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THE SINGAPORE CONVENTION: NOT MUCH THERE, THERE

by David J. Stute & Alexis N. Wansac

I. INTRODUCTION

The United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”), meant to facilitate the enforcement of international commercially mediated settlements, was adopted in December 2018 and opened for signature the following August.¹ By January 2021, six countries, most significantly Singapore and Saudi Arabia, had ratified the Convention, and a total of 52 countries had signed the Singapore Convention, including the US, China, and India.²

At a time of receding multilateralism on the international stage, any broad expression by several dozen countries of their willingness to cooperate is noteworthy. And, indeed, “amidst much fanfare and excitement,”³ the Singapore Convention was received enthusiastically as “a development that the arbitration and mediation fraternity alike has cause to celebrate.”⁴ Commentators noted that the Singapore Convention will “legitimise mediation as a means of dispute resolution,”⁵ and described it as the “most credible acknowledgement of mediation as a meaningful

¹ United Nations Convention on International Settlement Agreements Resulting from Mediation, opened for signature Aug. 7, 2019 [hereinafter Singapore Convention].

² For the status of the Singapore Convention, see Status: United Nations Convention on International Agreements Resulting from Mediation, U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

³ Dan Perera & Joyce Fong, The Singapore Convention on Mediation—The Beginning of a New Era?, REED SMITH CLIENT ALERTS (Aug. 7, 2019), <https://www.reedsmith.com/en/perspectives/2019/08/the-singapore-convention-on-mediation>.

⁴ Iris Ng, The Singapore Convention: What Does It Mean for Arbitration and the Future of Dispute Resolution, KLUWER ARB. BLOG (Aug. 31, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution>.

⁵ Michael Fletcher, *Signed But Not Sealed*, 169 NEW L.J. 7856, 9679 (2019).



tool to resolve cross-border commercial disputes.”¹ Further, predictions forecast that “the [Singapore] Convention will make it easier for businesses to enforce mediated settlement agreements with their cross-border counterparts.”² US industry groups, including the Chamber of Commerce, summed up the sentiment in a letter to the US State Department:

The treaty negotiation was launched . . . with the aim of developing a cost-effective international legal mechanism for resolving cross-border commercial disputes between private parties. By encouraging the use of mediation as a viable path to resolving commercial disputes, the Convention reduces cost and eliminates the need for duplicative litigation. The Convention also improves the enforcement process by obliging governments to recognize the legal status of any mediated settlement. As a result, the Singapore Convention helps mitigate risk when entering into a commercial relationship with businesses in foreign markets and raises the standards of fair trade globally.³

Initial perceptions aside, however, there is a question as to whether the Singapore Convention as adopted will prove capable of living up to the hype of being a mediation analog to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁴ The real test for the Singapore Convention will be at the ratification stage. Without achieving the near-universal recognition of the New York Convention, which as of 2019 had been ratified in 160 countries,⁵ the Singapore Convention will have no more impact than other multilateral instruments,

¹ Deborah Masucci & M. Salman Ravala, *The Singapore Convention: A First Look*, 11 N.Y. DISP. RESOL. L. 60, 61 (2018).

² *The Singapore Mediation Convention*, JONES DAY ALERTS (Sept. 2018), <https://www.jonesday.com/en/insights/2018/09/the-singapore-mediation-convention>.

³ Letter from Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for International Business, to Secretary of State Michael R. Pompeo, Nov. 6, 2018, *available at* https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SignaporeConvention_onMediation_11.6.18.pdf.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046 [hereinafter New York Convention].

⁵ Cf. Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.



such as the Convention on Choice of Court Agreements, which was adopted by the Hague Conference on Private International Law and opened for signature in 2005, but fell short of wide acceptance.⁶

Moreover, glowing comments about the Singapore Convention notwithstanding, why would the Convention's impact surpass that of either the UNCITRAL Model Law on International Commercial Conciliation⁷ or the European Union (EU) Directive 2008/52 on certain aspects of mediation in civil and commercial matters ("EU Mediation Directive")⁸—neither of which have had much effect on the mediation landscape,⁹ despite hopes that they would promote the use of mediation as a dispute settlement tool in a transnational context.¹⁰ The Singapore Convention's premise that a treaty as such will move the needle as to parties' resort to mediation is yet to be seen.

Turning to the provisions of the Singapore Convention, this article expresses a note of caution: the Convention's enforcement provisions are vague and untested so as to raise doubt about whether reliance on the Singapore Convention leaves parties to a mediated settlement any better off than with a conventional settlement

⁶ Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (entered into force Oct. 1, 2015) [hereinafter Hague Choice of Court Convention]. The Hague Choice of Court Convention has only been ratified by a handful of signatories, most notably the European Union, and took a full ten years to enter into force. While the United States became a signatory in 2009, it never ratified the Convention.

⁷ UNCITRAL Model Law on International Commercial Conciliation (2002), *reprinted in* 33 UNCITRAL Y.B. 615.

⁸ European Parliament and Council Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3 [hereinafter the E.U. Mediation Directive].

⁹ Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, ASIAN J. INT'L L. 1, 4 (2019) (noting that "the Singapore Convention goes further than the European Directive on Mediation (the EU Directive), which has not produced the hoped-for impact of growing the use of mediation in the EU").

¹⁰ See *id.* at 4; see also European Parliament, "Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, at 162 (2014), available at [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET\(2014\)493042](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042) (noting that "[t]he number of mediations, [is] on average less than 1% of all cases litigated in the EU," some five and a half years after the EU Directive's adoption).



agreement with a jurisdiction and choice-of-law clause. Principally, this article posits that the Singapore Convention's omission of straightforward enforcement and set-aside mechanisms is an unfortunate choice that may well render the Singapore Convention little more than an historical curiosity.

II. A SYNOPSIS OF THE SINGAPORE CONVENTION'S ORIGINS

In many circles, international litigation and arbitration have been characterized as too expensive, too time-consuming, and too burdensome.¹¹ By way of contrast, mediation has been portrayed as a less costly, less combative alternative that allows parties to “save face.”¹²

Yet unlike international commercial arbitral awards, which fall under the New York Convention's enforcement regime, mediated settlement agreements have reportedly been plagued by enforcement issues.¹³ For instance, there is “evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation in cross-border disputes.”¹⁴ With the vision of putting settlement agreements on equal enforcement

¹¹ S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, at 27-28 (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, Nov. 17, 2014) [hereinafter Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report*]; see also Bruno Zeller & Leon Trakman, *Mediation and Arbitration: The Process of Enforcement*, 24 UNIF. L. REV. 449, 465 (2019) (quoting New South Wales Chief Justice James Spigelman (“Arbitration is no longer fulfilling the basic need of business customers for early and effective resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR.”)).

¹² Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report*, *supra* note 16, at 24. Additionally, the renaissance of mediation can be tied to that of ADR generally. See Haris Meidanis, *International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements*, 85 ARB. 49, 51 (2019) (“[I]n its core, the ADR renaissance is an expression of the crisis of the nation state in the post-modern era. The state monopoly is clearly questioned, also in the field of dispute resolution and this gradually gives mediation an all the more important role.”).

¹³ See Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?*, 37 BERKELEY J. INT'L L. 215, 215-16 (2019).

¹⁴ 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, 3 (2019) [hereinafter Schnabel, *The Singapore Convention*]; see also Strong, *Use and Perception*



footing with arbitral awards and thereby encourage resort to mediation in a transnational context, the US' representatives to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (UNCITRAL Working Group) proposed the development of a multilateral convention for mediated settlement enforcement in 2014.¹⁵ “[P]roponents of developing the Convention expressed a hope that it will be able to give mediation the same type of boost that arbitration received from the New York Convention.”¹⁶

Acting on the US Proposal, the UNCITRAL Working Group spent six sessions developing the Singapore Convention.¹⁷ In December 2018, the UN adopted the Convention's final text, which was opened for signature in August of the following

of International Commercial Mediation and Conciliation: A Preliminary Report, *supra* note 16, at 43-44 (“For example, 9% of the respondents indicated that it would be impossible or very difficult to enforce an agreement to mediate or conciliate an international commercial dispute in the respondent’s home jurisdiction. Approximately 28% of respondents indicated that enforcement would be somewhat difficult, while only 35% of the respondents thought that it would be easy to enforce a settlement agreement arising out of an international commercial mediation or conciliation seated in their home jurisdiction. Approximately 17% of the respondents indicated the issue was largely untested in their home jurisdiction, and 11% did not know how the matter would be resolved under domestic law.”). This accords with the results of a 2007 survey conducted by the by the International Bar Association’s Mediation Committee. See IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation (Oct. 2007), available at https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.asp.

¹⁵ UNCITRAL, Proposal by the Government of the United States of America: future work for Working Group II, at 2, 4, U.N. Doc. A/CN.9/822 (2014) [hereinafter 2014 US Proposal].

¹⁶ Schnabel, *The Singapore Convention*, *supra* note 19, at 3. Note, however, that the data relied on by these proponents also pointed to other obstacles to relying on mediation, such as a lack of education. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report*, *supra* note 16, at 31. Moreover, a comprehensive study of the EU Directive’s failure to promote use of mediation in the EU questioned the very premise of the boost-through-enforcement rationale, noting that “[e]ven where the domestic processes to enforce mediated settlements are deemed to be relatively easy, therefore dispelling the concern that litigants might not engage in mediation out of fear that enforcing its result might be too cumbersome, the number of mediations is low.” European Parliament, Directorate-General for Internal Policies, “Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, at 163 (Jan. 2014), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET\(2014\)493042](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042).

¹⁷ Schnabel, *The Singapore Convention*, *supra* note 19, at 5-7.



year. As of January 2021, 52 countries had signed the Convention and six had ratified it. This means that the Convention, which requires a minimum of three such ratifications, has now entered into force.¹⁸

III. BROAD AND UNTESTED NON-ENFORCEMENT GROUNDS

According to a member of the US delegation, the Convention was designed not as a tool to “provide enforceability for settlement agreements that otherwise would not have been enforceable at all, but rather to provide a framework for enforcement . . . that would be more efficient than litigation under contract law.”¹⁹ Thus, the instrument attempts to “convert what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally-binding international framework, and provide an entitlement to privileged treatment in other states, similar to a judgment.”²⁰ In particular, the Convention seeks to “eliminate the need for a court to address all but a few enumerated defenses relating to the mediation process and the subject of the settlement.”²¹

Seeking to achieve these goals, Article 5 of the Singapore Convention, which borrows from Article V of the New York Convention, provides limited grounds for non-enforcement:

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

¹⁸ For an outline of the steps required to ratify the Convention in the United States, and a discussion of how delays in the United States’ ratification of the Convention may delay any momentum for its adoption elsewhere, see Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 AM. REV. INT’L ARB. 265 (2020) [hereinafter Schnabel, *Implementation of the Singapore Convention*].

¹⁹ Schnabel, *The Singapore Convention*, *supra* note 19, at 4.

²⁰ *Id.* at 11.

²¹ Gilbert Samberg, *The Future of Int’l Mediation After the Singapore Convention*, LAW 360 (Aug. 2010), <https://www.law360.com/articles/1191759/the-future-of-int-l-mediation-after-the-singapore-convention>.



- (b) The settlement agreement sought to be relied upon:
 - (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;
 - (ii) Is not binding, or is not final, according to its terms;or
 - (iii) Has been subsequently modified;
 - (c) The obligations in the settlement agreement:
 - (i) Have been performed; or
 - (ii) Are not clear or comprehensible;
 - (d) Granting relief would be contrary to the terms of the settlement agreement;
 - (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
 - (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.
2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:
- (a) Granting relief would be contrary to the public policy of that Party; or
 - (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

These defenses were formulated by the UNCITRAL Working Group to be limited, exhaustive, stated in general terms, and not cumbersome to implement, while affording “flexibility to the enforcing authority with regard to their interpretation.”²² Moreover, as with Article V of New York Convention, these grounds “are permissive rather than mandatory; a court can choose to provide relief [i.e., enforce an

²² UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 17, U.N. Doc. A/CN.9/861 (Sept. 17, 2015).



agreement] even if a particular exception might apply, and if a state implements the Convention through legislation, it has no obligation to permit courts to use all grounds for refusal.”²³

But drafters’ intentions and commentators’ characterizations aside, Article 5’s untested language appears to provide ample opportunities to obstruct the enforcement of a mediated settlement. In principle, the Singapore Convention’s aim is that “a breached qualifying settlement agreement should be enforced according to its terms more or less summarily by the national courts of a convention country, rather than being considered merely the basis for a plenary proceeding for breach of contract.”²⁴ Notably, however, there is substantial overlap between the enumerated grounds for countering enforcement and common contract law defenses—including incapacity (Article 5(1)(a)), inability of performance (Article 5(1)(b)(i)), lack of finality and subsequent modification (Article 5(1)(b)(ii)–(iii)), completed performance (Article 5(1)(c)(i)), and incomprehensibility (Article 5(1)(c)(ii)).²⁵ In fact, rather than build on the New York Convention’s narrow grounds for non-enforcement, the Singapore Convention introduces uncertainties at many levels, for instance, omitting from Article 5(1)(a)—concerning incapacity—the phrase “under the law applicable to them” included in the New York Convention. Similarly, the Singapore Convention’s failure to provide criteria for fixing the governing law leaves it to any competent enforcement court to select the body of law that best suits its purposes.

Thus, it appears doubtful that parties to a mediated settlement agreement subject to enforcement under the Singapore Convention will be better off than they are now when measured against the apparent goal of “obliging governments to recognize the legal status of any mediated settlement,” and thereby “mitigat[ing] risk when entering into a commercial relationship with businesses in foreign markets.”²⁶ By way of

²³ Schnabel, *The Singapore Convention*, *supra* note 19, at 42.

²⁴ Samberg, *supra* note 26.

²⁵ See generally, Nadja Alexander & Shoyu Chong, *Article 5(1)(a)–(d). Contract-Related Grounds for Refusal*, in *THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY* 87 (2019).

²⁶ Cf. Letter from Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for



example, in the US, courts have adopted a sweeping policy in favor of enforcing negotiated settlements, leading to such agreements being treated as “super contracts” with courts frequently reluctant to refuse enforcement, particularly in commercial disputes where sophisticated parties have been advised by competent legal counsel.²⁷ As for international mediated settlement agreements, certain US states (such as California and Texas) have statutes in place that subject international mediated settlements to enforcement as international arbitral awards.²⁸ In contrast, generally speaking, a party seeking or resisting enforcement under the Singapore Convention navigates uncharted waters.

IV. NO SET-ASIDE MECHANISM UNDER THE SINGAPORE CONVENTION

Whereas Article 5’s broad language has been the subject of some critical commentary,²⁹ to date the nascent literature on the Singapore Convention has largely glossed over a major distinction between the Singapore Convention and the New

International Business, to Secretary of State Michael R. Pompeo, Nov. 6, 2018, available at https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SingaporeConvention_onMediation_11.6.18.pdf.

²⁷ See Edna Sussman & Conna Weiner, *Striving for the ‘Bullet-Proof’ Mediation Settlement Agreement*, 8 N.Y. DISP. RESOL. L. 22, 22 (2015).

²⁸ 2014 US Proposal, *supra* note 20, at 4 (citing Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211). Note also that some institutions have sought to ensure direct cross-border enforceability of mediated settlement agreements by combining mediation with features of arbitration. Such processes include “Arb Med-Arb” (as developed by the Singapore International Mediation Centre) and “Med Arb” (as is common in China and some other Asian jurisdictions, including Japan). In these processes, the parties attempt to settle their dispute through mediation and, if successful, have an arbitral tribunal record the mediated settlement agreement as a consent award enforceable under the New York Convention. Despite meeting this objective, Arb-Med-Arb and Med-Arb processes are seldom used in cross-border disputes, possibly due to the cost and inefficiency of requiring both a mediator and an arbitrator. Craig Celniker et al., *Newly Signed Singapore Convention to Make International Settlement Agreements Directly Enforceable in Convention States*, JDSUPRA (Apr. 15, 2019), <https://www.jdsupra.com/legalnews/newly-signed-singapore-convention-to-31516>.

²⁹ Refer to Fletcher, *supra* note 5, at 9678–79, for a discussion of how the Singapore Convention is not a fix-all, especially in situations where settlement agreements do not result in “straightforward monetary payments in exchange for the waiver of claims,” but are rather “complex new arrangements to govern future commercial relations,” which may require a determination of facts. To this end, Fletcher advises parties to seek local advice “prior to entering any mediation settlement to which the Convention may apply.” *Id.*



York Convention: the Singapore Convention's lack of a set-aside mechanism³⁰ or what has been described in a different context as "a treaty-based solution for limiting the ground of refusal of enforcement that the [mediated settlement agreement] has been set aside in the country of origin."³¹ This was a deliberate choice by the UNCITRAL Working Group.³² As a member of the US delegation reasoned:

[I]n arbitration, the disputing parties consent only to the process for resolving their dispute, but not to the ultimate outcome, yet the agreement to arbitrate and the arbitral award—which otherwise would only be private acts governed by contract law—are given privileged status under the New York Convention. In mediation, by contrast, the parties have agreed to not only the process for resolving their dispute but also to the ultimate outcome—thus suggesting a far stronger justification for according a privileged status to the mediated

³⁰ There is some limited commentary. For instance, one blog post notes: "Unlike the EU Mediation Directive, the Singapore Convention on Mediation emphasizes only the stage of enforcement and dispenses with the initial control at the country where the settlement agreement is reached. In other words, the Convention allows the enforcing party to directly enforce the settlement agreement in the courts, or by any other competent authority, of the country where the assets are located. This elevates an otherwise purely private contractual act to a *sui generis* status, which is comparable to the status of arbitral awards[.]" Hassan Faraj Mehrabi & Hosna Sheikhattar, *The Singapore Mediation Convention: A Promising Start, an Uncertain Future*, LEIDEN L. BLOG (Sept. 5, 2019). Others have glossed over the distinction, however: "It is true that the arbitrators make an award that is, by itself, enforceable upon the parties, whereas parties to mediation reach an enforceable agreement. However, the distinction between the legal effect at the seat of arbitration and at the place where the award is enforced is also applicable to the enforcement of mediation agreements. In this respect, the process of enforcing arbitration awards and mediation agreement are comparable." Zeller & Trakman, *supra* note 16, at 459.

³¹ Albert Jan van der Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID REV. 263, 274 (2014).

³² See Schnabel, *The Singapore Convention*, *supra* note 19, at 43. Note, however, that at least in the early deliberations in 2015, the UNCITRAL Working Group contemplated adopting provisions paralleling Article V(1)(e): "[I]t was widely felt that the instrument would need to indicate the possible impact that other related judicial or arbitral proceedings could have on the enforcement procedure. . . . It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. For instance, the instrument might provide that the enforcing authority might, if it considers proper, adjourn its decision on the enforcement of the settlement agreement when there exists an application for a judicial or arbitral proceedings about the settlement agreement. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 15, U.N. Doc. A/CN.9/861 (2015).



settlement agreement.³³

Beyond this attempt to make out qualitative distinctions between settlements and arbitral awards, the Singapore Convention's marked departure from the New York Convention on the set-aside issue deserves careful scrutiny. To illustrate, suppose that after the Singapore Convention enters into force, a Chinese corporation and a Delaware corporation enter into a mediated settlement agreement governed by New York law and executed in Singapore. The Delaware corporation later fails to abide by the terms of the mediated settlement. The Chinese corporation brings an enforcement action in Delaware, but the court refuses enforcement on an Article 5 ground of the Singapore Convention. However, the Delaware corporation has assets in some three dozen countries—twenty-six of which have ratified the Singapore Convention. Over the ensuing years, the Chinese corporation brings lawsuit after lawsuit against the Delaware corporation in an effort to enforce the terms of the settlement agreement. Though courts in many of the jurisdictions side with the Delaware corporation, the Delaware corporation's board concludes that the outstanding amount pales in comparison with the legal fees associated with continually fighting enforcement actions across the globe and instructs its counsel to pay any remaining monies due under the settlement agreement despite abundant Article 5 grounds for not enforcing that settlement.³⁴

Of course, “award-debtors frequently comply voluntarily with international arbitral awards made against them,”³⁵ and as some have suggested, “[i]deally, the [Singapore] Convention will rarely need to be invoked in court, as in most cases, parties will abide by the mediated settlement they conclude.”³⁶ Yet enforcement mechanisms do exist for a reason. As one commentator notes:

Some people may believe that enforcement of settlement

³³ Schnabel, *The Singapore Convention*, *supra* note 19, at 11 (emphasis added).

³⁴ Cf. Philippe Hovaguimian, *The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or not to Bind?*, 34 J. INT'L ARB. 79, 96 (2017) (noting with respect to international arbitrations that “[e]nforcement is often sought simultaneously in multiple jurisdictions, and the award-debtor's resources may become accordingly limited”).

³⁵ Gary B. Born, *International Commercial Arbitration* 3164 (2nd ed. 2014).

³⁶ Schnabel, *The Singapore Convention*, *supra* note 19, at 4.



agreement should not be a primary concern in an international instrument of this type, since mediation is a consensual dispute resolution mechanism that would likely lead to the parties' living up to their agreements voluntarily. However, parties do in fact fail to live up to their agreed obligations, which suggests that enforcement mechanisms are needed.³⁷

There are myriad reasons that may cause a party to retreat from a mediated settlement agreement, including: buyer's remorse; a change in company management or ownership; disagreement over a material term; external factors, such as currency fluctuations, government action, natural events, negative publicity, etc.³⁸ Indeed, judging by sixty years of experience with the New York Convention, "there are circumstances in which a party concludes, either for tactical reasons or because of a genuinely-held sense of injustice, that an award against it is fundamentally wrong."³⁹ Notably, this outcome may be more likely "when the settlement agreement relied upon will be devoid of the comfort of reasoning by an accepted and recognized qualified arbitrator as one would [tend to] find with an award."⁴⁰

Under the New York Convention, as generally implemented, parties could seek to annul or set aside the award against them at the arbitral seat, and that set-aside then may be relied upon as an explicit ground for non-enforcement in other jurisdictions. As detailed below, however, that degree of procedural certainty is not woven into the fabric of the Singapore Convention. As noted by one commentator, "If the buck does not stop at the primary jurisdiction, it may not stop anywhere."⁴¹

³⁷ S.I. Strong, *Beyond International Commercial Arbitration—The Promise of International Commercial Mediation*, 45 WASH. U.J.L. & POL'Y 10, 35 (2014) [hereinafter Strong, *Beyond International Arbitration*] (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-77 (1994); Margaret Graham Tebo, *A Learning Experience*, 27 ABA J. E-REPORT 2 (2006) (discussing case where the American Bar Association failed to live up to the terms of a consent decree)).

³⁸ Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, 2 THE FORDHAM PAPERS 343, 3-4 (Arthur W. Rovine ed., 2008).

³⁹ BORN, *supra* note 40, at 3164.

⁴⁰ Craig Carter, *Singapore Convention 2018: Reshaping Alternate Dispute Resolution and Enforcement*, 48 L. SOC'Y J. 84, 85 (2018).

⁴¹ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* 118 (1992).



A. *Set-Aside Under the New York Convention and Set-Aside's Omission from the Singapore Convention*

As under the Geneva Convention of 1927,⁴² the New York Convention's "only limits on the annulment authority of the arbitral seat are implied (and . . . disputed); even if accepted, these limits leave the subject of annulment primarily to local law in the arbitral seat. Nonetheless, . . . most national arbitration regimes have adopted broadly similar approaches to the available grounds for annulment of international arbitral awards. In most states, the grounds for annulment are limited to bases paralleling those applicable to non-recognition of awards in Article V of the New York Convention."⁴³ This parallelism has been attributed to the popularity of the 1985 UNCITRAL Model Law, which has been implemented in 80 countries, and whose grounds for set-aside parallel those of the New York Convention.⁴⁴ Among the non-enforcement grounds, under Article V(1)(e) of the New York Convention:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (e) The award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.⁴⁵

Thus, if an award has been set aside at the seat of the arbitration, courts in other jurisdictions will—in all likelihood⁴⁶—consider that set-aside itself a ground for non-

⁴² Convention on the Execution of Foreign Arbitral Awards, July 25, 1929, 92 U.N.T.S. 301 [hereinafter Geneva Convention].

⁴³ BORN, *supra* note 40, at 3391.

⁴⁴ Van den Berg, *supra* note 36, at 266.

⁴⁵ New York Convention art. V(1)(e) (emphasis added).

⁴⁶ BORN, *supra* note 40, at 3391 (citing UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 36(1)(a)(v) ("[T]he award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, under the law of which, that award was made[.]"); English Arbitration Act 1996, c. 23, § 103(2)(f) (providing that recognition "may be refused if the person against whom it is invoked proves . . . that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made"); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1061, para. 3, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.) (providing that "[w]here the arbitration award is reversed abroad, after having been declared



recognition and non-enforcement.⁴⁷

It is through the seat-of-the-arbitration concept, and the explicit recognition of that forum as the appropriate place to challenge an award, that the New York Convention provides a degree of enforcement predictability—including effective recourse—to those involved in the arbitral proceeding.⁴⁸ The Singapore Convention, in contrast, does not follow the lead of the New York Convention with respect to set-aside and instead omits any analog to Article V(1)(e). One proponent of eschewing the seat concept for challenges wrote:

The model of the Singapore Mediation Convention essentially delocalizes from the enforcement process the place where the [mediated settlement agreement] may have been reached. This is done by allowing enforcement in the country of choice of the enforcing party. This has the extra value that it can be of use to the existing and increasing electronic mediation proceedings and the freedom that parties in mediation expect to have, so as to design solutions not tied to a specific legal system. This simple mechanism is, to our mind, a recognition of the following givens: (a) a situs of mediation is irrelevant, or at least not as relevant, contrarily to the situs of litigation or arbitration; (b) the MSA does not need to produce a *res judicata* or have enforcing power in the country where it has been concluded in order for it to be enforced internationally. This also exerts substantial influence on the enforcement

enforceable, a petition may be filed that the declaration of enforceability be repealed”).

⁴⁷ See, e.g., Van den Berg, *supra* note 36, at 277 (“I have to warn you that . . . reliance on the verb ‘may’ [in Article V(1)(e) of the New York Convention] is a view expounded by some scholars. But, to my knowledge, there is not a single court that has used a discretionary power under Article V(1) of the Convention, granting enforcement of an award set aside in the country of origin.”); *but see* BORN, *supra* note 40, at 3391 (“[E]ven if an award is annulled in the place of arbitration, courts in other jurisdictions may nonetheless choose to recognize and enforce the award. . . . [T]his is particularly true where the award has been annulled on grounds of local public policy and/or nonarbitrability, or because local law permits review of the merits of the arbitral tribunal’s decision.”).

⁴⁸ For sake of historical perspective, it should be noted that the Geneva Convention, the New York Convention’s predecessor, had rendered enforcement overly burdensome by making recognition at the seat of arbitration a prerequisite to any enforcement elsewhere—so-called double *exequatur*. See Geneva Convention art. 1(d) (“To obtain . . . recognition or enforcement, it shall, further, be necessary: . . . (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel*, or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.”).



process: one can try direct enforcement in any country, irrespective of the country where the MSA may have been reached. Actually, the [UNCITRAL] Working Group discussed the matter in detail prior to agreeing on the direct enforcement model. The basic idea is that given the nature of mediation, the difficulty in localizing the emanating state of the MSA and in order to avoid a double *exequatur* [as under Geneva Convention] process that this would entail, direct enforcement would be the suitable model for MSAs.⁴⁹

This assessment perhaps reflects that “[s]etting aside seems to have become the *bête noire* of international arbitration.”⁵⁰ But from a practical point of view, the arguments advanced make little sense. They are a prescription for a seemingly endless opportunity to litigate the validity and enforceability of a mediated settlement agreement in one jurisdiction after another.

B. “Delocalized” Dispute Resolution

While it may be fair to suppose that mediations between parties from multiple countries will be, and perhaps already are, conducted by virtual communication methods,⁵¹ that is no reason to “delocalize” the mediation so that it is stateless, *i.e.*, that there is or cannot be a *situs*. The rationale offered by the UNCITRAL Working Group—that identifying a particular state of origin for a mediated settlement would be too difficult—appears more result-oriented than compelled by circumstances. And the argument by a member of the US delegation offered to buttress the delocalization approach—that “the mediation process [does not] itself necessitate the identification of a seat⁵²—offers little more persuasive reasoning. The same applies to the following hypothetical:

Party 1 is a Canadian company represented by its general counsel, who participates remotely in the mediation while on vacation in Israel; Party 2 is a Mexican company represented by its general counsel, who participates in the mediation while on a business trip to Singapore; the mediator is Danish

⁴⁹ Meidanis, *supra* note 17, at 53-54.

⁵⁰ For a rejection of this assessment, refer to Van den Berg, *supra* note 36, at 271.

⁵¹ For instance, JAMS offers an online mediation product called “Endispute”, albeit only for claims of US\$100,000 or less. *Endispute Online Dispute Resolution*, JAMS, <https://www.jamsadr.com/endispute>.

⁵² Schnabel, *The Singapore Convention*, *supra* note 19, at 13-14.



professor currently living in (and participating from) Texas; the online mediation is administered by an Australian institution; and the resulting settlement, which resolves a dispute over a contract governed by Swiss law, provides that it is governed by Dutch law for some issues and German law for other issues.⁵³

The situs of the mediation, according to the hypothetical, “would be neither obvious nor important.”⁵⁴ Yet, the logic underpinning that conclusion is far from inescapable. After all, like arbitration, mediation is a creature of contract, meaning that even if the mediation does not take place in one physical location, mediating parties could, and probably should for the sake of predictability, specify a particular jurisdiction whose law is to govern the settlement agreement.⁵⁵ In so doing, they would come within the situs selection ambit of the New York Convention’s time-tested language. What is more, private international law has long grappled with and established its ability to tackle conflict-of-laws and choice-of-law questions. Thus, the notion that delocalized mediations cannot or need not have a situs, or that it would escape any straightforward definition, is misguided.

C. *Direct Enforcement Without Effective Recourse*

Under the Singapore Convention as signed, a mediated settlement agreement “does not need to produce a *res judicata* or have enforcing power in the country where it has been concluded in order for it to be enforced internationally.”⁵⁶ A party to a mediated settlement agreement could seek enforcement in any jurisdiction that has ratified the Convention without the need for confirmation at the arbitral seat. This, as noted above,⁵⁷ is no different from the New York Convention:

The [UNCITRAL] Working Group wanted to avoid replicating the problems that arbitration faced prior to the New York Convention—i.e., the Geneva Convention approach that required double exequatur for arbitral awards—due to the fear of creating a system that would be so burdensome that parties

⁵³ Schnabel, *Implementation of the Singapore Convention*, *supra* note 23, at 267 n. 10.

⁵⁴ *Id.*

⁵⁵ There is more scholarship on conflict-of-laws and choice-of-law principles governing contracts than will fit into a footnote—and going back at least a century. See, e.g., Joseph Beale, *WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT*, 23 HARV. L. REV. 79 (1909).

⁵⁶ Meidanis, *supra* note 17, at 53-54.

⁵⁷ See *supra* note 54.



would not want to use it.⁵⁸

Conversely, the lack of any situs or any one jurisdiction considered per the Singapore Convention to have the authority to set aside a mediated settlement agreement is a departure from the New York Convention. And in that sense, bringing a mediation within the ambit of the Singapore Convention may do nothing more than become an invitation for a party to launch a forum shopping to enforce the mediated settlement. That in itself should give pause to any party whose mediated agreement is subject to the Convention.

As has been argued in the international arbitral context, “[i]t is axiomatic that there should be supervision over international arbitration, be it private law arbitration, investment arbitration or public arbitration.”⁵⁹ Professor Albert Jan van den Berg explained in 1981 (and reiterated in 2014):

[A]n elimination of the ground for refusal that the award has been set aside in the country of origin would, in my opinion, be undesirable. A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.⁶⁰

Professor Van den Berg’s observations are no less applicable to a mediated settlement: there is considerable value in recognizing and addressing the need for finality. As Lord Simon of Glaisdale put it in a related context, “Since judges are fallible human beings, we have provided appellate courts which do their own fallible best to correct errors. But in the end you must accept what has been decided. Enough is Enough. And the law echoes: *res judicata*, the matter is adjudged.”⁶¹

⁵⁸ Schnabel, *The Singapore Convention*, *supra* note 19, at 13.

⁵⁹ Van den Berg, *supra* note 36, at 283.

⁶⁰ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards A Uniform Judicial Interpretation* 355 (1981); *see also* Van den Berg, *supra* note 36, at 285-86.

⁶¹ *The Amptill Peerage Case* [1977] A.C. 547 (HL) 575-76 (UK).



With set-asides as in other areas of the law, “the finality of decisions is fundamental in any legal system as it ensures fairness, efficiency, certainty and predictability in the dispute resolution process.”⁶² Without a designated forum or institution to consider set-aside applications,⁶³ the Singapore Convention lacks a feature that would give parties to mediated settlement agreements under the Convention the assurance that setting aside a defective settlement can be accomplished by means more effective than an across-the-globe litigation expedition.

Put another way, one should ask whether a reasonably well-informed prospective party to a mediated settlement agreement would buy into the following proposition: The agreement will be directly enforceable in any Singapore Convention jurisdiction, and the only mode of resisting enforcement will be to oppose proceedings in every single jurisdiction where a party seeks enforcement. At the very least, this will cause some head-scratching; more likely, it will engender the pursuit of alternatives.

D. *Local Invalidation*

Some have argued that the lack of set-aside is not as impactful as just outlined. Direct enforcement would not deprive courts at the originating state to review the validity of the settlement agreement nor would it necessarily mean that courts in jurisdictions asked to enforce the agreement would ignore principles of international comity and turn a blind eye towards the decision of the court in the originating state.⁶⁴

⁶² Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals 2* (2016).

⁶³ See, e.g., Van den Berg, *supra* note 36, at 286 (“If we really want to improve the current situation [in international arbitration], States should transfer control over an international arbitral award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries.”).

⁶⁴ Meidanis, *supra* note 17, at 53-54 (noting that the Singapore Convention “would not deprive courts in the originating state [of] the competency to review the validity of the settlement agreement, but would not go so far as to accept even a limited review prior to direct enforcement, such limited review to be left to the enforcing state”); see also UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 15, U.N. Doc. A/CN.9/861 (2015) (“It was . . . mentioned that direct enforcement would not deprive



All of that is true, but there is little by way of assurance on the face of the Singapore Convention that invalidation in the “originating state” would have preclusive effect on enforcement in other jurisdictions.

Article 5(1)(b) provides for non-enforcement where:

The settlement agreement sought to be relied upon: Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought.

Yet, there is no indication that a competent authority’s decision in the originating jurisdiction would have any preclusive effect elsewhere. What is more, the *travaux préparatoires*, which are explicit in rejecting a forum for set-aside applications, would arm those searching for a favorable jurisdiction (after losses elsewhere) with an argument that every court should approach the application *de novo*.⁶⁵

E. *Lis Pendens*—a Viable Alternative to Set-Aside?

The principle of *lis pendens*, incorporated in Article 6 of the Singapore Convention (and a verbatim copy of the New York Convention), provides at least partial relief:

If an application or a claim relating to a settlement agreement has been made to a court, arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

“The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense.”⁶⁶

courts at the originating state to review the validity of the settlement agreement.”).

⁶⁵ See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session, at 21, U.N. Doc. A/CN.9/896 (2016) (“While it was suggested that the instrument could provide that the enforcing authority might refuse enforcement if it found that the enforcement would be contrary to a decision of another court or competent authority, it was generally felt that there was no need to include such a defence, as it would inadvertently complicate the enforcement procedure, invite forum shopping by parties and would generally be covered through the defences already provided in [Article 5].”).

⁶⁶ Edna Sussman, *The Singapore Convention—Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, 3 ICC DISP. RESOL. BULL. 42, 52 (2018).



As such, courts in their discretion may suspend proceedings concerning the enforcement of a settlement agreement based on parallel or related proceedings elsewhere. This could help reduce potential inefficiencies associated with parallel proceedings in multiple jurisdictions. *Lis pendens*, however, is no substitute for set-aside. First, it is discretionary, leaving competent authorities to decide whether to grant a suspension. Second, it does not affect the ultimate right to enforcement in other jurisdictions, so in the best case that authority will suspend proceedings pending the outcome of another case; but such competent authorities could also split on that question with only some deciding to stay proceedings. All things being equal, *lis pendens* may only work to prolong the dispute, for even if a jurisdiction waits for the outcome of a parallel proceeding, a non-enforcement decision would have no assured preclusive effect elsewhere.

F. *Res Judicata*

Relatedly, outside of the Convention, a non-enforcement decision in one jurisdiction could be given effect in another jurisdiction under *res judicata* principles of domestic or customary international or treaty law.

For instance, in the European Union, the Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters⁶⁷ seeks to avoid irreconcilable judgments in the courts of its member states.⁶⁸ According to the Committee of Experts' Report, "There can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments."⁶⁹ The European Court of Justice defines that term broadly to encompass "any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."⁷⁰

⁶⁷ Regulation (EU) 1215/2012, 2012 O.J. (L 351) 1.

⁶⁸ See SCHAFFSTEIN, *supra* note 67, at 62.

⁶⁹ P. Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 45.

⁷⁰ Case C-414/92, Solo Kleinmotoren GmbH v. Emilio Bloch, 1994 E.C.R. I-02237.



Indeed, civil and common law jurisdictions alike recognize *res judicata* as to foreign judgments.⁷¹ Some scholars even refer to *res judicata* as a rule of customary international law.⁷² But the scope and effect of the doctrine vary across jurisdictions.⁷³ In the US, for instance, “[t]here is presently no federal standard governing the enforcement by U.S. courts of judgments rendered by foreign courts,” and “the United States has made few attempts to conclude treaties with other countries on the reciprocal recognition and enforcement of judgments, and when it has, those attempts have failed.”⁷⁴ That being said, under principles of common law and statutes, “there are surprisingly few fundamental differences in the approaches taken by the various [U.S.] states.”⁷⁵

The arguably broad recognition of *res judicata* principles aside, the doctrine is no replacement for a definitive forum selection for consideration of set-aside applications. Even if in individual cases an end may be put to litigation in some jurisdictions on *res judicata* grounds,⁷⁶ this is a far cry from the certainty that would come from a well-defined mechanism through inclusion of an express non-enforcement ground for set-aside. What is more, there is a plausible argument that the Singapore Convention’s signatories, by excluding such a non-enforcement ground, sought to eliminate any *res judicata* effect for enforcement litigation arising

⁷¹ See generally SCHAFFSTEIN, *supra* note 67, at 15-59.

⁷² See, e.g., YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 246 (2003); see also Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 *ARB. INT’L* 35, 36 (2004) (referring to *res judicata* as a general principle of law).

⁷³ See generally SCHAFFSTEIN, *supra* note 67, at 15-59.

⁷⁴ Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1069-70 (6th ed. 2018).

⁷⁵ *Id.* at 1071 (noting that “most state courts have adopted the basic approach to foreign judgments taken almost a century ago in *Hilton v. Guyot*,” 159 U.S. 113 (1985)).

⁷⁶ See, e.g., *V Cars, LLC v. Chery Auto. Co.*, 603 F. App’x 453, 458 (6th Cir. 2015) (“The arbitration proceedings in Hong Kong provided V Cars with the opportunity to raise all of the RICO claims available to it. Because the arbitral tribunal had jurisdiction over the claims, because the arbitrators issued a final decision on the merits of the claims, and because the arbitration proceedings and the federal court proceedings involved the same parties and the same causes of action, principles of *res judicata* preclude V Cars from pursuing their RICO claims in another forum.”).



from mediated settlement agreements.⁷⁷ In other words, principles of *res judicata* may afford little respite.

G. Contractual Set-Aside

To be sure, parties could provide for a set-aside mechanism in the settlement agreement itself. After all, Singapore Convention Article 5(1)(d), without parallel in the New York Convention,⁷⁸ states unequivocally that enforcement may be refused where “[g]ranted relief would be contrary to the terms of the settlement agreement.”

As a member of the U.S. delegation confirmed:

[I]f the parties agree to limitations on their ability to seek relief, those limitations must be given effect. Choice of forum clauses under which the parties to the mediated settlement can only seek relief in a particular jurisdiction should be given effect, as should clauses in the mediated settlement providing that further disputes will be resolved by arbitration.⁷⁹

But leaving set-aside to a negotiated term may pose a Hobson’s choice—do parties expend negotiating capital on a term that may prove controversial and whose utility to any one party will only emerge with the benefit of hindsight, thereby endangering the achievement of a substantively favorable settlement? Further, judicial appetite to enforce a clause prescribing a set-aside mechanism is untested and may vary from one jurisdiction to another.⁸⁰ In short, the contractual workaround itself lacks

⁷⁷ Vienna Convention on the Law of Treaties art. 31(10), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). A possible textual hook for parties seeking a *res judicata* effect of a non-enforcement decision in other jurisdictions could rely on Singapore Convention Article 5(2)’s exception for public policy or not being “capable of settlement by mediation under the law of that Party.”

⁷⁸ Chua, *supra* note 14, at 201 (noting, without explaining why the same cannot be true of an arbitration clause, that “Article 5(1)(d) has no equivalent in the New York Convention but that is only because it is unique to the mediation context, where a mediation agreement could possibly preclude or limit enforceability as one of its terms”).

⁷⁹ Schnabel, *The Singapore Convention*, *supra* note 19, at 48-49; see also Schnabel, *Implementation of the Singapore Convention*, *supra* note 23, at 271 (“Any limitations on relief that parties include in the settlement agreement should be given effect, such as forum selection clauses or even opting out of the Convention’s framework entirely.”).

⁸⁰ Cf. Zeller & Trakman, *supra* note 16, at 457 (“The scope of this opt-out provision is not yet tested.”).



predictability⁸¹ and illustrates what is arguably a substantial shortcoming of the Singapore Convention.

H. Antecedents

Last, limiting the availability of set-aside is not without precedent, and the history of such efforts is instructive. Belgium in 1985 amended its arbitration law to the effect that for arbitrations in Belgium without Belgian parties, there would be no set-aside procedure available before Belgian courts.⁸² The effect was that “[p]arties turned away from Belgium as a place of arbitration,” “Belgium was . . . black-listed by arbitral institutions,” and it eventually reversed course, abolishing the amendment and returning the set-aside recourse.⁸³

Similarly, to this day the Swiss Federal Statute on Private International Law permits two non-Swiss parties to opt out of set-aside proceedings in Switzerland.⁸⁴ Parties avail themselves of this option only on rare occasions, and the majority opinion among scholars now comes out against a waiver clause in a contract because recourse to the federal court for the setting aside the arbitral award is efficient: it has a maximum number of grounds for set-aside; it is limited to a single proceeding; it does not have a *lis pendens* effect on enforcement of the award; and it is decided in less than six months.⁸⁵

As has been observed, “[i]t is telling that indeed it is rare to find in practice an agreement expressly excluding the action for setting aside the award. What [this]

⁸¹ For instance, the Swiss Federal Statute on Private International Law, art. 192(1), explicitly allows for opt-out (“If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).”). However, while the statute was adopted in 1982, it was not until 2005 that the Swiss highest court accepted a valid waiver. Tribunal federal [TF] [Federal Supreme Court] Feb. 4, 2005, 131 ARRETS DU TRIBUNAL FEDERAL SUISSE [ATF] III 173.

⁸² Belgian Arbitration Law of 1985, adding a new paragraph to the CODE JUDICIAIRE/GERECHTELIJK WETBOEK [JUDICIAL CODE], art. 1717.

⁸³ Van den Berg, *supra* note 36, at 275 (citing Belgian Arbitration Law of 1998, amending the JUDICIAL CODE, art. 1717(4)).

⁸⁴ See *supra* note 86.

⁸⁵ Van den Berg, *supra* note 36, at 276 (citations omitted).



seems to show is that practice does not wish to abandon the action for setting aside the award in the country of origin as a universal bar to enforcement of a dubious award.”⁸⁶ If the same holds true for mediated settlements, the default lack of a set-aside mechanism—even more so than the potential for opt out under the New York Convention’s local implementing legislation in some jurisdictions—may prove to be unpopular with parties and therefore pose a significant obstacle to the success of the Singapore Convention.

I. *A Possible Cure Through Modification of the Singapore Convention*

Paralleling the New York Convention, the Singapore Convention could provide that the “seat” of the mediation—regardless of the actual physical location of the participants—would be the place agreed by the parties in the agreement to mediate or, failing a selection by the parties, the place designated by the mediator at the outset of the mediation. From that, it would not be much of a stretch to prescribe for set-aside applications to be heard at the seat and for enforcement elsewhere to follow the challenge at the seat.

Such relatively simple revisions from a drafting perspective would, the authors submit, give the Convention real meaning and opportunity to make international mediation as much a staple of international dispute resolution as international arbitration has become due, in no small measure, to the New York Convention.

V. CONCLUSION

The Singapore Convention’s goal of facilitating the enforcement of international commercial mediated settlements is laudable; yet in addition to the lingering question of whether the Convention will enter into force, there is reason to question whether it should in light of the shortcomings discussed above. Despite the Convention’s professed goal of “limiting” non-enforcement grounds in the image of the New York Convention,⁸⁷ and the intent of being “more efficient than litigation under contract

⁸⁶ *Id.*

⁸⁷ UNCITRAL, Forty-Ninth Session, Report of Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/861, at 17 (Sept. 17, 2015).



law,”⁸⁸ many of the non-enforcement grounds borrow from traditional contract law defenses and would now subject mediating parties to each jurisdiction’s “flexibility” regarding legal interpretations of such grounds—something certain to vary across jurisdictions.⁸⁹

Further, and most notably, unless the Singapore Convention is revised to add a set-aside mechanism, there is no effective recourse against repeated attempts at enforcement in multiple jurisdictions, no matter the merits of setting aside a particular settlement agreement. Instead, as the Convention now stands, it would leave those resisting enforcement no choice but to defend against enforcement actions in every single jurisdiction where the party seeking enforcement happens to file suit. This, the authors submit, deprives the Convention and those employing it of effective safeguards against flawed settlement agreements—safeguards that are customary in international dispute resolution.

Of course, the Singapore Convention permits parties to opt out of its coverage, but even if that can be thought of as a silver lining, it also confesses a fatal flaw. At any rate, from a risk mitigation standpoint when transacting in foreign markets,⁹⁰ for the time being it is the authors’ view that there is no reason to opt for relying on the Singapore Convention over conventional methods of enforcing mediated settlements.⁹¹



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⁸⁸ Schnabel, *The Singapore Convention*, *supra* note 19, at 4.

⁸⁹ UNCITRAL, Forty-Ninth Session, Report of Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/861, at 17 (Sept. 17, 2015).

⁹⁰ *Id.*

⁹¹ See Strong, *Beyond International Arbitration*, *supra* note 42; REISMAN, *supra* note 46.



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