ENFORCEMENT OF MEDIATION SETTLEMENT AGREEMENTS IN FOREIGN JURISDICTIONS

- Bhavya Goswami*

Abstract

Mediation settlement agreements are voluntary, unlike court rulings, hence they are preferred over them. However, an enforceable agreement may be needed to clarify the penalties of breaching the conditions. The agreement can help prevent future disputes by guiding future encounters. Thus, enforceability is crucial, especially in international mediation because parties from different jurisdictions lack a trust connection.

The Singapore Convention is a welcome addition to cross-border dispute settlement enforcement procedures in this uncertain environment. Countries not signing the Singapore Convention or opting out under Article 8 should consider common and civil law options and other international instruments that facilitate enforcement.

This article covers three topics: First, the Convention-its origins, scope, background in private international law, enforcement, and judicial refusal. Second, alternatives to the Convention include local court orders, consent arbitral awards, and notarization. Third, how the Mediation Bill, 2021 enables Singapore Convention and alternate mechanism implementation.

Keywords: *Mediation, iMSAs, Singapore Convention, Enforcement of Settlement Agreements, Mediation Bill 2021.*

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INTRODUCTION

Mediated settlement agreements, which are voluntarily entered into by the parties, have a higher chance of being executed compared to court decisions. However, if the obligations agreed upon are distant in the future, or if the parties require reassurance, they may still wish to create an enforceable agreement. Parties may also hesitate to comply with changes in circumstances or delay performance. The need to enforce agreements is especially important in international mediation, where parties from different cultures may not have a long-standing relationship of trust. The enforcement of international mediated settlement agreements can be complicated, adding to the uncertainty and transaction costs of resolving an international dispute through mediation.

The "Singapore Convention"[1] is a valuable addition to the methods available for enforcing cross-border dispute resolution outcomes. The mediation community is optimistic that the convention will have the same impact on mediation as the "New York Convention"[2] had on arbitration. The Singapore Convention seeks to establish strong regulations to give cross-border mediation the same importance as other international dispute resolution methods like litigation and arbitration. This is important for improving the standing of mediation as a viable and effective method for resolving disputes.

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BACKGROUND: FORMATION OF THE CONVENTION

[1] Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).
[2] 330 UNTS 3 (10 June 1958; entry into force 7 June, 1959)

In 2014, the United Nations Commission on International Trade Law (UNCITRAL) was submitted a proposal by the United States delegating UNCITRAL Working Group II (Dispute Settlement) (WG II) to find measures and instruments which would help enforce mediation settlement agreements in an expedited manner. Thus, in 2015, the WG II started working on the proposal for making international commercial mediation settlement agreements (iMSAs). In the 68th Session in New York, during 2018, WG II proposed two drafting of the 'UNCITRAL Model Law on International Commercial Mediation' and 'International Settlement Agreements Resulting from Mediation, 2018'. In June 2018, UNCITRAL submitted its final drafts to the UN General Assembly, who adopted the Singapore Convention on 20 December 2018 and opened it for signatures in August 2019.[3]

Paper Scheme

This paper discusses three aspects: *First*, the Convention, particularly focusing on its genesis, scope, and enforcement. *Second*, the provisions are the Convention are examined through the lens of Private International Law, including understanding the conflict of jurisdiction and choice of law. *Finally*, the paper discusses the alternatives to the Convention, such as an order of a domestic court, considering the domestic laws and international or bilateral treaties; a consent arbitral award and its enforcement; and notarisation.

Requirement of the Convention

[3] Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition & Enforcement of Mediated Settlements, 19 *Pepp. Disp. Resol. L.J.* 1 (2019)

Before the Convention came into the picture, the international community exhibited a cautious approach towards opting for mediation as their dispute resolution method, especially when it came to international commercial agreements.[4]The general trend was to file a suit in Courts and subsequently apply for out of the Court settlement or court directed mediation proceedings.

The major reason for such hesitancy is the unpredictable challenges to enforceability across different jurisdictions. The iMSAs are treated as any other contractual element with substantive and procedural elements. Thus, their enforceability changes in different jurisdictions- such as in countries following common law against those following civil law.[5] For instance, the common law country given the discretion to the Courts to remedy any breach or partial breach of contracts by applying doctoring of equitable relief to do complete justice, which consequentially also gives effect to the 'Rule against Penalty Clauses' of the Contracts, thus rendering them inapplicable to the breach.[6] However, countries following civil law follow specific performance of contracts by default. The Penalty clauses are also restricted in civil law, but the restrictions are not identical with restrictions found in common law. The Singapore Convention makes the enforceability of the iMSAs conclusive in nature. Any iMSA made under the Convention can be challenged in the domestic courts only on the grounds provided under Article 5 of the Convention.[7]

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[4] Stacie Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation," 74 (4) *Wash and Lee L Rev* 1973 (2016)

[5] James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation," 11 *Harv Negot L Rev* 43 (2006)

[6] *Lee Chee Wei* v. *Tan Hor Peow Victor* [2007] 3 SLR(R) 537

[7] The German Civil Code (Biirgerliches Gesetzbuch), Section 339 ff

Furthermore, mediation proceedings are more suited to commercial agreements. Mediation provides an exit from the contemporary legal methods of resolution and upholds the elements of a business relationship. Since the process is consensual, informal, and flexible, it accommodates culture, respect, and preliminary and tangential interests affecting the parties which cannot be put on the table in arbitration and litigation proceedings.[8] Thus, the procedure provides a win-win solution at low-costs and preserves the continuity of business relationships.

It is important to finish this section by noting that the Singapore Convention, by providing a strong enforcement mechanism, indirectly supports mediation as a desired and, in many cases, acceptable alternative to international arbitration and litigation. From the standpoint of a consumer in the market for conflict resolution services, parties will gain economically and qualitatively by having access to a larger array of alternatives to pick from.

Scope of the Convention

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To scope of the Convention is provided by both inclusive and exclusive provisions on iMSAs governed by the Convention. Article 1(1)[9] of the

[8] Carrie Menkel-Meadow, "The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation" in Essays on Mediation Dealing with Disputes in the 21st Century (Ian Macduff ed) (Wolters Kluwer, 2016) at p 31.

[9] *Article 1. Scope of application*

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.

Convention lays down three essential elements of any iMSAs to which the Convention is applicable:

i. To agreement resulting from mediation,
ii. Resolving commercial dispute,
iii. The dispute has to be international.

Article 1(1) itself defines the international nature as –

"*At least two of the 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 are performed or the state with which the subject matter of the settlement agreement is most closely connected.*"[10]

According to Art. 2(1)(a)[11], if a party has more than one place of business, the relevant place is the one that is most closely related to the dispute that the "*settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the settlement agreement's conclusion.*" If a party lacks a place of business, Art. 2(1)(b)[12] requires that the party's habitual residence be used as a point of reference.

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The definition of international has been essentially included by the drafters of the Convention, since unlike arbitration, there is no concept of a seat of mediation.

[10] Ibid

[11] *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.*

[12] Ibid

Commercial dispute is outlined with the use of illustration from footnote 1 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.[13] The Convention only applies to "commercial" disputes. The drafters are aware that any incompatibility with domestic public policy, which may occur if the Convention were made to cover non-commercial issues, should be avoided.

If the Convention were designed to regulate just business-related transactions, such a conflict would be less likely to arise. Thus, according to Article 1(2) of the Convention, conflicts between consumers "for personal, family, or domestic purposes" and those concerning "family, inheritance, or employment law" are not covered.[14]

The Convention's implementation will establish whether the concept of mediation in Article 2(3)[15] is overly wide. This definition includes aspects such as a peaceful resolution, the involvement of third parties, and no power to enforce a solution, and it may also apply to methods other than mediation, such as conciliation and ombudsman proceedings. These

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[13] GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

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.

[14] Shouyu Chong & Felix Steffek, Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective, 31 *SAcLJ* 448 (2019).

[15] *"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*

processes include parties seeking to negotiate an acceptable settlement with the assistance of a third party who lacks decision-making authority. Such techniques include neutral review, mini-trials, and expert opinion. If courts want to limit the scope of applicability, they may demand a more qualified third-party engagement, which would preclude methods such as expert opinion that just give parties with information without engaging in an amicable resolution approach. Furthermore, it is unclear if the Convention's functional definitions of "mediation" and "mediator" would include technical advances in conflict resolution, such as the employment of artificial intelligence algorithms to aid in dispute resolution services.[16]

With respect to the exclusions, if the mediation's subject matter is international and commercial and isn't precluded by Art. 1(2) or 1(3), the Singapore Convention is applicable to both institutional and ad hoc mediation. Under Art. 1(2), disputes involving consumers are excluded, as are those involving family, inheritance, or employment law. Under Art. 1(3), iMSAs that have been approved by a court or resolved during court proceedings, recorded, and enforceable as judgements in the state of that court, or recorded and enforceable as arbitral awards, are excluded. For the Convention to fill up any gaps in the cross-border enforcement of iMSAs, these exclusions are deemed essential.[17] As long as the mediation's subject matter is international and commercial and isn't precluded by Art. 1(2) or 1(3), the Singapore Convention is applicable to both institutional and ad hoc mediation. Under Art. 1(2), disputes involving consumers are excluded, as

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[16] Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation Perspectives from Singapore" Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 2018 (22) 4, *available at SSRN*: https://ssrn.com/abstract=3756911 (last visited on: 02.06.2023)

[17] Nadja Alexander & Shouyu Chong, "The New UN Convention on Mediation (aka the 'Singapore Convention') Why It's Important for Hong Kong" *Hong Kong Lawyer* 26 (2019)

are those involving family, inheritance, or employment law. Under Art. 1(3), iMSAs that have been approved by a court or resolved during court proceedings, recorded, and enforceable as judgements in the state of that court, or recorded and enforceable as arbitral awards, are excluded. For the Convention to fill up any gaps in the cross-border enforcement of iMSAs, these exclusions are deemed essential. In accordance with the Hague Convention of June 30, 2005 on Choice of Court Agreements (HCCA)[18], iMSAs may result from judicial or arbitral procedures and may be documented as a judicial settlement or as an arbitral consent award that is enforceable under the New York Convention.[19] The exclusions in Art. 1(3) exclude any overlap between the Convention's administration and those of these international agreements, and the Convention will enforce IMSAs that fall beyond the purview of the HCCCA or the New York Convention. The Convention's Article 7[20] retains the duties that member governments currently have under existing treaties regarding the pertinent rights of settlement agreements.[21]

If the applicable laws permit, the Singapore Convention shall manage settlement agreements emerging from investor-State disputes without conflicting with any existing bilateral or multilateral agreements that limit how they can be implemented.

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[18] Hague Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 12.

[19] Gary Born, *International Commercial Arbitration* 3021-3027 (Wolters Kluwer, 2nd Ed, 2014)

[20] *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.*

[21] Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report (by Trevor Hartley & Masato Dogauchi) at paras 206-209.

THE CONVENTION WITH RESPECT TO PRIVATE INTERNATIONAL LAW

In cross-border disputes, private international law primarily addresses three concerns. First, it offers conflict rules so that parties, judges, and attorneys can decide which venue has jurisdiction over issues. It also offers conflict rules to help choose the law to use in conflicts. Lastly, it offers conflict rules for parties wishing to have dispute resolution decisions made by foreign courts, arbitral tribunals, and iMSAs recognised and enforced internationally.[22]

The Singapore Convention doesn't specify the appropriate forum for enforcing mediation agreements, hence it has very minor jurisdictional consequences. Moreover, it has no impact on how courts and arbitral tribunals exercise their jurisdiction over international issues. Yet the Convention will alter how iMSAs are acknowledged and applied. Each signatory state shall carry out a settlement agreement in accordance with its own procedural procedures and the guidelines outlined in the Convention, as per Article 3(1). This indicates that the Singapore Convention will have an equivalent impact on iMSAs to the New York Convention's elimination of the necessity for "double exequatur" for arbitral judgements in international enforcement procedures. The quantity and variety of legal instruments that can be recognised and upheld in accordance with principles of private international law are increased by these instruments.[23]

When requesting the recognition and enforcement of IMSAs under the

[22] Paul Torremans, Uglješa Grušić, *et al (ed.) Private International Law* 3 (Oxford University Press, 15th Ed, 2017)

[23] *See* Lucy Reed, "Ultima Thule: Prospects for International Commercial Mediation" NUS Centre for International Law Working Paper 19/03 (unpublished) 12-13 (2019)

Convention, particularly when Art 5 defences are asserted, the issue of choice of law may be pertinent. The Convention is further examined in light of these problems with private international law.

JURISDICTION ON MATTERS OF THE AGREEMENT – OR BEYOND

Working Group II omitted measures for enforcing mediation agreements when crafting the Singapore Convention.[24] This was due to the fact that mediation is a flexible alternative dispute resolution method and parties may discuss issues that are neither expressly covered by the mediation agreement nor impliedly covered by it. The introduction of convention rules for upholding mediation agreements would cause disarray since it would be difficult to define the boundaries of the disputes addressed by the agreement, which would be against the mediation process. At the moment, jurisdictional questions for mediation forums are governed by the regulations or legislation each state has enacted to regulate mediation procedures. Sometimes mediation is required before moving on with a legal or arbitral process for adjudicating a dispute. For instance, mediation agreements are seen as binding in France, where parties are required to try mediation before using alternative dispute resolution techniques like litigation. A properly formulated mediation agreement is usually binding on the parties in Germany and claims in court may not be brought until after a mediation session has been agreed upon.[25] Common law examples from the

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[24] Stacie Strong, "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 Conciliation" 46 (University of Missouri School of Law Legal Studies Research Paper No 2014-28)

[25] Klaus J. Hopt & Felix Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective* 549 (Oxford, 2012; Online Ed., Oxford Academic, 2013), *available*

UK[26], Hong Kong[27], and Singapore demonstrate the need of carefully drafting mediation agreements. If not, there will probably be too much ambiguity for them to be enforced.[28]

CONFLICTS IN CHOICE OF LAW

It is crucial to emphasise some of the new choice of law conflicts that result from the Convention's implementation to give a thorough assessment on the position of the Singapore Convention in private international law. These problems only come up during the iMSA enforcement stage, notably when the signatory nations' competent authorities or courts are asked to take the Art 5 reasons for refusal into consideration. The four basic grounds for refusal listed in Art. 5 are (a) the law of obligations, (b) the misconduct of the mediator, (c) public policy, and (d) the subject matter that are unsuitable for mediation.

Law of Obligations

Owing to constraints, only the choice of law conflicts resulting from the reasons for rejection listed in Art. 5(1) will be addressed in the paper. These circumstances include those in which (a) a party was under incapacity at the time the agreement was reached and (b) the agreement is void, ineffective, or unable to be carried out under the relevant legislation.

A. Incapacity

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at: https://doi.org/10.1093/acprof:oso/9780199653485.003.0008 (last visited on: 02.06.2023)

[26] Ibid

[27] Hyundai Engineering and Construction Co Ltd v Vigour Ltd [2005] HKEC 258 at [29].

[28] *Cf Scandinavian Trading Tank* v *Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 at 540.

The Singapore Convention's definition of incapacity in Art. 5(1)(a) has the same language as Art. V(1)(a) of the New York Convention, but it does not include the clause on choice of law, which states that incapacity is determined "under the law applicable to them." Nonetheless, given how differently civil and common law courts perceive disability, it appears improbable that the choice to remove this word represents an independent opinion on incapacity. The drafters' aim must thus be understood in more detail. Applying Gary Born's "validation principle,"[29] according to which parties who voluntarily engage in international commerce are assumed to want their dispute resolution agreements to be performed effectively, even if that necessitates a broader choice of law principle, is one strategy that might be used. As a result, a court may have a pro-enforcement bias.[30]

As an alternative, a court may use renvoi to ascertain a party's eligibility to sign an iMSA. Renvoi[31] might be used to determine whether a party has the legal competence to complete the agreement, for instance, if a party enters into an agreement in State A in accordance with that state's laws but seeks enforcement in State B, where the legislation is different. Yet, courts have not overwhelmingly backed the renvoi doctrine or the validation principle. The pro-enforcement bias has not found much support in practise, and the application of renvoi is difficult due to its complexity. It is uncertain if the courts will eventually employ these choice-of-law strategies to decide whether an iMSA can be denied enforcement under the Convention because one or more parties are unable.

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[29] Gary Born, *International Commercial Arbitration* 3489-3490 (Wolters Kluwer, 2nd Ed, 2014)
[30] *Ibid*
[31] David Alexander Hughes, "The Insolubility of 'Renvoi' and Its Consequences" (2010) 6 *JPIL* 195

B. Void, ineffective, or unable to be carried out

The language of Art. 5(1)(b)(i) of the Singapore Convention is similar to that of Art. 11(3) of the New York Convention, with the addition of a choice-of-law clause that requires the court to choose the appropriate law before determining whether the agreement is void, ineffective, or incapable of performance. In order to determine whether the iMSA is subject to any of these situations, the court of the signatory state must first determine the applicable legislation to the agreement.

If the court rules that the iMSA is null and invalid, it signifies that the contract was founded on a flawed document, which may have been created under pressure, fraud, coercion, unconscionability, or other circumstances. In defending against such problems, the law of obligations is definitely a useful tool.[32]

The court also considers whether the applicable legislation prevents performance of the iMSA. The clauses involving contractual impossibility, frustration, or other unforeseen events that arise after contract formation would need to be examined by the court.[33]

Nevertheless, as "inoperative" is a legal word of art that is not specifically defined in the contract laws of many legal systems, it can be difficult for the court to decide if an iMSA is inoperative. The courts may take an independent stance while considering this defence. If an iMSA contains

[32] George A Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts* 23 (Springer, 2017)
[33] Ibid

inherent inconsistencies or self-defeating clauses, it may be deemed "inoperative" at the time of its completion or after. Alternately, a future agreement to surrender all rights to pursue remedies under an iMSA might render it ineffective.[34]

Misconduct by the Misconduct

In the Singapore Convention, the two categories of behaviour that constitute grounds for refusal based on mediator misconduct are failing to declare conflicts of interest under Article 5(1)(e) and the occurrence of undue influence before or during the mediation process under Article 5(1)(f). In deciding whether a party entered into the agreement under undue influence, the court of the signatory state may need to consider the governing law of the agreement where a party seeks to refuse execution of an iMSA under Article 5(1)(f). In addition, the party seeking to refuse enforcement may show that the mediator's wrongdoing significantly affected them and prevented them from entering the agreement if adequate disclosure had been provided. In certain situations, the court might need to take the iMSA's governing law into account while deciding whether there was a meaningful impact.[35]

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Hence, while assessing the grounds for rejection based on mediator misconduct in the Singapore Convention, selecting the appropriate controlling legislation of the iMSA is crucial. The court will depend on the applicable legislation to assess whether the party seeking to refuse the enforcement of the iMSA was the victim of undue influence and if the mediator's misconduct had a material effect on the party that would have

[34] Ibid

[35] Supra note 14

impacted their choice to enter into the iMSA.[36]

Public Policy

Using the public policy defence under Art. 5(2)(a), during the enforcement stage of a cross-border dispute resolution agreement, requires close examination of both domestic and foreign elements.[37] Unless extraordinary circumstances require differently, the courts of the signatory state shall use reasonable discretion in applying this ground for refusal and granting enforcement of iMSAs under the Singapore Convention, even if they conflict with some domestic public interests. As a result, the public policy argument should only be used in situations when it violates fundamental international public policy, including when there is corruption or a violation of human rights.

Subject Matters not Amenable to Mediation

Parties seeking to plead with the court of a signatory state to refuse enforcement of an IMSA under Art 5(2)(b) of the Singapore Convention must refer first to the law of the enforcing state for guidance. However, since this ground for refusal is another exceptional "escape mechanism" similar to the public policy defense, the courts should use a restrictive approach when applying it.[38]

Therefore, when the enforcing court refers to its law to establish if the IMSA relates to subject matters amenable to mediation, it should also evaluate the degree of nexus linking the subject matter resolved at mediation

[36] Supra note 20, p. 3652
[37] Supra note 17
[38] Supra note 14

to its forum. The court should not automatically apply its domestic rules concerning the IMSA. Instead, it should assess and evaluate the availability of the defense based on the law of the state with the closest connection to the dispute resolved at mediation.[39]

This means that the courts should avoid being parochial when administering the "subject matter" defense in the context of international commercial arbitration. In conclusion, when deciding whether to refuse enforcement of an IMSA.

ALTERNATIVES OF ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENTS

Without the Singapore Convention on Mediation, it may be difficult to enforce international agreements reached through mediation. The Convention offers a framework for the acceptance and enforcement of agreements for international mediated settlement, which can aid in the mediated settlement of cross-border conflicts.

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The acceptance and execution of international mediated settlement agreements will be governed by the domestic laws of each party to the dispute in the absence of the Singapore Convention. In order to enforce the settlement agreement, the parties may need to negotiate many legal frameworks and processes, which may be a difficult and time-consuming process.

The acceptance and enforcement of international mediated settlement agreements may be covered by national laws or treaties in some nations. For

[39] Supra note 20, p. 3702

instance, the Uniform Mediation Act in the United States offers a framework for the acceptance and enforcement of mediated settlement agreements throughout various jurisdictions.

Other international treaties or conventions that support the execution and acceptance of international mediated settlement agreements may also be parties to which some nations are a signatory. For instance, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards establishes a framework for international arbitral awards to be recognised and enforced in more than 160 nations.

The enforcement procedure, however, may become more challenging and ambiguous due to the lack of a standardised international framework for the recognition and execution of international mediated settlement agreements. By establishing a consistent framework for the acceptance and enforcement of international mediated settlement agreements, the Singapore Convention on Mediation tries to overcome this problem and may encourage the use of mediation as a successful method of settling international conflicts.

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It is crucial to be informed of the choices when nations decide whether or not to sign the Singapore Convention on Mediation or when potential users choose to opt out of it if given the chance, which is a choice made possible by Art. 8 of the Singapore Convention on Mediation. Considering common law, civil law, and other international instrument enforcement strategies following are the options available for enforcement of mediated settlements without the enforcement of Singapore convention.

Court orders

Without the Singapore Convention on Mediation, it may be difficult and

complicated to enforce mediated agreements through a court order under international law.

The domestic laws and processes of the nation where enforcement is sought will frequently determine whether a mediated settlement agreement may be carried out. For instance, in the United States, parties may file a petition to enter judgement based on a mediated settlement agreement in order to attempt to have the agreement enforced in court.

But, in addition to the legislation of the country where the mediation took place, any applicable international treaties or conventions may also have an impact on whether a mediated settlement agreement may be enforced. In rare circumstances, the parties to a mediated settlement agreement may need to file a lawsuit in the court where the agreement was made or in the court where enforcement is sought in order to have it enforced.

Additionally, parties may decide to include clauses in their mediated settlement agreement that specify how the agreement will be enforced across different jurisdictions or that demand that, in the event of a dispute regarding the enforcement of the agreement, the parties submit to binding arbitration.

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Without the Singapore Convention on Mediation, enforcing a mediated settlement agreement under international law can be a complicated and difficult process that requires parties to negotiate several legal systems and processes. Nonetheless, parties can raise the chance of effectively enforcing their agreement in several countries by taking rigorous planning precautions and include enforceability measures in the settlement agreement.

For instance, in the United States, parties may file a motion to enter

judgement based on a mediated settlement agreement in order to attempt to have the agreement enforced in court. A mediated settlement agreement is regarded as a contract under US law, and parties may enforce the agreement by asking a court to issue an order that has the same legal weight as a court decision. Other cases have employed this strategy, notably in *re Gulf Oil Spill*, when the US District Court for the Eastern District of Louisiana upheld a mediated settlement deal relating to the Deepwater Horizon oil leak.[40]

Similar to other countries, Australia allows parties to request that a mediation settlement agreement become a court order by submitting an application. According to the Australian method, a mediated settlement agreement is recognised as a legally enforceable contract, and the parties can ask the court to make the agreement's contents binding just like any other court order. Many instances have employed this strategy, notably Pennisi v. Maritsas, in which the Supreme Court of Victoria upheld a mediated settlement agreement relating to a business dispute.[41]

A court in another country is typically not required to recognise a foreign court's judgement unless there are pre-negotiated obligations to enforce in place, whether in the form of a multilateral or bilateral agreement, so even if some expedited procedure is available for a mediated settlement agreement to take the form of a court order, there remains the challenge of international enforcement. The discussion in this section looks at domestic legal concepts, international treaties, and regional or bilateral agreements to see how they affect the execution of mediated settlement agreements that

[40] In re Gulf Oil Spill, 2012 U.S. Dist. LEXIS 129082 (E.D. La. Sept. 12, 2012).
[41] *Pennisi* v. *Maritsas* [2017] VSC 502.

take the form of a foreign court judgement or order. It comes to the conclusion that, notwithstanding the promise of multilateral treaties for the implementation of foreign court judgements, parties will need to rely on regional or bilateral treaties in addition to domestic law.

However, since these treaties are subject to various restrictions, it is challenging to provide precise general guidelines that might help parties understand when one jurisdiction will recognise court orders issued in another. The application of a domestic law concept to enforcement practise varies much more. International enterprises who conduct business globally and have counterparts with global assets face uncertainty as a result of this.[42]

International Treaties

In the absence of the Singapore Convention on Mediation, additional pertinent international treaties or conventions must exist in order to enforce international mediated settlements through international treaties.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an example of international convention that offers a framework for the execution of international mediated settlements. Notwithstanding the fact that the New York Convention[43] focuses on the enforcement of arbitral judgements, some courts have construed its provisions to also apply to the execution of mediated settlement agreements.

Another example would be the Singapore Convention on Mediation, which

[42] Bobette Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research" 7(1) *Contemp Asia Arb J* 87 at 95 (2014)

[43] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

provides a framework for the recognition and enforcement of international mediated settlement agreements, which was adopted in 2018 and is also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation.[44] A framework for the execution of international mediated settlement agreements is also provided by a few bilateral investment treaties (BITs), apart from these treaties.

An international instrument that aimed to provide harmony and certainty to the execution of foreign judgements is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, this instrument has not acquired much support. A more effective multilateral treaty that allows for the mutual recognition and execution of foreign judgements from courts that the parties have mutually agreed upon is their choice of court is the Choice of Court convention. The Choice of Court Convention has been ratified by 31 nations as of December 31, 2018. China, Ukraine, and the US are signatories to the Choice of Court Convention. Even with the signatories listed, it is obvious that these nations have a small geographic dispersion. Namely, there are just two Asian nations, one Latin American nation, and no Middle Eastern or African nations. It is also uncertain whether the US, a signatory since 2009, would implement the Choice of Court Agreement. So, unless additional nations ratify and implement the Choice of Court Agreement, its ability to enforce international judgements may be limited.

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International parties to a mediated settlement must make sure that their agreement to mediate contains a clause establishing an exclusive choice of court before having that court record the settlement agreement as a court

[44] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation)

order to take advantage of the Choice of Court Convention.[45] So, if the parties did not initially consider enforcement in another jurisdiction, this method of enforcement might not be helpful.

However, in some instances, such as where a dispute between foreign parties is of a civil rather than a commercial nature, resort to the Choice of Court Convention may be preferable over the Singapore Convention on Mediation. This is since, Singapore Convention on Mediation, only applies to commercial disputes, the Choice of Court Convention covers both civil and commercial disputes, and, to gain from the finality that very few justifications exist for not enforcing the agreement.[46]

The only other ground for refusing recognition or enforcement under the Choice of Court Convention, aside from the agreement being void and unenforceable, a party lacking capacity, failure to provide notice for the institution of proceedings, recognition or enforcement being manifestly incompatible with public policy, and inconsistency with existing judgements, is if the judgement was obtained through fraud.[47]

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These reasons for rejecting a mediation are more stringent than those provided by the Singapore Convention on Mediation, which may have more subjective elements.

These include the mediator's "serious breach" of the standards that apply to the mediator or mediation and the mediator's failure to disclose to the party's information that "raises justifiable doubts as to the mediator's

[45] Convention of 30 June 2005 on Choice of Court Agreements
[46] Supra note 1, Art 1.
[47] Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force I October 2015) Art 9.

impartiality or independence."[48]

The Singapore Convention on Mediation also permits non-enforcement when doing so would be "contrary to the public policy" of the nation from which relief is sought, which seems to be a less stringent standard to meet than the "manifestly incompatible with public policy" requirement of the Choice of Court Convention.[49]

Separately, the Hague Conference on Private International Law has resurrected its Judgments Project, which broadens the scope of international cases involving choice of court agreements beyond the scope of the Choice of Court Convention and incorporates all judgements in civil and commercial cases where recognition and enforcement are sought abroad. From 2016 through 2018, the Special Commission on the Judgments Project met often to debate a draught treaty text. This could improve the international framework for the enforcement of foreign judgements in the future and support the search for convergence in this area, particularly when combined with other regional initiatives like the Asian Principles of Private International Law[50] and the Commonwealth Model Recognition and Enforcement of Foreign Judgments Bill.[51]

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Regional and Bilateral treaties

[48] Supra note 1, Art. 5(1)

[49] Supra note 1, Art 5(2); cf Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force I October 2015) Art 9(e).

[50] Weizuo Chen & Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" 13 *J Priv Int'l Law* 411 (2017)

[51] Commonwealth Secretariat, "Improving the Recognition of Foreign Judgments: Model Law on the Recognition and Enforcement of Foreign Judgments" 43 (3/4) *Commonwealth Law Bulletin* 545 at 547 (2017)

Regional and bilateral accords may also make it easier for mediated agreements to be enforced by judicial orders under international law.

For instance, the Mediation Directive (2008/52/EC) adopted by the European Union ensures that mediation agreements are upheld by all EU Member States. According to the Mediation Directive, parties can ask that a mediated settlement agreement be rendered enforceable in a Member State's court, and the court may do so in line with its own domestic legal framework. This strategy has been applied in a number of instances, including the one in which the English High Court upheld a mediated settlement agreement in compliance with the Mediation Directive in *Energy Finance Team AG* v. *LDK Solar HI-Tech Co Ltd.*[52]

Similar provisions for the execution of mediated settlement agreements may be found in various bilateral investment treaties (BITs). For instance, the Singapore-India BIT has provisions for the enforcement of mediated settlement agreements connected to commercial disputes. The Canada-China BIT[53] also contains measures for the recognition and enforcement of mediated settlement agreements linked to investment disputes. These BITs give parties a way to request that a mediated settlement agreement be recognised and upheld in line with the rules of the treaty[54].

A number of regional and bilateral treaties that India has signed have clauses allowing for the implementation of mediated settlement agreements.

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[52] [2014] EWHC 3116 (Comm).

[53] Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), Article 16.3(3)

[54] Agreement between the Government of the Republic of Singapore and the Government of the Republic of India for the Promotion and Protection of Investments (Singapore-India BIT), Article 15.8

A clause enabling the acceptance and enforcement of mediated settlement agreements pertaining to business disputes, for instance, is included in the Comprehensive Economic Cooperation Agreement (CECA) between India and Singapore. A mediated settlement agreement may be rendered enforceable in either country's courts under the terms of the CECA, and those courts may do so in line with their respective domestic legal frameworks.[55]

Moreover, India has ratified the SAARC Agreement on Arbitration, which permits the enforcement of arbitral rulings as well as "any other legal document" that the parties may agree upon, such as mediated settlement agreements. A mediated settlement agreement may be enforced in any SAARC member state's court at a party's request, and the court may do so in line with its own domestic laws and processes.[56]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which establishes a procedure for the recognition and enforcement of arbitral decisions, including those resulting from mediated settlement agreements, has also been approved by India. Although though the New York Convention does not directly address mediated settlement agreements, certain courts have acknowledged that, for the purposes of enforcement under the Convention, mediated settlement agreements can be interpreted as arbitral decisions.[57]

Domestic Laws

[55] India-Singapore Comprehensive Economic Cooperation Agreement (CECA), Chapter 8, Article 13.

[56] SAARC Agreement on Arbitration, Article 8 (1).

[57] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article 1(1), Article II, Article V

when it comes to enforceability of settlements through mediation, in International law domestic legislations can also be used to facilitate court orders.

The Mediation Bill, 2021, which provides a legal framework for the mediation procedure and the enforcement of mediated settlement agreements, was recently enacted by the Indian government. A mediated settlement agreement can be enforced under the Mediation Bill as if it were a court order, and parties can ask for a consent decree to be issued by the court based on the conditions of the mediated settlement agreement. In order to make it easier for people to recognise and enforce mediated settlement agreements, the Mediation Law also calls for the establishment of a central register of such agreements.

The Indian Arbitration and Conciliation Act, 1996 also offers a framework for the enforcement of mediated settlement agreements, in addition to the Mediation Bill. According to Section 74 of the Act, a court may issue an order requiring the execution of a settlement agreement that resulted through conciliation, and such an order will be enforceable as if it were a court judgement.

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Additionally, a method for enforcing agreements between parties is provided under the Code of Civil Process, 1908. Parties may petition to the court for the execution of an agreement or compromise under Section 47 of the Code, and the court will then issue an order that will be enforceable much like a judgement.

CONCLUSION

In essence, the Singapore Convention represents a significant advancement

in the field of international dispute resolution and gives parties another out-of-court conflict resolution alternative. It has brought up a number of concerns, including the choice of law and private international law considerations, regarding the acceptance and enforcement of IMSAs as a novel type of legal instrument.

The Singapore Convention seeks to gain from tried-and-true methods and maintain uniformity across conflict resolution systems by making comparisons to the New York Convention. Authorities, scholars, and practitioners are anticipated to create a body of guidelines and standards for the implementation of iMSAs in order to increase clarity and predictability as the Singapore Convention gains greater traction. The Singapore Convention offers a consistent and effective framework for implementing iMSAs among signatory states, which has the potential to boost global trade and commerce. Achieving this goal will depend on the Convention being implemented effectively, with adequate attention paid to conflicts between choice of law and private international law.

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It is crucial for prospective signatory states to consider the new laws and guidelines that could be necessarily present in order to enforce IMSAs under the Convention. Despite the basic guidelines provided by the Convention, signatory states are required to enforce a settlement agreement in accordance with their respective procedural laws and under the restrictions outlined in the Convention. Hence, prospective signatories must first determine whether their present procedures for enforcing international settlement agreements need to be updated to bring them into compliance with the Convention's requirements. A study of local laws, rules, and judicial procedures may be necessary to make sure they comply with the Convention's obligations. Local particularities, such as the legal system and

cultural norms of the signatory state, should be considered during this reform process.

Overall, the Singapore Convention is a welcome addition to the landscape of international dispute resolution, and its application may help to increase predictability and clarity in the mediation of cross-border conflicts.

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