The Acceleration of the Development of International Business Mediation after the Singapore Convention

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Abstract

The Convention on International Settlement Agreements Resulting from Mediation (hereinafter referred to as the Singapore Convention) entered into force on 12 September 2020.

The States' striking enthusiasm for the Singapore Convention since the day of its enactment and onwards seems to be an encouraging indicator of the increasing use of mediation for the settlement of international commercial disputes. More precisely, the Convention establishes an international legal framework for the enforcement of settlements reached through mediation, and provides for a very limited number of requirements thereon. Hence, and considering that the enforceability of arbitral awards is perceived as arbitration's most important feature, the cross-border enforceability of the settlement agreements reached through mediation conferred by the Singapore Convention could somehow erode arbitration's edge. Furthermore, the entry into force of the Singapore Convention will promote the use of mediation in the States comprised within the Belt and Road Initiative, in Europe and in the Asia-Pacific, namely within the construction sector and the shipping industry and also in investor-state disputes insofar as the wording of the Convention leaves room for an extensive interpretation that could encompass such disputes.

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1. Introduction

1.1. The Need for a Harmonized International Legal Framework for Commercial Mediation

Over the past decade, the resolution of international commercial disputes through mediation has gained momentum among practitioners, academics and States.[2] However, such development has been confronted with practical issues resulting from the essence of mediation. In fact, since agreements reached through mediation are mere contracts and not court decisions, they cannot be automatically enforced in cross-border disputes in the absence of an international legal framework.[3]

The enforcement of the settlements resulting from mediation is thus conditioned by a legal action for contractual liability before the national courts or arbitral tribunals. In addition to this first hurdle, in some legal systems, mediation is not widely spread and does not benefit from a set of well-established rules, which contributes to a lack of understanding of the mechanism and, ultimately, impedes the enforcement of such agreements in these countries.

In order to tackle these problems, the international community endeavoured to find appropriate and realistic solutions taking into account the differences between the various legal systems.

Within this context, it has been suggested to enact harmonised international and regional legal instruments providing for the mechanism of mediation, solution previously approved by a vast majority of practitioners. Such approval has also been reflected in a 2014 survey conducted by the International Mediation Institute[4] (referred to as IMI), the results of which showed that 93 per cent of the participants would be more keen on mediating a dispute with a party from another country if the latter had ratified a Convention on the enforcement of settlement agreements resulting from mediation.[5] Hence, a significant number of recent international treaties have been

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[2] Preamble of the Singapore Convention: *"The Parties to this Convention, noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, have agreed [...]"*

[3] Caroline Devcaux, *Convention de Singapour : les enjeux pour la médiation commerciale internationale* 36 Recueil Dalloz 2032 (2019).

[4] A non-profit public interest initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide.

[5] International Mediation Institute, *IMI Survey Results Overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements* (13 January 2020) available at

concluded, thus contributing to the harmonisation of the legal framework applicable to mediation (e.g. the Uniform Act on Mediation adopted by the *Organisation pour l'harmonisation en Afrique du droit des affaires* – referred to as OHADA – on November 2017;[6] the EU Directive 2008/52/EC).

In that respect, the most significant step towards such harmonisation and promotion of the enforcement and recognition of settlements reached through mediation is undoubtedly the Convention on International Settlement Agreements Resulting from Mediation[7] (hereinafter referred to as the Singapore Convention or the Convention). The Convention was adopted on 20 December 2018 and opened for signature on 7 August 2019. It has been signed by 53 States so far, including the world's largest economies, the US and China, and 3 of the 4 largest economies in Asia, *i.e.*, China, India and South Korea. It has been ratified on 25 February 2020 by Singapore and the Fiji Islands States. 6 countries have ratified the Convention – Saudi Arabia, Belarus, Ecuador, Fiji, Qatar and Singapore – which entered into force on September 12, 2020, i.e., six months after the deposit of the third ratification act on 12 September 2020 by Qatar, in accordance with Article 14(1).

Surprisingly, the European Union has not yet signed the Singapore Convention, neither did Japan and Russia. In fact, it remains unsettled, *inter alia*, whether it is the European Union as a stand-alone entity that is competent to sign the Convention or rather its Member States individually. More to the point, and as far as Japan is concerned, it decided to adopt a neutral position for the time being and observe its application in practice by refraining from the ratification of the Convention.

Furthermore, as it has been pointed out by some prominent scholars,[8] the Singapore Convention is not, in its current state, compatible with the existing legal framework for compulsory enforcement, on the one hand, and the alternative dispute resolution regulations, on the other hand.[9] Regarding Russia, in which mediation does not constitute a common method of dispute resolution, academics acknowledge that the implementation of the Singapore Convention would contribute not only to the development of mediation, in particular, but also of the Russian legal system as a whole.

<https://www.imimediation.org/2017/01/16/users-view-proposal-un-Convention-enforcement-mediated-settlements/>.

[6] Uniform Act on Mediation adopted by OHADA in November 2017, also available at <https://www.ohada.org/attachments/article/2292/Acte-Uniforme-sur-la-Mediation.pdf>.

[7] Also known as the Singapore Convention on Mediation.

[8] Reference is made to Prof. Kaiuchi, who sustained this idea during the 2nd Asia Pacific Conference, held on 2 August 2019.

[9] Olivia Sommerville, *Singapore Convention Series – Strategies of China, Japan, Korea and Russia* (Kluwer Mediation Blog, 16 September 2019) also available at <http://mediationblog.kluwerarbitration.com/2019/09/16/singapore-Convention-series-strategies-of-china-japan-korea-and-russia/>. More precisely, the Japanese Civil Execution Act 1990 provides that compulsory execution of a specific performance of a civil or commercial claim can be requested only where the party concerned has in its possession a title of obligation. However, under the same Act, mediated agreement settlements are not listed as enforceable titles of obligations. As regards the second incompatibility, the Japanese ADR Act 2004 requests the mediated agreements to result from a certified mediation service contrary to the Singapore Convention which does not require any such certification.

Looking at its prodromal stages, the first initiative for the enactment of the Singapore Convention was taken in 2015, when the United Nations Commission on International Trade Law (referred to as UNCITRAL), following the United States' suggestion to mandate the Working Group II – Arbitration and Conciliation/Dispute Settlement (referred to as the Working Group II) to start studying the topic of enforcement of settlement agreements at its forty-eighth session.[10]

The only firm opposition towards this initiative came from the European Union which expressed a general scepticism with regards to the need of harmonisation. It actually pointed out the impossibility of reaching a consensus on the elected approach and expressed its preference to leave the issue of enforcement of settlement agreements resulting from mediation to domestic laws.[11]

As the Working Group II restated during the panel discussion in the Singapore Convention signing ceremony and conference on 7 August 2019, the initiation of the Convention was driven by the need to promote mediation among the potential users by respecting at the same time the diversity of the cultural and legal traditions of the Contracting States.[12]

1.2. The Singapore Convention on Mediation: The Missing Third Piece in the International Dispute Resolution Enforcement Framework

To quote the Prime Minister of Singapore, Lee Hsien Loong, "*The Singapore Convention on Mediation is the missing third piece in the international dispute resolution enforcement framework*".[13] During the aforementioned ceremony, he also highlighted the fact that the Convention is a powerful statement in support of multilateralism, *i.e.* the coordination of national policies in groups of three or more states.[14]

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[10] *Official Records of the General Assembly*, Seventieth Session, Supplement No. 17 (A/70/17), paras. 135-142.

[11] *Intervention of the European Union*, in Audio Recording: U.N. Commission on International Trade Law, 48th Session (United Nations 2015), 2 July 2015, 9:30-12:30, <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

[12] Sophie Tkemaladze, *We Have the Law! We Signed the Convention! What's Next?* (Kluwer Mediation Blog, 30 September 2019), <http://mediationblog.kluwerarbitration.com/2019/09/30/we-have-the-law-we-signed-the-convention-whats-next/>.

[13] Speech by Prime Minister Lee Hsien Loong at Singapore Convention Signing Ceremony and Conference, 7 August 2019, available at <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>.

[14] As José E. Alvarez expressed it poetically, "*multilateralism is our shared secular religion*" (José E. Alvarez, *Multilateralism and Its Discontents* 11 European Journal. of Int'l Law 393-394 (2000). In fact, multilateralism is one of the existing approaches to foreign affairs defined as the practice of coordinating national policies in groups of three or more states (Robert O. Keohane, *Multilateralism: An Agenda for Research* 45 International Journal 731 (1990). At an international level, the multilateral cooperation is materialised through the establishment of multilateral organisations and institutions and the elaboration of multilateral legal instruments. Multilateral treaties, as opposed to bilateral ones – concluded only between two states, invite the international community at large to join them, and thus, at least in aspiration, aim at universal participation.

In the same vein, Stephen Mathias, UN Assistant Secretary-General for Legal Affairs, noted that "*the Convention establishes mediation as a credible and effective path for commercial parties, to not only resolve commercial disputes, but to preserve their long-term relationships*".[15]

In fact, the Convention establishes an international legal framework applicable to the enforcement of settlements resulting from mediation, which could be compared to the legal framework established by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (referred to as the New York Convention).[16] This definitely constitutes a milestone in the development of mediation.

More precisely, the Singapore Convention is designed as a tool by which the Contracting States (and their respective jurisdiction) undertake the obligation to modify their legal systems in order to implement the Convention as of 12 September 2020 and thus, to further strengthen the role of commercial mediation as a dispute resolution mechanism.

The Convention is therefore fully in line with the more general trend towards the development of a settled justice and meets the economic players' demands for a more structured legal framework.

The initiative to enact the Singapore Convention on Mediation was seen by the main mediation players as a timely and appropriate step, particularly at the time of the Covid-19 pandemic, causing a proliferation of international trade disputes notably as regards the existence of "force majeure" events and hardship, thus affecting the performance of international contracts.

As regards the scope of the Convention, it applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute.[17] Both the broad definition of mediation[18] and the limited number of required formalities provided for in the Convention reflect the general will of the Contracting States to eliminate the potential impediments to the circulation of the settlements resulting from mediation and allow the proper functioning of the Convention.[19]

The Convention excludes settlement agreements (a) that have been approved by a court or have been concluded in the course of court proceedings; (b) which are enforceable as a judgment in the state of that court or (c) that have been recorded and

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[15] Zheng Chengqiong, *New UN Treaty on Mediation Signed in Singapore* (7 August 2019), available at: <http://www.china.org.cn/world/2019-08/07/content_75076360.htm>.

[16] Adopted by the United Nations diplomatic conference on June 10, 1958 and entered into force on 7 June 1959. <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

[17] Art. 1 (1) of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

[18] The Convention defines 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."*(article 2(3) of the Singapore Convention).

[19] Intervention of the Chair, in *UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation)*, 64th Session, 3 February 2016, 10:00-13:00, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/3c4f5dc6-6acc-45bc-bd1ca419612128a5>.

are enforceable as an arbitral award.[20] This issue has been discussed at length during the preparatory works and the solution adopted by the Working Group II finally crystallised its will to opt for a compromise.

In fact, it has been argued that this exclusion constituted an attempt to avoid creating an overlap with other widely accepted international instruments such as the New York Convention and the Hague convention on the choice of court agreements of 2005 (referred to as the Hague Convention on the Choice of Court Agreement)[21] that specifically govern those types of settlement agreements.[22] However, it has been noted that there was no need for such exclusion given that the aforementioned Conventions provide for a minimum protection, by "setting floors rather than ceilings".[23] Thus, the Contracting States are free to provide greater protection than the one required by the various treaties in the sense that there will be no direct conflict between the treaties' obligations and rights.

After detailing the inception of the Singapore Convention, the article will focus on the future of arbitration after the signing of the Singapore Convention (2.), the impact of the Convention on the widespread of mediation in business relationships worldwide (3.) and the application of the Convention to investor-State disputes (4.). These developments support the conclusion that, inevitably, the Singapore Convention will alter the landscape of alternative dispute resolution in international commercial transactions of all kind, together with the legal organization by the States of their mediation and enforcement systems (5.).

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[20] Art. 1 (3) of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

[21] Adopted by the Hague Conference Private International Law on 30 June 2005 and entered into force on 1 October 2005, available at <https://assets.hcch.net/docs/510bc238-7318-47cd-9cd5-c0972510d98b.pdf>.

This convention was followed by Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention), which "*facilitates the effective international circulation of judgments in civil or commercial matters. By setting forth commonly accepted conditions for recognition and enforcement – and agreed grounds for refusal – the Convention provides legal certainty and predictability to parties involved in cross-border transactions, providing clarity as to whether and to what extent a judgment will be recognised and enforced in another jurisdiction. By ensuring the recognition and enforcement of foreign judgments, the Convention enhances access to justice and reduces legal timeframes, costs and risks in a cross-border context. The Convention generally strengthens a positive national and international environment for multilateral trade, investment, and mobility*" (see: HCCH | Judgments Section). The Convention has been signed by three countries so far: Israel, Ukraine and Uruguay, but ratified by none.

[22] Nadja Alexander, *Singapore Convention on Mediation* (Kluwer Mediation Blog, 24 July 2018) available at <http://mediationblog.kluwerarbitration.com/2018/07/24/singapore-Convention-mediation/>.

[23] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements* 1 Pepperdine Dispute Resolution Law Journal 24-27 (2019).

2. The Fate of Arbitration after the Signing of the Singapore Convention

Will mediation steal arbitration's spotlight after the entry into force of the Singapore Convention (2.4) or should both mechanisms be combined (2.5)? Before answering this question, we will first briefly recall the historical background of arbitration's genesis (2.1), state the reasons behind its success (2.2) and analyse both arbitration and mediation from a comparative standpoint (2.3).

2.1. Brief Historical Background of the Genesis of Arbitration

Arbitration has its roots in ancient Greece and in ancient Rome. With the development of trade among ancient cities, arbitral tribunals were created within the fairs and marketplaces in order to promptly settle disputes between merchants. It was a very efficient mechanism insofar as the party who failed to comply with the arbitral award was expelled from the marketplace.[24]

Promoting arbitration as a dispute resolution mechanism depended on the relationship that politicians held with judges. More precisely, when animosity prevailed, the legislator favoured arbitration, whereas when amicable bonds were established, arbitration was promoted. For instance, in the 16th and 18th centuries, in many European countries such as France, the legislator favoured arbitration notably for disputes between merchants, family members or business partners.[25]

Traders who feared national jurisdictions of their counterparts (as they were unable to appoint neutral adjudicators since arbitration was prohibited) became reluctant to conclude transactions, and international trade suffered therefrom. In an attempt to safeguard international trade, arbitration was reintroduced in the panel of dispute resolution mechanisms. At first, it was allowed only in an international context and in commercial disputes. Thereafter, arbitration's scope expanded to nearly encompass all types of disputes. Nowadays, despite some slight differences between international and domestic arbitration on one hand, and between commercial and civil arbitration on the other hand, arbitration is no longer perceived as a rival to state justice and it has proved to be a successful dispute resolution mechanism as it can be observed in practice.

In figures, according to the International Chamber of Commerce (referred to as ICC statistics of 2019),[26] 2,498 parties were involved in ICC Arbitration cases from 147 countries and the aggregate value of all pending disputes before the ICC court at the end of 2019 was USD 230 billion, with an average amount of USD 52 million per dispute, 60% of which had an amount in dispute of USD 10 million.

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[24] Christophe Seraglini, Jérome Ortscheidt, *Droit de l'Arbitrage Interne et International*, §§ 38-43 (Montchrestien, 2013). See also, Jean-Baptiste Racine, *Droit de l'Arbitrage*, §25 (PUF, 2016).

[25] *Ibid.*

[26] See 2019statistics_icc_disputeresolution_901.pdf (clickdimensions.com).

2.2. *Reasons behind Arbitration's Success*[27]

It has been argued that arbitration had everything state justice lacked: time and cost efficiency, neutrality, confidentiality, flexibility and customization to the users' needs. Are these advantages material and do they still stand scrutiny in light of today's practice?

The absence of a double degree of jurisdiction should render arbitration time efficient insofar as the arbitral tribunal issues a final and binding award. However, all arbitration statutes provide for a recourse against the award, operating as a sort of appeal, and therefore as a second degree of jurisdiction. Views were also expressed that arbitrators are generally more available than state judges who are compelled to handle several cases at a time. However, it has been observed that the same arbitrators are often appointed, which hinders their availabilities. On another note, the fact that it is possible to appoint an expert to sit as arbitrator avoids resorting to tribunal appointed experts. This being said, experts are frequently appointed during arbitration procedures, either by the parties or the arbitrators themselves. In addition, even though parties can freely set a reasonable time limit for rendering the award, they often request time extensions and struggle to coordinate their calendars with the counsels and arbitrators (to set a hearing date), not to mention their excessive recourse to state judges (either to the "*juge d'appui*", the "*juge d'annulation*" or the "*juge de l'exécution*") which lengthen the procedure.

As regards the cost efficiency of arbitration in comparison with litigation costs, nowadays, expenditures became arbitration's biggest flaw: in addition to counsels' fees, parties must pay arbitrators' fees and expenses, arbitration institution's fees, as well as additional costs related to the hearings, etc.

Although a party's state judge must not be seen as partial, a party and its state judge usually share the same cultural background (on a linguistical, economical and most of all legal level). Since arbitration allows parties to appoint an adjudicator with a neutral nationality, the foreseen advantage is that neither party will benefit from "the home field advantage". However, and practically, each party tends to appoint an arbitrator of the same nationality, or at least with a similar legal background.

As far as confidentiality is concerned, arbitration hearings are not public and the award is not published, which allows a company to safeguard business secrecy, reputation and market value. It should be kept in mind that in investor-State arbitration, the procedure is public. In addition, when the award is challenged before state courts, it becomes public; not to mention that the new ICC Arbitration Rules of 2021 provide for the publication of the award (under several conditions).[28]

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[27] Christophe Seraglini, Jérome Ortsheidt, *op.cit.*, §§44-54. See also Jean-Baptiste Racine, *op.cit.*, §§85-98.

[28] Updated Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (Note), 1 January 2021, §§ 56-64.

Arbitration was initially conceived to allow flexibility and a tailor-made justice: parties can choose the applicable procedural rules and fix the procedural calendar. Nonetheless, arbitration procedures became very standardised and most arbitration rules are very detailed; there is no more space for customization. Even if in theory parties can choose to apply trade usages (the *lex mercatoria)* and grant arbitrators the power to rule *ex aequo et bono*, they rarely choose to do so, preferring a foreseeable solution.

Despite the above-mentioned flaws, arbitration encountered a wide array of success notably with the entry into force of the New York Convention.

The New York Convention provides for: (i) an expedited and simple enforcement procedure[29]; (ii) limited grounds to refuse enforcement[30] and (iii) the "most favourable law" provision[31], thus facilitating the recognition and enforcement of arbitral awards.

More importantly, the New York Convention mechanism[32] helps promoting arbitration insofar as the signatory parties undertook to give full effect to arbitration agreements by requiring courts to deny parties access to court and to refer the matter instead to an arbitral tribunal[33]. Unfortunately, the Singapore Convention does not provide for a similar mechanism, *mutatis mutandis* (i.e., the obligation upon the courts to refer the matter to a mediator), whose purpose would be to give full effect to the mediation clause.

2.3. Arbitration and Mediation[34]: The "Pros and "Cons"[35]

Litigation is generally a method that people seek to avoid. It is expensive, time consuming, emotionally draining and unpredictable. Alternative dispute resolution, such as arbitration and mediation, became therefore very popular and the following table set forth a comparison between arbitration and mediation:

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[29] Article IV of the New York Convention.

[30] Article V of the New York Convention.

[31] Article VII of the New York Convention. Based on this Article, and under French law, an award that has been annulled in the state of seat can still be enforced in France. See in this respect the *Putrabali* case, French Cour de Cassation, 29 June 2007, N° 05-18.053.

[32] Emmanuel Gaillard, Georges Andrew Bermann, *The UNCITRAL Secretariat Guide on the New York Convention* (UNCITRAL Secretariat, 2017).

[33] Article II of the New York Convention.

[34] Loïc Cadiet, Thomas Clay, Emmanuel Jeuland, *Médiation et Arbitrage : Alternative Dispute Resolution – Alternative à la Justice ou Justice Alternative ? Perspectives Comparatives* (Litec, 2005); René Sève, *La Médiation* (Archives de Philosophie du droit, n°61, 2019).

[35] Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions,* 552 ff. (Kluwer Law International, 4th Ed, 2019).

[36] The Singapore Convention has the advantage of providing for a definition of mediation (article 2.3), whereas the New York Convention does not contain a definition of arbitration.

[37] Mediation ends when settlement is reached or when parties are deadlocked.

[38] Although mediation procedures may vary, parties usually first meet together with the mediator informally to explain their views of the dispute. Then, the mediator often meets with each party

	Arbitration	Mediation
Definition	A process by which parties grant the power to a third neutral (the arbitrator) to adjudicate the dispute by issuing a binding award	A process by which parties attempt to solve their dispute by reaching a settlement agreement, with the assistance of a third neutral (the mediator), who is not granted the power to adjudicate the dispute[36]
	The trial is replaced by an arbitration procedure	The trial is either replaced or stayed while awaiting the final outcome
Common grounds	Both are alternatives to traditional litigation	
	Both resort to a third neutral	
	The award and the settlement agreement are both binding	
Role of the third neutral	The arbitrator is empowered to render a legally binding award	The mediator's role is not to adjudicate the case but to frame and facilitate negotiation[37]
	The arbitrator has *jurisdictio* but lacks *imperium*	The mediator lacks both *imperium* and *jurisdiction*
Different Method	The arbitrator hears evidence and issues an award	The process is a structured negotiation between the parties with the assistance of a third neutral
	Arbitration is similar to the state court's procedure: the process is adversarial, the parties file submissions and evidence (such as witness statements and expert reports) and attend hearings	The mediator helps parties to reach a settlement by assisting them with communication, obtaining relevant information, and developing options[38]. The process is non-confrontational, and the mediator can meet one party without the other
Common advantage	Both mechanisms have the advantage of saving cost and time and provide parties with a greater degree of predictability in the outcome.	
	Both mechanisms are confidential	

separately. The mediator discusses the dispute with them and explores with each party possible ways to resolve it. It is common practice for the mediator to go back and forth between the different parties until settlement is reached.

	Arbitration	Mediation
Advantage	Avoiding the risk of the parties disagreeing and eventually taking the dispute before state courts	Both parties participate in resolving the dispute; they are more likely to carry out the settlement agreed upon Parties retain control of the dispute resolution process. As such, mediation can help preserving good business relationship in view of future collaboration, when compared to other forms of dispute resolution mechanisms (in which there is clearly a winner and a loser)
Common disadvantage	These alternative procedures do not follow legal precedent when reaching an outcome and parties cannot rely on legal precedent to be determinative of the result	
Disadvantage	The fact that the arbitrator is empowered to settle the dispute will inhibit the parties from sharing confidential information regarding their interests (unlike mediation) One or both parties may be dissatisfied with the result	Parties may not be able to reach an agreement and will end up in court anyway

2.4. Will the Singapore Convention Steal Some (Not to Say All) of Arbitration's Spotlight?

As stated above, the absence of a cross-border mechanism to enforce settlement agreements resulting from mediation was seen as one of mediation's major flaws. With the Singapore Convention, the purely private contractual agreement is granted a *sui generis* status, enforceable in all Contracting States, which is comparable to the status of arbitral awards under the New York Convention. Therefrom, the edge of arbitration could directly be eroded, considering that the enforceability of arbitral awards is usually listed as arbitration's most important feature.[39] In other words, the biggest fear of arbitration is losing its status as the most preferred form of alternative dispute resolution.

[39] Ashutosh Ray, *Is Singapore Convention to Mediation what New York Convention is to Arbitration?* (Kluwer Arbitration Blog, 31 August 2019, <http://arbitrationblog.kluwerarbitration.com/2019/08/31/is-singapore-convention-to-mediation-what-new-york-convention-is-to-arbitration/>); Iris Ng, *The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution?* (Kluwer Arbitration Blog, 31 August 2019, <http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/>).

It can however be noted that at several renowned arbitral institutions, the growing success of mediation has not dampened demand for arbitration services. This assumption arises from the fundamental differences between arbitration and mediation: arbitration is regarded as a "litigation-substitute". Unlike arbitration, mediation is a non-confrontational process and allows parties to craft a business solution, rather than a technical one, thus preserving their on-going relationship.

Those who consider that the Singapore Convention will not erode arbitration have raised the following arguments:

- Article 8 of the Singapore Convention allows Contracting States to express reservations as to the scope of application of the Convention,[40] the result of which is the exclusion of its application in investor-State disputes. By contrast, arbitral awards rendered in these types of disputes enjoy full enforceability and were not carved-out from the New York Convention's scope of application.
- The absence of a well-established legal framework on mediation in some of the Contracting States of the Singapore Convention comparable to the legal framework (and case law) on arbitration may drive parties to resort to arbitration instead, where solutions are more predictable.
- The expedited procedures[41] and the adoption of the Prague Rules[42] may help increase the tarnished time and cost efficiency of arbitration.
- Recent arbitration acts allow parties to waive their right to challenge the award.[43]
- Several arbitration centres[44] offer "low cost" arbitration services.
- A generation of young arbitrators and young practitioners who charge more reasonable fees is emerging.
- Parties can sign strict confidentiality agreements.
- The growing success of *ad hoc* arbitrations, which allows the procedure to be more personalized to their needs without being framed by institutional rules.

2.5. *Med-Arb: The Best of Both Worlds?*

Instead of envisaging arbitration and mediation as competing dispute resolution mechanisms, the rivalry can be put aside to combine the best of both worlds.

Actually, mediation and arbitration should not be contemplated as an "either-or" equation: there are various combinations of the two modes under arb-med, med-arb

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[40] The opt-out regime allows a Party to the Convention not to apply it to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration and to apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

[41] For instance, the 2017 ICC arbitration rules, Appendix 6.

[42] See <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799c26473d92961d926948c9.pdf>.

[43] Article 32.11 of the 2016 SIAC rules; Article 35(6) of the 2017 ICC arbitration rules; Article 35 (2) of the 2018 HKIAC rules; Article of 26.8 the 2014 LCIA rules.

[44] See for instance, Delos Dispute Resolution, Chambre arbitrale de Paris, CRCICA, etc.

and arb-med-arb protocols (collectively referred to as AMA protocols), which are increasingly popular.

Practically, arbitration and mediation can be combined at three different stages:

- Before arbitration: mediation can be the first step towards resolving the dispute by attempting to find an agreement with the help of a mediator. If the parties do not reach an agreement during the mediation process (or if some issues remain outstanding) then parties can go to arbitration. The threat of having a third party settle the dispute is often an incentive for the parties to double their efforts to reach an agreement. The mediation pre-requirement cannot be circumvented insofar as the claim will be inadmissible before the arbitrator if the party does no establish that it attempted to mediate. In practice, escalation clauses (or multi-tiered dispute settlement mechanisms)[45] are becoming more and more frequent, notably in construction contracts.[46]
- During arbitration: parties can reach a settlement pending arbitration and request the Tribunal to render an award by consent. This settlement can be reached with or without the help of a mediator (who can be the arbitrator himself, even though this is a debatable issue).
- After arbitration: mediation may be appropriate for parties in bifurcated proceedings after an award on liability or after the final award is rendered, so that the parties can reach a settlement regarding the quantum to be paid and avoid enforcement issues.

To sum up, if the signing of the Singapore Convention will promote mediation by offering a uniform legal framework for the international enforcement of settlements resulting from mediation, it will not yet dampen the recourse to arbitration. Despite its misuse, arbitration still holds a leading position in the dispute resolution mechanisms "market". This being said, parties should consider combining both arbitration and mediation instead of opting for one mechanism as an "*una via electa*".

3. The Impacts of the Singapore Convention on the Use of Mediation in Business Relationships Worldwide

The strength brought by the Contracting States to the Convention clearly puts conventional mediation in the spotlight on an international level and demonstrates that

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[45] Suggested Med-Arb Clause "*Any dispute arising out of or in connection with this contract shall first be referred to mediation under the [...] Mediation rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute being resolved, then such dispute shall be definitively settled by arbitration under the [...] Arbitration rules*".

[46] In this respect see the Dispute Adjudication Boards: the adjudicator renders a decision (like the arbitrator), but this decision is not technically an award and can only be implemented voluntarily by the parties (like the settlement agreement reached after a mediation). In case a party does not abide by the adjudicator's decision, the issue will be referred to the judge or the arbitrator. Before the Singapore Convention, referring back to the judge was a way to enforce the settlement agreement.

the Singapore Convention will impact business systems insofar as it is a solid tool for developing the use of mediation in business relationships.

There are some fertile grounds for developing the use of mediation in business relationships through or under the impulse given by the Singapore Convention. Particular regions of the world (A.) and specific industries (B.) are favorable springboards to jump to more mediation in business relationships.

3.1. Regions of the World that Could Benefit from the Singapore Convention

Three specific regions could benefit from the entry into force of the Singapore Convention: the Asia-Pacific area, the region covered by the BRI and Europe facing Brexit.

Factors establishing the Asia-Pacific region as a fertile ground for developing the use of mediation in business relationships range from general considerations to more specific observations of the legislative context and commercial ecosystem.

As general considerations, the facts that the signing of the Singapore Convention occurred in Singapore and that Singapore is the first signatory country to have ratified the Convention demonstrate both the growing influence of this country to be recognized as the worldwide hub for resolution of conflicts and of Asia as a terrific region for promoting mediation.

Mediation is consistent with Asian sensibilities and culture for business. According to the 2014 survey conducted by the IMI,[47] the corporate responders – of whom 51% were internal counsel and 29% were senior corporate managers – were asked to vote on the following proposition: "*An international Convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries*". 73% of all delegates voted in favour, among them 72% were responders from the Asia-Pacific region, indicating that their company or firm generally had a positive attitude to mediation.

Positive legislative environment also contributes to the positioning of the Asia-Pacific area as a fertile area for mediation. As examples of Asian countries that have actively promoted in their legislation the use of mediation in recent times, can be cited, among others: the People' Republic of China, that enacted the 2012 amendment to China's Civil Procedure Law who adopted the principle of "mediation first" in its Article 122; Hong Kong (which inherited its legal system from the UK) that issued the Mediation Ordinance (MO) in 2013 and the (first in the world) Apology legislation in 2017, adopted to facilitate the use of mediation by framing the circumstances for the parties expressing their apologies regarding a litigious situation without any downside on their legal rights; Malaysia, that promulgated the Malaysian Mediation Act in 2012 (Act 749)[48] and Practice Direction No. 4 of 2016 on Mediation issued by

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[47] See for further information, <https://imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/>.

[48] See for further details, <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=95605&p_country=MYS&p_count=199>.

the Chief Justice when the mediation is court-connected; Singapore, that issued the Singapore Mediation Act on 1st November 2017.[49]

Mediation is a recognized form of ADR in these countries. It is not only employed privately in disputes matters but forms an integral part of the dispute resolution frameworks. To focus on one of the two world's largest economies, and one of the fourth largest economies in Asia, China's approach to mediation is already quite sophisticated, where there are in general three mediation options for resolving commercial disputes: court mediation, mediation conducted in the course of arbitration proceedings (such as "med-arb"), and private mediation through professional third party mediation institutions (hereafter institutional commercial mediation), highly professionalized.[50]

Commercial mediation ecosystem is also quite elaborated in the Asia-Pacific area. Hong-Kong is organizing with the Department of Justice with the International Chambers of Commerce – Hong the ICC International Commercial Mediation Competition, focusing on mediation advocacy skills in international commercial mediation opened to both local and overseas university students, like it is in Europe. In Singapore, major Centers offer a wide range of services, such as: the WIPO Arbitration and Mediation Center,[51] the Singapore Mediation Centre[52] and the Singapore International Mediation Centre (referred to as SIMC),[53] offering commercial mediation services; the Singapore International Mediation Institute,[54] working closely with IMI, serving as independent professional standards body; the Singapore International Dispute Resolution Academy, lodging research and training academy.[55] Within this context, the Asia-Pacific area could gain interesting benefits from the implementation of the Singapore Convention. First, the Singapore Convention may and will certainly serve as an additional tool for the countries of this region of the world to structure and continue to develop business relationships by facilitating the management and the issues of the inevitable disputes arising. Second, the Convention may help Asian ADR institutions and centers to get greater recognition and visibility in the magic world of international commercial dispute resolution. This is even more true when facing the quite closed and already well-established world of arbitration. Third, by compelling the competent authorities to enforce settlement agreements resulting from mediation held in other countries, and thus, in other jurisdictions, and by restricting the grounds on which a foreign jurisdiction could decline enforcement, the Singapore Convention will favor cross-border enforcement of settlement agreements in this area, mainly where practices for enforcing foreign judgments are divergent. This will make the Singapore Convention a political and diplomatic tool to unify the area.

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[49] See for further details, <https://sso.agc.gov.sg/Act/MA2017>.

[50] See for an extensive analysis, <https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/2718311/c5351.pdf>.

[51] See for further information, <https://www.wipo.int/amc/en/>.

[52] See for more details, <https://www.mediation.com.sg/>.

[53] See for a deeper analysis, <http://simc.com.sg/>.

[54] See for more details, <https://www.simi.org.sg/>.

[55] See <https://sidra.smu.edu.sg/>.

If mediation is becoming a preferred method for dispute resolution in Asia, it has been primarily driven by China and the BRI.[56] Especially the latter phenomenon contributed to the development of international commercial mediation because of (i) the vast geographical impact of the BRI, which the World Bank estimates at over 70 countries, extended from the southern pacific to Europe, Africa and South America, (ii) the inevitable tendency to create cross-border disputes (iii) that must be settled as efficiently and quickly as possible. Interestingly, all disputes concerning the BRI and foreign compagnies are resolved through mediation by the International Commercial Expert Committee launched in 2018 by the Singapore International Mediation Centre and the China Council for the Promotion of International Trade. Thus, the Singapore Convention is considered as a stepping stone to the development of international dispute resolution in China.

As far as Europe is concerned, before BREXIT, the impact of the Singapore Convention on European commercial transactions was not a specific subject as Europe benefits from tools for easily enforcing agreements resulting from cross-border mediation. As Great Britain decided to exit from the European Union, enforcement of settlement agreements reached through mediation conducted in the UK between either multinational parties or between parties located in the UK should nowadays be considered in the same manner than the enforcement of settlement agreements resulting from international commercial mediation. Thus, the Singapore Convention could become a useful tool there as well.

3.2. Industries That Could Benefit from the Singapore Convention

One particular sector which stands to benefit from the adoption of the Singapore Convention is probably the construction industry, as well as the energy and infrastructure projects. Construction contracts need timed and due performance. Main contractors however encounter numerous obstacles in the performance of their contract, claims arising at various stages of the life of the contract, as early as the procurement moment. The causes of the conflicts are various, resulting from either tight timescale, misunderstandings between what was expected and what is really built, errors in the contractual documentation, overcharging, overspending, overage, etc. The main economic actors such as subcontractors, final clients, including State-owned developer clients are always looking for a quick and efficient fix of the issues. If their contractual documentation often contents dispute resolution provisions, these provisions are very often confined in dispute boards and arbitration clauses. In fact, the decision makers – still baby-boomers – consider more secure to adopt a traditional dispute resolution technique that will result in either an arbitral award or a court judgment, both of which are enforceable as a matter of law.

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[56] It is worth mentioning that China had already expressed its support towards mediation during the Opening Ceremony of the Belt and Road Forum for International Cooperation held on 14 May 2017, where the Chinese President Xi Jinping pointed out the need of an "*equitable and transparent system of international trade*" and the global promotion of "*mediation in the spirit of justice*".

The ratification of the Singapore Convention should change this international construction dispute resolution jigsaw. First, litigation or arbitration proceedings arising out of construction disputes are long and costly. Second, the baby-boomers are retiring from the business field. Third, actors in the chain of supplying the works may sometimes be small or weak and may collapse or be bankrupted before a solution is reached through litigation or arbitration. The Singapore Convention fulfill the needs of rapidity, efficiency and enforceability which are key needs of the construction industry. And mediation techniques also offer to the parties a chance for restoring their relations and finding a solution for the works to be completed on time and within budget.

The timing of the Convention for the construction community could not be better, not to mention the strict deadlines for Qatar to build infrastructure for the 2022 World Cup, for France to build infrastructure for the 2024 Olympics Games, or for Italy (Cortina d'Ampezzo and Milan) to realize the plants necessary to host the XXV Winter Olympic Games in 2026. Once into force, contractors bidding on new projects or closing out existing ones will welcome the Convention as an opportunity to settle their claims without the need for formal dispute resolution through courts or arbitration. Further to Qatar' ratification of the Convention, representatives of Qatari ADR Centers have already identified the interest for a Qatari enterprise to be able to enforce settlement agreements in an expedited manner under the Convention.[57]

An increase of international transactions and, thus, of the application of the Singapore Convention could also rest on the development of the maritime business shape. International shipping disputes are now expected on the BRI maritime sea route, connecting China's coastal regions with south east and south Asia, the South Pacific, the Middle East and Eastern Africa, all the way to Europe. The program is expected to involve over US$1 trillion in investments, including in infrastructure development for ports and networks.

Mediation was already gaining recognition in the shipping industry before the signing of the Singapore Convention, as the English case *Eleni Shipping Limited v Transgrain Shipping BV*[58] well demonstrates. Indeed, in this English Commercial Court case, TEARE J reviewed the mediation provision contained in a Baltic and International Maritime Council (referred to as BIMCO) dispute resolution clause and made reference to the extensive acceptance of mediation as an effective dispute resolution tool used and to be used in the maritime industry.

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[57] Sheikh Dr Thani Hani Bin Ali, board member of the *Qatar International Centre for Conciliation and Arbitration* (QICCA), said on 13 March 2020 in a statement to Gulf Times, "*if a Singaporean party to a mediated settlement has assets in Singapore or in any other Convention country, then the other party, such as a Qatari enterprise may be able to enforce the settlement agreement in an expedited manner under the Convention* [...] *With the entrance of the Convention into application next September*, [...] *in short, the Singapore Convention gives Qatari companies an additional reason to consider the role of mediation in an overall dispute resolution strategy, and in the event of a successful mediation, they must structure their mediated settlement agreements to take full advantage of the Convention*," available on <https://www.gulf-times.com/story/658334/Qatar-ratifies-Singapore-Convention-on-Mediation-s>.

[58] See *Eleni Shipping Limited v Transgrain Shipping* (*The ELENI P*) [2019] EWHC 910 (Comm).

In addition to the above mentioned BIMCO's Standard dispute resolution clause referring to mediation,[59] we can notice the evolution of the practice of the maritime arbitral institution of the London Maritime Arbitrators Association (referred to as LMAA).[60] First, LMAA model arbitration clause provides for either party to elect to refer the dispute to mediation. Second, since the revision in 2017 of the LMAA Terms of arbitration, the parties are now asked to consider whether the case is suitable for mediation (2017 LMAA, Third Schedule,[61] question 18).

The Terms of the maritime arbitral institution – the Singapore Chamber of Maritime Arbitration (referred to as SCMA)[62] differ, although mediation is considered as a tool to the parties. SCMA Terms differs from the 2017 LMAA Terms as the SCMA model clause does not make *per se* reference to mediation.[63] SCMA focuses more upon Med-Arb and Arb-Med-Arb clauses, whose features and potentialities have been addressed hereabove (see *supra* II. E).[64] The SCMA Terms, such as the 2017 LMAA Terms, contain however a questionnaire referring to mediation. And in its Rule 41 relating to costs, it is also provided that the arbitral tribunal may take into account any unreasonable refusal by a party to participate in mediation.[65]

To sum up, formal dispute resolution through courts or arbitration is, rightly or wrongly, perceived as being a hostile move, bad for business. Companies have already integrated the advantages of an amicable attempt to find a solution, strengthen or rebuild their businesses. *Via* the Singapore Convention, a contractor will be able to enforce any international commercial agreement resulting from mediation in the same way it could enforce an arbitral award, provided of course that the country in which it intends to enforce the settlement agreement has signed and ratified the Singapore Convention. Already in anticipation of 12 September 2020, contractors located either in Singapore, Fiji or Qatar and being in commercial transaction with counterparts located in one of these three countries can structure their dispute resolution clause or

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[59] It should be underlined that BIMCO had recognized the value of mediation as early as 2001 and pushed throw its use by drafting the BIMCO mediation clause that was later incorporated into the BIMCO Dispute Resolution Clause 2017. According to this clause "*the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this contract*".

[60] See <http://www.lmaa.org.uk/terms-the-third-schedule.aspx>. According to the LMAA model arbitration clause, one party serves upon the other a Mediation Notice. If a party does not agree to mediate, this element may be brought to the attention of the Tribunal when allocating costs. If the parties choose to try mediation, arbitration continues meanwhile.

[61] The third schedule of the LMAA Terms 2017 is an 18 questions' list. The question directed to the parties regarding mediation is N°18 (the last one) and is asked in the following terms: "*Have the parties considered whether mediation might be worthwhile?*"

[62] See for further details, <https://www.scma.org.sg/rules>.

[63] For a comparative approach of LMAA and SCMA Terms on mediation, see, for example the public presentation of Mr. Chris Edwards, at Hill Dickinson, available at <https://www.scma.org.sg/SiteFolders/scma/387/Events/seminar20160429Slide.pdf>.

[64] For examples of the SCMA combined model clauses, see <https://www.scma.org.sg/SiteFolders/scma/387/rules/rules_201510_eng.pdf>.

[65] Rule SCMA 41.4. provides that: "*When deciding which party shall bear the costs of the arbitration and the legal or other costs of the parties and the amounts of such costs, the Tribunal may take into account any unreasonable refusal by a party to participate in mediation*".

settlement agreements to benefit from Convention. With the important number of countries that have already signed and the increasing number that will ratify the Convention, business relationships could more easily find a quick, reasonable and effective answer without recurring to adversarial positions.

Last but not least, companies are now facing numerous situations where they are unable to perform their contractual obligations as a result of the restrictions that have been imposed due to the Covid-19 pandemic. This, added to the widespread court closure in the course of 2020, promote ARD and mediation in particular into the forefront as an unavoidable method of conflict resolution. The types of disputed concerned are endless, ranging – when focusing on Asia – from the "classical" private equity, M&A or *force majeure* claims to disputes aiming at renegotiating long-term supply agreements often used for commodities, not to forget the specific decommissioning disputes in the oil and gas industry, where it is required to manage the removing of the infrastructures after it ceases production and to rehabilitate the sites.

Several countries have established focused ARD tools to coop with these difficulties, such as, in France, the creation of a temporary original conciliation platform ("*Tiers-Conciliateurs*") helping companies seeking negotiated contractual solutions to disputes related to the pandemic[66] or in Asia, the Pusat Mediasi Covid-19 Center (referred to as the PMC-19) established by the Legal Affairs Division of the Malaysian Government on November 27, 2020[67] or the SIMC Covid-19 Protocol in Singapore,[68] designed to complement the Singaporean legislation on Covid-19, where the companies who enjoy relief under the Covid-19 Tempory Measures Act 2020,[69] passed on April 7, 2020 and amended on June 5 and September 18, 2020, can mediate at any time.

Due to the pandemic, one can without any doubt conclude that the role of mediation to resolve international commercial disputes has been growing rapidly.

4. Is It Possible to Apply the Singapore Convention to Investor-State Disputes?

4.1. The Notion of Investor-State Dispute Settlement and the Current Situation

Bearing in mind that the Convention, along with an accompanying instrument – the revised United Nations Commission on International Trade Law (referred to as UNCITRAL) Mediation Model Law (referred to as Model Law)[70] – was drafted with

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[66] See for further information, <https://tiers-conciliateurs.fr/>.

[67] See for further information, <https://www.malaysianmediationcentre.org/>.

[68] See for further information, <https://simc.com.sg/simc-covid-19-protocol/>.

[69] See for further information, <https://www.mlaw.gov.sg/covid19-relief/>.

[70] *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation*, 2018 (amending the UNICITRAL Model Law on International Commercial Conciliation, 2002, referred to as the 2002 Conciliation Model Law), *Report of the U.N. Comm'n on Int'l Trade Law – Fifty-first session*, U.N. Doc. A/73/17, annex II (2018). See Ellen E.

the principal aim to, on one hand, establish a framework for international settlement agreements that result from mediation, and, on the other hand, to promote mediation as a mainstream cross-border dispute resolution mechanism[71], it is thus relevant for this study to address the issue of investor-State disputes settlement (referred to as ISDS).

In February 2015, the United Nations Conference on Trade and Development (referred to as UNCTAD) released a study that revealed that in 2014, 42 appeals to the ISDS tribunals were filed by investors. In the same year, among the 356 cases decided, 37% were in favor of States and 25% in favor of investors, while the remaining 28% were settled *via* a settlement agreement.[72]

At this stage it is worth briefly mentioning the context for an ISDS claim: an investor from one country (the "home State") invests in another country (the "host State"), and both countries have agreed to ISDS. Should the host State breach the rights safeguarded to the investor under a treaty that the former has signed, the latter may bring the matter before an arbitral tribunal.

The ISDS or Investment Court System (referred to as ICS) is a system that allows the investors to sue States for alleged discriminatory practices. It is, therefore, an instrument of public international law, whose regulation is contained in several bilateral investment treaties, particularly in international trade treaties, such as the agreement between the United States of America, the United Mexican States, and Canada (referred to as USMCA). Many international investment agreements, such as the Energy Charter Treaty, refer to ISDS as a tool to settle controversies.

International arbitration and the rules of the International Centre for Settlement of Investment Disputes of the World Bank (referred to as ICSID) are often coupled.[73]

Deason, *What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions* 4 Cardozo Journal of Conflict Resolution 1157 (2019), who underlines that "*For the new Model Law, the Working Group amended the 2002 Conciliation Model Law to include a section on enforcement drawn from the Convention, and renamed the Model Law using the term Mediation. Overall, the new Mediation Model Law's approach to the concept commercial is a new hybrid of the original Conciliation Model Law and the Singapore Convention. It did not, in general, alter the broad commercial scope of the original Conciliation Model Law*".

[71] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements* 1 Pepperdine Dispute Resolution Law Journal 22 (2019), who affirms that "*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*".

[72] Martina F. Ferracane, *Investor-State Dispute Settlement (ISDS) Cases in the Asia-Pacific Region – The Record*, in Julien Chaisse, Tomoko Ishikawa, Sufian Jusoh (eds), *Asia's Changing International Investment Regime*, 234 (Springer, 2017), who underlines that "*The remaining 10 % of the cases were either discontinued for reasons other than settlement (8% of the cases) or a treaty breach was found but no monetary compensation was awarded to the investor (2% of the cases)*". See furthermore, European Commission, *Investor-to-State Dispute Settlement (ISDS). Some Facts and Figures*, 12 March 2015, p. 6 ff., available at <https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf>.

[73] See for further information, Julien Fouret, Rémy Gerbay, Gloria M. Alvarez (eds), *The ICSID Convention, Regulations and Rules. A Practical Commentary* (Cheltenham: Edward Elgar Publishing, 2019).

Besides, international arbitral tribunals governed by different rules or institutions, such as the International Chamber of Commerce, the London Court of International Arbitration, the Hong Kong International Arbitration Centre, or the UNCITRAL Arbitration Rules, are often involved in this field.

4.2. Towards the Extension of Mediation to Investment-State Disputes

The issue to be addressed is, therefore, to evaluate whether or not mediation – usually applicable in the context of international commercial disputes – could also apply to investment disputes, and in particular to ISDS.

The issue was first debated in the context of international investment arbitration, and especially in the "Guide on Investment Mediation" (referred to as the Guide), and the training activity organized by the ICSID.[74] Indeed, in July 2016, the "Energy Charter Conference" adopted the Guide whose purpose was to encourage States and investors to consider mediation for investor-State disputes. By going through the differences that exist between mediation rules and conciliation rules, the Guide covers several matters including, *inter alia*, the possible structure of mediation, the rules applicable to mediation process, and the enforceability of the resulting settlement agreement. Furthermore, in June 2017, ICSID held a particular training course for mediators tailored to investor-State disputes. In general terms, it could be easily argued that international arbitration has been preferred over international mediation, and this effect may derive mainly from the wide adoption of the New York Convention as a clear and stable framework for the recognition and enforcement of arbitral agreements and awards.

Indeed, historically, mediation has not been widely spread in the resolution of international investment disputes, probably because once the agreement was reached through mediation, there was the risk of legal action before a national court or through arbitration in order to enforce the agreement.

Therefore, it could be argued that the limited popularity of mediation in international investment disputes rests on the lack of enforceability of the settlement agreement. Indeed, although the reason behind this limited popularity is in reality quite difficult to grasp, it should be noted that the situation was identical in international arbitration before the full ratification of the New York Convention – whereby the issue of the enforceability of the awards has been resolved.[75] Thus, is the success of

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[74] Henry Abramson, *Introduction* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions*, cit., 1001, who affirms that the Singapore Convention "*[...] is the product of a complex negotiation involving diverse parties from around the world. Parties brought to the room varied professional, cultural, and political perspectives and experiences. The result reflects "compromises", a word with mixed and not always positive meanings [...]. Compromise is often understood as an anemic conclusion to a quarrel, where the parties exhaustedly offer to "split the difference*".

[75] Corinne Montineri, *The United Nations Commission on International Trade Law (UNICITRAL) and the Significance of the Singapore Convention on Mediation* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions*, cit., 1028.

arbitration for State investment disputes connected to the New York Convention? And if so, is it possible to extend the same assumption to the Singapore Convention and the international commercial mediation?

If the described perspective is correct, the ratification of the Singapore Convention should operate as a tool to facilitate the use of mediation in both commercial and investment disputes, particularly in the field of the investor-State ones, operating as a mean that could be used not in alternative but in combination with other tools of alternative dispute resolution, as considered earlier (see *supra*, paragraphs 46-47). Furthermore, the Convention and the Model Law could help to modify the domestic laws of the Contracting States mainly about the breach of contract claims and settlement agreements, and in so doing, contribute to increase the predictability, also at an internal level, for foreign commercial parties.

As it will be better specified in the following (see *infra*, paragraphs 105-115), it can also be noticed that a solution similar to the one following the adoption of the Singapore Convention could be the one related to the enforcement and recognition of court judgments that result from domestic litigation. In this respect, the Hague Conference on Private International Law has taken substantial steps to enact an international Convention to provide a framework under which parties will be required to recognize and enforce judgments rendered by a foreign court. The final draft of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (referred to as the Hague Judgments Convention) was completed, indeed, 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.[76] The diplomatic session that adopted the Hague Judgments Convention took place on 2 July 2019, and the Hague Judgments Convention open for signature.

On the same ground, it is possible to assume that facilitating the use of international mediation through a uniform enforcement process relative to settlement agreements could lead the Singapore Convention and the Model Law to place mediation on the same level of arbitration and litigation as a way for international dispute resolution. A relevant contribution in the recognition of mediation at a global scale could be facilitated since mediation, as it has considered earlier (see *supra*, paragraph 42), is often less expensive and faster than arbitration. Moreover, it is generally oriented in preserving the business relationship between the parties who may prefer to mediate their disputes once they have the guarantee that their settlement agreements can be enforced quickly.

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[76] *A New Legal Framework for the Enforcement of Settlement Agreements Reached through International Mediation: UNCITRAL Concludes Negotiations on Convention and Draft Model Law* (*intlaw*, 2018), available at <https://english.dipublico.org/109052/a-new-legal-framework-for-the-enforcement-of-settlement-agreements-reached-through-international-mediation-uncitral-concludes-negotiations-on-convention-and-draft-model-law/>.

4.3. *Towards the Extension of the Singapore Convention's Scope to Investor-State Dispute Settlement (ISDS)*

Despite the repeated references to "commercial relations" in the UN General Assembly Resolution, to "commercial disputes" "commercial practice" "commercial relationship" and "commercial parties" in the Preamble to the Convention, and to "commercial dispute" in Article 1 of the Convention itself, the word "commercial" is nowhere defined in the Singapore Convention.[77] Neither was it defined in the 2002 Conciliation Model Law. However, the Convention, instead of embracing a broad interpretation of the word "commercial", as reflected by the 2002 Conciliation Model Law, aims at ensuring a narrow scope of this concept. Nevertheless, rather than reaching this goal with a definition or examples, the Convention explicitly excludes from its scope settlement agreements on specific subjects, such as consumer transactions and matters of family, inheritance, or employment law [Article 1(2)].[78] In this regard, it must be noted that the revision of the Model Law integrates the footnote present in the Conciliation Model Law with expansive illustrations of commercial activities.[79] [Mediation Model Law, art. 16(2)].

Indeed, according to Article 1, the Singapore Convention will apply to all international agreements resulting from mediation and concluded in writing by parties to

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[77] Ellen E. Deason, *What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions*, cit., 1149 ff., who, after having noted that prior to the deliberations that led to the Singapore Convention and the Mediation Model Law, UNCITRAL adopted the Model Law on International Commercial Conciliation (Conciliation Model Law) in 2002, whose main purpose was to provide legal mechanisms to protect the confidentiality of the process, affirms that the latter following the example of the previously prepared Model on International Commercial Arbitration (Arbitration Model Law) has explained the concept "commercial", but through a footnote and not a specific Article. Therefore, footnote of Article 1 (*Scope of application and definition*, "*This law applies to international commercial conciliation*"), which contains an open-ended list of illustrations to convey the types of relationship that constitute *commercial* transaction, provides that "*The term commercial should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationship of commercial nature include, but are not limited to, the following transaction: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; financing; construction of works, consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road*".

[78] Ellen E. Deason, *What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions*, cit., 1154, where we quote "*Perhaps the most crucial consideration [...] was that consumer, employment, family, and probate disputes can involve parties with unequal bargaining power and less sophistication with legal proceedings. Thus, there was a danger that a broad scope for the concept commercial would create barriers to consensus on an efficient procedure and make the instrument less attractive to States considering its ratification*".

[79] Ellen E. Deason, *What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation* in *Singapore Mediation Convention Reference Book. Part III. In-Depth Consideration of Key Provisions*, cit., 1157.

resolve commercial disputes, not specifying whether such agreements grant pecuniary or non-pecuniary measures. On the other hand, according to the Model Law – which was developed simultaneously along with the Singapore Convention and is relevant to understand whether the drafters of the Convention contemplated investor-State disputes or not – the first footnote states that the term "commercial" should be given a broad interpretation and should cover all disputes arising out of both contractual or non-contractual commercial relationships. It also states that commercial relationships include "investment" transactions. Furthermore, the Working Group II's suggestion to limit the scope of the Singapore Convention to "commercial agreements between businesses only" was not accepted by the delegates.[80] The Working Group II also referred to Annex E of the ICSID (Additional Facility) Mediation Rules, which confirms that the Singapore Convention may apply to settlements reached in the context of investor-State disputes. It concluded that there could be "agreement to disagree", and there is "room for interpretation" on the question of whether the Singapore Convention covers investor-State disputes.

Therefore, is it possible to use mediation, in general, and the Singapore Convention, in particular, in investor-State disputes? If we argue otherwise, it would not have been necessary to include Article 8.1(a) in the Convention that states: "1. A Party to the Convention may declare that: (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration [...]".

In light of Article 8.1(a) of the Convention, it is noteworthy that the fact a government is allowed to exclude itself or its agencies from the application of the Convention when it is the party of a contractual relationship with an investor, reproduces, *albeit* in a somewhat different setting, the same rule as adopted by the drafters of the Hague Judgments Convention.[81] However, at the same time, Article 8.1(a) represents

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[80] Surya Kapoor, *Singapore Convention Series: How Does The Singapore Mediation Convention Affect International Dispute Resolution?* (ISDS Perspective, Kluwer Mediation Blog), available at <http://mediationblog.kluwerarbitration.com/2019/11/15/singapore-convention-series-how-does-the-singapore-mediation-convention-affect-international-dispute-resolution-isds-perspective/> (last visited 28 February 2020).

[81] According to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019, 1144 U.N.T.S. 249, "1. *A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party-(a) that State, or a natural person acting for that State; or (b) a government agency of that State, or a natural person acting for such a government agency. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin. 2. Recognition or enforcement of a judgment given by a court of a State that made a c declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration*". See J. Landbrecht, *Commercial Arbitration in the Era of the Singapore Convention and the Hague Court Conventions* 37 ASA Bulletin 871 ff (2019).

an exception to the legal framework of the New York Convention in which such exclusion is not provided for.[82]

In any case, and as already highlighted above, the hope is that the Singapore Convention, regardless of some exceptions to its direct application to some cases, will make mediation more appealing through specific and harmonized rules whose target is to make enforcement of what could be described as "international mediated settlement agreements (IMSAs)"[83] easier and faster to obtain. The reasons behind the reservation of Article 8.1(a) were various, although the prominent factor was that in some jurisdictions, government entities are not allowed to conclude mediated settlements.[84] Moreover, governments might become involved in disputes where the subject matter is particularly sensitive (*i.e.* national security), or with foreign policy implications.[85]

Even if these dilemmas are partially resolved by making an explicit reference to sovereign immunity in the context of enforcement of awards that result from investor-State dispute arbitration,[86] it is possible that the drafters of the Convention felt that providing some flexibility in the adoption of its regime could be probably better than excluding these matters entirely from the scope of the Convention. For some States, the solution adopted could be considered as an essential aspect in deciding whether to join the Convention or not.[87] Indeed, addressing the issue through a reservation appeared to be preferable to a blunt exclusion of government-related mediated settlements, but notwithstanding the concerns noted above, some government entities which engaged in commercial activities may still wish to resort to the Singapore Convention to enforce settlements reached through mediation.[88] Therefore, Article 8.1(a) fine-tunes the balance between these competing concerns by encouraging States wishing to make a reservation to limit the Convention's application to subject matters that are strictly necessary.[89]

Further proof of this flexibility derives from the way in which the Convention's regime could be practically adopted, considering the Contracting States, for instance,

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[82] Robert Morgan, *The Singapore Convention on Mediation: A Commentary* 22 Asian Dispute Review 41 (2020).

[83] Elisabetta Silvestri, *The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation* 3 Access to Justice in Eastern Europe 5 (2019).

[84] UNCITRAL Rep. of Working Group II (Arbitration and Conciliation) on the work of its 63rd Sess. (7-11 September 2015), 49th Sess., A/CN.9/861, para. 44 (2015).

[85] Itai Apter, Coral Henig Muchnik, *Reservations in the Singapore Convention – Helping to Make "The New York Dream" Come True* in *Singapore Mediation Convention Reference Book. Part III. In Depth Consideration of Key Provisions*, cit., 1273.

[86] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 54-55 (the ICSID Convention), Oct. 14, 1966, 575 U.N.T.S. 159.

[87] As an illustration, two countries signed the Convention while expressing upon signature reservation as to the application of its Article 8.1(a): the Republic of Belarus and the Islamic Republic of Iran.

[88] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, cit., 43.

[89] Itai Apter, Coral Henig Muchnik, *Reservations in the Singapore Convention – Helping to Make "The New York Dream" Come True* in *Singapore Mediation Convention Reference Book. Part III. In Depth Consideration of Key Provisions*, cit., 1274.

could be allowed to declare whether any reformed dispute resolution mechanism provides an additional choice (supplementing existing investor-State provisions in their investment treaties) or an exclusive choice (entirely replacing such provisions).[90]

Simultaneously, Article 8.1(a)'s reservation could operate as a deterrent for private parties to mediate an international settlement agreement with States, generating a negative impact on the spread of the use of mediation in the international context insofar as States today operate as relevant actors in the global commercial community both in contractual and investment contexts.

As a result, the actual regime stimulates the concern that some States will be required to choose between rejecting the Singapore Convention or accepting it in order to support the use of settlements reached by mediation in international disputes and, as an effect, exposing themselves to expedited enforcement procedures. It is difficult to understand what choices States will make, even in the presence of States that envisage the use of mediation as a valuable alternative to courts or international arbitration. Despite its limiting effect, Article 8.1(a)'s reservation may be fundamental in promoting wider participation of States in the Convention and, as a consequence, users will benefit from the Convention as they seek legal status and a global enforcement of their international settlements resulting from mediation. A specialized doctrine has pointed out that various States, including the European Union and Canada, have raised concerns with ISDS, including the high cost and time, the lack of consistency and predictability in arbitral awards and potential bias in arbitral appointments.

The consequences of these concerns have led the UNCITRAL Working Group III – Investor-State Dispute Settlement Reform (referred to as Working Group III) to propose the development of a broad directive to reform the ISDS, and the relative discussion has continued to advance, also during the third phase of the Working Group III' negotiations (October 2019).

Some States have advocated for systemic reform, which includes the possible creation of a permanent multilateral court to adjudicate investor-State disputes [*see* European Commission, Trade Policy Committee (Services and Investment), Working Group III, at 1, WK 3675/2018 INIT (Mar. 26, 2018)]. Still, this solution is debatable, and above all, this reform will not materialize overnight, others have argued for incremental reform, which may not go far enough.

International mediation could emerge as a mechanism to overcome some frustrations associated with both commercial and investment arbitrations, which could be complementary to the current Working Group III' negotiations irrespective of the approach ultimately adopted by the body. It is possible to assume this idea because, in general, the Singapore Convention potentially extends to investor-State disputes so long as they relate to a commercial matter.

At a practical level, it is undoubtful that the promotion of the Singapore Convention and, more generally of mediation may stimulate parties to use better the cooling-off periods provided for under many investment treaties. Indeed, claimants often do

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[90] United Nations Commission on International Trade Law Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS) Multilateral Instrument on ISDS Reform*, 5 (New York, 2020).

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 a settlement. Attempting to bypass the amicable negotiation period could serve as a missed opportunity in many cases. Therefore, an extensive application of international mediation in these areas as well could lead to an improvement in this kind of dispute.

At a broader level, the framework for mediation of investor-State arbitration already exists, although it is not such a comprehensive enforcement mechanism so far. Therefore, the International Bar Association Investor-State Mediation Rules has already built a legal framework to regulate mediation in the investor-State disputes' context, offering a helpful starting point for parties interested in pursuing mediation in this field. Not to mention the fact that the conciliation processes provided for under the ICSID[91] and UNCITRAL, although the first one has proposed some rule amendments that would create a separate set of mediation rules.[92]

Moreover, it is worth to underline that an enforcement mechanism (the lack of which was the concern in the commercial context) also exists under specific rules. Indeed, if the parties reach an amicable settlement through mediation, they may request that the tribunal incorporates the reached solution into a consent award under ICSID Arbitration Rule 43(2).[93] Nevertheless, in this case, we face a procedure that 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 formed 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 jurisdiction.[94]

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[91] More to the point, the International Centre for Settlement of Investment Disputes ("ICSID") is an evident example of an institution that recognizes both mediation and conciliation operating a distinction between them. The ICSID Rules of Procedure for Conciliation Proceedings indicate conciliators' functions whose tasks include clarifying the disputed issues, and in so doing, they are instructed to hear both parties and to try to obtain any information that may further this goal. The promotion of an agreement between the parties legitimate the conciliators to make recommendations to the parties that may include specific terms for settlement or requests that during the conciliation the parties refrain from specific acts, which could aggravate the dispute, and conciliators operate to point out to the parties the arguments in favor of their recommendation. See ICSID Convention, *Regulations, and Rules*, Part E, R. 22, available at <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/basic-en.htm> (last visited 8 March 2020).

[92] If the amendments are approved as currently drafted, the mediation rules will describe the mediator's role as simply direct to assist the parties "*in reaching a mutually acceptable resolution*" of their dispute. Furthermore, they will specify that the mediator does not have authority to impose a settlement and shall treat the parties in an equitable way.

[93] ICSID Arbitration Rule 43(2) provides that "*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*".

[94] See e.g., *Castro v. Tri Marine Fish Co. LLC*, 921 F.3d 766, 772-76 (9th. Cir. 2019) finding that a settlement agreement that was reached by parties, who then composed a tribunal to convert the

Furthermore, mediation is already being encouraged in investor-State disputes, and the Comprehensive Economic and Trade Agreement, which came into force in 2017, represents an example of this trend as it expressly provides for mediation of investor-State disputes (Article 8.20).

Indeed, as a matter of fact, 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.[95] The dispute was filed under the France-Philippines bilateral investment treaty. It appeared to have been the first time in which an investor and a host-State used the International Bar Association Rules to solve an investment dispute.[96]

Lastly, and probably most significantly, although not expressly stated in the Singapore Convention, the latter 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. This inapplicability to the settlement agreements that contain exclusive jurisdiction clauses may determine a limitation to the Singapore Convention's use in practice.

Therefore, if the legal counsels negotiating and concluding settlements on behalf of their clients would and should advise them 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, the insertion of such an arbitration clause would mean that most settlement agreements would fall outside the scope of the Singapore Convention in favor of the New York Convention. That is unless counsel inserted carefully drafted clauses providing for the Singapore Convention's application in certain circumstances in such way 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 Contracting State to the Singapore Convention. Careful attention will have to be paid to drafting such clauses – as well as how domestic courts interpret them – to benefit from the Singapore Convention.

In light of the above, and irrespective of whether the Singapore Convention will be used in practice according to its inapplicability to settlement agreements that, besides certain subjects such as consumer transactions and matters of family, inheritance or employment law [Article 1(2)], contain agreements to arbitrate or exclusive jurisdictional clause, its benefits are undoubtably in investor-State disputes also operating in this specific area as a "game-changer" in international dispute resolution.[97]

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settlement agreement into an arbitral award, did not "transform" the agreement into an arbitral award that could be enforced under the New York Convention.

[95] Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?* 37 Berkeley Journal of International Law 223 (2019).

[96] Christina G. Hioureas, cit., 223.

[97] Robert Morgan, *The Singapore Convention on Mediation: A Commentary*, cit., 41.

For instance, as shown by the few ICSID conciliation proceedings held so far, mediation could reduce costs in searching the backgrounds of arbitrators and negotiating with the other side to reach an agreement on the chairperson, because the selection of only one mediator is needed and the role of the mediator is not to opine on the law or the merits of the dispute.[98] In this regard, a not secondary relevance in the success of the Singapore Convention in ISDS should also be attributed to the provisions related to disclosure (art. 5.1(f) of the Singapore Convention) and its consequences in terms of facilitating the definition of the controversies.[99]

To sum up, Singapore Convention, which operates with mediation in the same way in which the Convention of New York operates with arbitration, could be considered as a useful tool to spread the use of mediation in all types of commercial disputes, including the particular hypothesis of the investor-State dispute settlement. Indeed, there are not restrictions that can be invoked to impede this extension, and Article 8.1(a) should be considered as a way to give more flexibility to the States. This flexibility, indeed, would encourage them to sign and ratify the Convention and become potential parties of disputes that can be settled *via* mediation and, consequently, governed by a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement.[100]

5. Conclusion

5.1. The Singapore Convention Will Alter the Landscape of Dispute Resolution in the Forthcoming Years

Whereas the elaboration of a Convention on mediation in such a short period of time (2015-2019) appeared dubious and implausible in the beginning, the converging wills of the Contracting States proved the contrary. Thus, today, five years after the inception of the project, the Singapore Convention came to light and entered into force as of 12 September 2020.

More precisely, the Singapore Convention, signed already by 53 states and ratified by 6 (Belarus, Ecuador, Fiji Islands, Qatar, Saudi Arabia and Singapore,) can be seen as the missing piece of the international dispute resolution jigsaw.

It is undoubtable that in the upcoming years, the Convention will radically alter the landscape of alternative dispute resolution and promote mediation in cross-border transactions and disputes. Ultimately, the Singapore Convention may serve as the rule

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[98] Christina G. Hiourcas, cit, 224.

[99] Ana Maria M. Goncalves, François Bogacz, Daniel Rainey, *Beyond the Singapore Convention: The Importance of Creating a Code of Disclosure to Make International Commercial Mediation Mainstream* 6 International Journ. of Online Dispute Resolution 164 ff. (2019).

[100] United Nations Commission on International Trade Law, *United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018) *(the «Singapore Convention on Mediation»)*, 2019, available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements>.

of law to incentivize the uniformity of domestic legislation on contractual interpretation. Landscapes of alternative dispute resolution however differ whether European cross-border or international cross-border transactions are concerned.

As a reminder, Europe took in 2018 an important step towards supporting cross-border mediation and the recognition and enforcement of cross-border mediated settlement agreements.[101] As a consequence, where the EU Directive in Civil and Commercial Matters applies (parties located in the EU), cross-border agreements resulting from mediation are enforceable by a type of order called a "mediation settlement enforcement order" should both parties so request.[102] On the other hand, where the EU Directive in Civil and Commercial Matters does not apply (e.g. mediations between parties outside the EU, or with one or more party outside the EU), settlement agreements resulting from mediation will be enforceable such as mere contracts in the countries that have not signed and ratified the Singapore Convention.

Indeed, the international conventions (not mentioning the European context) in force before the signing of the Singapore Convention were dedicated to either litigation (the Hague Convention on the Choice of Court Agreement and the Hague Judgments) or arbitration (the New York Convention), but not to mediation.

5.2. Interactions between Mediation and Arbitration

With the signing of the Singapore Convention, we may now face two scenarios:

- either a litigation or an arbitration has already been initiated before the competent authority, and settlement agreements resulting from mediation may be recorded as part of those proceedings and potentially be enforced in trial as a judgment or in arbitration as an award by consent, or
- neither litigation nor arbitration has been initiated, and the Singapore Convention will complete the Hague Convention on Choice of Court Agreements and the New York Convention.

The Singapore Convention will positively alter the current legal practices, especially in the construction and shipping industries. The complexity of these two areas and the technical issues that may arise therefrom make mediation the most appropriate means of resolution of such cross-border disputes, the Singapore Convention being the decisive tool of facilitating the enforcement of the agreements reached throughout the process. In that context, the geographical and economic regions which may mainly benefit from the Singapore Convention are the Asia-Pacific region, the regions affected by the Belt and Road Initiative and Europe facing Brexit. All these

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[101] These include mechanisms related to the 2008 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (referred to ask the EU Directive in Civil and Commercial Matters), the Rome I Regulation and the Brussels Regulation.

[102] The practical way to deal with cross-border settlement agreements is, for example, by way of inserting in the mediation settlement agreement an enforceability clause either by court approval (*homologation*) or certification by a public notary.

above-mentioned regions face a multifaceted and fluctuating reality and are called to deal with cross-border conflicts requiring a solid and comprehensive enforcement mechanism.

As it has been pointed out in this paper, further benefits of the Singapore Convention on mediation may be examined *vis-à-vis* international arbitration. In fact, mediation offers all the advantages of arbitration and, in addition, it has the benefit of being more time and cost efficient alongside with being a non-adversarial process, which helps safeguarding good business relations in view of future collaboration.[103]

In this context, considering that the Singapore Convention offers a mechanism for enforcement, it can be argued that 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. Hence, under these circumstances, arbitration might not remain the most privileged dispute resolution mechanism in the international landscape.

However, it has been demonstrated that while at first glance international mediation and arbitration seem incompatible, their combination is not only an increasingly popular practice but a smart way to benefit from the advantages of both methods. Thus, even where mediation does not replace arbitration, it can still supplement arbitral processes by refining the issues to be addressed in the arbitral proceeding. One can note that the Singapore Convention has been added in the United Nations Treaty Collection as the 4th instrument available in the Chapter XXII, the title of which is "*Commercial Arbitration and Mediation*".[104]

As regards the *ratione materiae* of the Convention, its extension to investor-State disputes could increase the diffusion and appeal of international mediation at a global level as a general tool of alternative dispute resolution. In parallel, it would be able to operate as a real complementary or alternative instrument also in the field of international investment arbitration. Such extension is likely to increase legal security and predictability with regard to foreign commercial parties and thus, establish a uniform legal regime in that respect.

The question remains whether the Singapore Convention will be as successful as the New York Convention. Facts show that the odds are in favour of such success insofar as 46 States have signed it once it opened for signature on 7 August 2019, in comparison to the 10 States that have signed the New York Convention when it was enacted on 10 June 1958.

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[103] Christina G. Hiourcas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward* 37 Berkeley Journal of International Law 224 (2019).

[104] See for further details, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>; The 3 other instruments inserted in Chapter XXII are the New-York Convention, the European Convention on International Commercial Arbitration (Geneva) of 21 April 1961 and the United Nations Convention on Transparency in Treaty-based Investor state Arbitration (New-York) of 10 December 2014.

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Contents

VOL. 32, ISSUE 4
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EUROPEAN BUSINESS LAW REVIEW

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