

12-31-2020

## The Singapore Convention on Mediation: A Brave New World for International Commercial Arbitration

Robert Butlien

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>



Part of the [Commercial Law Commons](#), [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Robert Butlien, *The Singapore Convention on Mediation: A Brave New World for International Commercial Arbitration*, 46 *Brook. J. Int'l L.* 183 (2020).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol46/iss1/5>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# THE SINGAPORE CONVENTION ON MEDIATION: A BRAVE NEW WORLD FOR INTERNATIONAL COMMERCIAL MEDIATION

## INTRODUCTION

From Confucius's teachings to the rabbi or priest resolving disputes in the community, the idea of mediation, in concept if not in name, is prevalent throughout much of human civilization.<sup>1</sup> Mediation is, in short, “[n]egotiation facilitated by a trusted neutral person.”<sup>2</sup> The neutrality and impartiality of that third party, the mediator, is crucial to the process.<sup>3</sup> Mediators help facilitate the negotiating process with the end goal of having the parties reach a consensus.<sup>4</sup> Unlike a judge or an arbitrator however, the mediator is not a decision maker or adjudicator.<sup>5</sup> Although mediation can sometimes be required by court or a procedural process, it is most often—and always in spirit—a voluntary process.<sup>6</sup>

There are three main forms of mediation.<sup>7</sup> First, there is “facilitative” mediation, where, as the name suggests, the mediator works to facilitate communication between the parties, ensuring that they understand the other’s perspective.<sup>8</sup> The end goal of this form of mediation is to assist the parties in reach-

---

1. See generally Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1983 *MEDIATION Q.* 3 (1983).

2. Michael Leathes, *Stop Shovelling Smoke! Give users a classic definition of mediation*, INT’L. MEDIATION INST., <https://www.imimmediation.org/2011/08/30/stop-shovelling-smoke-give-users-classic-definition-mediation/> (last visited Aug. 8, 2020).

3. *Id.*

4. *Id.*

5. *Mediation: Frequently Asked Questions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/amc/en/mediation/guide/index.html#whatis> (last visited July 3, 2019).

6. See *id.*; Lucia Valentová, *Mandatory Mediation in Family Law Issues with Domestic Violence – Limits and Experience from USA*, 15 INT’L & COMP. L. REV. 103, 106–114 (2015); Jennifer Winestone, *Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process In Their Adversarial Systems*, *MEDIATE* (Feb. 2015), <https://www.mediate.com/articles/WinestoneJ4.cfm>.

7. Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?*, 26 INT’L L. PRACTICUM 38, 40 (2013).

8. *Id.*; *Mediation: Frequently Asked Questions*, *supra* note 5.

ing their own agreement.<sup>9</sup> Second, there is “evaluative” mediation where the mediator takes a slightly more active role by creating a non-binding evaluation of the dispute.<sup>10</sup> Consistent with the voluntary nature of the process, the parties are free to accept or reject the mediator’s assessment as the settlement of the dispute.<sup>11</sup> Third, there is “directive” mediation, where the mediator will actively persuade the parties to accept his or her settlement proposal.<sup>12</sup> Because the parties are expected to submit to the mediator’s settlement, the process more resembles a formal adjudicative process.<sup>13</sup> Regardless of the form of mediation, it should be emphasized again that it is non-binding by nature.<sup>14</sup> A mediation settlement agreement (MSA) therefore only becomes binding if the parties put the terms of the settlement into a binding form, such as a contract.<sup>15</sup>

Enforcing an international MSA, previously a potentially arduous process, will be made much easier because of the United Nation’s Convention on International Mediated Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation or Convention).<sup>16</sup> This Note argues that the Singapore Convention on Mediation is an extremely effective, though short of perfect, means to enforce commercial mediation on the international level. Part I of this Note will provide a background on the current state of international commercial mediation and the difficulties in enforcing international MSAs. With these challenges as context, this Part will also discuss the advent of the Singapore Convention on Mediation and what it purports to do. Part II will compare the Singapore Convention to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Although the two bodies of alternative dispute resolution (ADR) are arguably conflated and often erroneously related to one another, it is difficult to discuss mediation without also mentioning arbitration. The comparison between the two forms of ADR and their re-

---

9. Gaultier, *supra* note 7, at 39–40.

10. *Id.* at 40; *Mediation: Frequently Asked Questions*, *supra* note 5.

11. Gaultier, *supra* note 7, at 38, 40; *Mediation: Frequently Asked Questions*, *supra* note 5.

12. Gaultier, *supra* note 7, at 38, 40.

13. *Id.*

14. *Mediation: Frequently Asked Questions*, *supra* note 5.

15. Gaultier, *supra* note 7, at 38–39.

16. *See infra* notes 17–22 and accompanying text.

spective conventions, however, will be useful in the context of this note.

Part III will then argue that, because of the presumption of enforceability that the Singapore Convention provides and because mediation has distinct advantages over litigation and arbitration, mediation should be used increasingly—if not primarily—to settle international commercial disputes. This section will focus mostly on the advantages of mediation over arbitration, the latter of which has enjoyed decades of success following the New York Convention as the most popular form of ADR on the international stage. After the strengths of weaknesses of arbitration and mediation are discussed, this section will briefly explore the efficacy of combining these forms of ADR through the processes of Med-Arb and Arb-Med. Finally, this Note will then turn to the Convention's weaknesses. This section will also advocate for an amendment to remedy one of the Singapore Convention's most notable deficiencies: that it does not provide for enforcement of agreements to mediate. Whether or not this change is brought about, this Note will make the case that, overall, the Singapore Convention on Mediation should bring about a better future for the use of mediation in settling international commercial disputes.

#### I. THE CURRENT STATE OF ENFORCING INTERNATIONAL COMMERCIAL MSAs PRIOR AND LEADING TO THE SINGAPORE CONVENTION ON MEDIATION

This section will briefly discuss the mechanisms used to enforce international commercial MSAs outside of the Singapore Convention on Mediation. After exploring the inadequacies of enforcing MSAs without the Convention, this Part will then turn to the advent of the Convention. It will explain key parts of the Convention, including when it applies, how it enforces MSAs, and the limited defenses it provides to prevent enforcement.

##### *A. Contract Law and Other Procedures*

Even with a binding contract, enforcing international disputes through mediation can be a complicated process.<sup>17</sup> There

---

17. See generally Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 UCLA L. REV. 1385 (2007).

is no universal manner for nations to enforce MSAs.<sup>18</sup> The default method, relied upon by most nations, is litigating a contract law claim.<sup>19</sup> For example, a wronged party may initiate a claim for breach of contract.<sup>20</sup> To do so, “a claim will have to be brought against the non-conforming party on the basis of the mediated agreement, i.e. a contract, and in accordance with the dispute resolution mechanism set out in the mediated agreement.”<sup>21</sup> Resolving a contractual dispute through mediation is not ideal, however, because “a contract is what the parties started out with, and litigating a contract again in another posture was not what the parties contemplated when they entered into the mediation.”<sup>22</sup>

Some nations have special judicial procedures for enforcing conditions of mediation, such as consent decrees in the United States, and stipulation and judicial notarization for enforcement in Bermuda and India.<sup>23</sup> It has also become increasingly common for countries to facilitate the enforcement of MSAs through the context of arbitration.<sup>24</sup> Under the Arbitration and Conciliation Ordinance of India, for example, a valid settlement agreement signed by the parties has “the same status and effect as if it were an arbitral award rendered by an arbitral tribunal.”<sup>25</sup>

Given the lack of international harmonization however, the need for an enforcement mechanism of international commercial mediation is very well-recognized.<sup>26</sup> The International Bar Association’s Mediation Committee summarized the results of 2006 survey on mediation by noting that “[t]he enforceability of a settlement agreement is generally of the utmost im-

---

18. David Weiss, *A Pathway to Enforcement Mechanisms of International Settlement Agreements*, 70 DISP. RES. J. 25, 26 (2015); *see also id.*

19. Steele, *supra* note 17, at 1394–97; *see also* Edna Sussman, *The New York Convention through a Mediation Prism*, 15 DISP. RESOL. MAG. 10, 10 (2009).

20. Steele, *supra* note 17, at 1388.

21. Yvonne Foo, *Singapore Convention on Mediation 2019: Embarking on a new era in alternative dispute resolution*, CLYDE & Co (Aug. 7, 2019), <https://www.clydeco.com/en/insights/2019/08/singapore-convention-on-mediation-2019-embarking-o>.

22. Sussman, *supra* note 19, at 10.

23. Steele, *supra* note 17, at 1388.

24. *Id.* at 1389–90.

25. Weiss, *supra* note 18, at 28.

26. *See* Sussman, *supra* note 19, at 10.

portance' and 'in international mediation . . . reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.'"<sup>27</sup>

### *B. UNCITRAL*

In order to tackle the inconsistencies and inadequacies in the enforcement mechanisms of international mediation, the United Nations Commission on International Trade Law (UNCITRAL) attempted to develop a model law on conciliation.<sup>28</sup> The resolution was drafted with mediation in mind: "[r]ecognizing the value for international trade of methods 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 . . . ."<sup>29</sup> To meet this need, Article 14 of the UNCITRAL Model Law on Conciliation reads: "[i]f the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."<sup>30</sup> In drafting this broad language, UNCITRAL was concerned with the "diversity of approaches" that countries used in enforcing mediation settlements and thus "searched for the lowest common denominator."<sup>31</sup> Their work proved unsuccessful, however, and the drafters eventually abandoned their initial efforts, leaving the development of enforcement procedures to the individual adopting countries.<sup>32</sup>

### *C. Transition to the Singapore Convention on Mediation*

Given the inadequacies of the UNCITRAL model law on conciliation, UNCITRAL formed Working Group II at its 49th ses-

---

27. Sussman, *supra* note 19, at 10.

28. Steele, *supra* note 17, at 1390. The UNCITRAL is the UN body tasked with harmonizing and modernizing international trade law. G.A. Res. 2205 (XXI), at 99–100 (Dec. 17, 1966). This organization was established by the General Assembly in 1966 through Resolution 2205(XXI). *Id.*

29. G.A. Res. 57/18, at 1, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (Jan. 24, 2003).

30. *Id.* at 7 (second alteration in original).

31. Steele, *supra* note 17, at 1390; *see id.*

32. Steele, *supra* note 17, at 1390.

sion.<sup>33</sup> The Working Group was specifically mandated to address the enforcement of settlement agreements.<sup>34</sup> Working Group II, at its 63rd and 64th sessions in Vienna, thus crafted an instrument that could provide enforcement for international commercial settlement agreements resulting from mediation and produced what ultimately became the Singapore Convention on Mediation.<sup>35</sup>

On August 7, 2019, a total of forty-six countries met and signed the Singapore Convention.<sup>36</sup> The goal of the Convention was to facilitate the cross-border enforcement of international MSAs, facilitate international trade, and promote mediation as an effective form of ADR.<sup>37</sup> The Singapore Convention's signatories include some massive economic powers, including the United States, China, India, South Korea, Saudi Arabia, Iran and Singapore.<sup>38</sup> On the other hand, there are notable absences, such as Japan, Brazil, Canada, Russia, Mexico, and the entirety of the European Union.<sup>39</sup> The Singapore Convention on Mediation entered into force on September 12, 2020.<sup>40</sup>

---

33. See Piotr Wójtowicz & Franco Gevaerd, *A New Global ADR Star is Born: The Singapore Convention on Mediation*, 37 ALTERNATIVES HIGH COST LITIG. 141, 141 (2019).

34. *Id.*

35. *Id.*

36. Nadja Alexander, *It's DONE: The Singapore Convention on Mediation*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Aug. 9, 2019), <http://mediationblog.kluwerarbitration.com/2019/08/09/its-done-the-singapore-convention-on-mediation/>.

37. *United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")*, U.N. COMM'N INT'L TRADE L., [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) (last visited July 6, 2020).

38. Alexander, *supra* note 36; *GDP (current US\$)*, WORLD BANK, [https://data.worldbank.org/indicator/ny.gdp.mktp.cd?most\\_recent\\_value\\_desc=true&view=map](https://data.worldbank.org/indicator/ny.gdp.mktp.cd?most_recent_value_desc=true&view=map) (last visited July 7, 2020).

39. Alexander, *supra* note 36; *GDP (current US\$)*, *supra* note 38.

40. *Status of United Nations Convention on International Settlement Agreements Resulting from Mediation*, U.N. TREATY COLLECTION., [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-4&chapter=22&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en) (last visited July 10, 2020). The first three nations to ratify, accept, or approve the treaty were Fiji, Qatar, and Singapore. *Id.*

#### *D. Overview of the Singapore Convention on Mediation*

The Singapore Convention is best viewed as a solution to the main barrier that hampered the use of mediation in settling international disputes: “if a party to a mediated settlement agreement defaults on its obligations, the non-defaulting party must turn to litigation, arbitration, or any other method contemplated by the settlement agreement to enforce the agreement like it would any other contractual obligation.”<sup>41</sup> The Convention ensures that when a party to an MSA is located within a country party to the Convention, it can rely on that MSA to prove that the dispute has already been resolved.<sup>42</sup> To meet these ends, the Convention begins by defining “mediation” as

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.<sup>43</sup>

Within this broadly applicable definition, the Convention applies to international MSAs resulting from mediation and concluded in writing.<sup>44</sup> A settlement agreement is “international” if either:

- (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

---

41. *The Singapore Convention on Mediation and the Path Ahead*, GIBSON DUNN (Aug. 22, 2019), <https://www.gibsondunn.com/singapore-convention-on-mediation-and-the-path-ahead/>.

42. Yvonne Foo, *supra* note 21.

43. G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018) [hereinafter Singapore Convention on Mediation].

44. *United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”)*, *supra* note 37.



(ii) The State with which the subject matter of the settlement agreement is most closely connected.<sup>45</sup>

Even when international in scope, however, the Convention does not apply to settlement agreements relating to family or employment law, settlements enforceable as a judgment in a court, and settlements enforceable as an arbitral award.<sup>46</sup>

The Singapore Convention on Mediation also uses strong, clear language in Article 3, its enforcement mechanism.<sup>47</sup> Article 3 states that, if the agreement is international and settled with mediation, parties to the Convention “shall enforce a settlement agreement in accordance with [their] rules of procedure and under the conditions laid down in the Convention.”<sup>48</sup> Following this language of mandatory enforcement, Article 5 lays out several limited and specific grounds for refusal to grant relief.<sup>49</sup> Articles 5(1)(a) through 5(1)(d) provide for contract-like defenses.<sup>50</sup> Article 5(1)(e) and (f) are used for defenses

---

45. Singapore Convention on Mediation, *supra* note 43, art. 1.

46. *The Singapore Convention on Mediation: Doing for Mediation What the New York Convention has Done for Arbitration?*, ASHURST: DISPUTE RESOLUTION UPDATE (Aug. 7, 2019), <https://www.ashurst.com/en/news-and-insights/legal-updates/the-singapore-convention-on-mediation/>.

47. See Singapore Convention on Mediation, *supra* note 43, art. 3 (emphasis added).

48. *Id.* Likewise, Article III of the New York Convention reads that each party “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down” in the Convention. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].

49. Singapore Convention on Mediation, *supra* note 43, art. 5. Article 5 must be invoked in order to apply. *Id.* Specifically, “[t]he 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” one of the defenses outlined in Article 5 apply. *Id.*

50. *Id.*; Shou Y. Chong & Nadja Alexander, *An Implied Ground for Refusal to Enforce iMSAs Under the Singapore Convention on Mediation: the Effect of Article 6*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Feb. 17, 2019), <http://mediationblog.kluwerarbitration.com/2019/02/17/an-implied-ground-for-refusal-to-enforce-imsas-under-the-singapore-convention-on-mediation-the-effect-of-article-6/>. Article 5(1)(a) provides for a defense if “[a] party to the settlement agreement was under some *incapacity*” (emphasis added). Singapore Convention on Mediation, *supra* note 43, art. 5. Article 5(1)(b) provides for several defenses, including if the agreement is “null and void, inoperative

from mediator misconduct.<sup>51</sup> Article 5(2)(a) gives a “[p]ublic policy” defense and, lastly, Article 5(2)(b) provides a defense to “[s]ubject matter not capable of settlement by mediation.”<sup>52</sup> Although not an express defense, Article 6 allows for a competent authority, whether a court or an arbitral tribunal, to adjudicate the claim if there is a parallel application or claim.<sup>53</sup>

## II. THE STRENGTHS OF THE SINGAPORE CONVENTION ON MEDIATION AND THE NEW YORK CONVENTION MIRROR

The Singapore Convention on Mediation looks to be for mediation what the New York Convention was for arbitration: a boon.<sup>54</sup> It should, however, be noted that the success of the New York Convention did not happen overnight. Only forty-five nations were present at the Conference that established what would become the New York Convention.<sup>55</sup> When the New York Convention was finalized in 1958, there were only twenty-eight initial signatory nations.<sup>56</sup> Of those twenty-eight nations, only fifteen actually ratified the convention within ten years of signing.<sup>57</sup> It took until 1970 and 1975, respectively, for the United

---

or incapable of being performed under the law to which the parties have validly subjected it,” is not a binding or final contract, or if it has been modified. *Id.* The defense in Article 5(1)(c) applies if the obligations required by the settlement agreement were either unclear or were not performed. *Id.* Lastly, Article 5(1)(d) provides for a ground to refuse enforcement where “[g]ranted relief would be contrary to the terms of the settlement agreement.” *Id.*

51. Singapore Convention on Mediation, *supra* note 43, art. 5; Chong & Alexander, *supra* note 50.

52. Singapore Convention on Mediation, *supra* note 43, art. 5; Chong & Alexander, *supra* note 50.

53. Singapore Convention on Mediation, *supra* note 43, art. 6; Chong & Alexander, *supra* note 50.

54. See, e.g., Stavros Brekoulakis, *Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement*, 19 AM. R. INT'L ARB. 415, 416 (2008).

55. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049, 1059–60 (1961).

56. *New York Convention, Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited July 10, 2019).

57. *Id.* That being said, a total of 33 nations had ratified the New York Convention by 1968. *Id.* Thus, although a signatory to a convention will not necessarily ratify it in the near future, this fact also shows that the amount of countries that ratify a convention can quickly surpass the initial number of signatories.

States and the United Kingdom to sign on to the New York Convention.<sup>58</sup> The New York Convention has, nonetheless, grown substantially over time.<sup>59</sup> By the end of 1986, sixty-eight countries had ratified the Convention.<sup>60</sup> Today that number has ballooned to 161, consisting of a majority of the world and all of the largest economies.<sup>61</sup>

#### *A. Overview of the New York Convention*

Before discussing why exactly a great majority of the world has decided to ratify the New York Convention and discussing its similarities to the Singapore Convention on Mediation, it is worth noting briefly what exactly the New York Convention provides, to what it applies, and what its intended goals were. The New Convention concerns arbitration, a private adjudicatory system designed and organized through contracts.<sup>62</sup> The key distinction separating arbitration from mediation is that the neutral third party, the arbitrator, has the authority to

---

58. May Lu, Note, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L L. 747, 748, 753 (2006); Once ratified, The New York Convention was implemented in the United States through the Federal Arbitration Act ("FAA") and in the United Kingdom through the 1975 U.K. Arbitration Act. Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States*, 62 AM. J. COMP. L. SUPP. 69, 70 (2014). See also Lu, *supra* note 58, at 753. The US originally chose not to become a signatory out of concerns that it would require substantial changes and developments in state and federal law. See Duca & Welsh, *supra* note 58 at 70; see also Lu, *supra* note 58, at 751. The United States' position ultimately changed with the rise of international commerce and the costs in litigating international disputes. Duca & Welsh, *supra* note 58 at 70. The United States' absence from the convention is an important fact because English is now the main language of used to conduct international commercial transactions. Lu, *supra* note 58, at 748.

59. See New York Arbitration Convention, *supra* note 56.

60. *Id.*

61. GDP (current US\$), *supra* note 38; New York Arbitration Convention, *supra* note 56.

62. See Robert Bird, *Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention*, 7 N.C. J. INT'L L. & COM. REG. 1013, 1014 (2012); see also Edna Sussman, *Why Arbitrate? The Benefits and Savings*, N.Y. ST. B. ASS'N J. (Oct. 2009). Arbitration is extremely flexible, as it allows parties to choose things such as the institution, who the arbitrators will be, the number of arbitrators, the extent of discovery, and more. Sussman, *supra* note 62, at 22–24.

grant an award.<sup>63</sup> An award by itself, however, is useless; it must be taken to a court to be enforced.<sup>64</sup> Due to difficulties enforcing awards between parties from two different countries, the UN convened the Geneva Protocol on Arbitration Clauses in 1923 and the Geneva Convention on the Execution of Arbitral Awards in 1927.<sup>65</sup> Soon after WWII and at the request of the International Chamber of Commerce, the UN's Economic and Social Council again convened a conference with representatives of forty-five nations "to consider . . . measures for increasing the effectiveness of arbitration in the settlement of private law disputes."<sup>66</sup> The Council drafted and ultimately adopted what would become known as the New York Convention.<sup>67</sup>

In a landmark decision, the Supreme Court of the United States succinctly articulated that the goal of the New York Convention "was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."<sup>68</sup> In more detail, UNCITRAL stated that the

---

63. *Arbitration*, A.B.A.: DISP. RESOL. PROCESSES, [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/) (last visited July 10, 2020).

64. See Sally-Ann Underhill & M. C. Cárdenas, *Awards: Early Stage Consideration of Enforcement Issues*, THE GUIDE TO CHALLENGING AND ENFORCING ARB. AWARDS 7 (J. William Rowley QC et. al eds., 2019).

65. See generally Quigley, *supra* note 55 at 1054–56, 1059; *History 1923 – 1958*, N.Y. Arb. Convention, <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> (last visited July 10, 2020).

66. Quigley, *supra* note 55, at 1059.

67. *History 1923 – 1958*, *supra* note 65.

68. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). *Scherk* involved a dispute between Alberto-Culver Co., an American company, and Scherk, a German citizen who owned several German and Lichtenstein businesses. *Id.* at 508. Scherk and Alberto-Culver formed a contract whereby Scherk would transfer ownership and trademark rights of his enterprises to Alberto-Culver. *Id.* The contract contained an arbitration clause specifying that the place of arbitration would be the International Chamber of Commerce in Paris but governed by the laws of the United States. *Id.* Alberto-Culver eventually rescinded the contract and commenced an action in the Federal District of Court in Illinois, alleging fraudulent representation under the Securities Exchange Act of 1934. *Id.* at 509. The District Court, relying on *Wilko v. Swan* 346 U.S. 427 (1953), the previous guiding Supreme Court decision on the enforceability of arbitration clauses, granted a preliminary order

objective of the New York Convention was to ensure “that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.”<sup>69</sup> Beyond the assurance of enforceability, it also directs “[p]arties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.”<sup>70</sup>

The New York Convention achieves these goals through very simple language. Article I sets out the scope of the convention,<sup>71</sup> but Article II provides that arbitral awards are presumptively valid and enforceable:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>72</sup>

Article II(3) further provides the actual enforcement mechanism:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it

---

enjoining Scherk from proceeding with arbitration. *Id.* at 509–10. In *Wilko*, the Court held that an “agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933.” *Id.* at 510. The Court of Appeals for the Seventh Circuit affirmed the district court’s ruling. *Id.* On appeal, the Supreme Court reversed the lower court and held that “the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.” *Id.* at 519–20 (1974).

69. New York Convention, *supra* note 48.

70. *Id.*

71. *Id.* art. I

72. *Id.* art. II; Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. OF INT’L. LAW 115, 120 (2018).

finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>73</sup>

This provision is especially important because it “ensures that international arbitration agreements will . . . be promptly and efficiently enforced in accordance with their terms by requiring the parties to arbitrate, rather than litigate, their underlying dispute.”<sup>74</sup>

The crucial objective of the New York Convention of “encourag[ing] recognition and enforcement of awards in the greatest number of cases as possible” is achieved through Article VII of the convention.<sup>75</sup> Article VII(1) states:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.<sup>76</sup>

This section recognizes “the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more [favorable] than the Convention.”<sup>77</sup> This provision is commonly known as the “most-favorable-right” provision because it allows domestic law to supersede the New York Convention where the domestic law would allow for a more favorable procedure for enforcement.<sup>78</sup>

### *B. The New York Convention’s Most Notable Weaknesses*

This is not to say that the New York Convention is not without any weakness and that the Singapore Convention on Mediation will be immune from similar flaws.<sup>79</sup> Ironically, the New

---

73. New York Convention, *supra* note 48, art. II; Born, *supra* note 72, at 120.

74. Born, *supra* note 72, at 120.

75. New York Convention, *supra* note 48, art. VII.

76. *Id.*

77. *Id.*

78. Georgios C. Petrochilos, *Enforcing Awards Annulled in Their State of Origin under the New York Convention*, 48 INT’L & COMP. L. Q. 856, 861, 874 (1999).

79. *See generally* Brekoulakis, *supra* note 54.

York Convention's most notable weaknesses have to do with the enforcement of arbitral awards, the very thing it was designed to improve.<sup>80</sup> Enforcing awards can be costly and adversarial, and thus unfriendly to businesses.<sup>81</sup> Because enforcing awards is difficult even under the New York Convention, many parties will choose to settle after the award has been granted, rather than seeking a court to enforce the award.<sup>82</sup> This weakness nonetheless results largely from the fact that it is the obligation of domestic legislation to create a system for the enforcement of arbitral awards.<sup>83</sup>

### C. *The New York Convention and Singapore Convention Mirror*

There is much overlap between the goals of the Singapore Convention on Mediation and the New York Convention.<sup>84</sup> The similarities between these two conventions, accordingly, might be a result of the recognition articulated by the Chair of The Corporate Counsel International Arbitration Group during the UNCITRAL Working Group II meeting in 2015:

One of the greatest challenges we face commercially is convincing companies in many parts of the world to agree to mediation in the first place [because] it does not have the kind of international recognition and legitimacy that the NY Convention has so successfully given to international arbitration.<sup>85</sup>

With this challenge in mind, put simply in a note by the UN Secretariat, the Singapore Convention on Mediation was designed to “[ensure] that a settlement reached by parties becomes binding and enforceable in accordance with a simplified

---

80. Brekoulakis, *supra* note 54, at 437–48.

81. *Id.*

82. *Id.* at 419–22.

83. *Id.* at 437.

84. See Iris Ng, *The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution?*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Aug. 31, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/>; Sreenivasan Narayanan S.C. & Wei Liang Jason Lim, *The Singapore Convention on Mediation: A Primer*, K&L GATES (July 25, 2019), <http://www.klgates.com/the-singapore-convention-on-mediation-a-primer/?nomobile=perm>.

85. Weiss, *supra* note 18, at 30.

and streamlined procedure.”<sup>86</sup> The Singapore Convention on Mediation was additionally intended to increase predictability and greater respect when using binding MSAs.<sup>87</sup> Thus, as outlined above, both the Singapore Convention on Mediation and the New York Convention are concerned primarily with the *enforceability* of awards granted by their respective forms of ADR.

Perhaps due to the success enjoyed by the New York Convention, the Singapore Convention on Mediation borrows much of its language and structure from the New York Convention.<sup>88</sup> For example, the third article of both conventions require that “[e]ach party to the convention” or “[e]ach [c]ontracting [s]tate” shall enforce settlement agreements or arbitral awards in accordance with the procedure of the territory where enforcement of the award is sought and under the conditions of the conventions, respectively.<sup>89</sup> Further, Article V of the New York Convention and Article 5 of the Singapore Convention both provide for defenses—grounds for refusing to grant relief.<sup>90</sup> Both Article

---

86. U.N. Comm’n on Int’l Trade Law [UNCITRAL], Settlement of Commercial Disputes International Commercial Mediation: Draft UNCITRAL Notes on Mediation, U.N. Doc. A/CN.9/987, at 4 (2019).

87. Singapore Convention on Mediation, *Building Trust, Enabling International Trade*, SINGAPORE CONVENTION, <http://digiwebmm.com/staging/SGConvention/assets/pdf/statements/SCMRoundtableChairsStatementFinal.pdf> (last visited Sep. 19, 2020).

88. UNCITRAL, Planned and possible future work — Part III Proposal by the Government of the United States of America: future work for Working Group II, U.N. Doc. A/CN.9/822, at 3 (2014) [hereinafter U.N. Doc. A/CN.9/822]; see generally Singapore Convention on Mediation, *supra* note 43, art. 3; New York Convention, *supra* note 48. It should be stated again that it is far from a coincidence that the New York Convention and Singapore Convention on Mediation share goals about enforceability and thus much of their language. The United States specifically proposed that the UNCITRAL Working Group II form a

multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration. Just as the New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.

U.N. Doc. A/CN.9/822, *supra* note 88.

89. Singapore Convention on Mediation, *supra* note 43, art. 3; New York Convention, *supra* note 48, art. III.

90. Eunice Chua, *The Singapore Convention on Mediation - A Brighter Future for Asian Dispute Resolution*, 9 ASIAN J. INT’L L. 195, 200–02 (2019); Singapore Convention on Mediation, *supra* note 43, art. 5; New York Conven-



VI and Article 6 of the respective conventions address parallel applications or claims and if a “competent authority” has set aside or suspended the award.<sup>91</sup> These articles are particularly important because they balance the countervailing concerns of enhancing the enforceability of foreign arbitral awards against the need for judicial oversight thereof.<sup>92</sup> Finally, like the New York Convention, the Singapore Convention on Mediation also requires domestic implementation of the treaty.<sup>93</sup>

### III. THE SINGAPORE CONVENTION ON MEDIATION AND THE PATH FORWARD FOR THE INCREASED USE OF MEDIATION ALONGSIDE OR IN PLACE OF ARBITRATION

With the Singapore Convention on Mediation contextualized and its relationship to the New York Convention explained, it is worth now exploring the efficacy of mediation and arbitration. Each form of ADR has its own strengths and weaknesses,

---

tion, *supra* note 48, art. V. Some of the language differences between the defenses in Article 5 of both conventions is merely out of a necessity to suit the context of mediation or arbitration. For instance, Article 5(1)(a) to (c) of the Singapore Convention on Mediation, which provides a defense for incapacity to enter into an agreement, “as well as when an arbitral award has not yet become binding on the parties or has been set aside or suspended” are extremely similar to Article V(1)(a) and (e) of the New York Convention. Singapore Convention on Mediation, *supra* note 43, art. 5; New York Convention, *supra* note 48, art. V. Additionally, Article 5(2) of the Singapore Convention is essentially a mirror of Article V(2) of the New York Convention, “which allows refusal of enforcement if the ‘subject matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition and enforcement is sought]’ and where recognition or enforcement ‘would be contrary to the public policy of that country.’” Singapore Convention on Mediation, *supra* note 43, art. 5; New York Convention, *supra* note 48, art. V. The only major difference in the defenses between the two conventions is in Article 5(1)(d) of the Singapore Convention on Mediation. *Compare* Singapore Convention on Mediation, *supra* note 43, art. 5 *with* New York Convention, *supra* note 48, art. V. Although Article 5 is not directly based on a defense from the New York Convention, “that is only because it is unique to the mediation context, where a mediation agreement could possibly preclude or limit enforceability as one of its terms.” The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution.

91. Singapore Convention on Mediation, *supra* note 43, art. 6; New York Convention, *supra* note 48, art. VI.

92. Emmanuel Gaillard & Benjamin Siino, *Enforcement under the New York Convention*, THE GUIDE TO CHALLENGING AND ENFORCING ARB. AWARDS 96 (J. William Rowley QC et. al eds., 2019).

93. Singapore Convention on Mediation, *supra* note 43, art. 1.

regardless of the mechanism used to enforce arbitral awards or MSAs. In an attempt to minimize the flaws and maximize the benefits of mediation and arbitration, some parties use hybrid types of ADR that combine the two mechanisms. Med-Arb, Arb-Med, and Arb-Med-Arb, as their names suggest, allow parties to first conduct a mediation or arbitration and, depending on the circumstances, then switch to the other.

In addition to the weaknesses inherent to mediation, the Singapore Convention on Mediation has its own unique flaws. Despite its many similarities to the New York Convention, the Singapore Convention on Mediation does not mirror the New York Convention closely enough. In particular, this Note argues that the Singapore Convention on Mediation should enforce *both* MSAs and agreements to mediate, similar to how the New York Convention enforces both arbitral awards and agreements to arbitrate.

#### *A. Strengths and Weaknesses of Arbitration in Resolving International Commercial Disputes*

To be sure, arbitration has some distinct advantages over mediation in resolving international commercial disputes. While mediation might have more of a reputation for voluntariness, arbitration too requires parties to consent to submit to an arbitration clause within an enforceable contract.<sup>94</sup> Typical contract defenses against unfairness or lack of voluntariness, such as duress and unconscionability, accordingly apply.<sup>95</sup>

Perhaps the most notable and powerful advantage that arbitration has is that the decision rendered is *final*.<sup>96</sup> Although arbitral awards must be enforced and turned into a judgment by a court in whatever jurisdiction the winning party wishes to collect, under the New York Convention, arbitral awards are *binding*.<sup>97</sup> This efficiency has the additional benefit of avoiding the potential bias parties might face litigating in a foreign

---

94. See Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 50 (2012). If the hallmark of mediation is voluntariness, the hallmark of arbitration might be called consent. *Id.*

95. New York Convention, *supra* note 48, art. V.

96. See William Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 808 (1999).

97. New York Convention, *supra* note 48, art. III.

court.<sup>98</sup> This finality does, however, come at the cost of depriving the loser of strong procedural safeguards.<sup>99</sup>

These advantages notwithstanding, arbitration shares many similarities with litigation.<sup>100</sup> In fact, some critics argue that arbitration has essentially become indistinguishable from litigation.<sup>101</sup> In contrast to its intended function as a faster and more flexible alternative to litigation,<sup>102</sup> arbitration has even been called “the new litigation.”<sup>103</sup> In arbitration, parties can choose their adjudicator—and thus find an extremely competent finder of fact—all while avoiding the costs of standard litigation that include: depositions, interrogatories, general discovery exchange, and the delays that come with litigation and working with the courts.<sup>104</sup> These costs, usually associated with litigation, are becoming increasingly common in arbitration because of the “Americanization” of international arbitration.<sup>105</sup> The Honorable John L. Kane of the American Bar Association highlighted just how far arbitration’s advantages have fallen in comparison to litigation:

Many arbitrations now last as long as or longer than comparable court cases. They are frequently as expensive as, if not more expensive than, litigation because the arbitrators and facilities are paid for by the parties rather than provided at public expense. While there are no guaranties of quality relating to any decision, whether obtained through arbitration or the courts, the absence of appellate review of arbitral awards leaves errors in reasoning unaddressed.<sup>106</sup>

Arbitration, moreover, can heavily favor the more powerful party—just like in conventional litigation.<sup>107</sup> The more resource-rich party can secure better representation, which can in turn lead to the obtaining of better supporting substantive

---

98. William Park, *supra* note 96, at 808.

99. *See id.* at 808, 816–17.

100. *See generally* Rutledge, *supra* note 94, at 52–58; Hon. John L. Kane, *Sua Sponte: A Judge Comments*, 37 LITIG. 33, 34 (2011).

101. *See* Rutledge, *supra* note 94, at 49.

102. Kane, *supra* note 100, at 33.

103. Sussman, *supra* note 19, at 10.

104. *Id.*

105. Sussman, *supra* note 19, at 10.

106. Kane, *supra* note 100, at 35.

107. Jean Strenlight, *Dispute Resolution and the Quest for Justice*, 19 EXPERIENCE 14, 15–16 (2009).

law or finding a more favorable arbitrator, thus increasing the likelihood that the arbitrator will rule in their favor.<sup>108</sup> The party with more resources is also better suited to withstand a prolonged dispute, potentially forcing concessions or an outright victory.<sup>109</sup> The advantages begin before a dispute even arises, as the stronger party can draft and negotiate a more favorable arbitration clause.<sup>110</sup> Finally, because parties must pay their arbitrator, an arbitrator may be more likely to favor the wealthier party out of a fear of losing future business.<sup>111</sup>

### *B. Strengths and Weaknesses of Mediation in Resolving International Commercial Disputes*

Mediation, like arbitration, is also subject to some well-recognized weaknesses, most notably its lack of enforceability.<sup>112</sup> The Singapore Convention on Mediation, however, largely remedies this concern in the international context. Mediation nevertheless has its own costs, and it requires time, preparation, and money from the participating parties.<sup>113</sup> Because mediation is voluntary in nature, there is nothing guaranteeing a final agreement, regardless of input costs.<sup>114</sup> If the parties thus cannot reach a settlement agreement, all of this investment will be wasted.<sup>115</sup>

---

108. *Id.* at 16.

109. *See id.*

110. *Id.*

111. Jessica Selver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>. This issue, however contrary to the notion of neutrality it may be, is an unfortunate reality. *See id.* For instance, “in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.” *Id.*

112. *See, e.g.,* Wójtowicz & Gevaerd, *supra* note 33 at 141; Sussman, *supra* note 19, at 10.

113. Sussman, *supra* note 19, at 10.

114. Bruce Love, *New UN Singapore Convention drives shift to mediation of trade disputes*, FINANCIAL TIMES: SPECIAL REPORT INTERNATIONAL MEDIATION (Aug. 4, 2018), <https://www.ft.com/content/6e1df030-9e6f-11e9-9c06-a4640c9feebb>.

115. Sussman, *supra* note 19, at 10.

Just as in arbitration and litigation, an asymmetry of power can also affect the outcome of mediation.<sup>116</sup> A distinct power disparity between parties may increase the stronger party's view of the mediator as a roadblock towards achieving a total victory, rather than a means to reach a mutually beneficial compromise.<sup>117</sup> That party may therefore be unwilling to accept mediation in the first place, or, if it is accepted, be less likely to make concessions or compromise—elements necessary to a successful mediation.<sup>118</sup> It has also been shown that the stronger party can use the mediator merely to facilitate the surrender of the weaker party.<sup>119</sup>

Despite the strengths of arbitration, mediation has certain advantages that make it a better long-term solution in resolving disputes between parties.<sup>120</sup> Most notably, mediation is more effective than arbitration or litigation at maintaining relationships between parties.<sup>121</sup> Where “the maintenance of relationships or harmony between the parties is particularly important” or “where the disputants have, or desire to have, continuing business relationships[,] a procedure and resolution which does not unduly impair the relationship is particularly valuable.”<sup>122</sup> Arbitration is not effective at meeting this end because it is, like litigation, adversarial in nature.<sup>123</sup> In arbitration, moreover, a decision can be forced upon the parties by an arbitrator without concession having ever been reached.<sup>124</sup> In mediation, by contrast, the parties involved must *voluntarily* agree to the resolution.<sup>125</sup> The voluntary nature of mediation is precisely what preserves business relationships: both parties have to come to an agreement through consensus.<sup>126</sup> Media-

---

116. See Marieke Kleiboer, *Understanding Success and Failure of International Mediation*, 40 THE J. OF CONFLICT RESOL. 360, 368 (1996); Strenlight, *supra* note 107, at 15.

117. Kleiboer, *supra* note 116, at 368.

118. *Id.*

119. *Id.*

120. *E.g.* Love, *supra* note 114; Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INTL. ARB. 267, 273 (1996).

121. *E.g.* Love, *supra* note 114; Pryles, *supra* note 120 at 273.

122. Pryles, *supra* note 120 at 273.

123. Sussman, *supra* note 19, at 10; *see generally* Strenlight, *supra* note 107; Rutledge, *supra* note 94.

124. Love, *supra* note 114.

125. *Id.*

126. *Id.*

tion's focus "on the accommodation of interests can result in a 'win/win' result" and thus also further foster relationships between parties.<sup>127</sup>

The benefits of a conciliatory process are not necessarily at the expense of time or flexibility.<sup>128</sup> Rather, mediation settlements can also be more creative than results of arbitration or litigation.<sup>129</sup> Mediation is also a much quicker process than arbitration and can even be completed within a day.<sup>130</sup> Because the process takes less time to prepare for and conduct, if parties are able to form an agreement, it can also be significantly cheaper than arbitration, even if there are sunk costs from an unfavorable deal or the failure to come to one altogether.<sup>131</sup>

### *C. Med-Arb and Arb-Med as a Best-of-Both-Worlds and Additional Avenues for Resolving Disputes*

As stated above, both mediation and arbitration have unique advantages when settling international disputes. Parties need not, however, decide on only one or the other; in fact, there are ways to combine the two forms of ADR, often while retaining the strengths and minimizing the weaknesses of each.<sup>132</sup>

#### 1. Med-Arb

Med-Arb is a hybrid mechanism in which the parties first attempt to reach a voluntary agreement through neutral third-party mediation; if unsuccessful, the parties proceed to arbitration.<sup>133</sup> The same neutral party that presides over and leads the mediation also tends to be the arbitrator if the case does not

---

127. Pryles, *supra* note 120 at 273.

128. *Id.* at 278–79.

129. *Id.* at 278. In mediation, "an existing dispute may be resolved on a basis which includes an agreement to enter into a new commercial relationship," while litigation and arbitration "can only resolve a dispute by determining existing rights. It is no part of the function of a judge or arbitrator to suggest or require that new rights or arrangements be created." *Id.*

130. *Id.* at 279.

131. *Id.*

132. See Joshua M. Javits, *Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes*, 32 A.B.A. J. LAB. & EMP. L. 167, 169–70 (2017); see also Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, 19 DISP. RESOL. MAG. 40, 40 (2013).

133. Weisman, *supra* note 132, at 40.

settle.<sup>134</sup> This form of ADR is used most frequently in resolving international commercial disputes.<sup>135</sup>

Med-Arb is an effective form of ADR because it first allows parties to promptly and efficiently settle their dispute through mediation.<sup>136</sup> Parties are especially encouraged to settle the dispute at the mediation stage because, if they cannot resolve the dispute, parties will be left facing the prospect of an arbitral award, which is final and virtually non-appealable.<sup>137</sup> For better or worse, studies have shown that “parties were substantially more motivated to settle in mediation because they wanted to avoid the loss of control that would come in the arbitration phase.”<sup>138</sup> Med-Arb nonetheless still maintains the voluntary spirit of mediation as the mediation process comes first and it is highly encouraged that the parties settle the dispute before turning to arbitration.<sup>139</sup> Moreover, both parties have to subscribe to the idea of resolving their dispute through Med-Arb by making a binding and enforceable contract.<sup>140</sup> In this contract, of course, the parties may choose the scope of the mediation and arbitration, as well as who the third party will be.<sup>141</sup>

Med-Arb, nonetheless, has been subject to criticism.<sup>142</sup> The main critique of Med-Arb focuses on the fact that the same third party will preside over the mediation *and* arbitration.<sup>143</sup> During the course of mediation, it is likely that confidential information will be shared.<sup>144</sup> This confidential information, once divulged, might potentially alter subsequent arbitration proceedings.<sup>145</sup> It should be reiterated, though, that mediation and

---

134. Javits, *supra* note 132, at 169.

135. Weisman, *supra* note 132, at 40.

136. *Id.*

137. *Id.*

138. *Id.*

139. See Brian Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 172–200 (2015); Weisman, *supra* note 132, at 41.

140. Javits, *supra* note 132, at 169.

141. Weisman, *supra* note 132, at 40.

142. See, e.g., Julie Brienza, *Adr: Doing Two Things at Once Can Be Problematic*, 34 TR. 94 (1998); Weisman, *supra* note 132, at 42.

143. See, e.g., Brienza, *supra* note 142, at 93–94; Weisman, *supra* note 132, at 41.

144. Weisman, *supra* note 132, at 41.

145. *Id.*

arbitration are both wholly private matters to the extent parties wish it to be, and this confidential information does not need to leave the room of mediation or arbitration.<sup>146</sup> Parties not cognizant of this fact or cautious of harming their chances in arbitration might be less willing to share information during mediation, which in turn may increase the challenge in creating a settlement during mediation.<sup>147</sup> Med-Arb also faces the same issues about enforcement that mediation currently does.<sup>148</sup>

## 2. Arb-Med and Arb-Med-Arb

Similar to Med-Arb and as the name suggests, Arb-Med is a hybrid form of ADR that combines the adjudicative approach of arbitration with the non-adjudicative approach of mediation.<sup>149</sup> The process works by first placing the parties into arbitration.<sup>150</sup> Once both parties present their case, “[a]t the end of the hearings, the arbitrator writes up a decision and seals it in an envelope without disclosing its contents to the parties.”<sup>151</sup> The parties are then moved directly into mediation for a fixed period of time set either by contract or the arbitrator whereby the parties can work on an MSA.<sup>152</sup> Although the same neutral third-party usually acts as both the mediator and arbitrator, the parties can also opt to have a different mediator.<sup>153</sup> If the

---

146. See Sussman, *supra* note 62.

147. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ON ARB. & MEDIATION 219, 224 (2013).

148. See Morrison Foster, *Newly Signed Singapore Convention to Make International Settlement Agreements Directly Enforceable in Convention States*, MOFO.COM: INSIGHTS (Aug. 15, 2019), <https://www.mofo.com/resources/insights/190815-newly-signed-singapore-convention.html>.

149. Weixia Gu, *Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications*, 29 WASH. INT'L L. J. 117, 118 (2019).

150. Elizabeth A. Hunt, *Arb-Med: ADR in the New Millennium*, 42 ORANGE CNTY. L. 29, 29 (2000).

151. Arnold M. Zack, *The Quest for Finality in Airline Disputes: A Case for Arb-Med*, 58 DISP. RESOL. J. 34, 37 (2003).

152. *Id.*

153. *Id.* Parties may select different people to act as the mediator and arbitrator to preserve the neutrality of the third-party, the essence of both forms of ADR. *Id.* Selecting different people, however, can increase the time it takes



parties are able to come to an agreement through mediation, the arbitrator's decision is never revealed and is thrown out.<sup>154</sup> If the parties cannot settle their dispute through mediation, the arbitrator's decision becomes final and binding on the parties.<sup>155</sup> Sometimes, the parties will be returned to arbitration in Arb-Med cases, an event sometimes referred to as Arb-Med-Arb.<sup>156</sup> An arbitral award will be the final result regardless.<sup>157</sup>

Arb-Med is a valuable form of ADR because it "can ensure that the parties continue their relationship without the rancor inherent in a decision externally imposed . . . which disallows the face-saving dialogue inherent in mediation."<sup>158</sup> Arb-Med also promotes openness between the parties because there is the looming threat that the arbitrator may decide the dispute on the merits.<sup>159</sup> As such, Arb-Med has an advantage over Med-Arb in that "the neutral can conduct the mediation without fear that information he learns will contaminate the arbitration process."<sup>160</sup> Med-Arb nevertheless remains more popular than Arb-Med because of the cost barriers resulting from the fact that the parties must pay for both an arbitral hearing and mediation, even if they are able to settle the dispute through the most cost-effective means of mediation.<sup>161</sup>

#### *D. The Singapore Convention on Mediation's Unique Weaknesses and Potential Remedies*

The Singapore Convention on Mediation's main weaknesses stem from its limitations on enforcement. Namely, the Convention does not support awards derived from hybrid forms of ADR.<sup>162</sup> The Convention also does not cover MSAs in family or

---

to resolve the dispute as the new third-party will have to familiarize themselves with the issues of the case and the parties' positions. *Id.*

154. *Id.*

155. *Id.*

156. Gu, *supra* note 149, at 122; *see also* Deason, *supra* note 147, at 222.

157. Gu, *supra* note 149, at 122.

158. Hunt, *supra* note 150, at 122.

159. *See* Deason, *supra* note 147, at 222.

160. *Id.*

161. *Id.* at 221–22

162. *See, e.g.*, Singapore Convention on Mediation, *supra* note 43, art. 1; Rachel Chiu, *Arbitration, mediation, and the Singapore Convention on Mediation*, THOMAS REUTERS: ARB. BLOG (Aug. 5, 2019), <http://arbitrationblog.practicallaw.com/arbitration-mediation-and-the-singapore-convention-on-mediation/>.

employment law disputes.<sup>163</sup> Most significantly, however, the Convention does not provide enforcement for agreements to mediate,<sup>164</sup> which can have detrimental ramifications for parties that initially intended for their dispute to be resolved through mediation.

### 1. Hybrid Dispute Resolution Procedures

One strength overlying both Med-Arb and Arb-Med is that both forms of ADR combine the voluntary, “conciliatory nature of mediation” with the certainty and finality of arbitration.<sup>165</sup> The certainty of arbitration results from its presumption of enforceability in most of the world through the New York Convention.<sup>166</sup> However, Med-Arb is rarely used in international disputes, most likely a result of the costs and inefficiencies of requiring both a mediation and arbitrator.<sup>167</sup>

The Singapore Convention on Mediation, however, does not support hybrid dispute resolution methods of mediation and arbitration or litigation, so it does not further support Arb-Med or Med-Arb.<sup>168</sup> Article 1 of the Convention specifically does not apply to “[s]ettlement agreements that have been recorded and are enforceable as an arbitral award.”<sup>169</sup> Thus, as valuable as these hybrid dispute mechanisms may be to sophisticated parties, the Convention will not help with perhaps their weakest aspect: enforceability. Commercial parties who favor resolving their disputes in a non-adversarial manner might, therefore, opt purely for mediation<sup>170</sup> with the additional knowledge that their MSA will be enforceable under the Singapore Convention.<sup>171</sup> Regardless of the prevalence of these hybrid forms of ADR, there is still the chance that larger international businesses that contract to have these types of dispute resolution mechanisms will be left wanting because of the lack of added

---

163. Singapore Convention on Mediation, *supra* note 43, art. 1.

164. *See* Singapore Convention on Mediation, *supra* note 43, art. 1.

165. Chiu, *supra* note 162.

166. *See* Born, *supra* note 72, at 120; New York Convention, *supra* note 48, art. III; New York Arbitration Convention, *supra* note 56.

167. Foster, *supra* note 148.

168. Singapore Convention on Mediation, *supra* note 43, art. 1.

169. *Id.*

170. Chiu, *supra* note 162.

171. *See* Singapore Convention on Mediation, *supra* note 43, art. 3

enforceability.<sup>172</sup> It remains to be seen if this will hinder the Convention's overall success, but it is nonetheless a notable absence, and one in which contracting parties should aware.

## 2. Caveats and Unique Attributes to the Singapore Convention on Mediation

The Singapore Convention on Mediation has certain caveats not found in the New York Convention.<sup>173</sup> Article 1 of the Singapore Convention on Mediation, for example, states that the 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” or “(b) Relating to family, inheritance or employment law.”<sup>174</sup> Mediation is very frequently used to resolve disputes in family law and employment law,<sup>175</sup> thus this exclusion leaves out a large number of potential disputes.

---

172. Ashutosh Ray, *Is Singapore Convention to Mediation what New York Convention is to Arbitration?*, Wolters Kluwer: Kluwer Arbitration Blog (Aug. 31, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/08/31/is-singapore-convention-to-mediation-what-new-york-convention-is-to-arbitration/>.

173. See Singapore Convention on Mediation, *supra* note 43, art. 1; New York Convention, *supra* note 48, art. I.

174. Singapore Convention on Mediation, *supra* note 43, art. 1.

175. See generally Roger C. Clapp, *Family Law Disputes Cry Out for Mediated Settlements*, 53 DISP. RESOL. J. 34, 34 (1998) (“mediation is a required step in family law matters in many states”); Radoslaw Pawlowski, *Alternative Dispute Resolution for Hague Convention Child Custody Disputes*, 45 FAM. CT. REV. 302 (2007) (noting the use of ADR in resolving family law disputes in the US, Australia, and Europe, and advocating for the use of an international ADR process for the Hague Convention on the Civil Aspects of International Child Abduction); Marta Requena, *Activities of the Council of Europe in the Field of Family Law*, 31 CAL. W. INT'L. L.J. 53, 56–59 (2000) (discussing the European Conference on Family Law, including Family Mediation Recommendation No.R (98), which provided for the use of mediation as alternatives to judicial or administrative determinations); David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L. L. REV. 2 (2001) (exploring the effectiveness of international mediation in employment disputes); Jim H. Young & Lin Zhu, *Overview of China's New Labor Dispute Mediation and Arbitration Law*, DAVIS WRIGHT TREMAINE LLP: INSIGHTS (2012), <https://www.dwt.com/insights/2008/01/overview-of-chinas-new-labor-dispute-mediation-and> (providing an overview of the Labor Dispute Mediation and Arbitration Law of the People's Republic of China, which includes provisions for mediation and arbitration).

Article 5 of the Convention, which sets out defenses to enforcement of mediation, also provides a distinct non-contract defense:

[t]he competent authority where relief is sought (in other words, a national court) may refuse to grant relief on the grounds that “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.”<sup>176</sup>

While it should be noted that protecting against “a serious breach by the mediator”<sup>177</sup> seems like a fair defense for which to provide, it is a nebulous and ill-defined concept. This language further raises the potential question of whether the MSA would have been agreed upon “but for the serious breach by the mediator of standards applicable to the mediator or the mediation [and] would place in issue potentially thorny issues of fact as to what the motivation was of the party seeking to resist enforcement for entering into the mediated settlement agreement.”<sup>178</sup> Here, the Convention is balancing the line between fairness and efficiency. As the mediator lacks the adjudicatory power of an arbitrator or judge however, the Convention is potentially opening the door to unnecessary litigation in the name of a minor risk.

Perhaps the most significant potential weakness of the Singapore Convention on Mediation is that its scope speaks only to the enforcement of MSAs.<sup>179</sup> The New York Convention, in contrast, covers *both* enforcement of arbitral awards and agreements to arbitrate.<sup>180</sup> The latter is especially important because parties that agree to arbitrate can be confident that their dispute will be resolved in arbitration—according to the terms of the contract—rather than in court.<sup>181</sup> It is now simple to say

---

176. Sapna Jhangiani, *The Singapore Convention on Mediation – A Commitment to Multilateralism*, CLYDE & CO: INSIGHTS (Aug. 20, 2019), <https://www.clydeco.com/insight/article/the-singapore-convention-on-mediation>.

177. *Id.*

178. *Id.*

179. See Singapore Convention on Mediation, *supra* note 43, art. 1.

180. See New York Convention, *supra* note 48, art. I.

181. See New York Convention, *supra* note 48, art. III; see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (holding that the basic objective of the Federal Arbitration Act is “to ensure that commercial

that if parties agreed to arbitrate, they should be able to settle their dispute through arbitration.<sup>182</sup> Unlike the New York Convention, however, the Singapore Convention on Mediation does not provide parties a guarantee that their claims will ever make it to mediation to be resolved.<sup>183</sup> This results from the fact that the Singapore Convention on Mediation does not provide enforcement for agreements to mediate.<sup>184</sup> As such, the Convention offers no protection “if an opposing party breache[s] the agreement to mediate. The party wishing to enforce an agreement to mediate will have to resort to other protracted avenues to enforce the mediation agreement, just like any other contractual agreement.”<sup>185</sup>

The lack of enforceability of agreements to mediate was not an accident,<sup>186</sup> but nonetheless should be considered as grounds for an amendment to the Convention. The drafters considered, but ultimately rejected, language that would have allowed for the enforcement of agreements to mediate.<sup>187</sup> Their primary reason for exclusion was that including such a clause would complicate and potentially hinder the drafting process.<sup>188</sup> It is also likely that the drafters considered this to be a less-important issue. Indeed, evidence from US litigation might support this notion.<sup>189</sup> Of the US judicial opinions about a disputed mediation issue, “disputes about court power to compel mediation were just 6% of all cases in 2013–2017 . . . while disputes about contractual or statutory obligations to mediate were 9% of all cases in 2013–2017.”<sup>190</sup> US courts will also “generally enforce a pre-existing obligation to participate in media-

---

arbitration agreements, like other contracts, ‘are enforced according to their terms,’ . . . and according to the intentions of the parties.” *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

182. Singapore Convention on Mediation, *supra* note 43, art. 1.

183. Compare New York Convention, *supra* note 48, art. I, with Singapore Convention on Mediation, *supra* note 43, art. 1.

184. Ray, *supra* note 172.

185. *Id.*

186. See James R. Coben, *Evaluating the Singapore Convention Through A U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 CARDOZO J. CONFLICT RESOL. 1063, 1090 (2019).

187. *Id.* at 1089–90.

188. *Id.* at 1090.

189. See *id.*

190. *Id.*

tion, whether the obligation was judicially created, mandated by statute, or stipulated in the parties' pre-dispute contract."<sup>191</sup>

The drafters of the Singapore Convention on Mediation might have also been concerned with the issue of voluntariness, the heart of mediation. Forcing a party into mediation could be seen as contrary to this fundamental notion. However, whether a pre-dispute or post-dispute agreement to mediate exists, like any other contract, it should be enforced if it is entered into voluntarily. Standard contract defenses, such as unconscionability or duress, already exist to prevent involuntary contracts from being enforced.

The core of the New York Convention's effectiveness is the certainty it provides parties using arbitration to resolve their disputes. This certainty derives not only from its near-universal adoption, but also from the presumption of enforceability it provides to both arbitral awards and agreements to arbitrate. UNCITRAL should strongly consider adopting an amendment to the Singapore Convention on Mediation to provide for a similar dual-enforcement of both MSAs and agreements to mediate. Given that much of its text is derived, or directly copied, from the New York Convention, the Singapore Convention on Mediation should do the same for this amendment. The Convention should specifically borrow the language from Article II of the New York Convention, and merely substitute "mediation" in place of "arbitration" as follows:

"Each Party to the Convention shall recognize an agreement in writing under which the parties undertake to submit to *mediation* all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning the subject matter capable of settlement by *mediation*."<sup>192</sup>

This text arguably enhances the spirit of voluntariness in mediation because it ensures that parties who have a written agreement to mediate will be certain that mediation occurs. If a party reneges on its agreement, there will be a presumption of enforcement, thus helping ensure that meritorious claims suc-

---

191. *Id.* (quoting James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 105 (2006)).

192. *See* New York Convention, *supra* note 48, art. II for the text from which this proposed amendment borrows.

ceed while preventing the costs of a protracted litigation. Furthermore, even with this added language, the Convention still would not require that the parties make a contractual agreement to mediate before actually entering into mediation and creating an MSA (which itself will have a presumption of enforceability under the Convention). However, if such an amendment is ever drafted, it should be drafted soon. As more members sign the Convention it becomes an increasingly difficult political challenge to bring many states together to agree on a new convention.<sup>193</sup>

Even if an amendment is never drafted or passed, the aforementioned strengths of the Convention still far outweigh this weakness. It should also be noted that, even under the New York Convention, there are still limits on the enforcement of agreements to arbitrate.<sup>194</sup> If there is a dispute about whether the claims were covered by the arbitration clause and are arbitral, the matter may go to court.<sup>195</sup> In the United States, the Supreme Court has made clear that the presumption is that a court—rather than an arbitral tribunal—will decide a question of arbitrability *de novo*.<sup>196</sup> This presumption can only be undone if there is “‘clear and unmistakable’ evidence” that it was the parties’ intent for the arbitrators to decide arbitrability.<sup>197</sup> This is nonetheless a reflection of United States policy that heavily favors arbitration, and merely ensures that the proper claims are being arbitrated.<sup>198</sup> If there is no question of arbitrability, however, the New York Convention has a presumption of enforcement for arbitration.<sup>199</sup> The parties can thus be sure that all the appropriate claims will be settled through arbitration.<sup>200</sup>

---

193. See Brekoulakis, *supra* note 54, at 443.

194. See generally *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010) (explaining the doctrine of severability as it pertains to arbitration clauses); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (discussing what claims are arbitrable and in what situations the court or the arbitrator decide questions of arbitrability).

195. See, e.g. *Jackson*, 561 U.S. at 71; *First Options*, 514 U.S. at 942–47.

196. *First Options*, 514 U.S. 938, 947–48.

197. *Id.* at 944 (quoting *AT & T Techs., Inc. v. Commun. Workers of Am.*, 475 U.S. 643, 649 (1986)).

198. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); see *First Options* 514 U.S. at 944–45 (1995).

199. New York Convention, *supra* note 48, art. I.

200. See generally *Jackson*, 561 U.S. at 68–71; *Kaplan*, 514 U.S. at 942–47.

## CONCLUSION

While mediation is by no means a perfect form of ADR, and the Singapore Convention on Mediation is by no means a perfect convention, the future of international commercial mediation looks to be bright. International mediation cannot, however, reach its highest possible effectiveness without providing certainty for the enforcement of agreements to mediation. Nevertheless, the lack of any international enforcement mechanism, the previous major flaw hampering the use of mediation, is still largely remedied by the Singapore Convention on Mediation. As such, and because of mediation's advantages over arbitration and litigation, the use of mediation may—and should—rise. All that remains is for more countries to ratify the Convention. Once more countries do so, businesses will be even more inclined to contract to settle their disputes through mediation. If businesses are still hesitant to rely solely on mediation, even after the global growth of the Singapore Convention on Mediation, then perhaps its drafters should consider giving the enforceability of hybrid dispute resolution techniques a second look too.

*Robert Butlien* \*

---

\* B.A., Kent State University (2014); J.D., Brooklyn Law School (Expected 2020); Associate Managing Editor, *Brooklyn Journal of International Law* (2020-2021). Thank you to my parents, Mike and Joyce Butlien, for their boundless love and support, even during my teenage years. Thank you to my uncle, Neil Cohen, who not only always seems to know the right thing to say, but also the right question to ask. Thank you to Nick Fuchs, Rob Austrian, and Marco Donatelli for your friendship and for making law school more enjoyable than it has any right to be. Thank you, LeBron James, for making me proud to be from Akron, Ohio. Finally, thank you, Michael Cooper and Ernira Mehmetaj of the *Brooklyn Journal of International Law*, for your guidance during the development of this Note. All errors or omissions are my own.