center (SCMC), in the hundreds of cases mediated by SCMC since its establishment where the parties reached settlement, all of the settlement agreements have been voluntarily complied with, without a single one being submitted to the people's court for mandatory enforcement. We also heard from JAMS on the scarcity of occasions where the parties failed to perform the settlement agreements. In addition, we know from the Singapore International Mediation Center (SIMC) that in all the cases where settlement was reached since its establishment in 2014, the settlement agreements were all complied with and there has been no record of seeking judicial confirmation of the settlement agreement yet. As Zhang Wei explains, commercial mediation is a dispute resolution method aiming at maximizing the parties' interest under the assistance of professional mediators. Therefore, generally the parties will voluntarily perform the settlement agreement*" in 'Singapore Convention Series - Why China should sign the Singapore Mediation Convention: Response to concerns (Part 1)', in Kluwermediationblog, 19.7.2019 at
http://mediationblog.kluwerarbitration.com/2019/07/19/singapore-convention-series-why-china-should-sign-the-singapore-mediation-convention-response-to-concerns-part-i/

[21] F. Peter Phillips, *Concerns on the New Singapore Convention*, in Mediate.com, October 2018, at
https://www.mediate.com/articles/phillips-concerns-singapore.cfm

Alberto Elisavetsky and MarìaVictoria Marum, *Interdisciplinarity Mediation and the Singapore Agreement*, in Mediate.com, November 2019, at

Jan O'Neil underlines "*the fact that the Convention may operate on an opt-in basis in some States but not others has the potential to result in an imbalance between parties if an agreement was enforceable against one party because its home jurisdiction (or wherever its relevant assets were) did not apply the opt-in, but unenforceable against the other because its home jurisdiction did. .... However, the more fundamental objection to the opt-in is its potential to limit the overall extent to which the Convention will apply globally*".[22]

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https://www.mediate.com//articles/marun-interdisciplinarity-mediation.cfm

Daniel Rainey, *Thoughts on the Singapore Convention*, in Mediation.com, December, 2019, at
https://www.mediate.com//articles/rainey-singapore-convention.cfm

Bruce Love – According to F. Peter Phillips, at US-based Business Conflict Management, aspects of the convention "*seem inconsistent with the way commercial mediation is practised in major jurisdictions such as the UK and the US*". The way the convention handles enforceability of mediated outcomes, he argues, is antithetical to the process of mediation: "*mediation results from consensus between parties who won't be made to do something they didn't already agree to*." The convention also specifies that one criterion needed for settlements to be enforced by a court is proof that an agreement resulted from mediation. Yet Mr Phillips says it becomes problematic to prove such a claim. "*Under the convention, a mediator can attest by either signing the settlement agreement or another document certifying that the mediation was carried out*," he notes. Mr Phillips adds: "*But mediators conscientiously refuse to sign settlement agreements, either as part of their obligation of confidentiality, or so that they cannot be subpoenaed as a witness, or be included as a party to the agreement. In some jurisdictions, a mediator is immune and cannot testify about the agreements on which they mediate*" in 'New UN Singapore Convention drives shift to mediation of trade disputes', Financial Times, 5.8.2019, at
https://www.ft.com/content/6e1df030-9e6f-11e9-9c06-a4640c9feebb

Nicholas Lingard - "*One somewhat controversial ground for non-enforcement is Article 5(1)(e), which permits a court to refuse enforcement where there was a* 'serious breach by the mediator of standards applicable to the mediator or the mediation' *and, without such a breach, a party would not have entered into the settlement agreement. Some practitioners worry this provision may give parties wishing to resist enforcement a chance to re-litigate the mediation, with implications for both the efficiency and confidentiality of the mediation proceedings. It remains to be seen whether this will be the case in practice*"; and how strictly or liberally will courts interpret the grounds for refusing enforcement of a mediated settlement under Article 5 of the Convention. In '*46 States sign the Singapore Convention on Mediation*', Freshfields Bruckhaus Deringer, 8.8.2019, at
https://riskandcompliance.freshfields.com/post/102fp7h/46-states-sign-the-singapore-convention-on-mediation

[22] Jan o'Neil, *The new Singapore Convention: will it be the New York Convention for mediation?*, in Thomson Reuters, Dispute Resolution Blog, 19.11.2018, at
http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/

Wei Sun – "*Because there is no reciprocal reservation in the Singapore Mediation Convention, some commentators worry that if China becomes a*

Harald Sippel expresses his concerns in an article published in the Asia Pacific Mediation Journal[23], summarized in a later post, *Singapore Convention: game on or game over for mediation?*:

"*I fear that as a result of the Singapore Convention, mediation ... will change fundamentally to the worse: mediations will last longer, ... will become more costly ... and success rates will drop substantially*".

In other words, the *"lawyerization' of mediation*" ![24]

The mediator, as envisaged by the **SCM**, has no authority to impose a solution upon the parties to the dispute. But, will evaluative mediation be allowed?[25]

Zafar Iqbal Kalanauri points out that the exceptions to the enforceability of international commercial mediation agreements could be broader than those provided by the New York Convention against arbitral awards. Nevertheless "*the Convention does have*

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contracting state of the Convention, parties from non-contracting states would be able to apply for enforcement of Settlement Agreements in China, but Chinese parties would not be able to do so in non-contracting states. Consequently, some countries may take advantage of China's judicial proceedings. … regarding the lack of reciprocal reservation, because the Singapore Mediation Convention does not introduce the concept of 'place of mediation' similar to 'place of arbitration', nor does it define the nationality of a Settlement Agreement, there is no such thing as the Settlement Agreement of a contracting state or of a non-contracting state. Therefore, no reciprocal arrangements can be made and the Singapore Mediation Convention intends to benefit all countries rather than being limited to its contracting states" in 'Singapore Convention Series – Why China should sign the Singapore Mediation Convention: Response to concerns (Part 1)', Kluwermediationblog, 19.7.2019, at http://mediationblog.kluwerarbitration.com/2019/07/19/singapore-convention-series-why-china-should-sign-the-singapore-mediation-convention-response-to-concerns-part-i/

[23] Harald Sippel, *The Singapore Convention on Mediation: a overview of the key features and a review of critiques to date*, in Asia Pacific Mediation Journal, Vol.1, no.1, page 63, 29.3.2019, at http://www.mediate.or.kr/base/data/APMJ.php?com_board_basic=read_form&com_board_idx=6&&com_board_search_code=&com_board_search_value1=&com_board_search_value2=&com_board_page=&&com_board_id=10&&com_board_id=10

[24] Harald Sippel, *Singapore Convention: game on or game over for mediation?*, in Linkedin 5.8.2019 at https://www.linkedin.com/pulse/singapore-convention-game-over-mediation-harald-sippel/

[25] Elisabetta Silvestri, *The Singapore convention on mediated settlement agreements: a new string to the bow of international mediation ?*, in Revista Elettronica de Direito Processual – REDP 2019 / 2 (5.2019), at https://www.academia.edu/40140428/THE_SINGAPORE_CONVENTION_ON_MEDIATED_SETTLEMENT_AGREEMENTS_A_NEW_STRING_TO_THE_BOW_OF_INTERNATIONAL_MEDIATION?email_work_card=interaction_paper'

the advantages that it answers a need from users of international arbitration".[26]

In my opinion, the main concerns about the application of the **SCM** are the following:

- enforceability could change the real nature of mediation, making it adversarial;
- most lawyers will shift from arbitration to mediation but continue using the same techniques.
- it will not be easy to realize a common standard of conduct for mediators and mediation, given the huge differencies in cultures and in ADR techniques in different states (and continents).

III. WHAT TO DO?

Mediation is not the *panacea* for dispute resolutions; enforceability may be a *chimera*; the **SCM** is just a starting point of a very long journey.

As mentioned above, there are four main ways to solve conflicts: negotiation, mediation, arbitration, and litigation. It is necessary to choose the most appropriate one based on the circumstances.

If the parties live in countries where there are enforcement difficulties, a local court decision may be the best choice. If it is necessary to interpret standard rules (with prevailing legal aspects), which will be included in future contracts, an arbitration award would be second best. If "*time is money*" and a long term well-established trade relationship has to be continued, mediation could be the only way to go.

And different issues have to be considered in order to get an efficient cross-border mediation, such as: mediation contract clauses, proceedings (free lance professional / mediation institution; mediation / co-mediation), cultural differences, and training.[27]

Hybrid clauses (med-arb, med-arb-opt-out, med-arb diff-reccomendation, non-binding med-arb, med-arb-show cause,

[26] Zafar Iqbal Kalanauri, *The Singapore Mediation Convention, 2019*, in Academia.edu, September 2019, at https://www.academia.edu/40289206/The_Singapore_Mediation_Convention

[27] Giovanni Matteucci, *International commercial mediation 2019, challenges and opportunities*, in Academia.edu 17.4.2019, at https://www.academia.edu/38868145/International_commercial_mediation_2019_challenges_and_opportunities

medaloa - mediation and last offer arbitration, plenary med-arb, briaded med-arb, optional withdrawal med-arb, ama arbitration-mediation-arbitration, etc.)[28] are used in many countries, mainly to save time and money or to enforce the mediation agreement through an arbitration award. And worst of all, mediator and arbitrator are the same professional in many proceedings. As a result, mediation will lose confidentiality and the parties will be careful not to open up, for fear that what they say may be used aginst them in the subsequent arbitration (or judgment). The **SMC** avoids this problem, because the mediation agreement will be enforceable by itself[29] and an adequate use of the mixed mode

[28] Giovanni Matteucci, *Maritime international commercial mediation clauses*, in Altalex 15.9.2018, at http://www.altalex.com/documents/news/2018/11/23/maritime-international-commercial-mediation-clauses

[29] Ashutosh Ray – "*Unlike the New York Convention, the Singapore Convention does not support hybrid dispute resolution methods involving arbitration and litigation. This may not find favor with large international businesses who usually enter into elaborate dispute resolution clauses combining more than one dispute resolution tool. Surely, parties may still draft clauses in a manner allowing the application of Singapore Convention and the NYC alike. This will need careful drafting of the dispute resolution clause where mediation proceedings are divorced from the arbitration or litigation proceedings. The settlement agreement will be then enforceable under the Singapore Convention. If the mediation fails, the parties may then initiate a fresh arbitration proceeding and enforce the emanating award under the NYC. The parties may consider stipulating a time-frame to complete the mediation exercise so that their claim is not barred by limitation in the event of a failed mediation. Once the arbitration proceedings are initiated and the parties enter into mediation as part of the arbitration proceeding, any resulting agreement would take the form of a settlement award passed by the arbitral tribunal for it to be enforceable. It will no longer be enforceable under the Singapore Convention as it would be enforceable as an arbitral award. Perhaps, the parties could still use the Singapore Convention to enforce a settlement agreement from a mediation initiated mid-way during arbitration by ensuring that the arbitral tribunal is dissolved by the parties without an award. However, this convoluted mechanism may not be commercially or logistically* viable", in 'Is Singapore Convention to Mediation what New York Convention is to Arbitration?', Kluwerarbitrationblog, 31.8.2019, at http://arbitrationblog.kluwerarbitration.com/2019/08/31/is-singapore-convention-to-mediation-what-new-york-convention-is-to-arbitration/

Alison G. Fitz Gerald and J. Thomas Hatfield - "*The role of mediators in hybrid dispute processes (eg, mediation-arbitration, arbitration-mediation, arbitration-mediation-arbitration or mediation followed by last offer arbitration) may also complicate matters. In hybrid dispute processes, parties may shift between dispute phases and the same person may conduct the different phases of the dispute, potentially raising procedural integrity concerns. Proponents of hybrid processes argue that such concerns are offset by efficiencies gained in such processes as compared with traditional dispute processes which proceed sequentially through escalating procedures with separate persons serving as mediator and arbitrator. In many instances, where a dispute process concludes in*

dispute resolution will be possible.[30] Provided that the mediator is only a mediator and the arbitrator is only an arbitrator, two different professionals.

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arbitration or with a mediated settlement agreement recorded in a consent award, the Singapore Convention will not apply. Therefore, any procedural integrity issues are likely to be dealt with within the framework of the New York Convention. However, for those cases concluding in a settlement agreement to which the Singapore Convention applies, there may be uncertainty around the standards applicable to those involved in hybrid processes", in 'Singapore Convention: update on enforcing mediated settlement agreements', Lexology, 10.10.2019, at https://www.lexology.com/library/detail.aspx?g=7c7a35d7-e0e9-4faf-b8d5-f6bb0044b5f3&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2019-10-14&utm_term=

[30] In April 2016 the College of Commercial Arbitrators, the International Mediation Institute and the Straus Institute for Dispute resolution – Pepperdine Law School started a **joint international task force on "mixed mode" dispute resolution**, to explore the interplay among mediation, evaluation and arbitration in commercial cases.

"*The Task Force has been charged with examining and seeking to develop model standards and criteria for ways of combining different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation, arbitration, or adjudication) with non-adjudicative methods that involve the use of a neutral (e.g., conciliation or mediation), whether in parallel, sequentially or as integrated processes, which the Task Force has called 'Mixed Mode Scenarios'.*

"Practically speaking, this means exploring and investigating mixed mode practices from various cultural and legal standpoints, including information about current experience, best practices, and, where appropriate, the development of protocols to guide future implementation of mixed mode processes by neutrals more broadly. Some examples of questions to be explored are as follows:

- what are the dynamics of and appropriate uses of non-binding or non-adjudicative processes (including non-evaluative facilitation as well as non-binding evaluation or advisory opinions) in promoting settlement?

- in what ways may neutrals help parties tailor better dispute resolution processes, such as mediation 'setting the stage' for arbitration and vice versa?

- under what circumstances, if any, might it be appropriate for a mediator to become an arbitrator or judge, or an arbitrator or judge to become a mediator, during the course of resolving a dispute?

"*Since recent studies show settlement is becoming increasingly likely during the course of commercial arbitration, should arbitrators be more deliberate about helping to set the stage for potential settlement? If so, what are appropriate ways in which this might be done? Might arbitrators, for example:*

- make decisions on discovery/information exchange issues … of aspects of the dispute;

- encourage mediation or work with the parties to arrange mediation windows in the adjudication timetable; or

- offer parties preliminary views on issues in dispute or issue preliminary findings of facts or conclusions of law?

The enforceability may be a *chimera*, too. The foreign arbitral award / mediation agreement must be recognized by a court, the judgment must be executed by the local authority, and recoverable assets are needed. All three conditions do not always occur.[31]

The **SCM** will not be the *panacea* for international commercial mediation; it is just an (very important) initial step of a very long process.

The **SCM** is an international convention and its success, in the long-term, will depend on how many countries will become signatories. And the effectiveness of local legislation will be decisive to the **SMC**'s success. This will be a problem to be analyzed, and solved, by the local authorities, also based on the effectiveness of the tool.

The mediators and the mediation providers have to manage, by themselves, another challenge: the identification of international

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"*What is the proper protocol for arbitrators or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award? What other issues arise in enforcing mediated settlement?*

"*In what ways, if any, might non-adjudicative neutrals and adjudicative neutrals appropriately communicate in the course of working together on resolving a particular dispute, whether in a sequential, parallel or integrated manner?*

"*What combinations of non-adjudicative and adjudicative processes are most appropriate in the real-time management of conflict in ongoing relationships?*

"*These questions are of growing global significance in the management of conflict*", in 'Mixed Mode Task Force' in Imimediation.org, downloaded on 21.12.2019, at
https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/
International Task Force on Mixed Mode Dispute Resolution, "*Inaugural Summit*", in Imimediation.org 23.9.2016
https://www.imimediation.org/wp-content/uploads/2017/11/Mixed_Mode_Pepperdine_Summit_Written_Summary_April_27_2017.pdf

[31] Cameron Ford - "*Enforcement of arbitral awards is one of the main selling points of arbitration … there will be some industries and companies for whom the possibility of enforcement is important. These are where the debtor would not pay unless the judgment or award is enforceable and has assets readily available for execution. The ideal example of that situation is where the creditor holds security for the debt in a jurisdiction where execution is practically, as well as theoretically, possible*". But enforcement "*…. has a high chance of being ineffective because of the problems associated with recognition, execution and recovery in the debtor's country. Arbitration needs to concentrate on or create other unique features to attract parties where enforcement is not of particular concern*" in 'The Enforcement Chimera', Kluwer Arbitration Blog, 10.5.2018
http://arbitrationblog.kluwerarbitration.com/2018/05/10/the-enforcement-chimera/

Christopher Miers, *Enforcement of International Commercial Mediation Settlement Agreements*, in Perspective PM, 6.2016, at
http://www.probyn-miers.com/perspective/2016/06/enforcement-of-international-commercial-mediation-settlement-agreements/

accepted standards for mediators and the conduct of the mediation proceedings.[32] Simple to say, very difficult to realize. Different cultures and different traditions will play a very important role. Ability to listen, flexibility, confrontation, empathy (all characteristics of mediation) and, overall, training will be crucial.[33]

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[32] Nohyoung Park, *How to make effective the Singapore convention: a Korean View*, International Dispute Resolution Conference 17.4.2019, Hong Kong, at http://www.mediationcentre.org.hk/uploadfiles/News/Attachment/278/S2_4_Professor_Nohyoung_PARK_PPT.pdf

Rajesh Sharma, *The Singapore convention, finishing unfinished work, the research report*, International Dispute Resolution Conference 17.4.2019, Hong Kong, at http://www.mediationcentre.org.hk/uploadfiles/News/Attachment/278/Dr._Rajesh_SHARMA_(Announcement_on_Research_Report)_PPT.pdf

Jane Larner, *Challenges Facing the Singapore Convention on Mediation*, Bloomberglaw, 19.11.2019, at https://news.bloomberglaw.com/corporate-law/insight-challenges-facing-the-singapore-convention-on-mediation

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[33] Thomas Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation* (2015). 46 Victoria University of Wellington Law Review 1191 (2015); Pepperdine University Legal Studies Research Paper No. 2016/1, at SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712457 .

Catherine Green – *"There is a risk in over-generalising by classifying certain cultural groups as being relational, collectivist or individualistic. … diversity of culture in cross-border commercial conflict in tandem with a growth in pluralistic societies across the board, gives rise to specific issues which often require a degree of flexibility of process which cannot be met in the same way when engaged in more structured, rules-based dispute resolution processes … . Cross-cultural disputes are often characterised by parties having different goals, bargaining styles, styles of conduct, modes of communication, approaches to time, levels of emotionalism, approaches to the form of agreements, approaches to problem solving, approaches to settlement authority and views as to risk taking. …. Mediation model variants have evolved out of many different cultures with the result that mediation in one country might look entirely different to mediation in another. For instance, the North American or 'western' model of mediation is typically 'founded on the primacy and autonomy of individuals and the furtherance of individual interests', whereas a Chinese or 'eastern' model of mediation is typically founded on a 'traditional orientation toward, among other things, social hierarchy, societal harmony and obedience to authority'. … In light of the diversity of conflicts, circumstances, parties, and any number of other relevant factors in any given case, when considered globally, there cannot be any one correct approach to mediation. … Taking this into account, however, the potential value of mediation as a dispute resolution practice becomes clear. There is no prescriptive formula for how the process must be delivered and the various possible process options are arguably infinite*" in 'Addressing diversity and culture in international mediation', NZIAC New Zealand International Arbitration Centre, 20.9.2019, at

A big, so far new, player will be critical: China and its Belt and Road Initiative (BRI) project. Conciliatory practices to resolve conflicts, founded on the Confucian ethics and ideology, have been a tradition for thousands of years in China (the adoption of the arbitration model came later and was considered an "invention of the West"[34]). A model of semi-adjudicatory, authoritative conciliation, managed by individuals with a prominent and socially respected position in the social group was, and still is, the norm. But the BRI, announced by president Xi Jinping in 2013, obliged China to face commercial and financial disputes all over the world. The Chinese Supreme People's Court has established an International Commercial Court, is interested in promoting mediation to resolve BRI disputes, and in August 2018 appointed an International Commercial Expert Committee, consisting of thirty-two Chinese and foreign members, "*aiming to enhance international exchange and cooperation, ensure operation and promote adjudication of the International Commercial Court, and support parties to resolve international commercial disputes through arbitration, mediation, litigation and other diversified commercial dispute settlement methods*".[35] China was among the first 46 signatory Countries of the **SCM** on 7.8.2019.[36]

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https://www.nziac.com/addressing-diversity-and-culture-in-international-mediation-part-four-in-a-series-on-the-singapore-convention/

[34] Craig Pudig, *Domestic Lessons from International Arbitration*, in *Arbitrator and Mediator*, vol.23, no.3, December 2004, pages 29-45, Australia.

[35] China International Commercial Court 26.8.2018, at http://cicc.court.gov.cn/html/1/219/208/209/981.html

China Supreme People's Court Monitor, at https://supremepeoplescourtmonitor.com/2017/10/07/spc-reveals-new-belt-road-related-initiatives/
https://supremepeoplescourtmonitor.com/2019/02/11/some-comments-on-the-china-international-commercial-court-rules/
https://supremepeoplescourtmonitor.com/2019/03/27/singapore-mediation-convention-and-china/
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https://supremepeoplescourtmonitor.com/2019/12/10/singapore-mediation-convention-china-2/

[36] Giovanni Matteucci, *International commercial mediation, an opportunity for OBOR (One Belt One Road)*, at https://brill.com/view/book/edcoll/9789004373792/BP000028.xml in *The Belt and Road Initiative; Law, Economics and Politics*, Brill publisher 20.9.2018 a, 28-chapter volume, which brings together academics and practitioners to provide a comprehensive legal, economic and political analysis of the Belt and Road Intiative (BRI), at https://brill.com/view/title/38740?format=HC

BRI disputes will fuel mediation's global rise.

But, as arbitration has become the new litigation, so mediation could become the new arbitration. The former will erode space from the latter. Therefore, arbitrators (lawyers) will shift to the new market, using - most likely - their adversarial experience, leading to the *"lawyerization of mediation*". How to avoid it? Through a very high level of training. *Ad hoc* training courses carried out by universities, ADR providers and international organizations, located in different countries and financed by international resources, would be particularly useful.[37]

IV. CONCLUSIONS

Interesting scenarios face international commercial mediation: a global rise in the number of proceedings, the enforcement of mediation settlement agreements, widespread use of the Online Dispute Resolution process, likely connected with blockchain, the identification of internationally accepted standards for mediators and the conduct of the mediations, a reshuffle of mixed mode alternative dispute resolutions, and an international commercial expert committee appointed in China (the new big player). Sharp changes in ADRs and in mediation itself may happen.

But Harold Sippel fears the "*lawyerization*" of mediation: proceedings "*will last longer, ... will become more costly ... and success rates will drop substantially*". Something similar happened in Italy because of insufficient basic training (only 50 hours) and the introduction in 2013 of the compulsory assistance of lawyers to the parties in mediation (and lawyers attended only 15 hours training courses for almost two years). [38] The Italian

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Peter Corne and Mathew Erie, *China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention*, in Opinio Juris, 28.8.2019, at http://opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention/

[37] Michele Ruyters, *The role of the universities in supporting international dispute resolution processes*, International Dispute Resolution Conference 17.4.2019, Hong Kong, at http://www.mediationcentre.org.hk/uploadfiles/News/Attachment/278/S1_2_Dr._Michele_RUYTERS_PPT.pdf

[38] Giovanni Matteucci, *Civil mediation, how to kick-start it; the Italian experience. Training, compulsory, tax relieves, control*, in Revista de EMERJ, V. 19, n.4 2017, at

judges, instead, are working toward an adequate use of mediation proceedings and an increase in their quality.[39]

Adequate knowledge is the basis for every activity. A qualified training, carried out by universities, ADR providers and international organizations, located in different countries, would be particularly useful.

http://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista19_n4/revista19_n4_78.pdf

[39] Giovanni Matteucci, *Mediation and judiciary in Italy 2019*, in Asia Pacific Mediation Journal, 2019 / 2, page 62, at http://mediate.or.kr/base/data/APMJ.php

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APPENDIX

Uncitral 2018

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION, 2018

Amending the Model Law on International Commercial Conciliation, 2002

The Model Law is designed to assist States in reforming and modernizing their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.

The Model Law was initially adopted in 2002. It was known as the "Model Law on International Commercial Conciliation", and it covered the conciliation procedure. The Model Law has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation". In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In amending the Model Law, UNCITRAL decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of mediation, including appointment of conciliators, commencement and termination of mediation, conduct of the mediation, communication between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation issues, such as the mediator acting as arbitrator and enforceability of settlement agreements.

The Model Law provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure. It provides an exhaustive list of grounds that a party can invoke in a procedure covered by the Model Law.

The Model Law can be used as a basis for enactment of legislation on mediation, included, where needed, for implementing the United Nations Convention on International Settlement Agreements Resulting from Mediation.

Uncitral 2018, A/73/17, Annex II

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION, 2018

(amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Section 1 — General provisions

Article 1. Scope of application of the Law and definitions

1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

2. For the purposes of this Law, "mediator" means a sole mediator or two or more mediators, as the case may be.

3. For the purposes of this Law, "mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or

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

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Section 2 — International commercial mediation

Article 3. Scope of application of the section and definitions

1. This section applies to international[3] commercial mediation.

2. A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

3. For the purposes of paragraph 2:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

[3] States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

-Delete the word "international" in paragraph 1 of articles 1 and 3; and

-Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

5. The parties are free to agree to exclude the applicability of this section.

6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 4. Variation by agreement

Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

Article 5. Commencement of mediation proceedings[4]

1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

2. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

Article 6. Number and appointment of mediators

1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 7. Conduct of mediation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any

wishes that the parties may express and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

Article 8. Communication between mediator and parties

The mediator may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

Article 10. Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 11. Admissibility of evidence in other proceedings

1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 12. Termination of mediation proceedings

The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Article 13. Mediator acting as arbitrator

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 14. Resort to arbitral or judicial proceedings

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Article 15. Binding and enforceable nature of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

Section 3 — International settlement agreements[5]

Article 16. Scope of application of the section and definitions

1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").[6]

2. This section does not apply to settlement agreements:

[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.

[6] A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:[7]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

[7] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

6. 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 an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

Article 17. General principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

Article 18. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

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

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

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

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

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

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 19. Grounds for refusing to grant relief

1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

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

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

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

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

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

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Article 20. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order to the other party to give suitable security.

Uncitral 2019

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS
New York, 2019

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Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Commi ee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and uni cation of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 Decem- ber 1980, contributes signicantly to the establishment of a harmonized legal framework for the fair and efficient settlements of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

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[1] Resolution 57/18, annex.

[2] *Offcial Records of the General Assembly, irty- h Session, Supplement No. 17 (A/35/17), para. 106; see also Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

[4] *Offcial Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.
[5] Ibid., annex I.

62nd plenary meeting
20 December 2018

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

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

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

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

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

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) the State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) the State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. 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 an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

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

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

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

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

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

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

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

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

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

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

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

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

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which

breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

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

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

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

Article 6. Parallel applications or claims

If an application or a claim relating to a se lement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their con rmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on 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.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention:

(a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or *(b)* as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of rati cation, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months

after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Further information may be obtained from:
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List of Signatory Countries on 7 . 8 . 2019

1 Afghanistan
2 Belarus
3 Benin
4 Brunei Darussalam
5 Chile
6 China
7 Colombia
8 Congo
9 Democratic Republic of the Congo
10 Eswatini
11 Fiji
12 Georgia
13 Grenada
14 Haiti
24 Maldives
25 Mauritius
26 Montenegro
27 Nigeria
28 North Macedonia
29 Palau
30 Paraguay
31 Philippines
32 Qatar
33 Republic of Korea
34 Samoa
35 Saudi Arabia
36 Serbia
37 Sierra Leone

15 Honduras
16 India
17 Iran (Islamic Republic of)
18 Israel
19 Jamaica
20 Jordan
21 Kazakhstan
22 Lao People's Democratic Republic
23 Malaysia
38 Singapore
39 Sri Lanka
40 Timor-Leste
41 Turkey
42 Uganda
43 Ukraine
44 United States of America
45 Uruguay
46 Venezuela (Bolivarian Republic of)

on 24/27 . 9 . 2019

47 Armenia
48 Chad
49 Equador
50 Gabon
51 Guinea-Bissau

THE SINGAPORE CONVENTION IN LIGHT OF CHINA'S CHANGING MEDIATION SCENE

CARRIE SHU SHANG[*] *AND ZIYI HUANG*[**]

ABSTRACT

Law 4640/2019 that put in action on 30th of November 2019

The United Nations Convention on International Settlement Agreements Resulting from Mediation, or the "Singapore Convention", is a new convention developed by the UNCITRAL to provide a uniform and efficient framework for the cross-jurisdictional recognition and enforcement of mediated settlement agreements. Although the Convention has yet to come into force, it is already expected to greatly improve and promote the use of mediation in commercial settings in domestic and cross-border contexts. This article offers some China-specific analysis by taking a look at the likely impact of the Singapore Convention in three areas -- mediation law, the international commercial court, and the Belt and Road Initiative -- and discusses why the current legal environment in China provides some excellent opportunities for mediation to be more widely adopted. It concludes that the Singapore Convention will elevate the status of mediation to one of the top cross-border dispute resolution mechanisms in China. However, further observations need to be conducted to ensure that the continuous development of mediation in China will not undermine a rule-based legal infrastructure.

Key Words: Mediation, Singapore Mediation Convention, China, Belt and Road, ADR

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In 1958, the signing of the New York Convention legitimatized the use of arbitration in resolving cross-border disputes. With the cross-border enforceability of arbitral awards rendered in any signatory of the New York Convention, arbitration soon became the dominant method in international business dispute resolution. Years later, mediation proponents started to develop an international legal framework that boosts the use of mediation in ways similar to how the New York Convention safeguards arbitration.[1] Finally in 2019, the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") was open for signature.[2] To date, the Singapore Convention has been signed by 51 signatory members, while the number of countries adopting are still expected to grow.[3] By providing a clear and uniform framework for the recognition and enforcement of agreements resulting from mediated settlement agreements of international disputes, the Singapore Convention will increase the predictability of settlement agreements, which in turn will combat the perception that mediation is less preferable to arbitration in international dispute resolution due to enforcement obstacles.[4]

In addition to its effect on international dispute settlement, scholars who study the impact of the development of private international frameworks on domestic legal institutions also argue that international dispute resolution, and particularly arbitration, promotes formation of better legal rules in less developed legal regimes. [5] For example, numerous studies focusing on China have been able to relate positive developments in its legal system, leading to higher standards of foreign investor protection and

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[1] *See*, *e.g.*, Intervention of the United States, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), http://www.uncitral.org/uncitral/audio/meetings.jsp

[2] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018), https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited December 22, 2019)

[3] *See* Status: United Nations Convention on International Settlement Agreements Resulting From Mediation, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited December 22, 2019)

[4] *See*, *e.g.*, Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlement*, 19 Pepperdine Dis. Res. L. J. 1, 2-4 (2019)

[5] *See* Catherine A. Rogers & Christopher R. Drahozal, *Does International Arbitration Enfeeble or Enhance Legal Institutions*? Legitimacy in Investment Arbitration (forthcoming 2019)

stronger courts, to the country's embracement of international commercial arbitration.[6] After entering into the New York Convention in 1987, China continued modernizing its arbitration law and arbitration enforcement framework to meet international standards. This provided foreign investors with alternative routes of protecting their property interests, which benefited the country's economic growth due to foreigner's improved confidence in doing business in China and/or with Chinese parties.[7]

Compared to arbitration, mediation has a longer history and tradition in China.[8] China has also demonstrated itself as a strong advocate of using mediation and other non-contentious methods to resolve international disputes.[9] On August 29, 2019, China was among the first group of 46 countries to sign on to the framework of the Singapore Convention.[10] The signing of the Singapore Convention is also extremely timely for China. A number of reforms leading to a more modernized mediation scheme have already been pushed by the Chinese government in recent years. At the same time, compared to 30 years ago when China entered the New York Convention framework, the country's legal system has continued modernizing to provide a stronger legitimacy foundation for the country's gradual transformation to a more rule-based governance system.[11] In recent years, China has even adapted strategies to further position itself as one of Asia's dispute resolution hubs.[12] Therefore, the impact of the Singapore Convention on domestic legal regimes of China might be more trivial and less direct, although it could still be more long-lasting. This article, by discussing three areas of reform in China that have

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[6] *See* Scott Wilson, *Law Guanxi: MNCs, State Actors, and Legal Reform in China*, 17 J. Con. China 54 (2008); Randall Peerenhom & He Xin, *Dispute Resolution in China: Patterns, Causes and Prognosis*, The Foundation for Law, Justice and Society (2008)

[7] *See* Scott Wilson, *Law Guanxi: MNCs, State Actors, and Legal Reform in China*, 17 J. Con. China 25, 30-37 (2008)

[8] Jeremy Cohen, *Chinese Mediation on the Eve of Modernization*, 54 California Law Review 1201, 1201-26 (1966)

[9] *See id*; *see also*, Guiguo Wang & Xiaoli He, Media*tion and International Investment: A Chinese Perspective*, 65 Maine L. R. 216, 221-28 (2012)

[10] 40-odd Countries Including China Sign Singapore Convention on Mediation, http://www.xinhuanet.com/english/2019-08/07/c_138291506.htm (last visited December,18, 2019)

[11] *See* Taisu Zhang and Tom Ginsburg, *Legality in Contemporary Chinese Politics*, 59 V. J. of I'tnl L. 307 (2019)

[12] *See* Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 Virginia Journal of International Law 3 (forthcoming 2020)

provided a strong foundation for the country to adopt the Singapore Convention, argues that signing the Convention will continue to elevate the status of mediation in China to resolve domestic and international disputes, while transforming and modernizing the way mediation is conducted in China and by Chinese parties. At the same time, the recognition of a stronger mediation institutionalization also fosters a quicker convergence of domestic and international mediation standards in China. Conversely, in response to the Singapore Convention, the promotion of mediation and institutionalizing of mediators have become state policy objectives of China. This might further associate mediation with formal institutions and rule-based legal schemes such as courts and international treaties and deprive mediation of its traditional advantages, such as its flexibility, cost-effectiveness, informality, and confidentiality.

The article will be broken down into four parts. Part I walks the reader through the development of mediation practices in China, from community-based mediation to mediation that more resembles commercial mediation conducted in Western countries. Part II provides a brief account of the adoption process of the Singapore Convention in China and discusses some potential difficulties in further implementing the Convention. Part III discusses how existing reforms in three important areas will affect the longer-term impact of adopting the Singapore Convention in China: mediation laws, one-stop international commercial court, and the Belt and Road Initiatives ("BRI"). Part IV concludes from there and projects new research questions for the next stage.

I. FROM COMMUNITY-BASED MEDIATION TO COMMERCIAL MEDIATION: A BRIEF ACCOUNT OF THE DEVELOPMENT OF MODERN MEDIATION PRACTICES IN CHINA

As Jerome Cohen rightly observed, mediation holds an unusually important position in the legal system of China in the resolution of disputes.[13] Mediation is defined in China in broader terms. The definition itself seems to include any dispute resolution type when conflicts between parties are resolved based on a

[13] Cohen, *supra* note 8, at 1207

reasonable settlement with the help of a third party.[14] Since the establishment of the People's Republic of China, the development of mediation has gained some new momentum. Under the "disputes among people" rhetoric (rather than disputes involving enemies of people), disputes between individuals arising from civil life are recommended to be resolved by extrajudicial mediation.[15] While the procedures of extrajudicial mediation in China are largely inconsistent, the use of mediation is almost always associated with the Confucian value of social harmony and internalizing disputes to maintain a peaceful group order. According to Western scholars like Cohen and Erie, the progeny of modern mediation only started to appear in China around 2012, when the PRC Civil Procedure Law was amended to lay the framework for commercial mediation.[16] This is refuted by Chinese scholars and academics, who believe that modernization of mediation still has a long way to go.[17]

A. DEVELOPMENT OF MEDIATION DURING THE "GRAND MEDIATION" MOVEMENT

Both Eastern and Western views consider the mediation process to be a co-operative, participatory, and potentially empowering dispute resolution process for the parties involved.[18] For a long period in itshistory, mediation was the predominate form of dispute resolution in China. This changed during the series of economic and legal reforms associated with the China Communist Party ("CCP")'s "Opening-Up Policy" conducted in the late 1970s, when the promotion of rule of law and a rule-based legal order

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[14] *See Id*.

[15] *See Id*.

[16] *See* Jerome Cohen & Matthew S. Erie, *Mediation Reforms of China: Opportunities and Challenges of China in Light of the Singapore Mediation Convention*, http://opiniojuris.org/wp-content/uploads/%E4%B8%AD%E5%9B%BD%E7%9A%84%E8%B0%83%E8%A7%A3%E6%94%B9%E9%9D%A9.pdf (last visited December, 23, 2019) (original in Chinese)

[17] *See e.g.*, Huafang Zhu, *The Development Status, Challenges and Solutions of Mediation in China*, http://www.legaldaily.com.cn/Arbitration/content/2018-11/21/content_7690176.htm (last visited December, 23, 2019) (original in Chinese)

[18] *See* Jerome Cohen, Settling International Business Disputes with China: Then and Now, 47 Cornell Int'l L.J. 555 (2014)

necessitated the expansion of adjudication and the reach of court systems.[19] Therefore, during earlier stages of reforms, there was a significant reduction in the reliance on mediation and informal justice in general.[20] As Chinese legal reform continued to progress throughout the 1980s and 1990s, statistics show that the use of mediation in both judicial and extra-judicial process dropped significantly.[21]

However, probably due to political needs, there was a sudden change of direction in the early 2000's, when the state aggressively promoted and expanded the use of mediation to solve disputes in both judicial and extra-judicial settings. During this period, which is usually called the "Grand Mediation" movement, political priority was given to social stability and the prevention of potential harm that may arise from disputes. As many scholars pointed out, the decade between 2002 and 2012 saw the forceful return of mediation.[22] In extra-judicial settings, the People's Mediation Law was enacted in 2010, which legalized and formalized community-based mediation used to "resolve disputes among people in a timely manner, and maintain the harmony and order of the society."[23] Within the scope of the People's Mediation Law, community-based mediation is offered for free by qualified community mediators, who are dispute resolvers appointed by a local or community level People's Mediation Committee.[24] These selected mediators are usually retired government officials, judges, judicial officers or former members of the police. Although in principle these community-based mediators are independent third-party members, they are usually seen as representatives of the government.[25] At the same time, the objective of their services is usually seen to better help the government maintain the social order and minimize conflicts,

[19] *Id*.

[20] Hualing Fu, *Mediation and the Rule of Law: The Chinese landscape, Dispute Resolution: Alternative to Formalization, edited by Joachim Zekoll, Moritz Balz and Iwo Amelung* (Brill 2014)

[21] *Id*.

[22] *Id*., *see also* Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 Stan. J. Int'L. L. 103, 128 (2006)

[23] Art. 1, People'sMediation Law of the People's Republic of China

[24] People's Mediation Should be Transformed from Semi-Official to Consensual, http://www.npc.gov.cn/zgrdw/huiyi/lfzt/rmtjfzfjc/2010-08/09/content_1586534.htm (last visited December, 18, 2019)

[25] *See* Fu *supra* note 20

rather than realizing people's dispute resolution goals. During the same period, judicial or court-based mediation has witnessed similar trends. Under Chinese-style court-based mediations, the same judge can usually act first as mediators over a case she presides and then move to adjudication only when mediation fails.[26] Although this is rather contrary to Western style procedural due process, where it is uncommon for an adjudicator to wear two hats during the same dispute resolution proceeding, no Chinese law or court rule prevents judges from performing different roles while hearing the same dispute.

Although some scholars such as Fu Hualing heavily criticize the return to mediation during this period as undermining the weak rule of law infrastructure just slowly emerging in China, the outcome of encouraging the use of mediation in both judicial and extra-judicial settings seem positive. For example, Chinese ADR scholar Professor Fan Yu mentions that the use of mediation in Chinese judicial settings largely improves the rate of enforcement in China, therefore improving overall judicial efficiency and efficacy.[27] In extra-judicial settings, a Chinese official source records that the settlement rate of community-based mediation is around 90%, which appears to be an effective way of preventing conflicts from further escalating.[28]

B. THE AMENDED CIVIL PROCEDURE LAW AND THE EMERGENCE OF COMMERCIAL MEDIATION

Although in China there has not been any formal legislation on the use of commercial or business mediation, some see the landmark of the rise of modern commercial mediation as the amendment of the 2012 PRC Civil Procedure Law (the "2012 Amendment").[29] The 2012 Amendment itself does not mention commercial mediation, but it writes judicial mediation into law. In accordance with the newly added Article 112 of the 2012

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[26] *See* Chuyang Liu, *Navigating Med-Arb in China*, 17 U. Penn. J. Bus. L. 129, 1297-1301 (2015)

[27] *See* Yu Fan, *The Reconstruction of Mediation: A Discussion of Mediation by Focusing on Court-Annexed Mediation Reforms*, China Law Review (2014) (original in Chinese)

[28] National Public Complaints and Proposal Administration, Mediation Makes Mass Work Out of Home, http://www.gjxfj.gov.cn/gjxfj/news/gzdt/dfdt/webinfo/2016/03/1460416226815754.htm (last visited December, 18, 2019)

[29] Cohen & Erie, *supra* note 16

Amendment, "if a party initiates a civil dispute in people's court, mediation is required if it is deemed that the dispute is suitable for mediation, unless one party or both parties explicitly refuse the use of mediation."[30] This new legislation shows the endorsing attitude of the use of pre-trail mediation in China. However, despite the existence of this state-wide policy to encourage the use of pre-trial mediation, the big caseload faced by Chinese courts and the rather limited number of available judges make courts actively look for alternative ways of absorbing these mediation requests, in a process called the "mediation-litigation" transition (*su tiao dui jie*). During the process, courts are encouraged to refer cases judges deem appropriate to be mediated to court-referred mediators.

Consequently, following the passage of the 2012 Amendment, a number of pilot projects establishing independent mediation service providers were implemented nationally. Many of these newly initiated mediation programs are led by professional associations, and are specialized in disputes arising in a particular industrial sector, such as securities, insurance, medical services, intellectual property, and e-commerce, among others. For example, the Shanghai Financial Consumer Dispute Resolution Center established in 2016 is a mediation center affiliated with the Financial Consumer Protection Bureau of People's Bank of China, and specializes in mediating disputes between consumers and financial institutions.[31] The Center and its mediators, coming from financial industries, deal with a wide range of financial consumer disputes such as credit card debt, third-party payment, peer-to-peer lending, personal investment, and many others.[32] The Center also hears a big number of financial disputes from local courts. Since its establishment, the Center has handled more than 800 disputes.[33]

Meanwhile, private mediation institutions, completely independent from the government and industrial organizations, have also appeared. The Shanghai Commercial Mediation Center ("SCMC") is the first non-governmental dispute resolution service provider solely dedicated to providing mediation services in

[30] Article 112, People's Republic of China Civil Procedure Act (amen. 2012)

[31] ADR Innovations of the Shanghai Financial Consumer Dispute Resolution Center,
https://www.chinawealth.com.cn/zzlc/xwdt/xwzx/20180104/2070427.shtml (last visited December, 19, 2019)

[32] *Id*.

[33] *Id*.

China.[34] Established in 2011, the SCMC hears both court-referred and voluntarily filed cases, and has a panel of mediators consisting of around 100 professional neutrals.[35] Rather than relying on retired government and judicial officials like other community-based mediation services, many of SCMC's mediators come from private sectors, and conduct mediation hearings for a fee.[36] To further expand and diversify its panel of mediators, SCMC also has entered into exchange programs with institutions such as the Hong Kong Bar Association and JAMS to admit professional mediators from other countries.[37] Like many other mediation institutions abroad, a big portion of SCMC operating revenue comes from mediation training income, rather than case administrative fees.[38] Actually, since its establishment, SCMC's annual caseloads average around 15, and most of these cases were referred to the SCMC by local courts.[39] Although some point out that SCMC's existence is a mere formality, it is a symbol that even at an early stage modern commercial mediation has started to gain popularity among dispute resolution professionals in China.[40]

II. ADOPTING THE SINGAPORE MEDIATION CONVENTION IN CHINA: CURRENT STATUS AND PROBLEMS IN IMPLEMENTATION

The final text of the Singapore Mediation Convention was approved by the General Assembly of the United Nations on December 20, 2018 at its 62nd plenary meeting.[41] The signature ceremony was held in Singapore on August 7, 2019, where 46

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[34] *See* Cohen & Erie *supra* note 16

[35] Panel of Mediators, Shanghai Commercial Mediation Center, http://www.scmc.org.cn/page69?article_category=20&menu_id=56 (last visited December, 22, 2019)

[36] Schedule of Fees, Shanghai Commercial Mediation Center, http://www.scmc.org.cn/page111?article_id=77&menu_id=52. (last visited December, 22, 2019)

[37] *Id*.

[38] Interview of Dr. Wei Zhang, Director of the SCMC

[39] *Id*.

[40] *See* Wei Shen & Tao Yu, *An Empirical Study of the Operation and Impact Factor of Financial Dispute Resolution*, Legal Forum (6) (2016) (originally in Chinese)

[41] UN General Assembly Resolution 73/198

states signed on to the Convention.[42] Until now, the Convention has gathered 51 signatures.[43] However, currently it is not in force yet, as it will only become effective six months after the ratification by three states.[44]

A step up from the cross-border enforcement foundation already developed by the New York Convention, the Singapore Convention provides for more flexible mechanisms for the enforcement of qualified international settlement agreements, leaving the member states adequate discretion to decide on their own implementation strategies depending on domestic legal circumstances.[45] In addition, Article 4 of the Convention does not specify the "competent authority" in the forum to decide the enforceability of any settlement agreement domestically, allowing each member state to delegate the power to its most suitable domestic authority, which in some countries is not necessarily the judiciary.[46] In addition, the Convention also removed recognition as a required step for the "competent authority" of a member state to give effect to a settlement agreement.[47] While the New York Convention requires both recognition and enforcement steps, the recognition process proves to be of little value as it is in the final enforcement process where the fate of an arbitral award is decided. In some cases, the authority of a member state recognizes the legal force of an arbitral award but declines to enforce it on other grounds.[48] Therefore, it is largely agreed that the recognition procedure is of little use to most parties applying for awards

[42] Status: United Nations Convention on International Settlement Agreements Resulting from Mediation，
https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited December, 18, 2019)

[43] Status: United Nations Convention on International Settlement Agreements Resulting from Mediation，
https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited December, 18, 2019)

[44] Art. 14, Singapore Convention

[45] *See generally*, *Id*.

[46] Although the term "competent authority" is also used in the New York Convention, the main text of the Singapore Convention does not contain limiting language on the term's definition as compared to the "Objectives" section of the Introduction of the New York Convention, which provides that:"[the New York Convention] seeks to provide common legislative standards for the recognition of arbitration agreements and *court* recognition and enforcement of foreign and nondomestic arbitral awards."

[47] Xiantao Wen, *The Singapore Mediation Convention and Commercial Mediation in China*, China Law Commentary 198, 201-02 (2019)

[48] *Id*. Article III, New York Convention

enforcement. By completely leaving out the recognition step, the Singapore Convention allows applicants to move onto the enforcement stage directly, enabling the process to proceed in a more expeditious and efficient manner.

Compared to the New York Convention, the Singapore Convention is also more inclusive in membership as it permits the participation of non-sovereign entities.[49] Although all of its current signatories are sovereign states, the Singapore Convention does open the gate for the participation by regional economic integration organizations.[50] It remains to be seen how such organizations will react to the provision.

Among the core provisions of the Singapore Convention, the mechanism that attracts the most attention is perhaps the provision setting out the grounds for refusing to grant relief.[51] Similar to the New York Convention, grounds under the Singapore Convention to refuse the grant of relief are also very limited. Currently, only two sets of grounds are possible.

The first set can be invoked by application only. These grounds concern capacities of disputing parties, substances of the settlement agreement, or problems of the mediation procedure,[52] and are generally in line with those set forth in Article V.1 of the New York Convention. According to Article 5 of the Singapore Convention, the competent authority can only refuse to grant relief when the resisting party furnishes proof to establish the existence of one of the following circumstances: 1) the incapacity of a party; 2) the settlement agreement is null and void, inoperative or incapable of being performed under its governing law; 3) the settlement agreement is not binding or final; 4) the settlement agreement has been subsequently modified; 5) the obligations in the settlement agreement have been performed or unclear or incomprehensible; 6) granting relief would be contrary to the terms of the settlement agreement; 7) the mediator has seriously breached the standards applicable to the mediator or the mediation, without which the party would not have entered into the settlement agreement; or 8) failure of the mediator to disclose circumstances

[49] *See* Art. VIII, New York Convention (The New York Convention is open to states only)

[50] Art. 12, Singapore Convention

[51] *See* Wen *supra* note 47

[52] Text and status of the Singapore Convention, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited December, 18, 2019)

that give rise to justifiable doubts on her independent and impartiality which has materially or unduly resulted in one party's entering into the settlement agreement.[53]

Apart from the above, the competent authority may also refuse to grant relief *sua sponte* under two conditions, i.e., when granting relief would be contrary to the public policy or when the subject matter is not capable of settlement by mediation under its law.[54] These provisions mirror languages used in the New York Convention,[55] affording the competent authority of a member state with a safety net to ensure its public interest is not undermined.

To make it easier for member states to implement domestically, the Singapore Convention adopted a rather broad scope of applicability and ambiguous language regarding implementation procedures. However, this could be problematic in a statutory law country like China. Practicable implementation standards need to be put in place to guide judges' applications of the laws.[56] Therefore, there is still substantial amount of work to be done before the Singapore Convention can change the dispute resolution landscape of China.

Two uncertainties are particularly problematic. The first uncertainty comes from specific standards the Chinese judiciary needs to design when enforcing an international mediated settlement agreement in accordance with the Singapore Convention. If the Chinese judiciary is designated to be the competent authority to hear mediation enforcement cases, as in cases of recognition and enforcement of arbitral awards, it will need to carefully consider to which level of courts judicial review power could be delegated and whether to delegate it to a specific group of judges with relevant expertise. Although professionalism of the assessors is vital to the successful implementation of the Singapore Convention in China, qualities and experiences of Chinese judges vary.

The second uncertainty of implementing the Singapore Convention in China comes from the vague applicability of the Singapore Convention. By adopting a "place of business" approach to ascertain whether a settlement agreement is

[53] Art. 5, Singapore Convention
[54] Article 5.2, Singapore Convention
[55] Article V.2, New York Convention
[56] *See* Wen, s*upra* note 48

international, the Singapore Convention has broad scope of applicability and does not follow the New York Convention approach by giving any settlement agreement "nationality".[57] To preserve flexibility, the Singapore Convention also does not provide a definition for the concept of "place of business".

However, unlike the relatively simple test of ascertaining the nationality of an arbitral award by looking at the seat of arbitration adopted by the New York Convention, the place of business is a more fluctuant and less easily discernible concept which will be subject to vastly different interpretations by the member states. Therefore, it is expected that this definition might bring about considerable unpredictability. Chinese statutes and relevant legal principles lack a clear definition of place of business. The PRC Civil Procedure Law and the General Provisions of the Civil Law, principal Chinese laws regulating commercial activities, do not contain a definition of "place of business". The closest approximation may be found in the PRC Choice of Law for Foreign-related Civil Relationships and the Contract Law. Both use the term "principal place of business", which implies that a business can have more than one place of business. In other legislations, different terms such as domicile, habitual residence and place of registration are used interchangeably.[58] Distinctions between these terms are not explained in these laws. Under this background, it is not uncommon for Chinese companies to have multiple places of business, which can include places of incorporation, corporate headquarters, places where most of business revenues come from etc.[59] This vagueness in definition affords flexibility, but might also give rise to significant disputes in practice. If the party resisting enforcement has multiple places of business, but only one that generates most of its business revenues can accord the settlement agreement an international character under Article 1.1(a), can this party argue that the appropriate place of business should be its corporate headquarters instead, therefore rendering the Singapore Convention inapplicable? Or alternatively, can the resisting party argue that

[57] Art.V.1, New York Convention

[58] *See e.g.,* Art.21, Art. 196, People's Republic of China Civil Procedure Law; Art.10, People's Republic of China Corporate Law; Art. 25, General Provisions of the Civil Law of the People's Republic of China; Art.50, People's Republic of China Enterprise Income Taxation Law

[59] *See* Xinli Du, *Legal Problems in Private International Law*, 64-5 (2005) (originally in Chinese)

although one of its places of business satisfy the international requirement under Article 1.1(a), it is the other unqualified place of business that is actually relevant to the transaction at hand? In its current shape, Chinese laws and the Singapore Convention do not contain a clear answer to such inquires. Private international law rules are to be employed to determine the place of business that has the closest relationship with the settlement agreement.[60]

In addition, when there is no dispute that the parties' places of businesses are located in the same state, Article 1.1(b) of the Singapore Convention again calls for the application of private international law principles for the conduct of a "most closely connected to the subject matter" or "substantial obligations performed" test to the determination of the agreement's international character, which gives the authority of a member state broad discretion to interpret and apply its own jurisprudence, but at the same time also gives rise to uncertainties.[61]

Apart from the above, one of the few limitations of the Singapore Convention on the place of business is a temporal one, i.e., "at the time of its conclusion".[62] Whilst this restrictive provision is very useful in narrowing down the relevant places of business, difficulties may arise from the rapidly changing nature of businesses. A resisting party may simply argue that its current place of business, which satisfies the internationality requirement under the Singapore Convention, is not the one at the time of the conclusion of the settlement agreement, so as to deprive the other party recourse under the Singapore Convention. In such cases, the party seeking enforcement might have to conduct substantial evidentiary investigation to refute this contention, causing uncertainties and a waste of litigation resources.

That being said, removing the nationality assessment is still considered a rather positive development as the broad applicability of the Singapore Convention in a specific case does not hinge on reciprocity any more, which is usually required in mutual or multilateral enforcement assistance agreements. For instance, under the New York Convention, if an arbitral award is not rendered in a New York Convention member state, the award will not be able to be recognized and enforced in any other New York Convention member country. In contrast, under the Singapore

[60] Art. 2.1, Singapore Convention
[61] Art. 1.1 (a)-(b), Singapore Convention.
[62] Art. 1.1, Singapore Convention

Convention's broad "place of business" test, parties are no longer bound by places of mediation, leading to more liberty in mediation processes and the possibility of more settlement agreements being enforced.

III. EMBRACING THE SINGAPORE MEDIATION CONVENTION: MEDIATION LAWS, INTERNATIONAL COMMERCIAL COURT, AND THE BRI

A few years before the Singapore Convention was put on the negotiation table, China had initiated numerous efforts to modernize practices and regulations of private commercial mediation.[63] These efforts have been intensified in later years, as influenced by the promising negotiation process of the Singapore Convention. In this section we mainly discuss three areas that could hugely benefit from China's adoption of the Singapore Convention -- the emerging progeny of modern mediation practices, the establishment of a "one-stop" international commercial court, and the ongoing construction of Belt and Road Initiatives. Benefits of the greater international mediation enforcement framework are especially sensitive to developments in these areas, and development of these areas is likely to reinforce mediation reforms after the Convention takes effect. Although these discussions might not be "China unique", it offers a groundwork as for why current mediation infrastructure in China has provided some special opportunity for mediation to be rapidly developed and adapted.

A. MEDIATION LAWS

Rogers and Drahozal have hypothesized and been able to empirically test the positive impact of the promotion of international arbitration and development of local institutions, through the presence of activities of a group of "transnational legal elites" who welcome and accolade the introduction of international arbitration into their national legal systems mostly out of self-interests.[64] Therefore, the interaction between private

[63] *Supra* part II
[64] *See* Rogers & Drahozal *supra* note 5

international law and local legal professionals cannot be overlooked.

However, compared to arbitration, mediation is largely unregulated worldwide.[65] As noted by a prominent Chinese practitioner, mediation under the current Chinese legal system mostly denotes that conducted in the process of litigation or arbitration.[66] Mediation under the People's Mediation Law, although bearing the name "mediation", in fact looks more similar to the amicable conciliation process that is more voluntarily conducted by local autonomous governing bodies, the People's Mediation Commission.[67] Actually, disputes covered by the Peoples' Mediation Law largely overlap with those carved out of the scope of the Singapore Convention.[68] In addition, the People's Mediation Law has provided simple guidelines for who can become community-based mediators in China.[69] Only those who are entrusted by the government and the people can perform roles such as neutrals mediating family and neighbor disputes. Compared to the international commercial disputes anticipated by the Singapore Convention, the People's Mediation Law aims at resolving more traditional types of civil disputes, particularly domestic and family cases in an amicable and cost-effective manner.[70] Moreover, such mediation is limited to those directly supervised or overseen by formal institutions, either people's government or local bar associations.[71] Under the current Chinese legal system, there is almost no place for mediation conducted by independent mediators without the involvement of institutions or the judiciary, which makes it hard to directly apply the Singapore Convention framework to China.[72] In the past, this has harmed the image of mediation in China as being overall unprofessional and unscrupulous.

Nevertheless, in recent years there is a revived interest in promoting the use of commercial mediation in China, by encouraging legal professionals to participate in commercial mediation practices. In 2017, the Supreme People's Court of China

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[65] *See*, *e.g.*, Art Hinshaw, *Regulating Mediators*, 21 Harvard Neg. L. Rev. 163, 167-68 (2016)
[66] *See* Zhu *supra* note 17.
[67] *Id*.
[68] *Id*.
[69] Art. 13 – 16, People's Mediation Law of the People's Republic of China
[70] *Id*.
[71] Art. 4, People's Mediation Law of the People's Republic of China
[72] *See also*, Wen *supra* note 47

and the PRC Ministry of Justice passed the *Opinions on Implementing the Pilot Program of Lawyers Mediation*, making "lawyers participating in mediation" one of the central objectives of the recent ADR reform.[73] This pilot program was first conducted in 11 economically more advanced regions in China.[74] In accordance with the Opinions, qualified local People's Courts and Bar Associations need to establish specialized "lawyer-mediator studios" as places to organize and designate legal professionals and particularly lawyers to mediate cases referred by courts.[75] Lawyers who participate in mediation are usually compensated for their services.[76] In 2019, the applicable scope of the Opinions was further expanded to all provinces of China.[77] Even as it is still a bit early to make certain predictions, it is likely the group of professional lawyer-mediators will experience growth under these state initiatives.

Under this backdrop, the adoption of the Singapore Convention has provided incentives to further standardize the practices of commercial mediation in China, in a way strengthening legal institutions that support international mediation and making local practices more in line with international standards. As market demand starts to grow, new trainings on international mediations are becoming more popular in China. The Hong Kong Mediation Centre is one of the first non-mainland mediation training institutions that openly promotes its international commercial mediator training courses in mainland China, and accredits those qualified as HKMC accredited mediators.[78] The China Council for the Promotion of International Trade ("CCPIT") Mediation Center, one of China's oldest and most renowned commercial mediation service providers, has also recently entered into a joint training program with the Centre for Effective Dispute Resolution ("CEDR"), a prominent mediation training facility in the United Kingdom, to conduct joint workshops on international commercial mediation skills and practices and to accredit a small number of

[73] Opinions of the Supreme People's Court and the Ministry of Justice on Implementing the Pilot Program of Lawyer Mediation
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] Opinions of the Supreme People's Court and the Ministry of Justice on Expanding the Pilot Program of Lawyer Mediation
[78] Mainland-Hong Kong Joint Mediation Center, https://mhjmc.org/sc/Page_Format_7.php?nws=224

Chinese mediators who can pass the CEDR standard.[79] Although the qualities and standards of these mediation trainings conducted in China are hard to fathom, they are likely to expose potential Chinese meditators to various foreign practices and infuse with Chinese mediation techniques. This trend is likely to intensify since the signing of the Singapore Convention. The end result is that international rules and norms will be gradually internalized into local legal systems, which will further elevate the standards of commercial mediation practices and the social status of professional mediators in China.

B. THE "ONE-STOP" COMMERCIAL COURT

The signing of the Singapore Convention is also likely to impact the ambitious construction of multi-door courthouses in China. On June 29, 2018, the Supreme People's Court ("SPC") of China established the China International Commercial Court ("CICC") to address the need for specialized courts to hear international commercial disputes.[80] Its first and second divisions were set up in Shenzhen and Xi'an respectively.[81] The CICC has been said to be an example of a multi-door courthouse as envisioned by Professor Frank Sander.[82] According to its rules, the CICC can exercise jurisdiction on a broad array of cases when certain conditions are met, or when the SPC decides that the case is to be heard by the CICC.[83] In its mission statement, the CICC seeks to "build a diversified dispute resolution mechanism that efficiently links mediation, arbitration and litigation," which integration will create a "one-stop" international commercial dispute resolution mechanism.[84] Although it is not clear to academics and practitioners how exactly this link will work, it is likely that a CICC dispute resolution mechanism will evolve to

[79] The First International Commercial Mediator Certificate Jointly Certified by Chinese and British Mediation Institutions, https://adr.ccpit.org/articles/244 (last visited December, 18, 2019)

[80] China International Commercial Court, http://cicc.court.gov.cn/ (last visited December 22, 2019)

[81] CICC Introduction, http://cicc.court.gov.cn/html/1/218/19/141/index.html (last visited December 22, 2019)

[82] Matthew Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative*", ASIL Insights

[83] Art. 2, Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court

[84] Art. 1, Working Rules of the CICC's International Commercial Expert Committee

blur lines between litigation, arbitration and mediation. In December 2018, the CICC announced the first batch of arbitration and mediation institutions to be included in this platform, and particularly emphasized that the parties could choose to settle their disputes through mediation conducted by all these institutions.[85]

Establishing international commercial courts has become a regional trend in the Asia-Pacific.[86] Supporters of international commercial courts have previously acknowledged the current enforceability advantage of international arbitration.[87] However, many also warn that the competition of arbitration and commercial courts could be a zero-sum game. Given that the adoption of the Singapore Convention will likely narrow or even close the enforceability gap, mediation would have more potential to offer advantages of a consensual process that preserve business relationships, and avoid the potential bias of domestic courts and international arbitration that has been increasingly judicialized.

In addition, unlike typical arbitration proceedings, the mediation settlement proceedings do not have to bypass national courts. This may provide better chances for the integration of mediation and adjudication, both of which could be easily supervised by the CICC. What's more, although CICC could not appoint foreign persons to be its judges, it does house an Expert Committee consisting of Chinese and foreign experts from more than 20 regions of the world.[88] While these experts cannot adjudicate CICC cases due to barriers in the PRC Laws on Judges, they can be appointed to participate in mediation proceedings as requested by the court.[89] To many that are suspicious of fairness and

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[85] Notice of the General Office of the Supreme People's Court on Determining the First Group of International Commercial Arbitration and Mediation Institutions to be Incorporated into the "One-Stop" Dispute Resolution Mechanism, http://cicc.court.gov.cn/html/1/218/149/192/1124.html last visited December 22, 2019) (originally in Chinese)

[86] *See generally*, Man Yip, *The Singapore International Commercial Court: The Future of Litigations? 12 Erasmus L. Rev. 82* (2019) (introducing the background of establishment of the Singapore International Commercial Court); Gary F. Bell, *The New International Commercial Courts – Competing with Arbitration? The Example of the Singapore International Commercial Court*, 11 Contemporary Asia Arb. J. 193 (2018) (looking at advantages of arbitration and international commercial courts in resolving cross-border disputes)

[87] *See* Justice Steven Chong, *The Singapore International Commercial Court: A New Opening in a Forked Path*, British Maritime Law Association Lecture, pp 16, 26 (2015)

[88] *See* Resume of Expert Committee Members, http://cicc.court.gov.cn/html/1/218/226/234/index.html (last visited December, 22, 2019)

[89] Article 3.1, CICC Court Rules

professionalism of Chinese judges, they could be more willing to invoke CICC foreign experts to be their neutrals and thus voluntarily opt for mediation proceedings. Therefore, encouraging the use of mediation is likely to make the integration of mediation and litigation under the auspices of CICC easier.

At the very least, the signing of the Singapore Convention has also provided opportunities for the CICC and domestic courts to reform their mediation rules to be more in compliance with international standards and best practices. These reforms will also be accompanied by adoption of international standards and rules of local mediation institutions. Like arbitrations, Chinese mediation centers will borrow from leading mediation practices abroad to craft their own rules and administrative procedures, ensuring that terms and standards newly introduced are familiar to the international community. Throughout repeated exposure to international mediation practices, Chinese lawyers and mediators will be less likely to accept much lower standards (and standards of compensation) in domestic mediation or national courts not adapted to modern mediation practices.

C. BELT AND ROAD INITIATIVES

As a third matter, the signing of the Singapore Convention will increase the possibility of mediations included as a way of resolving disputes between Chinese parties and foreign parties, especially these arising out of transactions related to the Belt and Road Initiative.[90] With the utilization of the BRI, China declared that it seeks to advance greater peace, stability, joint progress and prosperity. Recognizing the commitment to and the pursuit of harmony, China has also been searching for a new and clear independent dispute resolution system that fits with the China model. Mediation, particularly in the case of the BRI, may give some legal determinacy to the concept of harmony and avoid bureaucratic and legal burdens.[91]

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[90] Singapore, *China jointly Write Mediation Rules for Belt and Road Arbitration Courts*, https://www.silkroadbriefing.com/news/2019/02/21/singapore-china-jointly-write-mediation-rules-belt-road-arbitration-courts/ (last visited December, 18, 2019)

[91] *See* Malik R. Dahlan, *Dispute Regulation in the Institutional Development of the Asian Infrastructure Investment Bank: Establishing the Normative Legal Implications of the Belt and Road Initiative*, AIIB Yearbook of International Law, 127-35 (2019)

Mediation advocates in China have already experimented with some BRI focused mediation mechanisms. A local mediation institution supervised by the Beijing Municipal Bureau of Justice is already in operation under the name of the BnR Service Connection Mediation Commission.[92] The Commission is open to parties through voluntary application for disputes that arise from BRI. As the Singapore Convention has no requirement regarding the "seat" of mediation, it allows more flexibilities for parties to choose places for conducting mediation. For example, the Commission just opened mediation hearing rooms in Astana and Almaty, two of the largest commercial cities in Kazakhstan. By such collaboration, these hearing centers in Kazakhstan could take local cases and refer parties' mediation requests back to Beijing for mediator appointment and assistance with other forms of administrative proceedings. Then and through the Singapore Convention, settlement agreements could be easily enforced in China or in Kazakhstan.[93] Actually, due to few restrictions on the places of mediation, adopting the Singapore Convention also allows for some BRI mediation to be conducted online. For example, the newly incorporated online dispute resolution service provider, the eBRAM in Hong Kong, has a vision to provide an efficient and cost-effective online platform for BRI disputes involving Chinese issues to be resolved through ADR.[94] On these online platforms, BRI disputes could better utilize the advantages of mediation.

Moreover, the Singapore Convention might bring Chinese parties a step closer to mediating their disputes with Belt and Road countries. The definition under Singapore Convention for "commercial dispute" is broad, which seems to include a wide range of arms-length business disputes and even investment disputes.[95] Actually, mediation has already been encouraged in investment disputes worldwide. Some of the regional trade

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[92] Belt & Road Service Connections, New Feature, http://www.bnrmediation.com/ (last visited December 22, 2019)

[93] Kazakhstan singed the UN Convention on Mediation, http://mfa.gov.kz/en/singapore/content-view/kazahstan-podpisal-konvenciu-oon-o-mediacii (last visited December, 22, 2019)

[94] Now Hong Kong Plans to Take Arbitration Online with new eBram Project, https://www.scmp.com/news/hong-kong/law-and-crime/article/3005025/how-hong-kong-plans-take-arbitration-online-new-ebram (last visited December, 18, 2019)

[95] Art. 1.1(a), Singapore Convention; *see also* Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward*? 37 Berkeley J. Int'l L. 215, 216-17 (2019)

initiatives, including the EU-Canada Comprehensive Economic and Trade Agreement ("ECTA"), which came into force in 2017, expressly provides for mediation of investor-state disputes.[96] The International Bar Association's investor-state mediation rules for example, also have provided a legal framework specifically designed for mediation in the investor-state context, offering a helpful starting point for parties interested in pursuing investment mediation.[97] Due to the strong mediation tradition in China, the Chinese government has always been keen on advocating the use of mediation in investor-state dispute resolution.[98]

In the BRI region, currently there is no multilateral dispute resolution mechanism. Although China has entered into Bilateral Investment Treaties ("BITs") with most of the Belt and Road countries, many of its earlier generation of BITs contain some incomplete form of investor-state arbitration clauses, only allowing those disputes related to compensation to be submitted to ISDS.[99] At the same time, as a capital-exporting country, Chinese investor attitudes are more dominate in invoking these investor-state dispute resolution clauses. Until recently, Chinese investors have not been fully active on ISDS forum, possibly because of some unwarranted fears of conducting arbitration in international arenas.[100] This gives investor-state mediation some natural favoritism among Chinese parties.

At the same time, China has tried to promote the use of mediation in many of its recent treaties and has shown renewed interest in using mediation in investment and commercial dispute resolution. For example, in the Closer Economic Partnership Agreement ("CEPA") Investment Agreement signed between China and its two Special Administrative Regions ("SAR"s), Hong Kong and Macau, mediation is selected as one of the five dispute resolution mechanisms between Hong Kong/Macau investors to resolve investment-related disputes between the Chinese government in China, and Chinese investors to resolve the same

[96] Art. 8.20, EU-Canada Comprehensive Economic and Trade Agreement
[97] IBA Rules for Investor-State Mediation
[98] *See* Wang & He *supra* note 9
[99] Jingxia Shi & Nuan Dong, *The Reconstruction of Investor-State Dispute Resolution Mechanism in View of the Belt and Road Initiatives*, Wuhan Int'l L. Rev. (2), 6-8 (2018)
[100] Chinese investors have only invoked six investment treaty related ICSID disputes so far, see International Center for Settlement of Investment Disputes Case Database

kind of dispute with the SAR governments in the SAR's.[101] A handful of mediation institutions were appointed as CEPA operating institutions, and a list of renowned legal professionals were included as official CEPA mediators.[102] This has set a good example for an investor-state mediation mechanism to be designed between China and its Belt and Road trading partners.[103] Apparently, working out a deal with these countries will be more difficult than negotiating such provisions with SAR governments. The fundamental processes for the applicability of mediation, relevant procedures of mediation, appointment of mediators, and length of mediation should not be significantly different.[104] It is likely that China continues to advocate these approaches in its renegotiation of BITs with BRI countries, or even to further propose this issue at a multilateral level. In a recent article, Chinese investment law scholars Shi and Dong also suggest the inclusion of a mandatory enforcement clause in renegotiating BITs with these countries.[105] Therefore, the adoption of the Singapore Convention might further promote the inclusion of mediation and conciliation as an option in more investor-state disputes arising along the Belt and Road.

IV. A PRELIMINARY CONCLUSION AND RESEARCH THOUGHTS FOR THE FUTURE

In recent years, mediation has continued to grow in China. The slow professionalization of mediators, integration of various dispute resolution mechanisms in the newly established international commercial court, and continuous search for a more China-focused dispute resolution mechanism for the BRI have provided unique opportunities for the Singapore Convention to interact with domestic legal institutions in China. Unlike the era when China just entered into the New York Convention when the

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[101] Art. 20, Investment Agreement, Mainland and Hong Kong Closer Economic Partnership Agreement.

[102] CEPA Designated mediators, http://mhjmc.org/en/Page_Format_6.php?fmd=259&con=712 (last visited December, 18, 2019)

[103] *See* Shu Shang, *Responding to the ISDS Legitimacy by Way of Mediation: Implications from CEPA's Dispute Resolution Mechanism*, 18 J. Int'l Bus. & L. 217, 228-32 (2018-19)

[104] *See Id*.

[105] *See* Shi and Dong *supra* note 99, at 4

entire country was aggressively opening up to attract foreign capital, in recent years the strong development of the domestic Chinese market and the global economic recession have made the Chinese government react more to internal needs as a means of achieving a performance-based political legitimacy. That being said, the impact of an international legal system on China's rule of law and legal infrastructure could not be overlooked. A timely adoption, signing the Singapore Convention could be seen as an important external force providing primary incentives for local reform, which provides further incentives for the Chinese government to push for a reform in its mediation laws, "one-stop" commercial court and dispute resolution mechanism construction for BRI initiatives.

Compared to the miracle brought by the New York Convention more than 50 years ago, the Singapore Convention's impact on China could be even more long-lasting. Firstly, in contrast to many of the Western nations, in China there is little resistance to the use of mediation, both from the government's end and from businesses' end. Secondly, the Chinese government has worked to promote mediation awareness among legal professionals in China by encouraging and even mandating lawyer's participation in mediation settings. By increasing mediator's fees and promoting mediator trainings, added economic incentives and existing awareness will soon stimulate market need for mediation. At the same time, concerns remain. Due to the special interest-focused nature of mediation as a dispute settlement mechanism, some scholars remain suspicious that increased use of mediation could undermine steps towards a more rule-based and formal legal governance system in China. If parties rapidly turn to mediation to resolve and internalize their commercial conflicts, there might be little incentive for the government to continue improving the quality of its courts. At the same time, the confidential nature of mediation might slow down steps leading to improved transparency of the Chinese judiciary, shifting blame to low quality of interest-based results delivered by non-court-based mediators. Leaving fairness and transparency aside, whether the increased use of mediation is going to negatively impact the emergence of a stronger rule-based legal regime in China is still subject to debate. More empirical data and results need to be collected in order to further answer these questions.

Overall, although some of these impacts are going to be more incremental and gradual than others, the signing of the Singapore

Convention will diminish barriers for mediation to become one of the dominant alternative dispute resolution methods used in domestic and cross-border contexts. At the same time, having undergone hundreds of years' development in ancient China, it is predictable that modern mediation will become a more mainstream dispute resolution method, presenting courts and users some alternative ways of achieving the balance of efficiency and preservation of longer term business relationships. Therefore, following the signing of the Singapore Convention, an increasing number of parties will become aware of the advantages to resolve their disputes through mediation, in and out of China.

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THE SETTLEMENT AGREEMENT AS A MEANS OF RESOLVING CROSS-BORDER COMMERCIAL DISPUTES IN LIGHT OF THE SINGAPORE CONVENTION ON MEDIATION AND RUSSIAN LAW

DMITRY DAVYDENKO[*]

ABSTRACT

In December 2018 the United Nations adopted the Convention on International Settlement Agreements resulting from Mediation, also known as the Singapore Convention on Mediation. It applies to international settlement agreements resulting from mediation. It establishes a harmonized legal framework for the right to invoke such settlement agreements as well as for their enforcement.

The Convention has been open for signature since August 2019. However, many States, including Russia and the EU, have not signed the Convention.

This paper analyses whether it makes sense for Russia and other States with a similar legal and economic system to take part in such an international convention or to adopt legislation following the amendments to the UNCITRAL Model Law on the International Commercial Conciliation. The paper concludes that it is worthwhile for Russia to implement the mechanism for enforcing settlement agreements, resulting from international commercial mediation.

In itself, the absence in Russia and some other countries of the domestic mechanisms for the simplified enforcement of out-of-court settlement agreements does not exclude the possibility of a successful implementation of the Singapore Convention. Establishing such a mechanism for cross-border commercial settlement agreements does not require the prior availability of such mechanisms in all countries.

However, the implementation of the Singapore Convention entails a risk of abuse of the simplified procedure for enforcing a settlement agreement by dishonest parties against the other

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party, as well as the risk of its unfair use by both parties For example, it could be used to cover illegal transactions, or for money laundering or tax evasion. The risk is related to the absence of unified global standards for conducting mediations, guarantees of its quality and requirements of the mediator. As result, some settlement agreements might have illegal content and might grossly violate the interests of one of the parties, third parties or public interests. However, the Singapore Convention contains a number of safeguards to counteract abuses and otherwise protect the legitimate interests of the state and individuals.

Nevertheless, taking into account the risk of abuse of the simplified mechanism for enforcement of the settlement agreement, consideration should be given to the possibility of establishing additional guarantees in the instrument to verify the content of such agreements.

Keywords: settlement agreement, mediation, cross-border disputes, the Singapore Mediation Convention, Russian law

I. INTRODUCTION

When international business chooses between the dispute settlement procedures, it usually focuses on sustainability and enforceability of the result. This follows, in particular, from the global survey made within the recent Global Pound conference series: 52% of those polled saw the demand for certainty and enforceability of outcomes as a key influencer on such decisions.[1]

As regards international arbitration, the legal result is an arbitral award, which, if necessary, can be internationally enforced through the mechanism established by the New York Convention of 1958. The court considering an application to enforce the award shall grant it without any further trial on the merits. The party against whom the award is enforced may invoke a very limited number of grounds for the court to refuse it.

Things are quite different with international dispute settlement by mediation. The legal result is a settlement agreement reached

[1] Thomas J. Stipanowich, *What Have We Learned from the Global Pound Conferences?*
http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences (last visited on 4 January 2020).

with the assistance of a mediator ("settlement agreement"). Should a party fail to fulfill its obligations, the other party would have to commence litigation or arbitration against it through an ordinary procedure, often time-consuming and costly. This discourages use of international mediation, which is a valuable tool for the smooth development of the world economy and has great potential to harmonize turbulent business relations. Therefore, the problem of establishing a special mechanism for international enforcement of mediated settlement agreements has become an international concern.

In other words, a cross-border settlement agreement is usually considered as a contract and is internationally enforceable in the same way as other contracts. Meanwhile, UNCITRAL has carried out work to make it internationally enforceable in a way similar to foreign arbitral awards. As result, in December 2018 the United Nations adopted the Convention on International Settlement Agreements resulting from Mediation, also known as the Singapore Convention on Mediation" (the "Convention"). It applies to international settlement agreements resulting from mediation ("settlement agreements"). It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation

The Convention has been open for signature since August 2019. However, many States, including Russia and the EU, have not signed the Convention.

This paper analyses whether it makes sense for Russia and many other States with a similar legal and economic system to take part in such an international convention or to adopt legislation following the amendments to the UNCITRAL Model Law on the International Commercial Conciliation.[2]

[2] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the Model Law on International Commercial Conciliation, 2002). https://uncitral.un.org/en/texts/mediation (last visited on 4 January 2020).

II. ESSENCE OF THE CONVENTION

The Convention aims to provide an opportunity to give legal effect and enforce settlement agreements outside the country of their conclusion in a simple and convenient way. With this aim, a party would need to apply at the court (or other competent authority) of the State where the agreement is sought to be relied upon. As with the New York Convention of 1958, the Convention provides a limited list of grounds to refuse such application, such as an incapacity of the party, nullity of the agreement under the applicable law, and some others. Therefore, it is not an automatic coercive enforcement of settlement agreements, but, instead is a reduction in the range of possible grounds for the court to refuse recognition and enforcement.

The Convention deals specifically with international "settlement agreements". An agreement is international if at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties to the settlement agreement have their places of business is different from either:

- the State in which a substantial part of the obligations under the settlement agreement is to be performed; or
- the State with which the subject matter of the settlement agreement is most closely connected.[3]

The Convention does not cover enforcement of those settlement agreements that have been approved by a court judgment in the State of their conclusion or by an arbitral tribunal as an arbitral award on agreed terms.[4] The agreements approved by a court judgment can be enforced abroad in the same manner as ordinary foreign judgments (there are other international instruments for that, for example, treaties on legal assistance and the Hague Choice of Court Convention of 2005). Foreign arbitral awards on agreed terms are subject to enforcement abroad like ordinary foreign arbitral awards in accordance with the New York Convention of 1958.

Thus, the essence of the Convention consists of creating a mechanism for a simplified cross-border enforcement of extrajudicial settlement agreements similar to the mechanism of

[3] Convention, Article 3(1); Model law, Article 15(4).
[4] Convention, Article 1(3); Model law, Article 15(3).

simplified cross-border enforcement of arbitral awards established in the New York Convention 1958 and in the Article 35 ("Grounds for refusing recognition or enforcement") of the UNCITRAL Model Law on International Commercial Arbitration.

II. LEGAL EFFECT AND ENFORCEMENT OF SETTLEMENT AGREEMENTS UNDER RUSSIAN LAW

At present, the following regime for enforcement of settlement agreements operates in Russia. A settlement agreement on a dispute arising out of civil legal relations, concluded by the parties as a result of mediation, conducted without referring the dispute to court or arbitral tribunal, is, in itself, a civil contract. Rights violated as a result of failure to properly perform such contract are protected by civil law.[5]

An agreement concluded by the parties as a result of mediation, conducted after the referral of the dispute to litigation, may be approved by the court as a settlement agreement in accordance with procedural legislation. The resulting ruling is enforceable as a court judgment on the merits or, as appropriate, legislation on arbitration.[6] If the parties concluded a settlement agreement after the referral of the dispute to arbitration, they may ask the arbitral tribunal to render a consent award enforceable in the same way as an arbitral award on the merits.

Consequently, if a settlement agreement is concluded out-of-court[7], it is enforceable the same as any other contract: through filing an appropriate claim at a competent court or arbitral tribunal.

Russian legislation does not provide for a special procedure for enforcement of international settlement agreements.

Therefore, under Russian law there is currently no special regime for enforcement of settlement agreements: it remains the same as for other contracts.

[5]Article 12(4), Federal Law of 27 July 2010 (as amended on 23 July 2013) "On alternative procedure for the settlement of disputes involving a mediator (mediation procedure)" ("Law on Mediation").

[6]Article 12(3), Law on Mediation.

[7] The term "out-of-court" settlement agreements in this paper encompasses those concluded outside litigation and arbitration.

III. Advisability of Russia's Implementation of the Convention from Different Perspectives

A. Improvement of the Environment for Foreign Commerce and Investment Attractiveness of Russia

As follows from the above, under Russian law if a party to an out-of-court settlement agreement fails to perform its obligations voluntarily, the other party will be forced to file a claim at court or arbitral tribunal in ordinary proceedings. The proceedings can be very time-consuming: in state courts, due to several levels of judicial review; in arbitration, taking into account the overall lengthy procedure. They also often prove costly, especially for foreign parties, and their outcome is frequently uncertain. As a result, parties tend to view the settlement agreement as an ineffective instrument, and the attempt to settle the dispute peacefully as a waste of time and other resources. Therefore, they seek to resolve their disputes by litigation or arbitration, rather than settle them amicably. This prejudices the good business relations of the parties, and leads to loss of profit. It also contributes to increasing the burden of caseload on judges.

In international business disputes, it is especially important for the parties to ensure the sustainability of the dispute settlement terms: the legal force and enforceability of the settlement agreement in the jurisdiction where the counterparty and/or its property are located. This creates additional difficulties for the foreign party to protect their rights abroad (foreign legal system, costs for legal representatives, differences in legal culture).

Thus, the lack of a uniform legal mechanism for cross-border recognition of the legal force and enforcement of settlement agreements hinders the referral of the parties to amicable dispute settlement, and in particular, to mediation.

When making the decision to conclude a deal with a Russian party, it is important for the foreign party to ensure that the parties will be able to effectively resolve any dispute without resorting to court, and that the concluded settlement agreement, if necessary, can be enforced in Russia without resorting to a lawsuit. Such confidence may become a decisive factor in favour of concluding a deal with a Russian business entity.

Russian participants in foreign trade are also interested in a dispute settlement which has legal force, in particular, in the country of the foreign counterparty enterprise or their property, and is enforceable through a simple and straightforward procedure.[8] The Convention aims to ensure such result.

Consequently, the implementation of the Convention will make the outcome of the dispute settlement of international commercial disputes more sustainable and increase the investment attractiveness of Russia.

B. Development of Mediation of Economic Disputes in the Country and Beyond

Mediation is a technology for an amicable settlement of commercial and other disputes. Potentially, it can have a positive social and economic effect on Russian society, which stands out as being highly contentious, with abounding conflicts.[9] At the same time, state courts are unable to cope with the resolution of these conflicts. Thus, the Russian courts of general jurisdiction annually consider about 15million cases[10], and state commercial courts about 1.5 million cases.[11] The average caseload of a judge constitutes several hundredcases *per annum.*[12]

The burden on judges is therefore extremely high and reduces the possibility of in-depth consideration of each dispute and the quality of the judgments rendered by the court. In this regard, it is

[8] This is indicated by Russian researches, including: Oleg Dmitriev, Alexandra Furtak, *Some aspects of the execution of the settlement agreement*. Bulletin of Omsk University No. 3. P. 249-253 (2013).

[9] The advisor to the President of the Russian Federation Veniamin Yakovlev noted that "the ability to correctly resolve conflicts can significantly reduce discords in society. Over the past decadesconflicts in society has increased dramatically. Our task is to find various ways to reduce conflicts. But more important is the ability to adequately exit conflicts, the ability to settle them based on the balance of conflicting parties' interests". (http://alrf.ru/blog/v-tpp-obsudilimezhdunarodnyj-arbitrazh-i-mediaciyu-v-rossii-i-germanii/ (last visited on 4 January 2020).

[10] So, in 2015, courts of general jurisdiction examined in the first instance with a ruling (court order) about 16 million cases. Bulletin of the Supreme Court of the Russian Federation. No. 1. 46 (2017).

[11] Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016). Placed in the Russian law database "KonsultantPlus".

[12] "A judge is not a machine for making decisions"
Interview with the Director General of the Judicial Department at the Supreme Court of the Russian Federation Alexander Gusev. https://iz.ru/news/649322 (last visited on 4 January 2020).

necessary to support and develop mediation in every possible way, which the Russian top political leaders repeatedly draw attention to.[13] This also applies to commercial disputes.

Nowadays, mediation in Russia is practiced but uncommon. One reason is the lack of trust towards the results of the procedure, the settlement agreement, or more specifically, towards its enforcement.

The Convention, as noted above (see section 2), precisely aims at the creation of an international mechanism for a simplified enforcement of settlement agreements.

Its implementation will benefit amicable resolution of the controversies between parties to foreign economic transactions. It will give the parties confidence in the sustainability of the result of the dispute settlement procedure, increase legal certainty and promote more frequent resort to mediation by the parties. Thus, the parties will be able to settle disputes more effectively themselves, rather than by a court decision or arbitral award. As such, adoption of the Convention or model law will lead to implementation of legal rules that *favor conciliationis* (favor reconciliation of disputing parties) contained in Russian procedural legislation.[14]

C. DEVELOPMENT OF THE DOMESTIC LEGAL SYSTEM

The implementation of the Convention will entail further development of the Russian legal system: by creating a mechanism for enforcing international settlement agreements, it will also be logical to subsequently simplify the procedure for enforcing **domestic** settlement agreements (*i.e.*, on disputes between Russian persons , without a foreign element).

At the same time, it would be reasonable to start the reform with agreements for the settlement of international commercial disputes:

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[13] For example, ex-President of Russia Dmitry Medvedyev, already in 2010 noted that "*the institution of mediation is without a doubt an absolutely positive thing ... this is just what has been suffered, what can be done quickly, without using the state machine and what is highly efficient*" http://www.mediacia.com/news/133.html (last visited on 4 January 2020).

[14] Article 190 of the Russian Commercial Procedure Code: "Article 2. Tasks of proceedings in arbitration courts. The tasks of legal proceedings in arbitration courts shall be… 6) assistance in the formation and development of partnership business relations, the formation of customs and ethics of business turnover.

Article 138. Reconciliation of the parties. 1. The arbitral tribunal shall take measures to reconcile the parties, assist them in settlement of the dispute".

in such transactions, the parties are usually most professional and are able to protect their interests when negotiating agreements.

Consequently, the implementation of the Convention in Russia would positively impact Russian business turnover and, above all, Russian foreign economic activity. It will also contribute to further development of the Russian legal system.

V. Enforcement of Settlement Agreements in the Context of Russian Legal Culture

A. Insignificance of Mediation Experience in Russia as an Argument Against the Implementation of the Convention in Russia

At present, commercial disputes involving Russian parties are infrequently settled through mediation. Therefore, the very problem of improving the enforcement of settlement agreements has not yet been recognized as urgent by the Russian participants in international business turnover. This problem is rather familiar to companies in those countries whose legal culture has already accumulated more significant experience with mediation. For example, the problem is known to US companies, which more often conclude settlement agreements with each other, and also with parties from other countries.[15] Accordingly, they better understand the benefits of a simplified enforcement. That is why the United States is the initiator of the idea for the Convention.[16]

So, in its comments in relation to the Convention, Russia stated that *"In the Russian Federation, the practice of using mediation/conciliation proceedings in commercial relations is currently in the very early stages of development. The business community in the Russian Federation has not yet gained the necessary experience for a broad application of this alternative*

[15] Elena Nosyreva, Альтернативное разрешение споров в США (Alternative Dispute Resolution in the USA) (2005).

[16] The Government of the United States of America submitted to the UNCITRAL Secretariat a proposal in support of future work in the area of international commercial conciliation. Its English version was submitted to the Secretariat on 30 May 2014. A/CN.9/822 — Proposal by the Government of the United States of America: future work for Working Group II. http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/822&Lang=E. (last visited on 4 January 2020).

method of settling disputes and differences of opinion in both domestic and international trade".[17]

Scarcity of such experience does not mean, however, that it is too early to introduce the simplified mechanism for enforcement of settlement agreements. Firstly, as a result of the implementation of the Convention, Russian participants in foreign economic activity will be able to take advantage of the simplified mechanism of enforcing the settlement agreement *on par* with foreign ones. Disputes arising from the conduct of international business are very diverse and can be settled on different terms. So, the terms of the settlement agreement, in many cases, can include obligations of an American or European company to pay money to a Russian legal entity. In that case, the simplified mechanism for enforcement will be very useful for the Russian party.

Secondly, the practice of mediation in Russia is not that small. As noted above, above 1000 cases annually settle by mediation.[18]

Thirdly, one of the deterrents for the development of mediation is the absence of a simplified mechanism for enforcing a settlement agreement: Russian participants in foreign trade (or their lawyers) fear that the outcome of the mediation will be insufficiently stable (not completely definitive), unlike judicial decisions. The results of the survey conducted by N.I. Gaidaenko Schaer support this: 86% of respondents considered it necessary to legislatively enhance legal certainty and enforceability of the result of the agreement reached by parties through extrajudicial mediation.[19]

Many specialists from various countries of the world express the opinion that the attractiveness of amicable dispute resolution will increase if the settlement agreement reached during such a procedure will use the regime of accelerated enforcement in a manner similar to the arbitral award.[20]

Postponing adoption of new mediation-enhancing legislation until a large mediation practice develops creates a "vicious circle":

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[17] A/CN.9/846/Add.4. Compilation of comments by Governments. Russian Federation. P. 4.

[18] Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016). Placed in the Russian law database "KonsultantPlus".

[19] Natalia Gaidaenko Schaer, *Юристы, судьи и альтернативные способы разрешения споров: итоги одного опроса (Lawyers, judges and alternative dispute resolution: the results of a poll)* // Treteyskiy sud (Arbitration Court), No. 1(97). 122-123 (2015).

[20] https://documents-dds-ny.un.org/doc/UNDOC/GEN/V02/544/95/PDF/V0254495.pdf?OpenElement. A/CN.9/514, section 77 (last visited on 4 January 2020).

the practice of mediation will not grow, because the legal environment is not favourable enough, and the environment will not improve, because considerable practical experience has not been accumulated. The Convention helps to "break" such a vicious circle.

In view of this, the lack of mediation experience in Russia does not constitute a convincing argument against the implementation of the Convention in Russia.

B. Does Availability of Arbitration Make Mediation Unnecessary?

Russia also argues that *"as practice shows, the availability of international arbitration procedures to contractors on the whole meets the demand dictated by the current level of development of international economic relations. Almost all international contracts drawn up in the vast majority of commercial transactions in international commercial trade include an arbitration clause. This allows contractors who have reached a settlement agreement resulting from mediation/conciliation proceedings to have such an agreement enforced, having requested an arbitral tribunal to convert their settlement agreement into an arbitral award on agreed terms".*[21] However, is it not necessary to establish favorable legal conditions for the parties so that they can settle their disputes without resorting to arbitration? Definitely yes, given the huge expense and time required for an international arbitration.

Furthermore, if the parties commence arbitration after their dispute is already settled merely to render a consent award, this raises doubt as to the international enforceability of such an award: the existence of a pending dispute constitutes a precondition of a genuine arbitration.[22]

In view of this, a simplified enforcement of mediated settlement agreements remains important, notwithstanding the availability of arbitration.

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[21] A/CN.9/846/Add.4. Compilation of comments by Governments. Russian Federation. P. 4.

[22] Yarik Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement* (November 7, 2015). Brooklyn Journal of International Law, Volume 40 845-849 (2015). Available at SSRN: https://ssrn.com/abstract=2580572 (last visited on 4 January 2020).

C. Combatting Possible Abuse of the Simplified Mechanism by Dishonest Parties

a. Third parties' rights and public interests

At present, the level of legal culture in Russia is generally insufficiently high. In these circumstances, some dishonest participants in business turnover will definitely try to abuse the simplified enforcement mechanism of settlement agreements, for example, to cover illegal transactions, or for money laundering or tax evasion.

As is known, dishonest persons try to use, for example, arbitration for illegal purposes: such parties initiate arbitral proceedings and eventually obtain an arbitral award in order to cover up the illegal transfer of money or other property. A similar possibility exists through the use of cross-border settlement agreements: under the guise of the settlement agreement, unscrupulous parties can effect a cross-border payment that does not have lawful grounds. However, the very possibility of abuse of the simplified mechanism for enforcing international commercial settlement agreements does not mean that such mechanism should be abandoned, as discussed in the framework of UNCITRAL. Above all, the mediation procedure itself aims at ensuring that the interests of the party are duly taken into account and reflected in the settlement agreement.

Statistical studies on the activities of Russian state courts have shown that the actions of the mediators in 2015 have not been disputed in either the courts of general jurisdiction, or in the state commercial courts. Information on filing court claims against mediators (for instance, on compensation for damages caused by the mediation procedure) remains unavailable. Cases challenging the validity of settlement agreements are rare. At the same time, according to statistical information from the Supreme Court of the Russian Federation, for instance, in 2016 mediation was successfully applied in 1223 cases[23], in 2015 in 1115 cases and in

[23] Consolidated statistical data on the activities of federal courts of general jurisdiction and justices of the peace for 2016. No. 2 "Report on the work of courts of general jurisdiction on the review of civil, administrative cases at first instance". Section 4. http://www.cdep.ru/index.php?id=79&item=3832 (last visited on 4 January 2020).

2014 in 1329 cases, respectively[24], which are rather considerable numbers.

Therefore, the risk of concluding a settlement agreement that grossly violates third parties' rights or public interests is insignificant.

Aside from that, the Convention is about enforcing contracts concluded between professional participants in foreign economic transactions. As a rule, both parties usually have in-house lawyers or consultants and procedures for internal approval of transactions that ensure the agreements are in accordance with the interests of the company.

Furthermore, the Convention contains a number of safeguards that counteract the abuses and otherwise protect public interests. Thus, when considering the issuance of a writ of execution to a settlement agreement, the court has the right to:

- any necessary document in order to verify that the [conditions] [requirements] of the Convention have been complied with (Article 4(4) of the Convention, Article 17(4) of the Convention model law). This gives the court broad powers: if the judge doubts the legality of the transaction, then he or she has the right to demand proof of its legality;
- determine the law applicable to the operation and enforcement of the settlement agreement, if the parties have not agreed upon such law (Article 5(1)(b) of the Convention, Article 18(1)(b) of the Convention model law);
- refuse to enforce the settlement agreement, if this would contradict the public policy of Russia (Article 5(2)(a) of the Convention, Article 18(2)(a) of the Convention model law). The application of public policy reservation allows to prevent significant violations in each particular case.[25]
- refuse to enforce the settlement agreement if the dispute is not capable of settlement by mediation under Russian law (Article 5(2)(b) of the Convention, Article 18(2)(b) of the

[24] Information on the practice of applying the Law on Mediation for 2015 (approved by the Presidium of the Supreme Court of the Russian Federation on 22 June 2016). Placed in the Russian law database "KonsultantPlus". Sections 1 and 2.

[25] Dmitry Davydenko & Alexandra Khizunova, Значение и функции оговорки о публичном порядке в иностранном и российском праве (The meaning and function of the reservation on public policy in foreign and Russian law). Zakon, No. 2 (2013).

Convention model law). For example, according to paragraph 4 of Article 1 of Law on Mediation, it does not apply if the dispute affects or may affect the rights and legitimate interests of third parties, not participating in the mediation procedure, or public interests.

It is also stipulated in the Convention that the state, upon accession to the convention, has the right to declare that the convention does not apply to the settlement agreement to which it, or any of its governmental agencies, is a party (Article 8(1)(a) of the Convention). Russia should make such a reservation. This would prevent the risk of internationally enforcing a dishonestly concluded settlement agreement (for example, as a result of bribery) against a Russian governmental agency.

At the same time, taking into account the risk of abuse of the simplified mechanisms for enforcement of the settlement agreement, consideration should be given to the possibility for establishing additional guarantees (model legislative provisions) in the convention, verifying the content of such agreements. Such guarantees may be, for example, the mandatory notary form of the agreement and its analogues; requirements for mediators: availability of professional status, registration in the register or participation in a self-regulated organization for mediators, availability of a mediator's signature on the agreement and others.

b. Infringement upon a party’s rights

A dishonest party may abuse the simplified order of enforcement of settlement agreements against the other party. For instance, the settlement agreement may be concluded on disadvantageous terms for one of the parties due to the presence of a conspiracy with its representative or the defiance of the party's will, or due to unequal bargaining power.

However, the Convention contains means to protect the rights of a *bona fide* party against whom a settlement agreement is being enforced. Such party has the right to present evidence to the court that the settlement agreement is void, inoperative or incapable of being performed; or the obligations in the settlement agreement have been performed; or the settlement agreement is not binding, or is not final, according to its terms; or has been subsequently modified; or is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is

invoked have not yet arisen (Article 5(1)(b and c) of the Convention, Article 18(1)(b and c) of the Convention model law).

In addition, the party has a right to refer to a competent court with a claim for recognising the settlement agreement as invalid, or to use other remedies of a similar nature. If, after that, the other party turns to the court to enforce the agreement, then the court may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security (Article 6 of the Convention, Article 18(3) of the Convention model law).

These provisions seem to preserve the balance of rights of the parties and protect against abuses of the mechanism.

Many of the mentioned mechanisms have long been used by Russian courts when examining applications to issue writs of execution to arbitral awards (§ 2 of Chapter 30 of the Commercial Procedure Code). Therefore, such mechanisms are known to Russian judges and have been tested in practice.

Aside from that, Russian courts have broad experience of examining applications on the approval of settlement agreements: a ground for refusal is breach of the law or a contradiction with the rights of other parties. To verify these circumstances, the courts also take appropriate measures, including demanding evidence.

In view of this, the risk in question does not seem to be significant, and adequate measures could be established to minimize it, known to the Russian law and practice, and provided for by the Convention.

VI. OTHER *PRO* AND *CONTRA*

A. THE LACK OF UNIFORM INTERNATIONAL STANDARDS FOR THE CONDUCT OF MEDIATION AND CONTROL OVER THE MEDIATION PROCEDURE

An analysis of the international experience in the regulation of mediation has shown that, at present, there is no uniformly accepted standard for the conduct of mediation and mediator training: different countries have their own standards.[26] As such,

[26] Natalia Gaidaenko Schaer, Альтернативные механизмы разрешения споров как инструмент формирования благоприятной среды для

it does not pose a risk for Russia and its business turnover in case of the implementation of the Convention. The real risk consists in the improper conduct of mediation, leading to the conclusion of an agreement that grossly violates the interests of the party. This issue was examined above in the section "Violation of a party's rights". Additionally, the Convention provides for the right of the party against whom the enforcement is sought, to refer to the following:

- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or
- There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.[27]

In those cases, the court should reject enforcement of the settlement agreement.

It should be noted that the 1958 New York Convention was adopted at a time when there was not yet a single standard of arbitration set out in the UNCITRAL Model Law on International Commercial Arbitration, which was only adopted in 1985. Nevertheless, this convention has become very successful, including in Russia.[28]

Furthermore, the mediator, unlike the arbitrator, has no authority to make a binding decision for the parties on the substance of the dispute. Thus, the parties themselves determine the content of the settlement agreement.

предпринимательской деятельности (опыт России и зарубежных стран): монография (Alternative dispute resolution mechanisms as a tool for enabling a favourable environment for entrepreneurial activity (the experience of Russia and foreign countries): monograph) / Ed. Natalia Semilyutina 248 p. (2016). Placed in "ConsultantPlus" electronic database in Russian.

[27] Article 5(1)(d and e) of the Convention, Article 18(1)(d and e) of the Model law.

[28] International Council for Commercial Arbitration. ICCA's Guide to the Interpretation of the 1958 New York Convention; A Handbook for judges. P. 5 (2012) Located at:
http://www.arbitration-icca.org/media/3/46059478358923/russian_text.pdf (last visited on 4 January 2020).

In summary, the existing risks of Russia's implementation of the Convention for Russia and its business turnover do not outweigh the advantages associated with such implementation. However, later it will be necessary to elaborate further on the issues related to the need to combat abuses, peculiar to States with a low legal culture.

B. WILL THE MECHANISM BE TOO COMPLEX?

In its comments in relation to the Convention, Russia also stated that the legal mechanism needed to enforce international settlement agreements is unlikely to be less complex than the current mechanism for enforcing international arbitral awards. In addition, it will require unified solutions to develop, which will be extremely difficult to achieve given the rather profound differences in approach in this matter among domestic legal systems, which largely reflect their prevailing cultural and legal traditions.[29]

As a whole, the UNCITRAL legal mechanism is identical to both the legal mechanism for enforcement of foreign arbitral awards, which has long been known to Russian law[30], and the issuance of writ of execution to domestic arbitral awards.[31] This mechanism is clearly more favorable for the creditor than filing a lawsuit.

Cultural differences are significant in disputes between individuals, especially in family or inheritance disputes, and disputes involving consumers. Therefore, these disputes are specifically excluded from the scope of the Convention.[32] In commercial disputes, especially international, these differences are minimal. Therefore, the creation of a uniform standards for the enforcement of international commercial settlement agreements is possible, despite the differences. In view of this, this argument is not convincing.

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[29] A/CN.9/846/Add.4. Compilation of comments by Governments. Russian Federation. P. 4.

[30] Chapter 31, Russian Commercial Procedure Code "Proceedings on cases on recognition and enforcement of decisions of foreign courts and foreign arbitral awards".

[31] § 2 of Chapter 30, Commercial Procedure Code "Proceedings on cases on recognition and enforcement of decisions of foreign courts and foreign arbitral awards".

[32] Article 1(2) of the Convention, Article 15(2) of the Model law.

C. Whether a Special Regime for Enforcing International Settlement Agreements can be Harmoniously Integrated into the Russian Legal System

If Russia takes part in a convention based on the Convention or adopts legislation following the Convention model law, this will mean that cross-border settlement agreements will be enforced in a way different from domestic settlement agreements. However, such divergence between international and domestic dispute resolution rules is feasible. This is shown by the experience of successfully integrating international mechanisms in relation to international arbitral awards: the UNCITRAL Model Law on international commercial arbitration and the New York Convention of 1958 have long been implemented into the Russian legal system with undoubted positive effect for Russian foreign trade. Since long time enforcement of international and domestic arbitral awards is governed by different, though in many ways similar, rules (see section 6.2 below).

Aside from that, further consideration could be given to the possibility of developing an identical or similar mechanism for "domestic" settlement agreements.

In view of this, the special regime for enforcing international settlement agreements can be harmoniously integrated into the Russian legal system.

Consequently, the arguments against Russia's implementation of the Convention for Russia and its business do not outweigh the advantages of such implementation.

VII. What Changes Need to be Made to Russian Legislation to Simplify the Order of Enforcement of Settlement Agreements in Accordance with the Convention

If Russia takes part in a convention based on the Convention or adopts legislation following the Convention model law, this will require the following changes to the Russian legislation. Firstly, it will be necessary to amend the Law on Mediation, namely, to supplement it with a separate chapter "Recognition and

Enforcement of International Mediated Agreements".[33] It will provide for a procedure for the recognition and enforcement of international settlement agreements on commercial disputes in accordance with the Convention. It may be similar in structure to Section 3 ("Enforcement of international settlement agreements") of the Convention model law.

Apart from that, the Law on Mediation will need to refer to the procedural legislation, for example, as follows: "An international commercial settlement agreement, regardless of the country in which it was concluded, is recognized as binding and when a written application is submitted to the competent court, it is enforced subject to the provisions of the articles ..., as well as provisions of the procedural legislation of the Russian Federation".

Accordingly, it will be necessary to include into the Russian Commercial Procedure Code ("CPC") (or a similar code adopted in the future) of the Russian Federation with a chapter on the recognition and enforcement/issuance of writ of execution for international settlement agreements on disputes arising from civil legal relations in the conduct of entrepreneurial (and other economic) activities. The chapter must apply where the party, against which an application for enforcement of the settlement agreement has been made, or the property of that party is located in the territory of Russia.

The chapter may be similar in structure to § 2 of chapter 30 of the CPC ("Proceedings on cases on recognition and enforcement of decisions of foreign courts and foreign arbitral awards").

The implementation of the Convention will not have a significant impact on the enforcement procedure because it will be carried out on the writs of execution issued by the Russian court upon the application of the party to the settlement agreement, in the same way as it is routinely done now on the writs of execution issued by the Russian court upon the application of the party to the arbitral award. Therefore, amendments to the Federal law of 2007 "On enforcement proceedings" appear unnecessary.

[33] Russian Law on Mediation uses the term "mediated agreement" ("*mediativnoye soglashenie*") to define settlement agreement.

VIII. WHICH FORM OF THE INSTRUMENT IS PREFERABLE TO THOSE WORKED OUT BY UNCITRAL?

UNCITRAL has worked out two instruments:

- Convention; and
- Model Law;

Each of the discussed instruments is considered separately below.

A. CONVENTION

The advantage of the convention as an instrument is that it creates a uniform legal regulation, mandatory for participating countries. In addition, such a convention, like the New York Convention of 1958, will prevail over the less favorable national legislation. This means that if the domestic legislation of a country does not provide for a convenient mechanism for enforcing international settlement agreements, then the parties (including, as appropriate, Russian participants in foreign trade) will still be able to enforce them in a simplified manner. From this point of view, the convention as an instrument is efficient.

Professor S.I. Strong from the University of Missouri conducted an international web survey on the development of the Convention. 74% of the respondents (mainly lawyers) recognized the practicability of concluding a convention on the implementation of a settlement agreement resulting from international commercial mediation.[34] However, a drawback of a convention is that its entry into force, in view of its contractual nature, requires the consent of other States to participate. Many countries today have not expressed their opinion on the practicability of working on a new

[34] Stacie Strong, Legal Studies Research Paper Series. Research Paper No. 2014-28 / Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed Convention on International Commercial Mediation and Conciliation. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302 (last visited on 4 January 2020). Geographical distribution of the respondents: 35 % from the USA, 11% from Great Britain, 27% from the rest of the countries in Europe, 13% from Asia.

convention. In addition, as shown above, great differences exist between countries in regulating settlement agreements, as well as any agreements on dispute settlement, and also mediation, and there are no generally accepted standards. In Russia, which is similar to China, Croatia, Kazakhstan and Israel[35], and unlike a number of other countries (e.g. France, Cyprus, Greece, Macedonia, Spain, Turkey)[36], the mediation law currently allows the activity of non-professional mediators who have not undergone special training. This raises doubts as to the quality of the resulting settlement agreements assisted by non-professionals.

The mediation practice also remains very different, in many countries it is still developing. However, some countries, for example Algeria, indicated the usefulness of developing an international instrument to recognize and implement such agreements[37], even though there are no specific provisions in their legislation on international commercial mediation.

In the light of the above, a wide adoption by States of the Singapore Convention (mediation counterpart of the New York Convention of 1958) can hardly be predicted in a short term. However, the adoption of the convention and the participation of Russia makes sense in the long run: it will benefit all those involved in international commerce.

B. MODEL LAW

The efficiency of the model law as an instrument relates to the fact that each State (including Russia) can adopt an appropriate regulation independently of other States. Also, each State has the right to opt out at its own discretion from the provisions of the model law. For comparison, limitations on the adoption of a convention can only be made on a small set of issues.

Accordingly, the model law gives States more freedom of action than the convention. It allows for differences between countries better than the convention. Mediation, as a procedure, is less uniform than arbitration because arbitration, by its nature, is an adversarial procedure and, as such, in many significant aspects is

[35]Article 15(1) of the Law on Mediation.

[36] Giovanni Matteucci, A*DR in 24 Countries: Mediators and Ombudsmen*. http://www.academia.edu/35683774/ADR_in_24_Countries_Mediators_and_Ombudsmen_Who_can_mediatie_Is_there_a_law_that_defines_who_can_perform_mediation (last visited on 4 January 2020).

[37]A/CN.9/846/ Add. 3, p. 3.

analogous to litigation.Mediation, by its nature, constitutes negotiations.

As a result, the drawback of the model law is that the legal regulation of the conditions and the procedure for enforcing settlement agreements may vary from country to country. This can lessen legal certainty.

At the same time, given the lack of uniform standards of mediation procedure and of uniform rules governing settlement agreements, a model law appears to be a more practical instrument, at least in the short run. It would allow Russia (as well as other States) to better take into account its particular concerns, such as the necessity to efficiently counteract abuses and ensure consistency with regulation of domestic settlement agreements.

IX. CONCLUSION

Based on the analysis of the Singapore Convention, the global experience in regulating enforcement of settlement agreements, the Russian legislation and the practice of mediation, it makes sense for Russia, as well as other countries with similar economic and legal systems, to implement a mechanism for enforcing settlement agreements resulting from international commercial mediation.

In itself, the absence in Russia, and some other countries, of the domestic mechanisms for the simplified enforcement of out-of-court settlement agreements does not exclude the possibility of the implementation of the Singapore Convention. Establishing such a mechanism for cross-border commercial settlement agreements does not require the prior availability of such mechanisms in all countries.

The implementation of the Singapore Convention entails a risk of abuse of the simplified procedure for enforcing a settlement agreement by dishonest parties against the other party, as well as the risk of its unfair use by both parties, for example, to cover illegal transactions, money laundering or tax evasion. The risk is related to the absence of unified world standards for conducting mediation procedure, guarantees of its quality and requirements to the mediator. As result, some settlement agreements might be illegal and might grossly violate the interests of one of the parties, third parties or public interests.

However, the Singapore Convention contains a number of safeguards to counteract abuses and otherwise protect the legitimate interests of the State and individuals. Above all, the Singapore Convention does not provide for the automatic enforcement of settlement agreements. Instead, it establishes a procedure for issuing the writ of execution to such agreements with the participation of both parties by the competent body of the State (the court). During the course of such procedure, enforcement may be refused on a limited range of grounds.

In particular, a Russian competent state court would have the right to require parties to provide the necessary documents to verify the legality of the transaction, and would be authorized to refuse to enforce the settlement agreement if this would contradict the public policy of Russia. The court could also refuse to enforce the agreement if the mediator exerted undue influence on any party or did not disclose circumstances that could cause grounds to doubt his/her impartiality or independence.

Nevertheless, taking into account the risk of abuse of the simplified mechanism for enforcement of the settlement agreement, consideration should be given to the possibility of establishing additional guarantees in the instrument to verify the content of such agreements. Such guarantees can be, for example, the mandatory notary form of the agreement and its analogues; introducing special requirements for mediators: availability of professional status, registration in the register or participation in a self-regulated organization for mediators, availability of a mediator's signature on the agreement and others. In this regard, a model law appears to be a more flexible and practical instrument than a convention.

When implementing the Singapore Convention, Russia should limit the scope of the simplified enforcement mechanism by stipulating that it does not apply to settlement agreements to which Russia itself or any of its public institutions are a party. The Singapore Convention allows this to be done.

The UNCITRAL mechanism for simplified enforcement of settlement agreements provides an opportunity for the courts to minimize the risks of abuse on a case-by-case basis. It is generally balanced and takes into account the interests of the parties and public interests.

Similar mechanisms are already known to the Russian judicial practice regarding enforcement of international arbitral awards. Considerable experience in their application has been accumulated

by the state courts. Therefore, that risk for the law of Russia is known and controllable.

At the same time, it will be necessary to elaborate further on the issues related to the need to combat abuses.

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THE REVIVAL OF MEDIATION IN CENTRAL NORTH AFRICAN COUNTRIES

SALMA BEN AYED[*]

ABSTRACT

A comparative study is essential for the construction of a unified policy. Noticeably, societies facing the "same" economic and social problems united by a unique language and a rich history and culture have, therefore, a common ground. The common legal heritage suggests the adoption of a similar legal policy for an alternative judicial system. However, mediation in the Central North African Countries (Algeria, Morocco and Tunisia) is not a simple unified process. Similarities of the past have vanished because of different choices. This specific process reflects the cultural specificities of each society and offers amicable settlement to face formal system deficiencies. The history of North African countries revealed that culture and religion had an important impact on the evolution of alternative dispute resolution. This process existed under different names in different contexts. The position of the tribe's leaders and specific Ombudsmen in the Islamic Era legitimated the expansion of this negotiated process. In many conflicts, there was a wise person to interfere relying on specific ethics and rules. Despite this distinguished heritage, the study revealed that cultural aspects that existed for centuries did not constitute the source of the ADR methods. Therefore, contemporary legal initiatives, because of cultural specificities, were not identical to international standards suggested by professionals. In certain periods, legislation adopting ADR methods was rarely implemented. The evolution of mediation was unnoticeable compared to arbitration in Tunisia specifically. In Algeria, this practice existed for decades but was not translated into legal rules. In Morocco, mediation, as an institutionalized practice, continued to play an important role in administrative conflicts. Currently, due to international partnerships, mediation and other ADR methods are at the center of academic programs, conferences and trainings. This

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revival was not complete because different legal amendments did not offer an efficient process, as expected by professionals.

Key words : Mediation- North Africa – ADR system – Ombudsman – Islamic culture.

I. INTRODUCTION

Mediation is a process presented differently in each civilization and community. The constant expansion of the practice suggests that this process is instinctively better than long judicial fights. Any fervent mediator would declare that the opportunity to reach a bad agreement in a peaceful way is more interesting than fighting for justice through a long and expensive litigation. The ideal resolution of disputes is to terminate conflicts at early stages. In North African countries, the various efforts deployed by selected practitioners and academics to promote mediation in the conventional and judicial contexts, are limited to certain noticeable achievements. A gap exists between official expectations after different reforms and the integration of this process in practice. If the desire to win a claim always exists and never vanishes, the formal judicial organization cannot offer the same opportunities for all opponents in different contexts. ADR methods are accepted as a relief from court congestion and expensive procedures. The integration of arbitration was easier than mediation mainly because international standards were clear and unified in matters of certification and procedure. Mediation, as a process, offers flexible opportunities and is not limited to pre-existing conditions.

The legislature in the Maghreb countries did not present a precise definition of **mediation** as a **process**. However, the Moroccan legislature defines the **mediation agreement** *as an enforceable contract whereby the parties agree to nominate a mediator whose mission is to facilitate the formation of an agreement to terminate litigation*[1]. This agreement is presented as a "*transaction*". The Algerian legislature presents judicial mediation as a mandatory process suggested by the judge to the

[1] Article 327-57 and 327- 61 of the *Dahir* (Royal Decree) N°1-07-169 of 30th November 2007 definition of the mediation agreement and the mediation clause. The amendment of the Moroccan code of civil procedure (O. J. M. Rsup) B.O.R.M. nº 5584, 6th December. 2007, p. 1369.

parties in most conflicts. Judicial mediation is not possible for family and labor complaints and matters related to public order.[2] The process to enter into negotiation is mandatory but judicial mediation remains voluntary for opponents. If they choose to accept this alternative dispute resolution, they are obliged to accept a mediator designated by the judge (a physical mediator or an association). In any context, the duration of this process cannot exceed three months, renewable once if requested by the mediator.[3]

The Tunisian legislature did not accept mediation as a distinctive alternative method in a general text but adopted it in few new laws. The previous legal interventions were more clear and advantageous and were crowned by the introduction of arbitration in a special code.

Any conceptual definition of mediation in a complex legal context has to satisfy international standards of this specific process. A conventional or mandatory mediation is a voluntary decision of disputants to terminate the conflict and to avoid litigation with the help of a neutral independent mediator. This professional facilitates their negotiations with respect to specific ethics.

Concepts and definitions presented by academics can be shortened in this presentation:

> - "Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated and consensual agreement among parties, without rendering a formal decision. In arbitration, a single third party or a panel of arbitrators, most often chosen by the parties themselves, renders a decision less formal than a court, but often with a written award.[4]"

In Arabic, the term ***Sulh*** means Conciliation; ***Wasata*** Mediation; and ***Tahkim*** Arbitration. These are the main alternative dispute methods. *Sulh* and *Wasata* are interchangeable terms for the same act. But there is another term which is specific to religious

[2] Article 994 of the Algerian civil and administrative procedure code. Law N° 08/09 of 25 February 2008 Part V

[3] Article 996 Algerian code of civil and administrative procedure.

[4] Menkel- Medow@2015, to be published in international encyclopedia of the social and behavioral sciences. Mediation, arbitration and ADR. Elsevier LTD 2015 university of California. USA. (Consulted PDF. SSRN, in, 22/1/2020)

behaviour and can be associated with a free mediation : **Shafa'a** : Intercession. The Doctrine of *intercession* in Islam is related to spirituality and Allah is the real Intercessor.[5] The act of intercession: *Shafa'a* given to the prophet the Day of Judgment[6] is reinterpreted in concrete meaning. Applying this term to certain disputes, means the intervention of a wise, honorable person to mediate for the benefit of a debtor.[7] Intercessors do not have any self-interest, they help persons in need of pardon. It can be compared to a mediation without mutual agreement or a conciliation in a judicial decision. The word is used also in laying a petition before a king.[8] Mediation/ Conciliation as an informal process are traditional methods followed to solve disputes or to prevent judicial claims. Mediation in its literal meaning is the attempt to reach the middle. In Arabic "Wasat" is the middle of a thing. It is the opposite of extreme: "***We have made you (believers) into a just (wasat) community.***[9]"

II. HISTORICAL BACKGROUND

The pre-colonial Arab Maghreb: Islamic law is an important source of contemporary codified law. The historical aspects of this source depend on particular areas and periods. The evolution of mediation/ conciliation as concepts remained close to the evolution of the Islamic society. Ancient documents written in the middle Era of Islamic Civilization revealed that mediation was one of the common processes used in economic and social conflicts. The development of Islamic trade and the organization of specific souks in each Islamic city produced efficient rules and instruments to control trade according to the teachings of Islam. Scholars and judges practiced mediation/conciliation within traditional institutions. North African tribal leaders also played an important

[5] « Whose makes a righteous intercession shall partake of the good that ensues therefrom, and whose makes an evil intercession, will bear the consequence thereof." Quran (4 : 85)

[6] C.E. Bosworth, et al.' Encyclopedia of Islam. Tome IX San-SZE. Ed. Leiden Brill.1998 P. 183.

[7] Ibn Mandhour. Lisan Al Arab. (13th century 1290) Dictionary of Arabic language. Ed Dare Essadr 1997.

[8] Farid Younos. Islamic culture. A study of cultural anthropology. Author House Ed. 2013. P. 144.

[9] The Qur'an (Oxford World's Classics) 2: 142 p. 16 https://ia600304.us.archive.org/4/items/QuranTransAbdelHaleem/Quran_trans_Abdel%20Haleem.pdf

conciliatory role, using Islamic jurisprudence, cultural norms and usages.

The *Hisba* is a traditional authority that existed in Islamic souks and was generalized during the ruling of the *Khalifat* Omar Ibn Elkhattab. This special institution developed in North Africa mainly because of the scriptures of some scholars from Andalusia (Islamic Spain). During this era, commercial activity developed in organized souks and seaports. Business ethics and morals in commercial transactions and social relations were public matters. *Diwane El Madhalim and Hisba* [10] were a part of the administrative organization. Islamic scholars and judges were charged to maintain order and good manners. The source of this obligation is the Holy Scripture and the general teaching of the Prophet.[11] "Enjoining right and forbidding wrong" - is a duty of each Muslim and it became a traditional institution of controlling public order and maintaining peaceful social and economic relations.

Currently, this institution has been abandoned since the establishment of a **contemporary judicial system** in Algeria and Tunisia. However, it was re-integrated in Morocco by the legislature as a part of the economic control of commercial activity. It is important to mention that the ***revival of the Hisba*** by the amendment of the law in 1982[12] unexpectedly minimized the role of the Muhtassib.[13] The conciliatory role of the Muhtassib in few economic disputes was maintained. The Muhtassib is presented as a neutral conciliator in consumers disputes (he has other prerogatives). In a formal judicial organization, he has no judicial powers but was placed close to merchants to negotiate and control consumer's transactions. In Algeria, Tribe leaders had an impact on social relations within their communities. They had a

[10] Ibn Taymiyya Al- Hisba Fi L-Islam. Traité sur la Hisba [Hisba Treaty]. Published and translated in French by Henri Laoust. Ed. Librairie orientaliste PauL Geuthner, Paris 1984. 114 P.

[11] Ahmed Ghabin. Hisba Art and Crafts in Islam. Harrassovitz Verlag. Wiesbaden. Germany. 2009.

[12] Dahir n° 1-82-70 du 28 chaabane 1402 (21 juin 1982) portant promulgation de la loi n° 02-82 relative aux attributions du mohtassib et des oumana des corporations. B.O.R.M du 07 Juillet 1982 - Numéro 3636. Décret n° 2-83-717 du 20 rebia II 1404 (24 janvier 1984) relatif à la rémunération forfaitaire allouée aux mohtassibs. B.O.R.M du 01 Février 1984 - Numéro 3718

[13] Michèle Zirari-devif, « La Hisba au Maroc: Hier et aujourd'hui.» [The Hisba in Morocco: yesterday and today.] (pp.71- 86) In, Traditional institutions in the Arab world. (S. Dir.) Hervé Bleuchot. Ed. Karthala-Iremam, 1996. 228 p. p. 77.

traditional role in certain area where customs still constitute an important source of law: (Kabily Madhabi…). In Tunisia, the replacement of the Muhtassib by economic agents was not efficient in economic conflicts because they were not integrated in souks and had insufficient prerogatives. However, in traditional and small souks, the *Amine*, an *expert supervisor,* continued to play the role of a mediator between customers and merchants.

The main reason for the establishment of the *Hisba* as an institution was initially to maintain public economic order and to facilitate business transactions. The act of mediation given to the Muhtassib was significant.[14] The authority exercised in different places to a variety of matters[15] depended on his competencies and his honorable position. The regression of the economy had a huge impact on traditional institutions and the *Hisba* became ineffective due to corruption and the influence of lobbies in most sectors.

This article highlights the importance of mediation as a process translated into legal instruments. Practitioners used this method differently to enrich their negotiating skills or to promote indirectly their work as litigators. Special attention will be paid for the legal adoption of mediation in the central Maghreb countries. ***The*** legislature ***in Morocco insured the revival of mediation by a general approach with the modification of the commercial and civil procedure. In Algeria, the strict adoption of a judicial mediation minimized its efficiency. Finally, the Tunisian*** legislature ***adopted mediation in certain technical sectors and did not adopt a general provision to insure its expansion***. The presentation of this comparative study by reference to the case of Morocco, initially, followed by Algeria and Tunisia, is a personal evaluation of the revival of mediation in the legal framework: from the best presentation of conventional mediation and the judicial one to the limited integration of mediation in certain sectors. If we study the Codification Process we will find that the first successful attempt to codify the ADR methods was in Tunisia. Since 1993 the ADR policy was integrated in the legal system. Unfortunately, this innovation was limited to arbitration. Mediation and conciliation were not clearly presented as independent processes. The revival of mediation as a distinctive

[14] Emile Tyan. *Histoire de l'organisation judiciaire en pays d'Islam.* [History of the judicial organization in Islamic terrritories]2e Ed. E. J. Brill 1960. P. 646.

[15] Ibn Taymiyya Al- Hisba Fi L-Islam. Traité sur la Hisba [Hisba Treaty]. Published and translated in French by Henri Laoust. Ed. Librairie orientaliste PauL Geuthner, Paris 1984. 114 P

alternative dispute process is clear if we study the recent legal framework. However, this evolution has a limited impact because of the hesitation in terms of the integration of a special status for the mediator as an independent professional.

III. LEGAL FORMS OF MEDIATION AS A PROCESS

Generally, when we offer to study a legal framework in North African countries, we talk about reception and not revival: reception of western values or of international norms. In fact, the primary source of the civil law and procedures is French law. However, mediation is a process that existed for decades and is colored essentially by cultural and social values. The same global context that explained this revival had different legal effects on the translation of this practice into an alternative justice.

A. GLOBAL AND NATIONAL CONTEXT OF THE LEGAL AMENDMENTS:

This subject is important because it not only sheds light on the legal implementation of an ADR method, but also provides an opportunity to examine the impact of cultural specificities on the development of conflict management. Mediation was transformed from a traditional practice in social and economic small disputes, to a legal process initiated by independent professionals and integrated in the judicial system.

Since the interference of the French protectorate, the use of mediation was suspended by the wave of the ***codification.*** The formal judicial system was an instrument of controlling the economy and the main important transactions. After independence, the justice system was re-organized to provide a formal system based on the new constitutions. At the beginning, alternative dispute resolution methods did not represent a priority for national authorities. However, the practice was never suspended in commercial and labor disputes. Mediation/ conciliation was unjustly limited to divorce disputes.[16] The complexity of certain

[16] Omar Azziman, «*La tradition juridique islamique dans l'évolution du droit privé marocain*.» [Legal Islamic tradition and its effect on the evolution of private Moroccan law.] In, Le Maroc actuel. Ouvrage collectif. Ed. C.N.R.S. P.267 (1992.) Indigenous and minorities continued to follow their customs. Family and social relations were organized by customary law and each

disputes and the disadvantages faced by opponents in a formal system revealed the necessity to avoid litigation as much as possible. The legal inefficiency and the celerity of commercial transactions were sufficient reasons for international commercial organizations to encourage the development of ADR. Mediation represented an easier method to solve common problems and to prevent ones that are more complex.

The integration of mediation was prepared with respect of its essence and origin in *Morocco* and it will need more effort for its promotion. In *Algeria*, the choice was made to accept a controlled form of mediation with less space for innovation in terms of contexts and methods. In *Tunisia,* ADR practices were victims of the early success of arbitration, which stole the whole space. Certain sectors integrated mediation as an alternative way to escape the payment of certified experts.

These different choices are the result of the acceptance of the **same program**. The European program had different effects on the legislative reform in the Central North African countries. Various partnerships had an important effect on the proliferation of ADR processes. The program was conducted similarly in Tunisia[17], Morocco[18] and Algeria.[19] It meant to prepare the legal reform and promotion of ADR processes.

During the first period of the signature of General Agreements, the involvement of these states in this free market system had an impact on legal harmonization. The judicial system was accused of obstructing foreign direct investments. In this global environment, mediation and other ADR processes served as an attraction for foreign investments. *European Partnerships, globalization, new economic policies -- all these international factors created the necessity to reorganize the legal framework to avoid as much as possible the national formal system.*

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community had its own jurisdictions according the contemporary judicial system. The wave of codification had an impact on the judicial system. The traditional role of the Muslim judge were neglect because of the risks related to corruption and failure to regain the supremacy of the local judicial authority.

[17] PARJ, L'ACTU DU PARJ, (september 2017) http://www.parj.gov.tn/wp-content/uploads/2017/11/LActu-du-PARJ.pdf ssf-tunisia-c_2017_5637_1_annex_fr_v1_p1_944238.pdf

[18] International institute of studies. A decade of reform in Morocco (1999-2009). Karthala Ed. 2010 (In French)

[19] P3a, Le Jumelage institutionnel, un instrument de rapprochement, https://www.p3a-algerie.org/le-jumelage-institutionnel-un-instrument-de-rapprochement/ (consulted 30th january 2020)

The second period of the adherence to special partnerships and especially the "post uprising movements", urged the need for modernization of legal institutions to enforce previous amendments. The technical support for the reform of justice added a dynamic role to the traditional judiciary. The efforts in promoting ADR methods were increased within and outside the legal environment. Mediation was presented essentially in academic events and conferences.

In Morocco each year, professional centres and public institutions published reports and organized conferences to expand the ADR culture in general, and mediation was presented as an important tool to attract investors.

In Algeria, the Commercial Chamber [20] sponsored many conferences and organised others to present the mediation process as an innovative process for economic development. Academic research in general is limited to the judicial form of mediation, but legal professions are not limited in their educational role to this rigid method.

Since 1994, the **Tunisian** ministry of justice organized many conferences to promote mediation and explain its adoption in the judicial system. The panels and the public in these conferences were exclusively composed of judges. There was not a large number of other speakers to spread mediation culture. The purpose was an internal exchange to explain the legislative policy at that time. The integration of mediation in certain contexts had limited impact: The legislature reacted for the sole purpose of preventing court congestion and protecting infants in family or criminal matters. One of these conferences was published at the regional conference. Court of appeal. Kef Tunisia. In Kef 12 June 1998. The Tunis Higher Institute of Justice. Mediation was presented as a judicial process adopted by special Statute, for specific reasons. It was not a free process and the reform did not respect the spirit of mediation. Despite a large reform of the legal system, and the second wave of reform, mediation was not mentioned in most international contracts with public entities.

B. VARIETY OF FORMS AND CONTEXT OF THE MEDIATION PROCESS:

[20] Algerian Chamber of Commerce and Industry created the Conciliation, Mediation and Arbitration Center of CACI Phone/Fax : 021 96 46 25Phone: 021 96 66 66 / Poste 158 E-mail : deeaj@caci.dz

a. Administrative Mediation.

In **Morocco**, a constitutional institution[21] examines conflicts arising between citizens and the state or users and administration. In Tunisia, to avoid administrative litigation, an administrative conciliator has the power to mediate in certain conflicts.

In Morocco, a special Ombudsman called the **Mediator Institution** (Kingdom of Morocco), is competent, according the *Royal Decree Dahir*, to examine complaints which fall within its jurisdiction. For instance, conflicts between citizens or private entities and the Administration or the State. This was a traditional institution, reffered to from the Islamic Era until its recent abrogation as Diwane Al Madhalim.[22] It was a higher qualified council of scholars competent to control the ruler's decisions. It was similar to a higher constitutional court vested with the widest powers. Contemporary judicial organization changed its role and this body became a higher administrative mediator with the limited powers of making recommendations and consultations. This institution is a link between citizens and public agencies in cases of abuse or breach of contract. This change was an adaptation to contemporary approaches of public power deriving from international concepts of human rights.

The most important role of the Mediator of the Kingdom is the promotion of conciliatory mediation and the cooperation between similar institutions to promote this specific alternative process. Each year the Mediator of the Kingdom publishes an annual report of the work, statistics and important recommendations. These different reports reveal an insignificant number of complaints that ended with amicable agreement.

In **Algeria**, this matter was subject to controversy because the institution **of Mediator of the Republic** operated for only a few years. The Algerian legislature abandoned it for lack of efficiency. There are few possibilities offered for private entities or citizens to follow ADR methods in administrative conflicts.

Judicial mediation was introduced in the Algerian code of civil and administrative procedures (Law N° 09/08). Controversies arose about the possibility of accepting mediation as a process for

[21] Article 162 of the constitution of the kingdom of Morocco. Dahir (Royal decree) of 17 march 2011 cration and internal statute of the institution of the Mediator of the Kingdom, B.O., n° 6054 (7 juin 2012), p. 2191

[22] A special traditional Ombudsman.

administrative conflicts or rejecting it because administrative procedures are a matter related to public order.

The use of terms about conflicts, without specifying their nature, in Article 994 of the CCAP was sufficient to accept the resolution of administrative conflicts through judicial mediation. Any conflict in any context can be the subject of a mediation process. The acceptance of the settlement of administrative conflicts through judicial interference depends on the will of the parties even if it is suggested by the judge. It is unrealistic to think that the administration will be required to submit to this process without a clear legal directive. Article 800 of the Algerian CCAP precisely states that the competencies of the administrative court are general and presents some exceptions related to traffic accident and certain liability claims and remedies related to specific laws. There is no referral to specific alternative dispute resolution methods for administrative complaints. Moreover, there was an attempt to introduce mediation as it was instituted in the Islamic Era, but this experience did not have any manifest legal consequences: the institution of The **Mediator of the Republic** was an experience for inspecting the administrative work. Instituted by presidential decree N° 96/113. This public institution, which was comparable to an ombudsman, did not last for political reasons.[23] A few years after its creation, presidential decree N° 170/99 of 2 August 1999 abrogated it.

However, conciliation for specific administrative disputes is mandatory according to new administrative rules.[24] In the case of conflicts related to procurement of public contracts, conciliation is a requirement before litigation. A specific commission, constituted by public personalities, examines public contracts and compels the consultation of complaints before access to the formal administrative justice. If an agreement is reached due to the instructions of the commission (within 30 days), there is no need for litigation.

In **Tunisia,** The administrative judiciary system is organized based on specific theories and principles and is a safeguard against public excesses of power. However, this rigid system faced problems related to complex and long procedures. In order to solve court congestion, a special judge was nominated as a

[23] Khelloufi Rachida, "Mediator of the Republic" IDARA National administration journal. Vol. 8 N° 1 Algeria 1998. Paper in French

[24] Presidential decree N° 247- 15 of 18 September 2015 about public contracts organization and procurements of public services.

conciliator to facilitate the efficient administration of this public service.[25] Since then, the judicial administrative organization adopted a conciliatory system led by a special ombudsman called the "**administrative mediator of the Tunisian republic**". This professional is a simple conciliator in a strict administrative context. His role is to examine complaints with a minimum of support and independence. This role will be more important if he/ she obtains flexible methods with a requested liberty to terminate conflicts.

The mediation in administrative matters interferes as a judicial or administrative conciliation in Tunisia and Algeria. The use of the term mediation in Morocco does not correspond to its real designation. This ADP process is comparable to an Ombudsman in Western cultures. This institution has no significant powers compared to others constitutional institutions.

b. Conventional Commercial Mediation

In **Morocco,** general legal reforms encouraged professionals to use mediation as an alternative process in conflict management. The legislature has instituted a conventional mediation as a free process used in undetermined contexts. The introduction of mediation in the civil procedure code in an abstract and voluntary method is efficient. Law N ° 08-05 of the Dahir N ° 1-07-169 of November 30th , 2007 integrated an ancient practice in compliance with contemporary values to enhance a peaceful way of resolving conflicts. In accordance with an open economic policy, other economic statutes integrated mediation as an amicable settlement of disputes.[26]

The expansion of mediation as a free choice based on an agreement depends generally on the awareness of their solicitors or legal representatives. The common ground can be found before the conflict increases. When opponents face opposite interests and are unable to prevent disputes, the contract will provide the possibility to make this dispute less harmful, less expensive and more flexible than arbitration or litigation. The free choice to follow a peaceful method is provided by an independent mediation

[25] Institution adopted by decree 92-2143 of 10 December 1992. With numerous amendments after this creation.

[26] Abd Errahman Almisbahi, «*L'arbitrage et la médiation dans le nouveau droit marocain*.» [Arbitration and mediation in the new Moroccan Law] International journal of arbitration. (pp- 59-78)N° 15, Jully 2012. Paper in Arabic

agreement. If the mediation/conciliation successfully leads to an agreement, the judge ends the litigation and endorses it as a judicially binding and enforceable decision.

Mandatory mediation **in Algeria** is incorporated in an inflexible judicial system.[27] It appears that conventional mediation is not possible because in every civil or commercial dispute, the judge interferes to impose a judicial mediator. However, another form of mediation is always possible according to the consensual contract to terminate a conflict with respect to a previous mediation agreement or a mediation clause. This transaction is not comparable to a free mediation but it has the same effects (article 459 to 466 of the civil code). The limits to this agreement are possible if it does not involve matters related to personal estate status or public order issues.

Conventional mediation is still an exceptional practice followed by a small number of lawyers competent in international law. It is more than urgent to do more promotion for this method. The expansion of mediation in the business environment is conceivable. It is a responsive area based on the speed of transactions and the need for security in conflict management.

The Tunisian legislature adopted mediation in specific sectors, and the possibility of adopting a conventional mediation exists according to the civil law. The option offered for conventional mediation in Tunisia is not sufficiently promoted. With respect to a long consensual tradition, this method is accepted through contractual techniques. In Tunisia, the legislature adopted mediation into separate legal reforms and as an accessory of other ADR processes. Unlike arbitration, this process wasn't regulated in a special legal code.

The use of conciliation in many provisions in Tunisian law means that there is no obstruction to adopt more flexible process. Conciliation/mediation are interchangeable terms of amicable settlement encouraged by a new economic policy. The adoption of conciliatory commissions in different fields can be interpreted as a possibility to accept mediation implicitly as a voluntary process. This possibility is provided in internal commercial conflicts according the Code of Civil and Commercial Procedures, Article 40. The president of the commercial chamber is invited to propose

[27] Mazari Rachid, «Alternative dispute resolution of conflicts according the law of civil and administrative procedures.» Nachrat al koudhat (judge's review) Part 1 N° 64, P. 495 (2009). Paper in Arabic.

conciliation for parties of a conflict at any stage of the formal procedure, referring to equity rules. It should be noted that conciliation is accepted since the adoption of CPCC and it is a requirement for any commercial disputes; it is easier then, to accept mediation outside courts. The only limits to set aside the mediation process are related to the respect of the public order.

The adoption of ADR methods by the Tunisian legislature was one of the earliest experiences in the region. Since 1993, the code of arbitration [28] was adopted with respect to international standards, but it undermined the importance of mediation. It was insufficient to refer to mediation in article 15 (arbitration code) as a voluntary step from parties to terminate the arbitration process at an early stage of the dispute settlement. It is an agreement executed in good faith according to article 242 of the Tunisian civil code. The legislature had the opportunity to organize mediation separately as a specific alternative dispute method. However, the process was accepted implicitly and depended on the awareness of the lawyers.

The legislature in other specific sectors explicitly adopted mediation as a mandatory process before litigation.

C. Mandatory Mediation

In some fields, mediation/conciliation is introduced as a precondition of an arbitral process or a judicial claim. For instance, conciliation in certain divorce or labor claims is mandatory. In other disputes, mediation is a free process adopted commonly in international commercial contracts. The necessity of mandatory mediation in certain conflicts where disputants are facing unequal bargaining power is obvious. Nevertheless, in a judicial environment characterized by a denial of basic business ethics and good faith in implementing contracts, a formal judiciary is perceived as a safeguard against corruption. The absence of awareness and faith in peaceful processes perverted the essence of ADR methods. In some cases, judicial conciliation is used unjustly as a method to delay proceedings or to prepare the claim technically for an inexpert judge. In this case, the mediator becomes a simple agent and loses his/her prerogatives as an independent negotiator. For a fast development of this dynamic process, the legislature has to guarantee the mediator's

[28] Law N° 93-42. Promulgation of arbitration code JORT N° 33-4 MAI 1993.

independence and institutes a real professional status. This is the sole possibility to maintain peaceful negotiations.

In **Morocco**, General provisions of civil procedure are used in the resolution of conflicts related to the regulation of public and private partnerships. Article 27 of this Act presents conciliation and mediation as a precondition of any attempt to start an arbitration or a formal litigation process.[29] This same mandatory mediation is required as a precondition process in conflicts between clients and banks or credit agencies.[30]

The efficiency of this legislative framework is increased by a constant effort from public and private agencies to promote mediation in international and local commercial activity.

The different translations of mediation into common practices highlight its importance. The flexibility of this process is used for its expansion in international commercial contracts but it is ignored when it comes to national contexts. These deficiencies can be easily avoided with a general reform. However, the real obstruction to the expansion of this process is the absence or distortion of the mediator's status.

In **Algeria**, mandatory mediation is a policy followed by the legislature to promote judicial mediation in civil matters, but it appears that the essence of mediation was not preserved because the judge controls all the steps of this directed negotiation.

The Algerian Act N° 08-09 of 23 February 2008 introduced mediation in its most rigid form instead of paving the way for a flexible process.[31] The amendment of the Algerian code of the civil and administrative procedure had diminished the legal effects by excluding conventional mediation.

The judicial mediation cannot provide free choices for opponents because of the absence of a secured independent environment. The judge's office in the court is not a suitable place to prepare long and free negotiation. Moreover, because of the absence of confidentiality and overabundance of claims, there is no time to negotiate freely. The role of mediators is limited to the preparation of the case for the judicial decision. Moreover, judicial mediation cannot really serve business. In commercial matters,

[29] Article 27- 2 of the Dahir 1/14/192 of 24 December 2014 about the promulgation of publics-private Contracts Law. B.O.R.M N° 6332 du 5/2/2015.

[30] Law n° 103.12 of 24 decembre 2014 about institutions of credits and assimilated organs; promulgated in the Dahir N° 6340 du 5 Mars 2015.

[31] Farid Ben Belkacem, «Mediation in Algeria: Past, present and future.» Supreme Court journal. Special Number: ADR methods. Vol. 2. Algeria 2009. Paper in French.

Flexibility and timeliness are essential in dispute resolution. On the contrary, judicial mediation is conducted only in a specific and rigid framework.

In **Tunisia**, mandatory mediation is regulated explicitly in the Banking and Financial Institutions Act N° 48-2016 of 7/11/2016, in a specific section. The mediation is a process organized by a specific professional organization of mediators expert in financial matters. Every complaint has to be examined by a specific mediator before proceedings according to national bank regulations. This is a requirement to prepare the claim for settlement and to prevent unnecessary litigation. This process sheds light on the importance of mediation in technical and complex complaints, but the relation between disputants is unbalanced and there is no choice for the client to choose the mediator or control this process for his own interests.

The free market system had an effect on legislative harmonization. ADR methods were a direct effect of this economic policy. It provided an alternative system compatible with international standards. In Tunisia, the new investments law referred to this dispute settlement by including in the Title VI, article 23 the conciliation process as a mandatory step before any arbitration procedure. The conflict between the state and a foreign investor will be subject to informal legal system for more efficiency and celerity. The conciliation is a necessary step unless one party rejects it clearly in writing. The legislature mentioned clearly that the source of this conciliation is a previous agreement between the parties. Otherwise, the source will be the implementation of conciliation clauses according to UNICITRAL.[32]

IV. THE UNSPECIFIED MEDIATOR'S STATUS

The legislature regulated mediation as a process, determined its context, but did not create a special status for the mediator, except in Algeria. The absence of a specified position of mediators or a common code of ethics constitutes important obstructions to the evolution of this process.

[32] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf

A. THE UNSPECIFIED POSITION OF MEDIATORS:

There is no doubt that mediation is an important mission that has social and economic impacts. This mission depends essentially on the personality of the mediator. Mediation was a prophetic/Religious privilege. Only persons known by their wisdom and good deeds were allowed to mediate. Currently, the mediator's competencies are presumed from their professional qualifications. These qualifications are not sufficient. The international certifications are based in general on;

- Competencies: specialization / negotiation skills
- Duties : confidentiality/ integrity / independence

The work of the mediator is not a simple profession. It is a mission and his/ her position differs according to the context. As a free academic/ mediator, an expert/mediator or a member of a conciliation commission, the mediator has different status. The parties expect a distinctive mission from him. The act of mediation, in any context, is about facilitating negotiations to reach an agreement and resolve disputes. The same purpose requires the same ethical behavior even if mediators come from different backgrounds and have specific qualifications. It is crucial to present common deontological rules to organize mediation in North African countries. Ethics and morals are interchangeable terms for professional conduct. There is no specific basis to determine these rules. Any institutionalized mediation is required to adopt a charter in which deontological rules are determined.[33] This is followed in some centers, but in general these ethical rules are presented under vague terms without any practical tools to insure Independence, integrity and confidentiality.

The need of a specific deontological charter exists for free or mandatory mediation in different fields. The risks of the absence of a specific status for mediation are important. The undefined limits for the mediator's mission will encourage abuses and obstruct the promotion of this process. The lack of educational and academic awareness of mediation will have an impact on the promotion of this process in its free or mandatory form. It is

[33] Moroccan professional bankers have adopted their code of conduct: http://cmmb.ma/wp-content/uploads/2014/06/Code_dEthique1.pdf (consulted 30th january 2020)

essential then for practitioners to adopt specific charters and reaffirm trust. Clarifying mediator's mission and duties will protect his independence and integrity. "The absence of a neutral third party would disqualify a dispute resolution from being named mediation.[34]"

Neutrality and **confidentiality** are the main duties of a respected mediator. Every professional is obliged to keep secret the discussion of the parties but the legislature does not require parties to clearly abstain from profiting off any information exchanged during the mediation sessions. A common requirement in mediation charters is presented in these terms: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.[35]" This professional duty is mentioned in Moroccan civil procedure code in article 327- 66. The Algerian Law obliges judicial mediators to respect the secrecy during his mission in article 1005 of CCAP. The Tunisian legislature reminds the professional duties of confidentiality for the mediation organ (the professional association of bankers). Article 187 refers to article 254 of penal code.[36]

The accreditation is not controlled, with only general references to international standards, and there is no specific criterion for access to this profession. One exception is in Algeria, where the nomination of mediators is controlled by a commission. Selected mediators can be professionals acting as independent physical persons or as a member of a professional association.

In Algeria, a Decree[37] fixed many conditions to acquire the quality of a judicial mediator. A highly qualified commission, composed of judges, has the ability to choose among candidates from different fields (legal profession is not specified). Integrity and competencies are evaluated on the basis of social position and good morals. No specific qualifications are required for this nomination. The oath presented by selected mediators in a court may represent mediation as a simple judicial expert.

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[34] Andrew Pirie. Alternative dispute resolution Mediation. Skills science and the law. Ed. Irwin Law 2000. P.153

[35] The institute of arbitrators and mediators: Principles of conduct for mediators. Australia https://www.resolution.institute/documents/item/2266 (1 / February 2020)

[36] Tunisian Law of banks and financial institutions. N° 48-2016 of 11/7/2016. JORT N° 58 of 15/7/2016.

[37] Executive Decree N° 100-09 of 10 march 2009 on modalities of nomination of judicial mediators. J.O N° 16 2009 p. 3

Cultural specificity: It is essential to explain the mediator's status by examining the legal rules or internal charters. However, it is more interesting to demonstrate these characteristics through specific Islamic thought. The aim is not to present a deep understanding of such teachings. The legal sources are complex and hardly available for a quick view; though, general Islamic concepts related to integrity, independence and wisdom can be found easily in the Quran and the prophet's sayings, the Hadiths. Islamic philosophers and scholars used these texts as a foundation for more complex theories and interpretations that are in constant evolution

Culturally, mediation derives its legitimacy from numerous Islamic precepts.[38] Verses in The Qura'an that exhort Muslims to maintain social peace and help each other are cited as common morals shared by humanity. The true faith is about adjusting and redressing matters of difference.[39]

The parties are invited to exchange and cooperate during negotiation. The act of mediation, if it is not accomplished as a profession or it is provided as a social service, can be compared to intercession as a social behaviour encouraged in the Quran: "Whosever intercede for a good cause will have the reward thereof, and whosever intercedes for an evil cause will have a share in its burden. And Allah is Ever Able to do everything.[40]"

Honesty is a primary characteristic of each professional. The prophet Mohamed said: "*There is no faith for those who don't preserve honesty and pledge*." And honesty is necessary in the fulfilment of promises and agreements. If someone promised with the intention not to fulfil, this is called hypocrisy.[41] And the agreements have an ethical binding force in Islamic Law: " *And fulfil every covenant, the covenant will be questioned about.*[42]"

Currently, mediator's ethics are not collected in a general charter or a code of conduct. It is essential to propose a special status for mediators through specific ethics independently from the judiciary.

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[38] Ahmed Abdallah Mohamed Alkabir. Ethical governance from an Islamic prospective. Comparative Islamic Study. Edition King Fahed. Saudia Arabia. Ryad. 2006. 247 p. (In Arabic)

[39] Search for common ground. ADR and Mediation in Morocco. Merging islamicc and contemporary approaches. 2014.

[40] The Quran. An Nisa 4 : 85.]

[41] Hasen Ayoub. Social Manners in Islam. Dar Essalam. Egypt 2006. 608 p. P. 384.

[42] The Quran. Al Israa' 17 : 34]

B. DIFFICULTIES IN PROMOTING MEDIATION AS A PROFESSION:

The promotion of mediation through academic conferences and trainings had a weak effect on the legal practice, and the lack of interaction between professionals and judicial authority in this topic does not serve the cause of mediators. The formal judicial system is working in a classical manner and legal professions are not generally enthusiastic about the new legal wave of change. The time saving can be interpreted as a loss of important fees earned during the judicial proceedings or can be perceived as an interference of "inexpert strangers" in legal fields. There is no objective evidence of the recent development of this interesting process, but we can suppose that promotion is still confined in a specific network which represents select international business professionals. The work of these professionals is not published and is not accessible to the larger public. Public agencies, except in Morocco, are not working seriously to promote mediation thorough statistics and information.

The revival of mediation as a distinctive process is still possible because culturally this method was integrated in traditions. The choice of the mediator/ conciliator according to these traditions was linked to the social position and competencies of the Muhtassib, Trib's leader or Amin.

Mediation is a voluntary process and the choice of the mediator is important for the parties. However the legislature in different conflicts imposes a specific mediator from a professional association (example : Banking Act in Morocco and Tunisia) and accepts only judicial mediators appointed by a commission consisting of only legal professionals (Algeria). The choice in such a case is limited to experts in finance or other certified lawyers.

This state of order minimizes the spread of mediation culture and obstructs the progress of this process as a voluntary practice. The independence of the mediator is an important requirement for the accomplishment of this mission. The choice of the conciliator / mediator according to a pre-selected commission can threaten the total process. The parties have the right to substitute the mediator/ conciliator in case of trust issues and it is not efficient to reject the whole process because of the nomination of wrong or incompetent mediators. The lack of specialized judges and the huge amount of

complaints in contrast with judicial possibilities are sufficient reasons for the legislature to minimize the interference of judges in ADR processes.

Mediation outside the strict judicial environment is in progress in commercial practices.[43] Despite the sponsoring of national chambers of commerce, ADR processes, few lawyers and practitioners have become more interested in mediation. The main difficulties for the development of mediation are the insufficiency of academic research, financial resources and statistics. Professional centers formed by mediators have, in general, a legal background.

We can mention **Moroccan** institutions that integrated mediation in their practices: The General Confederation of Moroccan Enterprises; Professional Group of Moroccan Bankers; Center for International Mediation and Arbitration.

In **Algeria** in 200,3 the creation of the center of conciliation mediation and arbitration started the interest for ADR processes in commercial disputes.

In **Tunisia** it was the center of arbitration and conciliation of Tunis and the Tunisian arbitration chamber.

The scope of mediation is to present a flexible process to help disputants in building positive negotiations. Though the Algerian legislature adopted this method in a complicated manner to minimize the role of the mediator and give the judge control of the whole process. There is a sole difference between mediation, as presented by the Algerian legislature, and conciliation mentioned in article 990 and proposed by the parties to terminate the conflict. This difference is the existence of a third neutral mediator. However, the designation of the mediator is not free for the parties. This process is comparable to the role of a judge in Tunisian civil and commercial procedures code. Since 1994[44], the District judge is obliged to try his best to conciliate between disputants at the early stage of the complaint. Judges are becoming mediators in courtrooms for most family and social complaints. This role is assumed according to the specificity of these contexts or because the conciliatory activity is a primary judicial in scope. Mediation

[43] Soraya Amrani Mekki, «*Justice Amiable. La question du statut du médiateur*.» [Amicable justice.] The question of the mediator's satus] In, La Médiation dans tous ses états. International colloquium Tunis 9 -10 March 2017. S. Dir. W. Ben Hamida and S. Bostanji Editions A. Pedone. (pp- 43- 53).2018.

[44] Article 38 bis, Law N° 59 / 1994 of 23 Mai 1994 abrogating provisions of Tunisian civil and commercial procedures code.

as a flexible free process, and cannot be compared to the conciliatory role of a judge.

We can add to the problems related to the mediator's status, other risks such as distortions and deformation of mediation in certain fields; unequal bargaining powers in some disputes; absence of interaction between professionals and exchange of statistics and skills.

Recommendations : The study of North African experiences in mediation highlighted the need to:

* Develop the social dialogue to promote ADR Methods;
* Reaffirm the specificity of the mediation process in each community;
* Spread of a peaceful process through academic talk and research through constant interactions between governmental agencies and liberal professions;
* Adopt legal instruments to control and guarantee the independence of Mediators and their protection professionally and specify the mediator's status offering him more tools and satisfactory certifications; and,
* Collect public funds for independent institutions, a necessary support, to guarantee the expansion of ADR in different fields.

ABBREVIATIONS

ADR: Alternative dispute resolution.

Amine: an expert in a specific souk (Market)

B.O.R. M: in French: Official Bulletin of the Moroccan Monarchy.

CCAP: Algerian Code of civil and administrative procedures

CCCP: Tunisian code of civil and commercial procedures.

Dahir: Royal Decree of Morocco.

Diwane El Madhalim : Traditional Higher institution of controlling the judicial authority and ruler's decisions.

Hadith': Tradition and sayings of the Prophet Mohamed peace be upon him.

Hisba: Specific Islamic doctrine: The duty of the Muslim to command good and forbid wrong.

JORT: in French : Official Journal of Tunisian Republic

Quran: Holly Book

Mohtassib: Special Ombudsman in Islamic Era.

UNICITRAL: United Nation Commission on International Trade Law

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COUNTRY REPORTS

THE SINGAPORE CONVENTION, THE EU AND ITALY: THE LONG RUN TOWARDS THE SIGNING OF THE CONVENTION

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Key Words: Singapore Convention – International Mediation – enforceability – mediation agreements – EU directive on mediation

I. THE STATE OF THE ART

Last August, during the official signing ceremony, 46 states signed the Singapore Convention, including China and the US. More recently, at the Treaty event entitled "Treaties in Support of the 2030 Agenda for Sustainable Development" held at the United Nations headquarters in New York from 24 to 27 September 2019, five more states signed the Convention (Armenia, Chad, Ecuador, Gabon and Guinea-Bissau). As of 29th January 2020, Rwanda has become the 52nd signatory state. No one can help but notice the significant absence of the European Union and all of its member states.

Many have suggested that the fact that the European Union and Great Britain haven't signed the Singapore Convention will diminish its global relevance. Following this assumption, the momentum gained from the Convention in civil and commercial mediation stands to benefit the countries signing in Asia and the Pacific region, including the US, but will not have a global impact, for now leaving Europe excluded.

I respectfully disagree with this idea.

The fact that mediation in the far eastern side of the globe has flourished does not mean that it has diminished on the globe's other sides. This is especially true when one considers that the first effect of the Singapore Convention, even before it is ratified by

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the signatory states, is to put the focus on mediation as a tool to resolve international conflicts. The European Union first did this ten years ago.

II. THE EU DIRECTIVE 2008/52/CE

As a matter of fact, before becoming positive law in and of itself, Directive 2008/52/CE on cross-border mediation acted as a catalyst for the attention and efforts of governments, law-practitioners, and economic actors. It showed them the concrete benefits that mediation offers, much like the Singapore Convention is doing now.

In the European Union, the Directive set out the framework and the principles which the member states had to respect and aspire to when legislating in civil and commercial mediation. But it was more than that. The EU also requires new countries which want to join the Union to include in their internal legislation laws favorable to alternative dispute resolution, both generally and specifically favorable to commercial and civil mediation. The directive had a huge impact on mediation development in the member states, especially in countries such as Italy, Spain, and Greece.

To think that the European Union can now be absent on the world stage of international commercial mediation makes no sense at all. This is even more true in the case of Italy, with its huge amount of accumulated experience in the last decade. The European Union and Italy simply must be a part of the conversation on international commercial mediation.

That being said, it's true that the news that Europe didn't sign the treaty was met with a bit of disappointment by supporters of mediation across the continent.

III. THE POSITION OF THE UE

As it is reported in the report on the panel on negotiation on the Singapore Convention (Singapore, 7 August 2019, lunch-time panel) Dr. Norel Rosner, Legal and Policy Officer, Directorate-General for Justice and Consumers of the European Commission, said that the EU would have preferred a soft-law instrument to

govern the question of executability of agreements made in mediation, i.e. something without direct binding effect, instead of an international convention. As the negotiations progressed, the European Union favored the two-track strategy made up of a convention and a model law.

Dr. Rosner also confirmed that that the European Union started an assessment procedure for the Singapore Convention in February of 2019 and that this process would take a bit of time. This is because it must take into account all of the interested parties, not just the member states, but also the commercial, economic, and financial actors.

IV. Is There an Exclusive Competence of the UE to the Signing of the Convention?

Just before the official signing ceremony, the minister of Internal Affairs and Justice of Singapore, K. Shanmugan, explained that the European Union hadn't signed because it was still examining the possibility of the Union itself signing versus each individual member state. The minister referred to a legal question which was well founded and deserves further consideration.

Article 3, paragraph 2, of the Treaty of the Functioning of the European Union states: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." The signing of the Singapore Convention would fall directly under this article.

In an opinion from the European Court of Justice from the 7th of February, 2006, with regards to signing the new Convention of Lugano, the court examined whether the power to sign was an exclusive or a shared competence of the EU. This was specifically concerning the judicial competence and the capacity to execute decisions in civil and commercial issues. The Court strongly confirmed that this was an exclusive competence of the European Union. It is also noteworthy that the new Lugano Convention, much like mediation, falls within the scope of civil and commercial judicial cooperation.

And this opinion makes a lot of sense. The European Union must avoid situations of contradiction between the legislation of different member states when it comes to jurisdiction and enforceability.

Therefore, it makes sense, from my point of view, that Europe proceeds with healthy caution, valuing every aspect of the case while listening to the interests of the parties involved.

The fact that the negotiations on the convention lasted only three years is noteworthy and reflects the strong interest in mediation of international commercial disputes. However, it also may not have left the EU the necessary time to carry out all the steps required to allow for its signing and subsequent ratification.

Within the European Union there already exist consolidated and sophisticated mechanisms upon which the recognition of executive actions among the member states can be based. As far as mediation is concerned, the mediation directive itself states in article 6 paragraph 2 that the agreements reached in mediation can be rendered enforceable in a judgment, a decision, or an authentic act of a court or other competent authority. In addition, in preamble subpoint 20 of the directive you can read that: "The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law".

Therefore, Europe is by no means a stranger to the idea of the recognition of enforceability with regards to agreements reached in mediation, also at the international level. In fact, the opposite is true.

In countries such as Italy where the agreements reached in mediation are already legally enforceable according to art. 12 D. Lgs. 28/2010, the fact that an agreement reached in an international mediation would also have the same force of law would simply be a bonus. This is said also recognizing that in certain European countries such as Belgium, Cyprus, Croatia, Lithuania, and Spain, regardless of the value of the agreement reached in mediation, the European Mediation Directive has already been accepted into their respective national legislations with regards to international mediation regulation. Therefore, also for these states the acceptance of the Singapore Convention would represent solely added value.

In addition, the Council of Europe's Commission for the Efficiency of Justice (CEPEJ), of which the Russian Federation is

a member state, recommended in its recent European Handbook for Mediation Lawmaking that member states should take into consideration the ratification of the Singapore Convention to assure the efficient recognition of agreements reached in international mediation.

Therefore, from my point of view, the point at which the EU accedes to the Singapore convention will be the right time. This will be when all of the interested parties have been heard, and when all of the potential issues with regards to the risk of contradictions between the Convention and individual national laws have been seen and resolved.

V. In Conclusion

The development of a multilateral treaty such as the Singapore Convention constitutes a reference base for the international community, with the hope that it will support and promote the development of international commercial mediation as a method of dispute resolution. It is my opinion that the EU and Italy, of course, is naturally destined to be part of it and to promote the further development of international commercial mediation.

THE RUBICON OF JUSTICE IN GREECE: A 10 YEAR "ROAD-TRIP" TO MEDIATION

OLGA N. TSIPTSE[*]

11-30-2019: A new legislation referring to mediation, as an Alternative Dispute Resolution (ADR) in Greece is a fact: the recent Law 4640/2019. Almost ten years after the first appearance of this institution[1] in Greece, and almost two years after a previous legislative effort[2] that was never put in force, this new endeavor towards mediation takes place in a fragile and intense environment. The reason for this situation is that mediation, that was a voluntary ADR until now, now in Greece is granted as a mandatory institution for some disputes and cases. The reactions to that transformation, in the field of justice, were very strong. From one day of fully darkness, mediation faced limelight and everyone began discussing the privatization of justice and how mediation is not compliant with the Greek culture. What happed from the first day until now and why all this reaction against mediation are questions that can only be answered with deep knowledge of the history of mediation in Greece.

I. HISTORICAL REFERENCE

After EU Directive 2008/52/EC was issued, the next step was for Member States of the EU to harmonize their laws and comply with the Directive. Greece was one of the last countries that adopted the Directive, through the enactment of National Law

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[1] 1 the Greek law that Mediation first appeared in Greece, was 3898/2010, when EU Directive 2008/52/EC finally was harmonized.

[2] Greek Mediation Law was amended for the first time in 2018, through the Law 4512/2018, when for the first time Mediation was mandatory for some cases (like family cases, tort, medical mistakes, car accidents, financial disputes etc. This Law, and its Article 182 in particular, was twice suspended (for the September 2019 and for the November 2019), because of the reactions towards the above provision, both of the Lawyers and of the Judges in all over Greece.

3898/2010. In the beginning, a very small part of the legal population began voluntary institution of amicable dispute resolution. The three first years passed without having any evolution in the practical adoption of mediation and in making mediation popular. Still, every claimant wanted to sit before a physical judge and to give him/her the authorization to solve his/ her dispute either in favor or against the claimant. No one had heard and informed, up to that point, any other way of resolving disputes.

After these first years, some lawyers, and only lawyers during that time[3], started to get trained and certified by the Greek Ministry of Justice. With the passage of time, in Greece, only a few mediations (almost all of them successful) took place. But still, an enormous percentage of The Greek population ignored this institution or any other ADR, as negotiation, conciliation, etc. Only Arbitration seemed to gain ground, and this assumption only in the business environment.[4]

Although a very useful institution, mediation was left unexploited for years, while at the same time the courtrooms all over Greece were full. Justice became non-functional because of the long time procedures[5] and the high costs needed. This discouraged any claimant to begin court proceedings. Quite common was the conclusion that interfering with justice in Greece lead to deadlocks. It is no symptomatic that foreign investors don't choose Greece to make their investments. In addition to the taxation, complicated company law and extensive graphiocracy, the major problem is the delay of dispute resolution and the entire justice system. It was high time for a big change, of culture first, to be fulfilled. And it happened.

[3] the Law 3898/2010 didn't allow other professionals but lawyers to become certified and accredited mediators. This changed in the year 2013 with new provisions, and today anyone who has graduated any Higher Educational Institution can become a Mediator.

[4] in the field of energy, contructions, international commercial disputes etc.

[5] a simple case, e.g. tort law or family, needs 3-5 years in Greece to be resolved finally.

Suspensions, Appeal, Strikes etc cause an enormous delay against the finally settlement of any dispute. And still, even if there is a Court Decision may not be enforced against the part who loses and in the end of the day, all seems to be in vain.

II. The Newest Legislations about Mediation

The Greek legislature, having in mind all the obstacles that were against the evolution and practice of mediation, wanted to go a step beyond: it copied the Italian Model and decided to pass from fully Voluntary to partially mandatory mediation, for certain cases, such as family cases, tort, medical mistakes, disputes among neighbours, and car accidents that didn't lead to death or injuries of bodies. The legislature knew, in 2018, that any amount of ADR was more than previously required, for overlapping the problematic in the field of justice, not to mention how mediation was required, as the most friendly and popular method of any other ADR. Greek justice, in the last years, has not achieved its goals. The problems of justice, together with the economic situation and crisis that Greece has faced in the ten last years, and together with the high taxation, pushed anyone who wanted to create any investment or any business away from Greece. And this limited Greece's competitive advantage, if there was still any.

The first amendment of mediation's Greek Law was implied in January of 2018, with the Law 4512/2018, which tried to copy the Italian Model, with the remedy not only to copy the text of the law but also the Italian reactions of lawyers and judges.

Though Greek new law had provisions for mandatory mediation, this obligation was only for the first, the initial meeting / session between the mediator selected and the parties with their lawyers. This means, that the parties of any dispute were obliged to sit together, only for the initial session, where a mediator could introduce him or herself and the mediator's duties, inform the parties about the Institution and the procedure and have a light conversation with the parties and/or their lawyers. After this first session, the parties could deny the following procedure and could prefer continuing the dispute in court.

Both lawyers and judges started immediately demonstrating that the new law was contra the Greek Constitution and should be canceled before enactment. The key reasons for such a reaction, seemed to be the following:

First, the limitation (through the initial session) of the claimants and defendants to stand before their natural judge and be judged due to substantial and procedural Greek law, as the Greek constitutional right was declared.

And second, the creation of financial burden for the actors of any dispute, in times, when liquidity is lost, after all these years of financial crisis.

Of course, many other justifications were raised by lawyers and judges for the denial of putting mediation in their professional life.

Many Bars declared that they would strike against the new law and protested with all the means they had. All this negative attention, that had a long duration, led to the suspension of the law, for the first time, until September of 2019. The suspension came also, after a decision of the Supreme Court of Greece, that declared almost the same justification as the one demostrated by lawyers, who stood against ADR and especially against mediation, using that mandatory and mediation are not synonyms.

Despite the above suspension of the law, the river started to flow and was not be able to be stopped. Lawyers started to learn more about the institution, many professionals started to be trained and certified as mediators, people started having knowledge about mediation and started experimenting with mediation, at least in the first steps before concluding to the court. Many organizations started to create mediation centers as the SMEs Chamber in Thessaloniki (North Greece) or the Banking Omundsman and the Association of Greek Banks that had trained limited number of mediators for dealing with financial disputes etc. Opemed, an organisation that joined, for the sake of mediation, all chambers, most commercial associations and some bar associations in Greece, has promoted this institution to the maximum. And many other actions took place, for any kind of promotion and advertisement of mediation, such as the exhibition in the Thessaloniki's International Fair for the first time in September 2019 etc.

After the elections in Greece on 7th July 2019 and the change of the political system, the new Government showed a willingness to promote more mediation, in a manner that was considered to be the best for all sides. For that reason, the Supreme Court of Greece gave the green light for the enactment of the last and final law:

- The initiation of mediation was suspended once last time, for a duration of 2 months,
- The new Government issued the final law that has already been in action[6]

[6] Law 4640/2019 that put in action on 30th of November 2019

- Some fields of the previous law have been changed in the below manner: there was a limitation of the cases that had to perform a mandatory mediation (these are only family cases and tort law), because the passage from one judicial system and culture to a preference for mediation should be done softly. The final law also implied the obligation that the lawyers should inform their clients about the mediation and prove this information in written, with the major penalty being that case will be lost for typical reasons and before the case will be examined on the merits.

III. ARTICLE 6 LAW 4640/2019

Mediation is an alternative way to resolve disputes without standing before courts. A third-party neutral, the mediator, who is commonly approved by the parties, usually facilitates the parties in civil or commercial or other disputes. In Greece, mediation is for some cases mandatory, not as a complete procedure, but as a preliminary, initial session that has to be fulfilled because the claimant will lose the case without it being examined on the merits of his / her claim.

The other obligations are, that this initial mandatory session for the cases that is applied and implied, must take place twenty days after mediator is appointed, with an extension of time up to thirty days maximum. Of course, this session is completely confidential and all the principles of mediation are in action. No minutes are kept. The parties have to decide after this first session if they want to continue mediating, or stop the proceedings and stand before the courts or decide at a future point to come back to mediation proceedings and continue if the case will be mature for that.

In Greece, all parties have to take part in the proceedings with their lawyer. For legal entities, the legal authorization can be fulfilled. If one party comes to the mandatory first session and the other does not, the court that will examine the case afterwards may impose to the absent party penalties and fees from 100 to 500 euros. Apart from the mandatory initial session of mediation, that was implied for certain cases, as is already written, the voluntary submission of mediation is applied, for any case that the parties have the authority to dispose (cases who are “mediatable”).

IV. WHY IS IT SO IMPORTANT TO CHANGE CULTURE?

The modern trends have implied that, since we live in a globalized environment, individuals and businesses move quickly. There are high expectations to have disputes resolved to the point, in a minimum amount of time. Greece is a country who tries to follow up the evolution, has to be transformed into a competitive place, giving the inception and the motivation to any entity who wants to deliver and to provide deed in this territory. In Europe these are considered as best practices and that is why other countries have a competitive advantage with Greece in the field of investments and workouts that can help the economy to expand.

It is high time for Greece to take the big step, to cure a dramatic situation. With this choice there are many other consequences that will positively occur: lawyers that nowadays have lost their glare and have become obsolete, through the proceedings of mediation, will provide such a substantial assistance that will be obvious to their clients.

Lawyers' participation will upgrade their contribution and clients' trust towards them will be restored and recover.

GENERAL STYLE GUIDELINES

1. Publication ethics:

APMJ seeks to practice highest standards in publication. Authors are also asked to conduct their research with best practices and code of ethics.

2. Format:

Papers can be submitted as Microsoft Words or HWP file.

3. Length:

Research articles should be between 6,000 to 10,000 words, country reports, comments, opinion or news updates can be between 1,000 to 4,000 words.

4. Abstract:

Research article must include 300 to 400 words abstract.

5. Key words:

5 to 6 key words must be included.

6. Heading:

a. Major headings are
b. Roman Numerals(I. II. III) and
c. secondary headings are in alphabetical order(A.B.C…).
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e. aa. bb. cc. ….if needed.

7. Footnotes:

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Two or more authors: first author's name & second authors name

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Jacqueline Klosek et al., International Legal Developments in Review: 2007 Industries, 42 Int'l Law. (2008)

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Author, Book Title (publication year)

Lawrence Lessig, Code: Version 2.0, 23-24 (2006)

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Tal Z. Zarsky, Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows, 18 Fordham Intell. Prop. Media & Ent. L.J. 741, 742-43, 748-52 (2008)

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