

The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?

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INTRODUCTION

This Article is part of a special joint issue of *Ecology Law Quarterly* and the *Berkeley Journal of International Law* in honor of the late Professor David Caron, based on presentations made at a conference in his commemoration organized by the Berkeley School of Law.

When it came to almost any emerging issue in international law, Professor Caron was at the forefront and, in many cases, had already written about it. We saw this with issues ranging from the minimum standard of treatment in *Glamis Gold v. United States of America*, in which he served as arbitrator, to the effects of rising sea levels on baselines, on which he published in the 1990s before the issue was at the forefront of discussions.

Professor Caron saw the value in alternative forms of dispute resolution, and I think he would have taken a keen interest in some of the recent developments taking place at the United Nations (UN) on the use of mediation for the resolution of international disputes. And that is the topic of my presentation: the recent uptick in the dialogue about international mediation and whether mediation could emerge as a viable alternative or complement to international arbitration—particularly in the context of the recent entry into force of the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation)¹ and Model Law on International Commercial Mediation and International Settlement Agreements

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1. See United Nations Convention on International Settlement Agreements Resulting from Mediation, *open for signature* Aug. 7, 2019, U.N. Doc. A/73/17, https://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_I.pdf [hereinafter Singapore Convention].

Resulting from Mediation (which amends the UNCITRAL Model Law on International Commercial Conciliation, 2002) (the Model Law).²

Whether inside or outside of the international commercial context, there has been an increasing interest in mediation and conciliation as an international dispute resolution mechanism. International mediation and conciliation is envisaged in Article 33 of the Charter of the United Nations. Under this framework, conciliation played a significant role in resolving a recent State-to-State dispute. In September 2017, through the Conciliation Commission, Timor-Leste and Australia agreed on the central elements of their maritime boundary delimitation in the Timor Sea.³ These proceedings were significant: they marked the first time that conciliation proceedings were initiated under Annex V, Section 2 of the UN Convention on the Law of the Sea. The process has largely been viewed as a success, and it is an example of how conciliation can be used for the pacific settlement of disputes.

This interest in advancing the use of mediation and conciliation has also been prevalent before the UN. On August 29, 2018, the UN Security Council held an open debate to provide its member States with an opportunity to consider the UN's role in both leading and supporting mediation and the ways in which the Security Council and the member States can best support these efforts.⁴ The open debate followed on the heels of a speech by the Secretary General in January 2017, asking the Security Council to make greater use of the options laid out in Chapter VI of the UN Charter on pacific settlement of disputes, including mediation. The Secretary General announced his intention to "launch an initiative to enhance the United Nations mediation capacity, both at Headquarters and in the field, and to support regional and national mediation efforts."⁵

In the context of international investment arbitration, in June 2017, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) held a special training course for mediators tailored to investor-State disputes.⁶ In July 2016, the Energy Charter Conference adopted a "Guide on

2. See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), U.N. Doc. A/73/17, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

3. Press Release, Permanent Court of Arbitration, Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Sept. 1, 2017), <https://pcacases.com/web/sendAttach/2230>.

4. President of the U.N. Security Council, *Annex to the letter dated 3 August 2018 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, Concept note for the Security Council's open debate entitled "Maintenance of international peace and security: mediation and settlement of disputes"* (29 August 2018), U.N. Doc. S/2018/586 (Aug. 14, 2018).

5. U.N. Secretary-General, *United Nations Activities in Support of Mediation*, U.N. Doc. A/72/115 (June 27, 2017).

6. Considering the Future of Investor-State Mediation, INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES,

Investment Mediation,”⁷ designed to encourage States and investors to consider mediation for investor- State disputes (the Guide). The Guide covers several matters, including the rules that may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement. The Guide also canvasses the key differences among existing mediation rules and conciliation rules.

The increasing attention toward mediation as a method of international dispute resolution in the context of international commercial as well as investment disputes has its roots in the debate regarding the increasing costs and time involved in international arbitration. The flexibility involved in mediation eliminates many of the hurdles of arbitration, including bypassing disclosure and preserving the parties’ commercial relationship.

However, historically mediation has not been as commonly used for the resolution of international commercial and investment disputes. Some practitioners and commentators have speculated that this may be due in part to the fact that once a mediated agreement has been reached, there was no comprehensive legal framework for the enforcement of international settlement agreements. The result is that parties have been required to attempt to enforce such agreements in domestic courts, typically as ordinary breach of contract claims. Thus, when a party to a mediated settlement agreement of an international dispute reneged on its obligations or otherwise refused to uphold the terms of the agreement, the other party had to commence separate proceedings in court or through arbitration to enforce the agreement. This has essentially meant initiating a new legal action after resolving the underlying one, adding increased costs and delay.⁸

The creation of a clear and uniform framework for the recognition and enforcement of agreements resulting from mediation of international disputes may ultimately increase the predictability of settlements achieved through this method. The Singapore Convention on Mediation—which was signed by forty-six States on August 6, 2019 and entered into force that same day—provides that framework.⁹ This stage marks an important development in international dispute resolution, both in creating a legal framework for agreement recognition and enforcement, and in promoting the use of mediation at an international level.

<https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue3/Considering-the-Future-of-Investor-State-Mediation.aspx> (last visited Apr. 2, 2019).

7. See Int’l Energy Charter, Decision of the Energy Charter Conference, CCDEC 2016 12 INV (July 19, 2016), <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

8. See S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL’Y 11 (2014).

9. See Singapore Convention, *supra* note 1.

I. BACKGROUND ON THE SINGAPORE CONVENTION

On February 9, 2018, after more than three years of negotiations in New York and Vienna, the United Nations Commission on International Trade Law (UNCITRAL) Working Group II concluded negotiations on a convention and model law regarding the enforcement of settlement agreements of disputes reached through international commercial conciliation or mediation.¹⁰ The instruments were finalized by UNCITRAL during the fall 2018 session, and on December 20, 2018, the UN General Assembly adopted a resolution opening the Singapore Convention for signature.

Data from a 2015 survey by Professor S.I. Strong of the University of Missouri suggests that international mediation and conciliation may be developing along the same path as international commercial arbitration, which at one time was extremely rare.¹¹ After the adoption of the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1958, the number of arbitration proceedings significantly increased. Seventy-four percent of the respondents in Professor Strong's study revealed that they believed that an international treaty concerning enforcement of settlement agreements arising out of international mediation could have a similar effect to increase the number of mediations in their home jurisdictions.¹²

While it is not clear if the limited popularity of mediation of international disputes is due to a concern for lack of enforceability, the same could have been asked of international arbitration in the period before the wide ratification of the New York Convention. Was it that parties were not agreeing to arbitrate disputes out of concerns that the arbitral awards would not be enforceable? Or did the New York Convention simply encourage its use by raising arbitration to the forefront as an option for resolving international commercial disputes?

The wide ratification of the Singapore Convention on Mediation could serve as the catalyst for the use of mediation in both the commercial as well as investment arbitration contexts, particularly in this broader environment of encouraging mediation as detailed above.

More importantly, and perhaps an additional motivation behind the concept, the Singapore Convention and Model Law could serve as a way to streamline the domestic laws of States with respect to breach of contract claims and settlement

10. The Singapore Convention encompasses both recognition and enforcement of settlement agreements. See Article 3(1) of the Singapore Convention, which provides for the use of a mediated settlement as a complete defense against a claim.

11. S.I. 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*, University of Missouri School of Law Legal Studies Research Paper Series Research Paper No. 2014-28, 45 (Nov. 17, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

12. *Id.*

agreements, serving essentially as a rule of law measure to increase predictability for foreign commercial parties.

II. CREATING AN ENFORCEABLE FRAMEWORK

Generally, international arbitration has been preferred over international mediation. This is in part because the widely adopted New York Convention provides a predictable framework for the recognition and enforcement of arbitral agreements and awards. Under the New York Convention, arbitral awards enjoy the same protection as domestic court decisions, and deference is given to agreements to arbitrate.

Similar efforts have been made regarding the enforcement and recognition of court judgments that result from domestic litigation. The Hague Conference on Private International Law has taken substantial steps toward realizing the conclusion of an international convention to provide a framework under which parties will be required to recognize and enforce judgments rendered by a court in one country, in another country. In fact, the final draft of the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters was completed in late 2018 during the meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments, which was attended by 180 participants from 57 States.¹³ The diplomatic session to adopt the treaty took place on July 2, 2019 and the convention is open for signature.¹⁴

Through the creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution. In fact, given that mediation may often be less expensive and speedier than arbitration—and perhaps better preserves the relationship between the parties, parties may prefer to mediate their disputes once they have the reassurance that their settlement agreements can be enforced easily.

III. THE CONTENT OF THE SINGAPORE CONVENTION AND MODEL LAW

The Singapore Convention will apply to all international agreements resulting from mediation and concluded in writing by parties to resolve commercial disputes.¹⁵ There is no limitation as to the nature of the remedies or

13. See Hague Conference on Int'l Law, *Conclusion of the third meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgements* (Nov. 21, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=578>.

14. 2019 Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, *opened for signature* July 2, 2019 (not yet in force), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

15. See Singapore Convention, *supra* note 1.

contractual obligations that can be reflected in the international agreements for the Singapore Convention and Model Law to apply. Thus, the agreement can involve both pecuniary and non-pecuniary remedies.

To seek the application of a mediated settlement agreement, parties will be required to furnish the competent authority of a contracting State with the signed settlement agreement and with evidence that the agreement was the result of international mediation. Each contracting State will then be required to enforce settlement agreements in accordance with its rules of procedure and the conditions set forth in the instruments.

The Singapore Convention allows contracting States to tailor their participation by making certain reservations or later withdrawing from the Singapore Convention by a formal written notification. Once a contracting State adopts the Singapore Convention, the contracting State will be required to enforce settlement agreements in accordance with its own rules of procedure and the conditions set forth in the convention and model law.

Similar to the New York Convention, the Singapore Convention and Model Law set forth several narrow grounds for judicial review and non-recognition of a settlement agreement. Two of these grounds may be raised *sua sponte* by the court or other competent authority of the contracting State where the agreement is sought to be enforced. Those grounds include if the subject matter of the dispute is not capable of settlement by mediation under the domestic law of the contracting State, or if granting relief under the agreement would be incompatible with the public policy of the contracting State. It is for this reason that enacting the model law in parallel with the Singapore Convention will be important to promoting its consistent application.

The remaining grounds are factual and depend on the manner in which the settlement agreement was drafted. These grounds must be invoked by the party against whom the settlement agreement is sought to be enforced, and require proof from that party that:

- A party to the agreement was under some incapacity;
- The agreement is null and void, operative or incapable of being performed, or the obligations of the agreement have been performed;
- The agreement is not binding or final, has subsequently been modified, or is conditional so that the obligations have not yet arisen;
- The agreement is not capable of being enforced because it is not clear and comprehensible;
- There has been a serious breach by the mediator of standards applicable to the mediator or the mediation; or
- There has been a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.

Exceptions to the application of the Singapore Convention include disputes arising out of transactions relating to personal, family, or household purposes, transactions relating to family or inheritance matters, or employment law issues.¹⁶ In addition, the instruments would not cover settlement agreements that are approved by a court or have been concluded in the course of proceedings before a court, or those that have been recorded and are enforceable as arbitral awards.

Lastly, and perhaps most significantly, although not expressly stated in the Singapore Convention, the convention would not apply to settlement agreements that contain exclusive jurisdictional clauses referring disputes regarding the settlement terms to arbitration as this would conflict with the New York Convention.

The inapplicability of the Singapore Convention to this last category—settlement agreements that contain exclusive jurisdiction clauses—may serve as a limitation to the Singapore Convention’s use in practice. Diligent legal counsel negotiating and concluding settlements on behalf of their clients would and should advise their clients to insert exclusive jurisdiction clauses (and better yet, arbitration clauses) into any settlement agreement to ensure predictability of fora for any dispute arising thereunder and to limit the risk of parallel proceedings.

But the very act of inserting such an arbitration clause would mean that most settlement agreements would actually fall outside of the scope of the Singapore Convention; deference would have to be given to agreements to arbitration under the New York Convention and thus the Singapore Convention would be inapplicable. That is, unless counsel inserted carefully crafted clauses providing for the Singapore Convention’s application in certain circumstances: that any dispute arising from or relating to the settlement agreement will be resolved by international arbitration under a specified law, unless the location where a party serves to challenge the validity of the settlement agreement or enforce it is a party to the Singapore Convention. Careful attention will have to be paid to drafting such clauses—as well as how domestic courts interpret them—to actually benefit from the Singapore Convention.

IV. WHAT COULD LIE AHEAD: MEDIATION IN INVESTOR-STATE ARBITRATION?

As addressed by Lee Caplan in *ISDS Reform and the Proposal for a Multilateral Investment Court*,¹⁷ various parties including the European Union and Canada have raised concerns with investor-State dispute resolution (ISDS), including the significant cost and time, lack of consistency and predictability in

16. *Id.*

17. Lee M. Caplan, *ISDS Reform and the Proposal for a Multilateral Investment Court*, 46 *ECOLOGICAL L. Q.* 53, 37 *BERKELEY J. INT’L L.* 207 (2019).

arbitral awards, and potential bias in arbitral appointments.¹⁸ These concerns have led UNCITRAL Working Group III to be tasked with a broad directive to develop a possible reform of ISDS. Discussions on the matter have continued to advance, including most recently in April 2019 during the second phase of the Working Group III negotiations.¹⁹

While some States have advocated for systemic reform, including the possible creation of a permanent multilateral court to adjudicate investor-State disputes,²⁰ this is hotly debated and such reform will not materialize overnight. Others have argued for incremental reform. But such reform may not go far enough.

International mediation could emerge as a mechanism to address some frustrations associated with both commercial *and* investment arbitration, which could compliment the current Working Group III negotiations irrespective of the approach ultimately adopted by the body. That is because the Singapore Convention potentially extends to investment disputes so long as they relate to a commercial matter, such as an expropriation of a real estate development or mine.²¹

At a basic level, perhaps the promotion of the Singapore Convention and mediation more generally could encourage parties to better utilize the cooling-off periods provided under many investment treaties. Claimants often do not take into account that by the time the relevant notice of dispute has been transmitted to the appropriate ministry and been vetted, the negotiation period has lapsed. Once a Request for Arbitration has been made public, the position of the parties often hardens as public criticism could result from settlement. Attempting to bypass the amicable negotiation period could serve as a missed opportunity in many cases.

At a broader level, the framework for mediation of investor-State arbitration already exists although, until now, not as a comprehensive enforcement mechanism. The International Bar Association Investor-State Mediation Rules already provide a legal framework specifically designed for mediation in the investor-State context, offering a helpful starting point for parties interested in

18. U.N. Comm'n on Int'l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS), ¶¶ 22–25, U.N. Doc. A/CN.9/WG.III/WP.142, at 6 (Sept. 18, 2017), <https://daccess-ods.un.org/TMP/486511.215567589.html>.

19. See U.N. Comm'n on Int'l Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), A/CN.9/970 (April 9, 2019).

20. European Commission, Trade Policy Committee (Services and Investment), UNCITRAL Working Group III, at 1, WK 3675/2018 INIT (Mar. 26, 2018).

21. See T. Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 22 (“The scope of the term [commercial dispute] could thus include at least some investor-state disputes in areas such as construction or national resource extraction.”).

pursuing investment mediation. And, of course, conciliation processes are provided under the ICSID and UNCITRAL conciliation rules.

An enforcement mechanism (the lack of which was the concern in the commercial context) also exists under certain rules: should the parties reach an amicable settlement through mediation, they may request that the tribunal incorporate their settlement into a consent award under ICSID Arbitration Rule 43(2).²² But such a process still requires the parties to commence and fund the arbitration process, at least until the tribunal is constituted and has rendered the consent award. If an arbitral tribunal were to be constituted after a settlement agreement is reached, some courts have found that such consent awards are not enforceable because there was no “dispute” before the tribunal for the purposes of jurisdiction.²³

Mediation is already being encouraged in investment disputes. The Comprehensive Economic and Trade Agreement, which came into force in 2017, expressly provides for mediation of investor- State disputes (Article 8.20).²⁴

In 2016, the Republic of the Philippines agreed to mediate a dispute with Systra SA and its local subsidiary Systra Philippines Inc. arising out of allegedly long overdue invoices for services and work performed on infrastructure projects (including metro and rail projects) for various government agencies of the Philippines. The dispute was filed under the France-Philippines bilateral investment treaty. This appears to have been the first time in which an investor and a host-State used the IBA Rules to solve an investment dispute.²⁵

The adoption of the Singapore Convention and the implementation of Model Law might further promote the inclusion of mediation and conciliation as an option in more investment treaties and may encourage parties to take that route to resolve disputes.

22. ICSID Convention, Regulations and Rules, Rules and Procedures for Arbitration Proceedings, Rule 43(2), Apr. 10, 2006, ICSID/15, <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partfchap05.htm#r43> (“If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.”).

23. See, e.g., *Castro v. Tri Marine Fish Co. LLC*, 921 F.3d 766, 772–76 (9th Cir. 2019) (finding that a settlement agreement reached by parties, who then constituted a tribunal for the purposes of converting the settlement agreement into an arbitral award, did not “transform” the agreement into an arbitral award that could be enforced under the New York Convention).

24. European Commission, *CETA Chapter-by-Chapter* (Aug. 24, 2018), <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

25. Luke Eric Peterson, *In An Apparent First, Investor and Host-State Agree to Try Mediation under IBA Rules to Resolve An Investment Treaty Dispute*, IA REPORTER (Apr. 14, 2016), <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/>.

CONCLUSION: MEDIATION AS A WAY FORWARD

Irrespective of whether the Singapore Convention will actually be used in practice in light of its inapplicability to settlement agreements that contain agreements to arbitrate, there are many benefits to the Singapore Convention and Model Law. More than anything else, the instruments may ultimately assist in the propagation of the use of international mediation to resolve disputes and serve as a rule of law measure to promote the development of more uniform domestic laws on contractual interpretation. Additional benefits of international mediation include:

Avoiding the Need to Engage the Arbitration Process: As the Singapore Convention would offer a mechanism for enforcement, parties would not be burdened with the need to engage the arbitral process to convert a settlement agreement into a consent award to guarantee enforcement.

Reducing the Cost/Length of Proceedings: Because the selection of only one mediator is required and the role of the mediator is not to opine on the law or the merits of the dispute, mediation could reduce costs in researching the backgrounds of arbitrators and negotiating with the other side to reach agreement on the chairperson. Moreover, it would obviate disclosure proceedings and eliminate the need for a lengthy written decision. The few ICSID conciliation proceedings that have been held show these benefits.²⁶

Narrowing Issues: Even where mediation does not replace arbitration, it can still supplement arbitral proceedings by refining the issues to be addressed in the arbitral proceeding.

Preserving the Commercial Relationship: Resolving a dispute through mediation enables the parties to maintain positive relationships so as to continue their contractual arrangement or future projects or investments.

The drafters of the Singapore Convention aimed to encourage greater predictability for parties opting to resolve disputes through international mediation. Discussions encouraging the use of mediation are already taking place in the context of State-to-State, investor-State, and commercial disputes.

Ultimately, the Singapore Convention may raise the profile for mediation, just as the New York Convention did for international arbitration, and increase the number of States adopting and implementing mediation legislation. As more countries ratify the convention and adopt mediation laws, an increasing number of parties will become aware of the benefits of resolving their disputes through mediation. In this sense, it may serve as a complement to the existing international arbitration framework.

26. For example, in the *Tesoro Petroleum Corporation v. Trinidad and Tobago* case, the parties had agreed on a conciliator within four months, and the dispute was settled in two years. Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, ICSID REVIEW-FOREIGN INV. L.J., 340-53 (Oct. 1, 1986), <https://academic.oup.com/icsidreview/article/1/2/340/705483>.