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Singapore Mediation Convention: A Concomitant to Alternate Dispute Resolution?

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I. INTRODUCTION

The shaping of multilateralism in the recent times has taken a sharp term towards nationalistic approaches and corroding of international cooperation, so much so that multilateralism is considered to be dead[2] and the same seems to be aggravated in the times of the global pandemic. However, to encourage the adoption of mutual benefits the United Nations General Assembly finalized the text of a multilateral treaty, alongside an amended model law.[3] The treaty, namely- United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "The Singapore Convention," hence provides for the ability to the parties to enforce and resort to international mediated settlement agreements for the solving of disputes related to commercial transaction.

The Singapore Convention finds inspiration from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter referred to as the "New York Convention"[4] and aims to mediate settled agreements in the same nature of the New York Convention with regards to arbitral awards. It is hence indisputable that the Convention recognizes that in the case of a mediated process the agreement settled to previously is not merely a contract and consequently needs to be recognized and enforced or invoked within its own requirements, taking into account the requirements of the Singapore Convention.[5] The Convention in its very preamble acknowledges appropriately the benefits of mediating as a form of an alternate dispute resolution mechanism. It therefore assures to offer a cost efficient and time effectual dispute resolution for both commercial parties as well as the States, allowing them to shape their narrative of dispute resolution as per their own requirements and needs. It hence not only enables a viable and amicable safeguard mechanism, but also

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[2] UNITED NATIONS SECURITY COUNCIL, Rising Nationalism Threatens Multilateralism's 70-Year 'Proven Track Record' of Saving Lives, Preventing Wars, Secretary-General, U.N. Meetings Coverage, SC/13570 (Nov. 9, 2018)

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

[4] CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (June 10, 1958)

[5] UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session ,U.N. Doc. A/CN.9/ 896 (Sept. 30, 2016)

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accredits preservation of commercial relationships and hence a growing economy.

II. SCOPE OF THE CONVENTION

Essentially, the Singapore Convention is applicable to four kinds of agreements- international, commercial, settlement agreements and those resulting from mediation.[6]

It is pertinent to note that an international settlement agreement is analyzed with respect to the locations of the parties of the agreement.[7] The Convention however does not pertain to consumer disputes or family, inheritance or employment laws.[8] Contrary to the Model Law, the Convention does not deal with the agreements to mediate mainly because of the fact that such agreements by their nature are not exclusive (unlike the arbitration agreement[9]) and conclusion for such an argument may always form the basis for the mediation process by the disputing parties.[10]

Furthermore, the Singapore Convention is not applicable to all the settlement agreements. This is done so to avoid multiplicity of legislations and overlaps with Conventions applicable to arbitral awards and judgments, such as Convention on Choice of Court Agreements.[11] Interestingly so, it also takes into consideration Conventions likely to be implemented in the future, such as the anticipated judgments convention being negotiated at the Hague Conference or New York Convention. Its scope is further restrained in case the settlement agreement is approved by a court of law or has been concluded in the course of proceedings and its enforceability is a form of Court judgment. Its jurisdiction also becomes moot wherein the settlement agreement is recorded and hence enforceable as an arbitral award.[12]

Article 1 of the Convention discusses the scope of the Convention and narrows down its applicability. Article 1.1 states and demarcates the application to disputes which are international, decided upon by the location of the business of the party wherein a "substantial part of the obligations under the agreement are performed," or wherein the matter of the subject is "mostly closely connected." Additionally, Article 1.2 and Article 1.3 encroach further on the scope of Convention by putting the specifications of the settlement agreements and disputes beyond the purview of the Convention. Article 1.2 distinctively lays down that consumer transactions or transactions in relation to family, inheritance and employment law

[6] SINGAPORE CONVENTION ON MEDIATION, art. 1(1).
[7] SINGAPORE CONVENTION ON MEDIATION, art. 1(1)
[8] SINGAPORE CONVENTION ON MEDIATION, art. 1(2).
[9] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session, U.N. Doc. A/CN.9/832, at 7 (Feb. 11, 2015)
[10] UNCITRAL, Report on Working Group II (2017)
[11] CONVENTION ON CHOICE OF COURT AGREEMENTS (June 30, 2005
[12] SINGAPORE CONVENTION ON MEDIATION, art. 1(3).

are beyond the scope of this Convention and Article 1.3. attempts to circumvent overlap with regimes already in place applicable to settlement agreement as discussed above. As per the discussions during the formation of Convention, it was noted that certain delegations were insistent on avoid duplication of regimes (especially with the Hague Conference instrument) whereas others were in favour of providing the states with multiple forums for resolving disputes under different instruments as the main concern was to limit gaps left by other instruments imposing ceilings and not the floors. Subsequently, the Working Group was able to reach a consensus on providing restriction to the scope in case of settlement agreements enforceable as either State Court judgments or arbitral awards.[13]

It is relevant to further understand and define the terms "commercial" and mediation' to comprehend the application of the new United Nations Convention on International Agreements Resulting from Mediation. The Convention and its supplementary instrument-Mediation Model Law 2 or the revised United Nations Commission on International Trade Law ("UNCITRAL"), provides for an elaborate process to enforce international settlements pertaining to commercial disputes reached in the mediation. The objective of the same is to encourage the further evolution of the usage and adoption of mediation for resolving cross-border disputes as an efficient process and hence consequently improve easy of doing business, business relationships and global economies. Essentially, the Convention conceives a legally backed up framework highlighting the pertinence of mediation internationally and provides a dedicated mechanism that is reliable and can be enforced readily.[14]

Further, the terminology "mediation" is operationalized with the intention of understanding it in the same context as the term "conciliation" referred to in the text of UNCITRAL's previous legislation on conciliation. It is interesting to note that during the course of discussions, it was expressed that the UNCITRAL work in this area should refer to "mediation" instead of "conciliation", the rationale being the wider usage of the term mediation in comparison to conciliation. However, it was recognized that the usage of the terms in the UNCITRAL texts has to be witnessed in a historical use of the terms. Hence the concern that it would lead to an inadvertent fundamental modification of the meaning, the Supplemental text of the Convention elaborately discusses the historical developments with respect to the terminology and its use in the UNCITRAL texts and hence accentuates that "mediation" is envisioned to jacket a much broader range of activities, specifically as defined

[13] Harold Ambramson, Singapore mediation convention reference book, digital commons (2019)
[14] Ellen E. Deason, Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?, Dispute Resolution Magazine (2015)

within Article 1(3) of the Model Law regardless of the expressions used.[15]

Hence, it can be inferred that the Singapore Convention's description of "mediation" preserves the four core key concepts that were previously unambiguously deliberated in the provisions of the two Conciliation Model law. However, it may be noted that the terminology used by the parties for defining the process is not necessarily definitive.

- Mediation is primarily used as an umbrella view inclusive of the processes undertaken under various names, hence accommodating the variations witnessed in the disparity between regional and national practices.
- In addition to that, the Convention's definition implicitly focuses on the fact that mediation as a process can be undertaken, irrespective of the basis of carrying it out. Its source may stem from anything varying from a contract or a legal obligation, to a court order, or even an impromptu decision of the involved parties. In essence, the basis of mediation is not a prerequisite or hurdle for engagement in the same.
- Further, the purpose of invoking the mediation process is ordinarily and always the settling of a disputed matter.
- Lastly, the disputant parties are assisted in this endeavor by an unbiased third-party which has no authority to decide the outcome.

III. ANALYSIS OF THE CONVENTION

(A) Occurrence of a Mediation

One of the most basic threshold requirements that must be met in order to invoke the enforcement under the Convention is stated under Article 4 which states the requisites of the burden of proof with regards to the fact that the settlement agreement was a result of the mediation. During the debates of the formation of the Convention, a concern was expressed that a misuse of the Convention might be done if the parties tried to enforce an agreement that is claimed to be reached at through mediation when in actuality it was not a result of a "real mediation" in its true sense. Essentially, there are broadly two takeaways from this provision- firstly, that the parties would have to ensure that the documentation of the settlement agreement in duly signed (either in person or digitally) and secondly, the parties would be required to show the Court of law a piece of evidence that would corroborate the actual happening of the mediation. Since the thresholds are suboptimal and can be fulfilled in

[15] UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (October 2–6, 2017)

multiple ways, it is anticipated that such a requirement would merely legitimize the process and rarely be an issue.

Fundamentally, it is humble document with an ingenuous premise. Parties reaching an agreement at mediation should be abiding by their commitments and rationally so expect that a failure in that regard would lead to the other party's ability to enforce those commitments. At the outset of practicality, persons mediating international disputes are either aware about the procedural requirements for the enforcement under the Singapore Convention or they are unaware of the provisions or are aware and forget to adhere to the procedural requirements of the Convention. The Parties that attain agreement in the process of mediation, needless to say assume that both the sides are willing to fulfill their mutually reached obligations and consequently the agreement is and in the future would be enforceable. Hence the interpretation of the provisions of the Convention or whenever the countries consider whether they should avail the provisions of opt-in[16] (discussed subsequently), the spirit and the foremost objective behind the process must be remembered- that is, enforcing of the agreements. The Courts must interpret agreements in favour of bona fide parties who merely want to follow through with respect to their settlements and not those who merely aim to renege. The purpose of the Convention is to address enforcement for parties wanting to do the same and not assist mala-fide intention of parties circumventing their commitments.

(B) Cross Border Mechanism

It is pertinent to note that in the world of using mediation to resolve disputes, one of the major obstacle faced by the parties prior (hence adding hesitation) and post disputes is the lackadaisical nature of cross-border mechanisms for legislation on international mediation settlement agreement.[17] Even highlighter in the New York Convention as "one of the very big problems for mediation",[18] An IMI survey further corroborates on the same. Conducted in 2014, the survey found that about 92.9% of the survey takers would either be much more likely or probably more likely to mediate with a party against a dispute from another country, provided the country of the other party had ratified the United Nations Convention on the Enforcement of Mediated Settlements.[19] With regards to the abovementioned

[16] SINGAPORE CONVENTION ON MEDIATION, art. 8.
[17] Lucy Reed, Ultima Thule: Prospects for International Commercial Mediation, Keynote Address at the Inaugural Schiefelbein Global Dispute Resolution Conference (Jan. 18, 2019), video available online at https://www.indisputably.org/?p=13752
[18] Carrie Menkel-Meadow, Mediation 3.0: Merging the Old and the New, ASIAN J. ON MEDIATION (2018).
[19] International Mediation Institute, IMI survey results overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements (2014) available at : https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements

backdrop, the Singapore Convention by tendering to a cross-border mechanism to give to a legal sanction to the internationally mediated settlement agreements not only emphasizes and legitimizes the substantive importance of resorting to mediation as a dispute redressal mechanism but also eliminates an extremely significant barrier towards the usage of mediation.[20] It was in fact stated that the model provisions of the legislation would support States that are willing to undertake the domestic implementation of an enforcement process and the Convention would be readily available for the States enthusiastic to join an international treaty.

(C) A Consensus Product

A fundamental or rather phenomenal feature about the Singapore Convention is that it is responsive to the diverse legal traditions and realities that are ingrained in the practice of mediation and relevant to enforcing the mediated settlement agreements. It is hence a product of multilateral consensus and is essentially in the form of a treaty with simple, easy to use and accommodate requirements with inherent flexibilities, living upto the actual gist of the very concept of mediation.[21]

To elaborate on the above, the three aspects of the Convention (amongst others) illustrating these features are discussed below:

(i) Definition of "mediation"- The very definition of mediation is encompassed in a broad manner under the Convention. It is hence used to refer to instances wherein the disputing parties are aspiring to reach an amicable settlement by utilizing the assistance of an unbiased third party who does not come from an authoritative stance to impose a decision or solution at the time of mediation.[22]

(ii) With regards to the form requirements for the purpose of evidence of a settlement agreement actually taking place that resulted from the process of mediation, these requirements have been tailored for the purpose of accommodating internationally practiced process of mediation, without unnecessarily being overly prescriptive. [23]

(iii) The grounds for refusal- The grounds prescribed for a Court of law with regards to refusing the enforcement or recognition of a mediated settlement agreement have

[20] Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, 19 Pepp. Disp. Resol. L.J. 1, 35–42 (2019)
[21] *Supra 14*
[22] SINGAPORE CONVENTION ON MEDIATION, art. 2(3)
[23] *Supra 14*

> been restricted to the laid down requisites in the Convention and yet again, have been tailored to be in accordance with the practice off mediation.[24]

Thus, it can be duly inferred that determined efforts have been undertaken to acclimatize various and differing legal traditions. In addition to that, the supplemental Model Law also attempts to accommodate the varying levels of experience with the process of mediation in different jurisdictions. The actual utilization of the Convention undoubtedly still remains to be the main determinant for analyzing the utility rate of the convention, however, the Singapore Convention has already successfully set a precedent in favour of a perspective shift towards democratization and a rules-based mechanism.

(D) Enforcement of a Settlement Agreement

The Singapore Convention explicitly excludes the settlement agreements enforceable as arbitral awards or judgments[25] and deals primarily with contracts. Moreover, the contracts dealt within the Convention specifically pertain to a particular kind of contract, that is, the settlement agreement which can be broadly defined as an agreement which results from the process wherein two parties meet with a mutually selected third party and neutral person who assists them in their process of negotiation. The Singapore Convention however sets forth its own definition of the contract under the settlement agreement itself as "an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute."[26] This definition at the very outset appears to be broader and more inclusive in terms of being independent of the definition provided by the national laws with regards to what constitutes to be a settlement. A notable difference with regards to "national" settlement is that the settlement agreement as defined under the ambit of the Convention defines the aspect of the agreement being "concluded in writing." Hence the requirement clearly distinguishes the settlement from a national one.

Furthermore, a stark comparison can be drawn between Article 5 of the Singapore Convention and Article V of the New York Convention as the former follows the structure of the latter. In the very first paragraph, the grounds that can be considered only if the opposing party is requesting it are elaborately mentioned. Similarly, the second paragraph is devoted to the explanation of the two grounds that are applicable for the competent authority (a court of law in principle) to raise its own motion (ex-officio.) The wording is liberal in implying the exhaustive nature of the grounds for refusal as well as the fact that party contradicting the

[24] SINGAPORE CONVENTION ON MEDIATION, art. 5.
[25] SINGAPORE CONVENTION ON MEDIATION , art 1.3
[26] SINGAPORE CONVENTION ON MEDIATION, art 1.1

enforcement or recognition has to corroborate the evidence or satisfy the burden of proof on the said grounds. It is also explicitly implied that the national courts can out rightly refuse the enforcement of an award but are discernably not obliged to do so.[27]

In addition to that, Article 5 also provides for cases of broader defences against the enforcement of an agreement or its use as evidence in case of proving that the mediation has taken place. A direct consequence of a radical change, the defenses is a resultant of the adoption of Article 3 of the Convention on enforcing settlement agreements. The article provides for the direct enforcement of a settlement agreement without the need for an erstwhile contractual litigation on the basis of merit or any preceding transformation of the settlement agreement into a judgment, an arbitral award or even a notarial act. This is essentially because a settlement agreement is not merely a common contract, but a contract which has the ability to mark the termination of a dispute, much like an arbitral award or perhaps a judgment. Hence this distinctive subject matter of the settlement agreement rationalizes its welfares from an apposite status for its enforcement which is precisely the change envisioned by the Singapore Convention. This transformation could prove to be decisive with respect to fostering and encouraging the use of mediation as a global tool for a useful, time saving alternative to judicial proceedings or arbitration.

(E) Opt-In Provision

An interesting aspect of the Singapore Convention was adopted by the Drafting Group in the form of an automatically applicable opt-out option for a party to the settlement agreement.[28] Although, the Convention overlooks explicitly empowering private opt-outs, the rationale is that the parties to a settlement agreement can mutually approve to eliminate the solicitation of the Convention and hence the clause will be upheld under the ambit of Article 5.1(d) as a defense which would be based on conforming with regards to the terms of the settlement.[29] Nevertheless, Article 8.1(b) sanctions a State which is a party to the Convention to opt-out of the Convention's automatic solicitation in case of a declaration. Interestingly so wherein a State opts-out, the private parties are still given the discretion to opt-in the the terms of the Convention by the way of a private agreement, such as a settlement agreement or the agreement to mediate.

Both the reservations, particularly the reservation of Article 8.1(b), led interpreters to express the understanding that if States do pursue them, it might lead to impairing the efficacy of the

[27] UNCITRAL SECRETARIAT GUIDE
[28] U.N. Doc. A/CN.9/942
[29] U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/ 73/17, at III C.2., para. 68 (2018)

Convention, including discouraging its chief motive to fetch certainty and endorse the practice of mediation globally as a dispute settlement mechanism.[30] The reservation instrument will embolden broader ratification of the Convention (without which essentially the adoption of the Convention becomes moot), the inclusive agenda for reservations provides for additional precautions that sustenance the convenience of the reservation mechanisms for augmented adherence concurrence.[31]

However, apart from the ones contained in Article 8.1, no other reservations are allowed. This kind of provision is not always explicitly encompassed in treaties which reflect the necessity of limiting the tractability of States to amend their obligations of the Singapore Convention in light of the probable complications accompanying with permitting enormous carve-outs. As a relatively exclusive concession to the general international law practice of authorizing reservations only at the time of signing, ratification, or accession to a treaty. Further, the Singapore Convention provides that the reservations acquiesced post the joining of a State as a party will be effective after six months from the date of their deposit[32] and incidentally, the reservation will be applicable to international mediated settlement agreements determined after the Convention is in force.[33] The purpose is to limit the ambiguity exemplified in the reservation mechanism, as well as prevent exploitation of the process by the States possible due to the flexible nature of the reservations, predominantly with regards to Article 8.1(a) wherein the opt-out uncertainties relating to settlement agreements wherein the States are a party. This anti-abuse establishment will also preclude strategic use of the reservation by States to evade the responsibility created by the enforcement of a settlement agreement which they are party to. The complete framework might not be able to address completely the concerns concomitant to the reservation regime under the Singapore Convention. The framework however could go a long way in providing additional maneuvering space for the states while debating their decision to join the Convention, while at the same time providing more inevitability for the parties to an international mediated settlement agreement seeking global compliance.

IV. CONCLUSION AND RECOMMENDATIONS

The Singapore Convention hence essentially creates a regime by which settlement

[30] Timothy Schnabel, Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties, 25 AM. Review International Arbitration. (2019)
[31] Art. 8(3) of the Convention which allows States to not only reserve, but also to withdraw from reservations at any time.
[32] SINGAPORE CONVENTION ON MEDIATION, art 8(3) and (5)
[33] SINGAPORE CONVENTION ON MEDIATION, art 9

agreements are enforced simply as they are, without the need of having them notarized or recognized before a court of law or even otherwise formalized. Hence relief is made accessible as it can be sought directly from the settlement agreement, which acts as paramount attractive feature of the instrument with regards to its prime applicability at the international level. However, the author's inference is that the Convention does have the potential for further simplicity, akin to the mediation practice at the commercial arena of the International field. UNCITRAL appears to have squandered over on the prospect of referring to commercial settlement agreements in general, especially when the scope has been limited to the mediated solutions and unjustifiably discriminated against negotiated settlements. Additionally, the scope was also further narrowed down when it was decided to deal with the settlement agreements that are purely of "international" character and by eliminating certain types of settlement agreements (for instance, those of non-commercial nature or those enforceable as a judgment or an award.) On an elaborative reading of the Convention, certain additional "hidden" grounds can also be witnessed which may resist the process of enforcement which is the primary focus of the Convention. For instance, apart from the narrowness defined in Articles 1 and Article 4, the Convention indirectly offers broad defenses.

However, it cannot be denied that the Singapore Convention offers a massive potential which aims to foster and encourage the use of mediation which in itself is an aspiration shared by the global fraternity. Additionally, despite the few inconveniences discussed above, the Singapore Convention also takes into account the prospective of creating a standardized regime for the enforcement of international settlement agreement for the mediation practitioners which in itself makes the Convention unique.

The potential of Convention can be further realized if a universal and undeviating methodology is applied towards enforcement. For instance, the New York Convention holistically covers that gap to a great extent with regards to arbitration. Although the Singapore Convention aims to bring about a similar gap filling approach for mediated settlement agreement, the same is dependent on its ability to gain reasonable support by States. If that is achieved, it would act as a phenomenal instrument for a universal reference for the parties as well as practitioners would perhaps find it more convenient and be nudged in the direction of using mediation after knowing that the protections offered herein do exist. The possibility of such a reality in itself is a revolution in the world of mediation which would not only provide easier and less time as well as fiscally consuming methods of dispute resolution but would also encourage global interconnectedness and multilateralism which in

today's time is the need of the hour. That in itself provides adequate causes to fully support this instrument.

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