

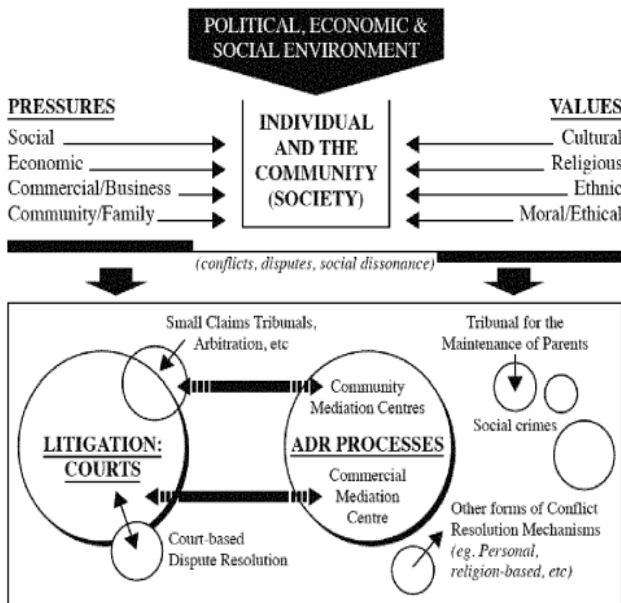


ANALYSIS AND SCOPE OF SINGAPORE MEDIATION CONVENTION

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Evolution

In Singapore the high-level ADR Committee in the mid-1990s gave a report in 1997 laying the foundation for Community mediation Centres (CMCs) and Singapore Mediation Centre (SMC) there. It proposed a model for conflict resolution as given in the diagram below-



Note 1: The 2 large circles represent the 2 main systems of conflict resolution in society that we want to maintain

Note 2: The bold lines show that there are linkages between the 2 systems

Note 3: The smaller circles at top right hand corner portray the existence of social conflicts leading to crimes, which we want to minimise or eradicate, over a period of time.

After the UNCITRAL Commission session of 2014 the UNCITRAL Working Group II (WG II) was formed for examining enforceability of mediation under some kind

of international level instrument in an expedited manner. In 2015 accordingly WG II facilitated preparations for enhancing the international mediated settlements (IMSAs). In New York during the 68th session WG II came to a consensus regarding Convention and Model Law on International Commercial Mediation resolving the following issues-

- In Section VII infra, the Convention chose ‘relief’ rather than ‘recognition and enforcement’. Article 1 and 4 would avoid the term ‘recognition’ and ‘enforcement’ but recognition was functionally described in Article 3 (2). The issue came with using mediated settlement in domestic legal proceedings for defence.
- In Section V (D) (2) infra, enforceable judgements or arbitral awards excluded from scope of the convention for mediated settlements.
- In Section IX infra, although mediated settlements and the Convention would by default be connected but the disputing parties should have affirmatively opted for it via declaration.
- In Section VIII (H) infra, the Convention’s inclusion in Article 5-grounds for refusal where a court can refuse to grant relief due to misconduct of the mediator.
- In Section IV infra, the WG’s contribution for developing the convention and model law simultaneously as a package.

On 25 June 2018, UNCITRAL along with its green signal of the final draft to be submitted to the UN General Assembly, adopted the Model law in its 51st session. On 20th December 2018, the Singapore Convention on Mediation was adopted by UN General Assembly and authorised opening for signatory from 7 August 2019.



Scope

Mediated

Delegations at the Convention considered mediation to be a 'structured process' provided there is a domestic legal framework regulating it like the Model Law. The Working Group (WG) was not satisfied with the idea of structured process and considered the basis and administering institution to be irrelevant. The only requirement should be disputing parties need for amicable settlement with the help of a third party unable to authorise a solution. The WG also considered whether Convention should cover non-mediated settlements but later decided not to. The idea for an independent mediator was dropped to avoid unnecessary litigation (Section VII (H) *infra*).

International

The settlement should have been concluded as international irrespective of whether relevant criteria was met during mediation or when the relief was requested and will depend on identity of disputing parties. A party having more than one place of business will choose the one closest to the dispute at the time of settlement conclusion¹ very similar to the Vienna Convention on Contracts for the International Sale of Goods (CISG)². A party having no place of dispute or mediation seat will consider its habitual residence but it is rare as the Convention is limited to non-consumer, commercial disputes³ and is also indifferent to the Model law where international criterion is not

required to be met⁴. Mediated settlement is made a stateless instrument unless the Convention submits to domestic law requirements that is rules for procedure and grounds for refusal⁵.

Commercial

The WG stated an international mediated settlement should be commercial and pondered on what to or not to include within its description like a list of the Model Law⁶. The concept is not defined in the New York Convention either.

Specific exclusion

- Consumer disputes are excluded from the Convention⁷ relating to personal, family or household purposes derived from CISG⁸.
- Disputes relating to inheritance, family or employment law are excluded⁹. It was done to avoid touching upon matters of the Hague Conference on Private International Law.
- Judgements enforcing mediated settlements are excluded¹⁰ which is of great significance for the European Union. It avoided overlapping with 2005 Choice of Court Agreements Convention (Hague Conference Instruments). The overlap could have been fruitful in marginal cases but not in all, hence the decision for exclusion was worthwhile. A judge's mere involvement does not amount for exclusion. The exclusion does not cover instances where it is presented recognition or enforcement under the Convention. A recognized judgement is not excluded as long as it is not enforceable.¹¹

¹ Singapore Convention art. 2(1)(a).

² U.N. Convention on Contracts for the International Sale of Goods art. 10, Apr. 11, 1980, 1489 U.N.T.S. 3

³ Singapore Convention art. 2(1)(b).

⁴ Model Law at art. 1(4).

⁵ Singapore Convention Article 5 (2).

⁶ Model Law art. 1 (1).

⁷ Singapore Convention art. 1(2)(a)

⁸ CISG art. 1 (2) (a).

⁹ Singapore Convention art. 1(2)(b).

¹⁰ Singapore Convention art. 1(3)(a)

¹¹ Singapore Convention art. 1(3)(a)(ii)



- Recorded enforceable arbitral awards are also excluded¹² to avoid overlap with the New York Convention. The State should analyse where the relief is sought rather than the seat of arbitration.

Analysis

Article 1 of the Convention places its focus on the subject matter of the agreement rather than that of the dispute. It also is ambiguous regarding determination of jurisdiction of competent authority based on place of dispute and not place of signing of agreement. Pre-existing mediation agreements leave the parties free to enter into mediation agreement at any time and it would still be valid as per the Convention. *Article 3* leaves enough scope for the states to get a detailed list of rules, compliances or obligations in their domestic laws that a party is bound to follow while dealing with the Convention.

Article 4 deals with production of written¹³ IMSA in the signatory State's Court signed by both parties¹⁴. It also evidence to be checked by competent authority as proof settlement agreement resulting in mediation¹⁵. Additionally, parties may be called to provide necessary further documents to check authenticity and compliance with the rules of the Convention so that cases of money-laundering and other illegitimate purposes are kept at bay. Evidence can consist of signature of the

mediator on the settlement agreement or a separate document indicating mediation had taken place, attestation by the administering authority or any other valid proof acceptable¹⁶. *Article 4 (2)* of the Convention is taken from *Article 9* of the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 concerning online disputes and electronic signatures. In spite of Art 4 (1) (b) (iv), *Article 4 (4)* the court of the signatory state can refuse enforcing an IMSA based on grounds under *Article 5*.

Under *Article 5* refusal to grant relief can be due to party's incapacity¹⁷, relief prayed is in contradiction of public policy¹⁸ of contracting party¹⁹, subject matter not amenable to mediation²⁰, settlement agreement being null or inoperative²¹, not binding or final²², subsequently modified²³ under subjected law or a breach by the mediator²⁴ knowing the parties would not have entered into an agreement or obligations in it are not clear²⁵ or have been performed²⁶ or relief contrasting terms of settlement agreement²⁷. *Article 5 (1) (d)* gives the parties the option to opt out of the Convention against any relief to be granted. It is to protect the parties for non-compliance of the settlement due to any genuine reason given in the *Article* or to avoid any delay in the mediation process and extra cost of conducting mediation meetings due to lack of full proof defences by either party. *Article 5*

¹² Singapore Convention art. 1(3)(b).

¹³ Singapore Convention on Mediation arts 1(1) and 2(2).

¹⁴ Singapore Convention on Mediation art 4(1)(a).

¹⁵ Singapore Convention art 2(3)

¹⁶ Singapore Convention arts. 4(1)(a) and (b)

¹⁷ Singapore Convention on Mediation art 5(1)(a).

¹⁸ *Daichi Sankyo Co Ltd v Malvinder Mohan Singh OMP(EFA) (Comm) 6/2016 (2016)*.

¹⁹ Singapore Convention art 5 (2) (a).

²⁰ Singapore Convention art 5 (2) (b).

²¹ Singapore Convention on Mediation art 5(1)(b)(i).

²² Singapore Convention on Mediation art 5(1)(b)(ii).

²³ Singapore Convention on Mediation art 5(1)(b)(iii).

²⁴ Singapore Convention on Mediation art 5(1)(e).

²⁵ Singapore Convention on Mediation Art 5(1)(c)(ii).

²⁶ Singapore Convention on Mediation Art 5(1)(c)(i).

²⁷ Singapore Convention on Mediation Art 5(1)(d).



(1) (a) of the Convention is derived from Art V (1) (a) of the New York Convention but omits the choice of law (Under the law applicable to them). In addition to the difference in application of the provision in civil or common law countries, Gary Born’s “validation principle” and renvoi should also be seen although they encounter reluctance. Article 5(1) (b) (i) is copied from Art II (3) of the New York Convention. An IMSA can be inoperable due to a subsequent agreement to forget all rights to pursue remedies under it.²⁸ Article 6 deals with implied grounds for refusal outside Article 5 or parallel proceedings. It is similar to Article VI of New York Convention. Article V (1) (e) of the New York Convention states that a court may not accept recognition and enforcement of foreign arbitral award when it is not binding or has been set aside or suspended by a competent institution of the country. It only applies to law of obligations or mediator misconduct as their legal test is unique to each signatory state²⁹.

Article 7 of the Convention enables the parties seldom depriving their rights for MSA and extend as allowed law or treaties provided it is not excluded under Article 1 (2) and Article 1 (3). Nevertheless, the State has the flexibility regarding domestic laws.

Article 8 provides for freedom to reserve the application of the Convention where any government agency or itself is a party. It also states that parties can withdraw or make reservation to the extent agreed. Reservation by private personals is omitted and parties to mediation settlement agreements can agree for exclusion from Convention as a defence. Rights of the parties are compromised by allowing the State to opt out by making a

declaration although the former can anytime opt in. It is feasible and creates disharmony in circumstances where other party is unable to enforce the agreement due to the other party making reservation in its country.

Article 12 provides for participation via Regional Economic Organisations made by sovereign states having a grip over matters governed by the Convention with eligibility to sign, ratify, approve and accede to the Convention as a party.

Article 13 states that the party has the option to opt in and out of the Convention with respect to different territorial units and diverse laws. The party is free to apply the rules of the Convention to all or any of the territorial units concerning signing, acceptance, ratification or accession.

Article 16 gives way to denunciation by way of formal notification addressed to the depository and it would normally be effective after 12 months.

Comparative Study

Singapore Convention	New York Convention
<ul style="list-style-type: none"> • Uses the term ‘international’. • Place of dispute resulting in MSA and no seat for mediation. • Procedural or substantive 	<ul style="list-style-type: none"> • Uses the term ‘foreign’³⁰. • Arbitral award in a different state that is seat of arbitration. • Article 2 (a) of the

²⁸ Apple & Eve LLC v Yantai N Andre Juice Co 610 F Supp 2d 226 (ED NY, 2009).

²⁹ Cf BAZ v BBA SGHC 27 [2018].

³⁰ New York Convention art I (1)



<p>domestic law can affect where the mediation is taking place.</p> <ul style="list-style-type: none"> • A setting aside issued in one jurisdiction will not be binding on other jurisdictions. • No refusal in case mediator did not meet local mediation requirements. • Places of businesses of the parties should not be same. • It cannot be invoked if settlement agreement incorporates an arbitral award as consent awards come under New York Convention. • Issue of same third neutral party playing more than one role in 	<p>Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and Article V of New York Convention deal with refusal of arbitral award concerning enforcement and recognition respectively. Setting aside in the seat of arbitration can lead to refusal of enforcement by other member states.</p> <ul style="list-style-type: none"> • Reducing cost of the process and can be online. • Same issues can be much more complicate 	<p>mix-mode dispute resolution under the Convention, becomes a complex scenario. For example- CPR Model Multi Step Dispute Resolution Clause, Negotiation-Mediation Clause, CPR Model Two-Step Clause with Designated Mediator Option, CPR Model Two-Step Clause: Mediation and Arbitration.</p>	<p>d with arbitration domestic laws governing certain subject matter.</p>
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Overview of Private International Law

Without a proper enforcement mechanism international mediated settlement agreements (IMSA) are ordinarily enforced as legally binding contracts with an international character.³¹ Relevant and mandatory rules subject IMSAs to costly process for the parties in light of private international law. In common law jurisdiction like Singapore there is a rule against penalty clause whereby the court is reluctant to grant equitable relief to parties arising out of contractual

³¹ Lim Sze Eng v Lin Choo Mee 1 SLR 414 [2019].



obligations.³² In a civil law jurisdiction like Germany specific performance could be enforced as default position where penalty clauses can be restricted³³. Three main problems in private international law are it provides conflict resolution rules for stakeholders:

- on how forums control jurisdiction over disputes dealt by Art 3 (1),
- to know the choice of law covering the disputes dealt by Art 5 and
- when parties seek outcomes for dispute resolution.

Indian Scenario

Following recommendations of 124th and 129th Law Commission Reports along with Justice Malimath Committee's study on Alternative Modes and Forums for Dispute Resolution, Code of Civil Procedure Amendment Bill 1997 inserted Section 89 in CPC for settlement of disputes outside the Court with Section 89 (1) and (2) dealing with mediation. Lack of speedy disposal led to enactment of The Commercial Courts, Commercial Appellate Division of High Courts Act 2015.

- A commercial dispute would exist even if
- (a) it involves recovery, realisation of monies out of immovable property as security or for any other relief
 - (b) State, it's agencies or private body with public functions is one of the contracting parties

The term commercial is comprehensive and with time more disputes can be notified by the Central Government to fit the description.

³² Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua 2 SLR 655 [2018].

Mediation for settling commercial disputes was added via a 2018 amendment. Inserted Section 12 A states that no suit shall be formed without pre-institution mediation and authorized authorities under Legal Services Authority Act 1987. Such authorities should complete the process within 3 months and further extension of 2 months from the date of application of plaintiff. Pre-institution mediation is not computed as per Limitation Act 1963.

Settlement arrived at by the parties reduced to writing and signed by parties and mediator have the same status as an arbitral award on agreed terms as per Section 30 (4) of the Arbitration and Conciliation Act 1996.

Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 was in line with the Commercial Courts Act 2015. Rule 3 deals with application process, rule 7 deals with mediator's duty to explain the process to the parties and maintain confidentiality, rule 12 concerns ethics of mediator.

Mediation and Conciliation Project Committee of the Supreme Court formed in 2005 is also a welcome step but there is still a need for codified law on mediation to attract more FDI and Multinational corporations to the country.

Civil Procedure Alternative Dispute Resolution and Mediation Rules 2006 (ADR Rules) framed by the Bombay High Court stated that a conciliator has a greater role than a mediator under Section 67 (4) of the Arbitration and Conciliation Act 1996.

³³ §§ 339ff of the German Civil Code (Bürgerliches Gesetzbuch) and § 348 of the German Commercial Code (Handelsgesetzbuch).



India needs to ratify the Singapore Convention to avoid the limbo towards arbitration³⁴ under Article 253 of the Indian Constitution³⁵ although efforts have been made to inculcate mediation since 2002 via Companies Act 2013, Consumer Protection Act 2019, Real Estate Regulation and Development Act 2016, Commercial Courts Act 2015 etc.

The Parliament can either amend the Arbitration and Conciliation Act 1996 to add a separate provision for mediation or consider mediation and conciliation as synonymous to each other and amend Part III of the 1996 Act or a separate legislation in lieu with Singapore Convention can be framed.

Conclusion

The dance between domestic laws and standards for a mediator could create disharmony between municipal and international laws. The lengthy formalities and compliances risk the confidentiality stressed by the Convention. The provision to opt out of the Convention affects cross-border international dispute settlement. The uniformity of the Convention is shaken with respect to relief regarding MSAs as domestic countries differ in their provisions. Domestic laws should make procedural laws clarifying uncertainty with issues like enforcement under Article 3 (1) and standards under Article 5 (1). An explanation under General Principles of Article 3 should be provided to deal with cases for administering relief while enforcing MSAs. Article 3 (1) and Article 3 (2) are the sword and shield of IMSA respectively.

³⁴ *Cairn Energy Plc v. Union of India*, PCA Case No. 2016-17

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³⁵ *M.R. Krishna Murthi v. New India Assurance Co. Ltd.*, 15 SCC 493 (2020)



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