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Enforcement of international mediated settlements without the Singapore convention on mediation

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ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENTS WITHOUT THE SINGAPORE CONVENTION ON MEDIATION

This article considers how international mediated settlement agreements can be enforced without the Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation"). Although the Singapore Convention on Mediation represents an important contribution to facilitate resolution of cross-border disputes through mediation, it will take time before there are enough signatories to make a significant impact. Additionally, in deciding whether or not to become a signatory to the Singapore Convention on Mediation or to opt out of it if given the option, jurisdictions and potential users of mediation will need to be aware of what the available alternatives are. This article discusses these alternatives, taking into account common law, civil law and other international instrument approaches to enforcement.

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1 Because mediated settlement agreements are entered into voluntarily by the parties instead of imposed on them by a third-party ruling, they have a higher chance of performance compared with court decisions.[1] Nevertheless, the parties may still wish to or find it necessary to create an enforceable agreement, for example, if the obligations agreed on are far in the future or if the parties have some specific need for reassurance whether for financial, emotional or other reasons. Additionally, the parties may be wary of the temptation to delay or

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1 Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Arthur W Rovine ed) (Martinus Nijhoff Publishers, 2009) at p 344; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th Ed, 2012) at p 382, citing empirical research from Stephen Goldberg *et al*, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Little Brown and Co, 2nd Ed, 1992) at p 8.

refuse performance or changes in circumstances that could affect compliance.[2] This need for enforceability is probably most acute in the international mediation context, where parties from different cultures and jurisdictions may not necessarily have a long-standing or robust relationship of trust. Complications in the enforcement of international mediated settlement agreements further add to the uncertainty and transaction costs of resolving an international dispute through mediation.[3]

2 For these reasons, many proponents of mediation see enforceability as a missing piece that could have a significant impact on the use of international mediation.[4] This view is supported by a large number of empirical research studies. In the Global Pound Conference Survey conducted from 2016 to 2017, delegates were asked about the areas that would most improve commercial dispute resolution. The top choice (51%) was the use of legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.[5] A survey published in 2016 and conducted by Stacie Strong showed that enforcement of international mediated settlement agreements was perceived as significantly more difficult than domestic mediated settlement agreements.[6] When asked to indicate whether they thought the existence of an international convention concerning the enforcement of settlement agreements arising out of international commercial mediations would encourage parties in the respondent's

2 Chang-Fa Lo, "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7(1) Contemp Asia Arb J 119 at 126–127.

3 Chang-Fa Lo, "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7(1) Contemp Asia Arb J 119 at 127–128.

4 Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" (2015) 6 TDM 1; Laurence Boulle, "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework" (2014) 7 Contemp Asia Arb J 35; Dorcas Quek Anderson, Nadja Alexander & Anna Howard, "UNCITRAL and the Enforceability of iMSAs: The Debate Heats Up – Part 3" *Kluwer Mediation Blog* (22 September 2016); David Weiss & Brian Hodgkinson, "Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements" (2014) 25 Am Rev Int'l Arb 275; Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" (2015) 22(1) Disp Resol Mag 32 at 32; Chang-Fa Lo, "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7(1) Contemp Asia Arb J 119.

5 The next closest option (47%) was the use of protocols promoting non-adjudicative processes before adjudicative processes. Herbert Smith Freehills, PwC & the International Mediation Institute, "Global Pound Conference Series: Global Data Trends and Regional Difference" (2018) at p 14 <https://www.globalpound.org>.

6 Stacie I Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Wash & Lee L Rev 1973 at 2051.

home jurisdiction to use mediation, a majority of 74% of the respondents thought that such an international instrument would encourage mediation.[7]

3 Building on Strong's survey, another survey adopting the same methodology had 84% of respondents selecting "yes" when asked whether they would be more likely to use or increase use of mediation in a cross-border dispute with another party or multiple parties of different jurisdictions if a uniform global mechanism was in place similar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[8] ("New York Convention") to enforce a settlement agreement reached in the mediation process.[9] In a 2014 survey conducted by the International Mediation Institute, 90% of respondents agreed that the absence of any kind of international enforcement mechanism for international mediated settlement agreements presented a major impediment or was at least one deterring factor to the growth of mediation as a mechanism for resolving cross-border disputes, and 93% indicated they would be likely to mediate a dispute with a party from a country that ratified an international convention on the enforcement of mediated settlements.[10]

4 The desire to promote enforceability of international mediated settlement agreements has been expressed and considered in the United Nations Commission on International Trade Law ("UNCITRAL") before, including during the preparation of the UNCITRAL Model Law on International Commercial Conciliation 2002[11] ("the Model Law"). Many "practitioners had put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a

7 Stacie I Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Wash & Lee L Rev 1973 at 2055.

8 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

9 David S Weiss & Michael R Griffith, "Report on International Mediation and Enforcement Mechanisms: Issued by the Institute for Dispute Resolution (IDR) NJCU School of Business to the International Mediation Institute for the Benefit of Delegates Attending the UNCITRAL Working Group II (Dispute Settlement) 67th Session" (2017) at pp 16–17.

10 International Mediation Institute, "IMI Survey Results Overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements (accessed 15 January 2019).

11 GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002). The Model Law has since been amended and renamed the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

conciliation would enjoy a regime of expedited enforcement".[12] The UNCITRAL also expressed that it was "generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted".[13] However, due to the great variance in the methods of achieving enforcement of settlement agreements between legal systems, the Commission ultimately left the issues of enforcement, defences to enforcement and the designation of authorities from whom enforcement could be sought to applicable domestic law. Accordingly, Art 14 of the Model Law provided that:

> If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable … [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

5 Following the Model Law, the next attempt to achieve some success in harmonising the enforcement of international mediated settlement agreements took place at the regional level in the European Union ("EU"). In the EU Mediation Directive,[14] Art 6 obliged member states to enforce a written settlement agreement resulting from cross-border mediation if all parties so requested and left the member states to implement this obligation based on procedural mechanisms of their choice. Unfortunately, the success of the EU Mediation Directive has been limited.[15] A study requested by the European Parliament's Committee on Legal Affairs has observed that the EU Mediation Directive has done little to solve the "EU Mediation Paradox" – "Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU."[16] The broad formulation of Art 6 has also led to not only the procedure but also the issues surrounding enforcement, including available defences to

12 United Nations Commission on International Trade Law, *Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* (A/CN.9/514) (27 May 2002) at para 77.

13 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002) at para 88.

14 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

15 Leonardo D'Urso, "A New European Parliament Mediation Resolution Calls on Members States and the EC to Promote More Use" (2018) 36(2) Alt to High Cost of Lit 19; Eunice Chua, "The Future of International Mediated Settlement Agreements: Of Conventions, Challenges and Choices" (2015) *Tan Pan Online: A Chinese-English Journal on Negotiation* 1.

16 With Italy as an exception due to the introduction of a form of mandatory mediation. European Parliament, Directorate-General for Internal Policies, Policy Department C (Citizens' Rights and Constitutional Affairs), *"Rebooting" the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (by Giuseppe De Palo *et al*) (PE 493.042, 2014) at p 1.

enforcement, being left to the domestic law of each of the EU member states.

6 Enter then the Convention on International Settlement Agreements Resulting from Mediation[17] ("Singapore Convention on Mediation"), which was adopted by the United Nations General Assembly on 20 December 2018. It signifies remarkable progress in the international community's acceptance of mediation as a dispute resolution mechanism and a desire to see its use grow. Completed within four years despite the many sceptical views expressed at the first proposal for such a convention at a meeting of UNCITRAL Working Group II,[18] the Singapore Convention on Mediation will allow parties to enforce an international mediated settlement in signatory states directly, akin to how the New York Convention allows the recognition and enforcement of foreign and non-domestic arbitral awards. It addresses the key issues surrounding the enforcement of international mediated settlement agreements but stops short of prescribing an enforcement procedure.[19]

7 Although reception to the Singapore Convention on Mediation has been warm,[20] it will take time before there are enough signatories to make a significant impact on the practice of international businesses. The New York Convention, now lauded as the most significant instrument in international arbitration, had 80% of the countries in the

17 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

18 See Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 5:

> The project did not get off to an auspicious start. Based on the first day of discussion in the Working Group, the chair assessed that the group did not have a great prospect of arriving at consensus on the desirability of work on this topic. Sobering views dominated the discussion, *e.g.*, a prediction that development of a convention would take many years, and fears that even if UNCITRAL did spend years working on the project, that work would be no more successful than prior efforts to address the issue in the context of UNCITRAL's development of the Model Law on International Commercial Conciliation …

19 See Eunice Chua, "The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution" (2019) Asian J Int'l Law (forthcoming) for a commentary.

20 See, *eg*, Patrick R Kingsley, "The Singapore Convention on Mediation: Good News for Businesses", *The Legal Intelligencer* (9 January 2019); Christian Schmitt, Alexandros Chatzinerantzis & Jane Larner, "The 'Singapore Convention': The Way Forward in International Mediation?" *Lexology* (31 July 2018); "UN Treaty on Mediation to Be Named after Singapore" *Business Times* (24 July 2018); and Ben Giaretta, "The Singapore Mediation Convention: A Game Changer?" *Mishcon de Reya* (28 August 2018).

world as signatory states as at 2018.[21] However, it should be remembered that "the international business community's penchant for international arbitration developed relatively recently",[22] and its influence expanded gradually as the number of signatory states grew at an average rate of between two and three states each year.[23]

8 Additionally, for countries deciding whether or not to become a signatory to the Singapore Convention on Mediation or for potential users deciding whether to opt out of it if given the option, which is a possibility permitted by Art 8 of the Singapore Convention on Mediation, it is important to be aware of what the alternatives are. This article discusses these alternatives, taking into account common law, civil law and other international instrument approaches to enforcement. It focuses on three generally available options to enforce international mediated settlement agreements: (a) as an order of a domestic court; (b) as a consent arbitral award; and (c) through notarisation.[24]

I. Enforcement as an order of court

9 If the mediated settlement agreement was arrived at after a court action had started, it is possible in many jurisdictions to have the court record the settlement agreement as a consent order of court, which is generally regarded as a final judgment of the court.[25] Exceptionally, domestic law may permit the courts to enter a judgment based on the mediated settlement agreement without starting a civil action. Examples include Ontario, Canada, where the Commercial

21 Paula Hodges QC, Peter Godwin & Justin D'Agostino, "60 Years of the New York Convention: A Triumph of Trans-national Legal Co-operation, or a Product of Its Time and in Need of Revision?" *Inside Arbitration* (July 2018).

22 Stacie I Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Wash & Lee L Rev 1973 at 1980, citing Gary Born, "A New Generation of International Adjudication" (2012) 61 Duke LJ 775 at 826–844.

23 Data on signatories obtained from http://www.newyorkconvention.org/countries (accessed 15 January 2019).

24 See generally Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Arthur W Rovine ed) (Martinus Nijhoff Publishers, 2009) at pp 345–359; Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) at pp 301–312; and Bobette Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research" (2014) 7(1) Contemp Asia Arb J 87 at 95–99.

25 Bobette Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research" (2014) 7(1) Contemp Asia Arb J 87 at 95.

Mediation Act 2010[26] permits the registration of a mediated settlement agreement with the Superior Court of Justice and for the agreement to have the same force and effect as if it were a judgment of the court; the Philippines, where s 17 of the Philippine Alternative Dispute Resolution Act[27] allows the parties to deposit a mediated settlement agreement with the appropriate clerk of a Regional Trial Court and for the court to summarily hear a petition if a need to enforce the mediated settlement agreement arises; and Singapore, where parties may make an application to court to have their mediated settlement agreement recorded as an order of court subject to certain conditions being satisfied under s 12 of Singapore's Mediation Act.[28]

10 Nevertheless, even if some expedited procedure is available for a mediated settlement agreement to take the form of a court order, there remains the difficulty of international enforcement because a court in another country is usually not obliged to recognise the foreign court's judgment unless there are pre-negotiated obligations to enforce in place, whether in the form of a multilateral or bilateral agreement.[29] The discussion in this part examines the enforcement of mediated settlement agreements that take the form of a foreign court judgement or order under international treaties, regional or bilateral treaties and under principles of domestic law. It concludes that although there is promise in multilateral treaties for the enforcement of foreign court judgments, the reality at present is that parties will have to rely on regional or bilateral treaties as well as domestic law. However, because these treaties are subject to different conditions, it is difficult to formulate with specificity general rules that can guide parties as to when one jurisdiction will recognise the orders of court made in another. There is even more divergence in terms of the practice of enforcement under a principle of domestic law. This leads to uncertainty for international businesses who have dealings all over the world and who have counterparts with assets all over the world.

A. International treaties

11 International treaties are arguably the best tool to bring certainty and harmony to the area of enforcement of foreign judgments. The Convention on the Recognition and Enforcement of Foreign

26 Commercial Mediation Act (SO 2010, c 16, Schedule 3) (Ontario) s 13.
27 Republic Act No 9285 (2004) s 17.
28 Mediation Act 2017 (Act 1 of 2017) s 12.
29 Bobette Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research" (2014) 7(1) Contemp Asia Arb J 87 at 95.

Judgments in Civil and Commercial Matters[30] is an example of an international instrument that sought to do this. Unfortunately, it has not gained traction, with only five contracting states.[31] The Choice of Court Convention[32] is a more successful multilateral treaty that provides for mutual recognition and enforcement of foreign judgements from a court that is chosen by the parties pursuant to a choice of court agreement. As of 31 December 2018, 31 countries have ratified the Choice of Court Convention.[33] These are the EU member states, Mexico, Montenegro and Singapore. The signatories[34] to the Choice of Court Convention are China, Ukraine and the US. It is apparent that the geographical spread of these countries is limited, even when the signatories are included. In particular, there are only two Asian countries, one Latin American country, and none from the Middle East and Africa. It is also doubtful when the Choice of Court Convention will enter into force in the US, which has been a signatory since 2009. Hence, the usefulness of the Choice of Court Convention to enforce foreign judgments may be constrained until more countries ratify it and bring it into force.

12 Further, in order for international parties to a mediated settlement to take advantage of the Choice of Court Convention, they will need to ensure that their agreement to mediate contains a clause stipulating an exclusive choice of court before having that court record the settlement agreement as a court order. Thus, this mechanism for enforcement may not be useful if the parties did not already contemplate enforcement in another jurisdiction at an early stage. Nevertheless, where recourse to the Choice of Court Convention is available, it could be preferred to the Singapore Convention on Mediation in certain circumstances: first, where the dispute between international parties is civil rather than commercial in nature. This is because the Choice of Court Convention applies to civil as well as

30 1 February 1971; entry into force 20 August 1979.

31 These are Albania, Cyprus, Kuwait, Netherlands and Portugal. See Hague Conference on Private International Law, "Status Table" https://www.hcch.net/en/instruments/conventions/status-table/?cid=78 (accessed 15 January 2019).

32 Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015).

33 Data on ratification status obtained from Hague Conference on Private International Law website https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (accessed 15 January 2019).

34 These are countries that have signed the convention thereby expressing their intention to comply with the treaty. Signing a treaty obliges a State to refrain in good faith from acts that would defeat the object and purpose of the treaty but does not otherwise bind the State to the terms of the treaty until it is ratified. Ratification occurs when a State has taken the necessary steps under its national laws to have the treaty take effect domestically and either notifies the other states or deposits the treaty with a depositary. See Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing, 2012) at pp 56–57.

commercial disputes, unlike the Singapore Convention on Mediation, which only applies to commercial disputes.[35] Second, to benefit from the finality that comes with very limited grounds for non-enforcement. Under the Choice of Court Convention, apart from the agreement being null and void, a party to the agreement lacking capacity, failure in the giving of notice for the institution of proceedings, recognition or enforcement being manifestly incompatible with public policy, and inconsistency with existing judgments, the only other ground for refusal of recognition or enforcement is if the judgment was obtained by fraud.[36] These grounds for refusal are more restrictive than those available under the Singapore Convention on Mediation, which arguably includes limbs with more subjectivity, including a "serious breach" by the mediator of standards applicable to the mediator or mediation, and a failure by the mediator to disclose to the parties circumstances that "raise justifiable doubts as to the mediator's impartiality or independence".[37] The Singapore Convention on Mediation further permits non-enforcement where this would be "contrary to the public policy" of the country where relief is sought, which appears to be a lower threshold to satisfy than the Choice of Court Convention's "manifestly incompatible with public policy".[38]

13 Separately, there has also been a revival of the Judgments Project by the Hague Conference on Private International Law, which goes beyond the Choice of Court Convention's narrow focus on international cases involving choice of court agreements and includes all judgments in civil and commercial cases where recognition and enforcement is sought abroad. The Special Commission on the Judgments Project has met multiple times from 2016 to 2018 to discuss a draft convention text. Alongside other regional efforts such as the Asian Principles of Private International Law,[39] and the Commonwealth

35 Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) Art 1.

36 Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 9.

37 Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) Art 5(1).

38 Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) Art 5(2); *cf* Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 9(e).

39 Weizuo Chen & Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" (2017) 13 J Priv Int'l Law 411.

Model Recognition and Enforcement of Foreign Judgments Bill,[40] this could enhance the international framework for the enforcement of foreign judgments in future and support the search for convergence in this area.

B. Regional or bilateral treaties

14 Two particular regions, Europe and Latin America, have a well-developed regional framework for the enforcement of foreign judgments. In Europe, the EU countries will mutually recognise and enforce the judgments of other EU countries pursuant to the recast Brussels I Regulation. Even if the UK exits from the EU and is unable to negotiate for continuing mutual recognition and enforcement of EU judgments, it should still be able to rely on the Choice of Court Convention, which it has acceded to in its own right, although the judgments covered by the Choice of Court Convention would be more limited. In Latin America, the conventions produced under the aegis of the Inter-American Specialized Conferences on Private International Law, including the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards[41] and the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments,[42] are influential in the region as they lay down conditions for enforcement of foreign judgments.

15 In terms of bilateral treaties for recognition and enforcement of foreign judgments, these vary from country to country and provide an uncertain basis to rely on. For example, if enforcement is sought within Commonwealth countries, it is likely that there will be mutual recognition and enforcement of judgments among these countries although this would still depend on the bilateral arrangements between the countries in question. To illustrate the lack of complete predictability in this regard, if one wished to enforce a judgment from the superior courts of Malaysia, Singapore, Aden, Bangladesh, Canada, the Cook Islands and the Trust Territories of Western Samoa, Fiji, Hong Kong, New Zealand, Papua New Guinea, Trinidad and Tobago, the United Arab Emirates and the UK in India, one could do so through s 44A of India's Code of Civil Procedure, 1908.[43] If one wished to enforce a judgment from the superior courts of the UK and other

40 Commonwealth Secretariat, "Improving the Recognition of Foreign Judgments: Model Law on the Recognition and Enforcement of Foreign Judgments" (2017) 43(3–4) *Commonwealth Law Bulletin* 545 at 547.

41 OAS Treaty Series No 51 (8 May 1979; entry into force 14 June 1980).

42 OAS Treaty Series No A/39; 24 ILM 468 (24 May 1984).

43 Act No 5 of 1908.

Commonwealth countries in Singapore, including Malaysia, Brunei, India (except the State of Jammu and Kashmir), the Commonwealth of Australia, and the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia, the Australian Capital Territory, Norfolk Island and the Northern Territory, one could rely on Singapore's Reciprocal Enforcement of Commonwealth Judgments Act.[44] If one wished to enforce a Hong Kong judgment in Singapore, one could rely on Singapore's Reciprocal Enforcement of Foreign Judgments Act.[45] For non-Commonwealth countries, which are usually civil law jurisdictions, this problem is further exacerbated and there is no discernible general principle to help ascertain the existence of bilateral treaties for mutual recognition and enforcement of domestic court judgments. In the Middle East, the close relations between the Arab states often means that bilateral treaties exist to permit mutual recognition and enforcement of court judgments. Nevertheless, one still needs to examine the bilateral treaty in question to ensure that one complies with the necessary requirements for enforcement that are not common across all treaties.

C. Domestic law

16 Absent a treaty, there are some countries that may enforce foreign court judgments based on principles recognised by domestic law. However, the domestic laws of countries relating to the recognition and enforcement of foreign judgments demonstrate great divergence and for international commercial disputes, this presents practical difficulties. In particular, the conflicts between civil law and common law give rise to thorny problems when the same term, such as "jurisdiction" or "finality", may have different meanings, or where certain terms may exist in one but not the other, such as "reciprocity".[46]

17 Under common law, it may be possible to enforce a foreign monetary judgment through a common law action on a judgment debt, which allows the judgment creditor to apply for summary judgment by producing the foreign judgment as proof of debt.[47] However, these procedures for enforcement may not be as swift or inexpensive as they appear, as the judgment debtor may use every means to delay

44 Cap 264, 1985 Rev Ed.

45 Cap 265, 2001 Rev Ed.

46 Jie Huang, "Conflicts between Civil Law and Common Law in Judgment Recognition and Enforcement: When is the Finality Dispute Final?" (2011) 29(1) Wisconsin Int'l L J 479 at 480–481; *Recognition and Reinforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at p 4.

47 *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 14-011.

enforcement and even, if possible, relitigate the original issues.[48] Additionally, even among common law jurisdictions differences still exist. The Asian Business Law Initiative project on the Recognition and Enforcement of Foreign Judgments reports that among Asian common law jurisdictions that adhere to the English common law framework, these jurisdictions differ on, amongst others, whether default judgments are final and conclusive in nature, and on the scope of the defence of fraud.[49] The US presents its own unique set of challenges due to the lack of uniformity among state laws.[50]

18 The civil law countries also demonstrate disparity. For example, in relation to the test for jurisdictional competence of the foreign court, this could be tested by reference to the law of the foreign court itself or to the law of the forum.[51] There are also vastly different approaches to recognition and enforcement. Some civil law countries require a treaty before a foreign judgment may be recognised and enforced, such as the Netherlands and some Scandinavian countries.[52] Others do not view the existence of a treaty as a necessary requirement but, absent a treaty, would be willing to enforce a foreign judgment based on some other principle in domestic law, like that of reciprocity. These include China, Vietnam, Japan and South Korea. However, it should also be mentioned that the principle of reciprocity is not uniformly understood and practised in civil law countries.[53] Reciprocity could mean that it must be shown that at least one of a country's judgments has been enforced by the other country in the past, or, that it is likely that its judgment would be enforced by the other country if the other country is called on to do so. The strictness in which the test of reciprocity is applied further adds to the uncertainty. Finally, there are also some civil law countries that even appear not to recognise foreign judgments at all as they require a

48 Commonwealth Secretariat, "Improving the Recognition of Foreign Judgments: Model Law on the Recognition and Enforcement of Foreign Judgments" (2017) 43(3–4) *Commonwealth Law Bulletin* 545.

49 *Recognition and Reinforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at p 3.

50 Yuliya Zeynalova, "The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It? (2013) 31 Berkley J Int'l Law 150 at 154.

51 *Recognition and Reinforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at p 3.

52 Ralf Michaels, "Recognition and Enforcement of Foreign Judgments" in *Max Planck Encyclopedia of Public International Law* (Rudiger Wolfrum ed) (Heidelberg and Oxford University Press, 2009) at para 10.

53 Béligh Elbalti, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite" (2017) 13 J Priv Int'l Law 184.

litigant to sue afresh on the same cause of action despite the foreign judgment in his favour, such as Indonesia and Thailand.[54]

19 Accordingly, enforcing international mediated settlements by way of a court order or judgment presents many challenges in the international context. Although some are optimistic about the progress of the Judgments Project, it will still take time before any convention is agreed, signed and ratified so as to come into force.

II. Enforcement as an arbitral award

20 Some countries have laws that give mediated settlement agreements the same status as arbitral awards. For example, under s 73(3) of India's Arbitration and Conciliation Act 1996,[55] a settlement agreement signed by the parties is final and binding on them and the persons claiming under them and is given the legal force and effect of an arbitral award. Similarly, Art 51(2) of the Arbitration Law of the People's Republic of China[56] provides that a conciliation statement has the same effect as an arbitral award on the merits. However, it is unclear whether these provisions would apply to international mediated settlement agreements as these are not provided for in the domestic legislation.

21 The more common way of enforcing international mediated settlements as an arbitral award is by combining the mediation and arbitration processes. This is most frequently done through mediation-arbitration ("Med-Arb"),[57] arbitration-mediation ("Arb-Med")[58] and arbitration-mediation-arbitration ("Arb-Med-Arb").[59] Of these three ways of combining processes, a small-scale international study of 81 participants showed that of the 27 participants (33.3%) that had experience with combined processes, Med-Arb and Arb-Med-Arb were the most popular, with about three-quarters indicating that they had experienced Med-Arb (74.1%) and Arb-Med-Arb (70.4%).[60] Arb-Med was much less frequently used, with only 25.9% of the participants indicating that they had experience with Arb-Med in the sense of

54 *Recognition and Reinforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at pp 3–5.

55 Act No 26 of 1996.

56 Promulgated by Order No 31 of the President of the People's Republic of China on 31 August 1994.

57 This refers to a tiered process where mediation is first attempted before arbitration.

58 This refers to a tiered process where the parties begin with the arbitration and complete the arbitration hearing before mediation is attempted.

59 This refers to a mediation window during an arbitration process.

60 Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" (2016) 33(1) J Int'l Arb 37 at 64.

mediation being conducted after the arbitration hearing but before issuing the award, and 11.1% where mediation was conducted after issuing the award.[61] Various factors can influence the parties' decisions regarding the manner in which mediation and arbitration are combined, including cost-effectiveness and the ability of the process to assist parties in preserving their relationships.[62] The discussion in this section will touch on the perceived advantages of Med-Arb, Arb-Med and Arb-Med-Arb, but will focus on the ability of the combined process to achieve international enforceability.

A. Med-Arb

22 In Med-Arb, if a settlement agreement is arrived at after mediation, the parties then appoint an arbitrator, who may be the same person as the mediator, to record their settlement agreement as a consent arbitral award. If no settlement agreement is reached, the appointed arbitrator will proceed to hear the case. However, variations of Med-Arb such as mediation and last offer arbitration also exist, where if the mediation fails, each party presents the mediator-turned-arbitrator with a proposed ruling and the arbitrator decides between the two.[63]

23 The key perceived benefit of Med-Arb is efficiency. First, the arbitrator is already familiar with the dispute; hence, there is no need for any duplication of work, additional expense or delay.[64] Second, any mediated settlement arrived at during arbitration may swiftly be recorded as a consent award. Third, even where there is no settlement reached, previous negotiations will have helped to narrow issues and result in procedural measures that could lead to a more predictable and acceptable award.[65] Another advantage of Med-Arb is its perceived ability to provide greater opportunity to salvage relationship concerns than Arb-Med.[66] Because mediation takes place before arbitration, and

61 Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" (2016) 33(1) J Int'l Arb 37 at 65.

62 See Eunice Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure" (2018) TDM 5.

63 Thomas J Stipanowich & Peter H Kaskell, *Commercial Arbitration at Its Best: Successful Strategies for Business Users* (CPR Institute for Dispute Resolution, 2001) at pp 25–26.

64 Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) J Int'l Arb 479 at 490.

65 Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) J Int'l Arb 479 at 490.

66 Trevor Jason Stones, "Choosing between Med-Arb and Arb-Med: An Exploratory Study" (Master of Arts thesis, University of Victoria) (2007) <www.cedires.be/

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assuming that most disputes can be settled at mediation and that even if they do not mediation can help the parties to narrow their differences and issues in dispute, the Med-Arb process helps to avoid or minimise adversarial behaviour.

24 Various international dispute resolution institutions offer a Med-Arb clause or have rules that provide expressly for Med-Arb, including the International Chamber of Commerce, the International Centre for Dispute Resolution, the London Court of International Arbitration and the Mediation Institute of the Stockholm Chamber of Commerce. Many Asian dispute resolution institutions also offer Med-Arb services, including the Asian International Arbitration Centre ("AIAC"),[67] Beijing Arbitration Commission ("BAC"),[68] China International Economic and Trade Arbitration Commission ("CIETAC"),[69] Indian Institute of Arbitration and Mediation[70] and Vietnam International Arbitration Centre.[71] Others such as the Hong Kong International Arbitration Centre offer both mediation and arbitration services although the rules do not provide for how both services can be combined. This shows that Med-Arb is perceived as being an attractive option in quite a number of jurisdictions although it is not clear how widely Med-Arb is used for international commercial disputes.[72]

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index_files/SONES_Trevor_Jason_Choosing%20between%20med-arb%20and%20arb-med_thesis.pdf> (accessed 15 January 2019).

67 Rule 15 of the Asian International Arbitration Centre ("AIAC") Arbitration Rules 2018 provides for half of the administrative fees paid to the AIAC for mediation to be credited towards the AIAC administrative fees in relation to the arbitration in the event that parties have failed to reach a mediated settlement under the AIAC Mediation Rules.

68 Article 23 of the Beijing Arbitration Commission Mediation Center Mediation Rules (31 August 2011; effective 28 September 2011) provides that:

> … [t]he parties can apply for arbitration to the Beijing Arbitration Commission by submitting an arbitration agreement and request the arbitral tribunal to render an arbitral award or a conciliation statement following the content of the settlement agreement.

69 Article 47 of the China International Economic and Trade Arbitration Commission Arbitration Rules (adopted 4 November 2014; effective 1 January 2015) provides for the combination of conciliation and arbitration.

70 Rule 19 of the Indian Institute of Arbitration and Mediation ("IIAM") Arbitration Rules 2017 provides for half of the administrative fee paid to IIAM for mediation to be credited towards the administrative fee of the arbitration where parties have referred their dispute to mediation under IIAM Mediation Rules and they have failed to reach a settlement and thereafter proceed to arbitration under the Rules.

71 Article 29 of the Vietnam International Arbitration Centre Rules of Arbitration 2017 allows the tribunal to conduct mediation at the parties' request.

72 Statistics provided by dispute resolution institutions including the Asian International Arbitration Centre, Beijing Arbitration Commission, China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, International Chamber of Commerce,

(*cont'd on the next page*)

25 Caution may be warranted because Med-Arb poses some difficulties in the context of international commercial disputes. There is first an issue of whether an award can be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation. This is because it could be argued that no "difference" existed between the parties to found an arbitration by the time of appointment of the arbitrator.[73] It appears that certain jurisdictions such as New York and Brazil require that the arbitral tribunal be constituted prior to settlement of the dispute.[74] Commentators examining this issue have come to different conclusions – that such an award is not enforceable,[75] that it is,[76] or that it is not clear.[77] It should further be noted that the New York Convention is silent on the specific question of its applicability to decisions that record the terms of a settlement between parties.[78] The *travaux préparatoires* of the New York Convention show that the issue of the application of the New York Convention to consent awards was raised during its deliberations, but that no decision was made.[79]

International Centre for Dispute Resolution, Indian Institute of Arbitration and Mediation, London Court of International Arbitration, Stockholm Chamber of Commerce and Vietnam International Arbitration Centre do not disclose the international cases that have been resolved through combining mediation and arbitration.

73 Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 262; Cyril Chern, *Dispute Resolution Guides: International Commercial Mediation* (Informa, 2008) at p 187.

74 Donna Ross, "Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?" in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Arthur W Rovine ed) (Martinus Nijhoff Publishers, 2013) at pp 362–363.

75 Christopher Newmark & Richard Hill, "Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?" (2000) 16(1) Arb Int'l 81 at 81; James T Peter, "Med-Arb in International Arbitration" (1997) 8 Am Rev Int'l Arb 83 at 88.

76 Harold I Abramson, "Mining Mediation Rules for Representation Opportunities and Obstacles" (2004) 15 Am Rev Int'l Arb 103.

77 Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" (2015) 6 TDM 1 at 8.

78 United Nations Commission on International Trade Law, *Note by the Secretariat – Settlement of Commercial Disputes – International Commercial Conciliation: Enforceability of Settlement Agreements* (A/CN.9/WG.II/WP.190) (13 July 2015) at para 19.

79 *Travaux préparatoires*: United Nations Economic and Social Council, *Recognition and Enforcement of Foreign Arbitral Awards: Report by the Secretary-General* (E/2822) (31 January 1956) Annex I (Comments by Governments) at pp 7 and 10; *Travaux préparatoires*: United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (E/CONF.26/L.26) (27 May 1958).

26 As an aside, although an interpretation of the New York Convention could suffice to address this issue,[80] a regime tailored to the specific concerns raised in the mediation context would better serve users.[81] This is because the defences for challenging an arbitral award and a mediated settlement agreement do not always overlap. Although incapacity of a party would be a basis to resist enforcement in both the mediation and arbitration context,[82] different thresholds and tests would apply to misconduct on the part of the mediator or arbitrator. Misconduct of the mediator is expressly addressed under Arts 5(1)(e) and 5(1)(f) of the Singapore Convention on Mediation but not under the New York Convention. The New York Convention addresses arbitrator misconduct through other defences, such as the award dealing with a difference not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration under Art V(1)(c); the arbitral procedure not being in accordance with the agreement of the parties or the law of the country the arbitration took place under Art V(1)(d); or for enforcement being contrary to public policy under Art V(2)(b). One could also challenge an arbitral award on the basis of the composition of the arbitral authority not being in accordance with the agreement of the parties or the law of the country the arbitration took place under Art V(1)(d), but this is not expressly provided for in the context of the appointment of the mediator.

27 Another issue with Med-Arb occurs where the mediator is the same person as the arbitrator. This may result in allegations of perceived or actual bias, for example, where information is disclosed in private sessions to a mediator that influences decision-making when that mediator sits as arbitrator.[83] The knowledge that the mediator may later switch to the role of arbitrator may also cause parties to be wary of disclosing information or to treat the mediation as an early trial run of

80 Edna Sussman, "The New York Convention through a Mediation Prism" (2009) 15(4) Disp Resol Mag 10 at 12–13.

81 Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" (2015) 6 TDM 1 at 9.

82 See Art V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) and Art 5(1)(a) of the Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

83 Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of Its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 259–260. See also *Glencot Development and Design Co Ltd v Ben Barrett & Son Ltd* [2001] All ER (D) 384; [2001] EWHC Technology 15 where Judge Humphrey Lloyd QC pointed out the dangers of appearance of bias caused by one person wearing two hats.

the arbitration hearing.[84] Nevertheless, this difficulty may only be a theoretical one in certain cultures where the arbitrator or mediator is regarded as an authority figure who is trusted to be capable of remaining impartial despite obtaining confidential information during mediation.[85] It has been argued that in societies where interpersonal relationships are more stable and long-lasting, procedures that allow for compromises are preferred, with parties seeking an arbitrator who will not only end their dispute but will also assist them in reaching a mutually agreeable solution with as little loss of face as possible.[86] For example, mediation and arbitration are frequently combined in China,[87] where the experience has been that combining the two makes mediation more likely to produce a settlement than when it is conducted separately.[88] Med-Arb as well as Arb-Med have also been described as well suited to meeting India's needs.[89] Domestic legislation in Hong Kong and Singapore offers a creative solution to the problem of confidential information being disclosed to the arbitrator by requiring the arbitrator to disclose to all the parties any information obtained through the mediation that the arbitrator considers is material to the arbitral proceeding in the event that the parties consent to the arbitrator serving as mediator.[90] However, even if the parties are willing to accept the same neutral playing the role of mediator and arbitrator, there remains the

84 Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 259–260; Thomas J Brewer & Lawrence R Mills, "Med Arb: Combining Mediation and Arbitration" (1999) 54 Disp Resol J 32 at 35.

85 Fan Kun, "An Empirical Study of Arbitrators Acting as Mediators in China" (2014) 15 Cardozo J Conflict Resol 777 at 786.

86 Research also shows that people with a high level of power distance place less weight on procedural justice than on distributive justice concerns: Fan Kun, "An Empirical Study of Arbitrators Acting as Mediators in China" (2014) 15 Cardozo J Conflict Resol 777 at 786.

87 Thomas J Stipanowich *et al*, "East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China" (2009) 9(2) Pepp Disp Resol LJ 379 at 398; Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) J Int'l Arb 479; Carlos de Vera, "Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China" (2004) 18 Colum J Asian L 149 at 162–178; Tai-Heng Cheng & Anthony Kohtio, "Some Limits to Applying Chinese Med-Arb Internationally" (2009) 2(1) NY Disp Resol Law 95.

88 Wang Shengchang, "CIETAC's Perspective on Arbitration and Conciliation Concerning China" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (ICCA Congress Series No 12) (Kluwer Law International, 2005) at p 27.

89 Sriram Panchu, "Arb-Med and Med-Arb Are Well-Suited to Meeting India's ADR Needs" (2009) 2(1) NY Disp Resol Law 103 at 103.

90 Arbitration Ordinance (Cap 609) s 33 (Hong Kong); International Arbitration Act (Cap 143A, 2002 Rev Ed) s 17.

practical challenge of finding someone who is skilled both as an arbitrator and mediator.[91]

B. Arb-Med

28 There are various forms of Arb-Med, including: (a) sealed arbitration award and mediation, where the arbitrator prepares an award which remains under seal and takes on the role of mediator after that; if the parties fail to reach a settlement agreement, the earlier drafted award is issued; and (b) Arb-Med-Arb, where mediation is attempted after arbitration commences and, if unsuccessful, the dispute returns to arbitration.[92]

29 The largest problem with the sealed arbitration award and mediation process is that unless the arbitration proceedings are quickly concluded and straightforward, there could be substantial and unnecessary costs incurred by everyone involved – the parties, counsel, and the arbitrator or mediator.[93] The rapport of the parties with the mediator and with each other may also be strained because of what transpired during the adversarial arbitration process, making mediation more difficult.[94] On the other hand, empirical research of students engaged in simulated Arb-Med demonstrates that this sealed arbitration award and mediation process produced settlement in the mediation phase more frequently and achieved settlements of higher joint benefit than a Med-Arb process.[95] This is likely due to psychological reasons such as the desire to reduce outcome uncertainty in Arb-Med, and greater willingness to exchange information in Arb-Med since there can be no impact on the sealed arbitral award.[96] The fact that the arbitrator

91 Lucy Greenwood, "A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement" (2011) 27(2) Arb Int'l 199 at 208.

92 Kathleen M Scanlon & Kathy A Bryan, "Will the Next Generation of Dispute Resolution Clause Drafting Include Model Arb-Med Clauses?" in *Contemporary Issues in International Arbitration and Mediation: Fordham Papers 2012* (Arthur Rovine ed) (Martinus Nijhoff Publishers, 2013) at p 430.

93 Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 263–264.

94 Eunice Chua, "The Future of International Mediated Settlement Agreements: Of Conventions, Challenges and Choices" (2015) *Tan Pan Online: A Chinese-English Journal on Negotiation* 1.

95 Donald E Conlon, Henry Moon & K Yee Ng, "Putting the Cart before the Horse: The Benefits of Arbitrating before Mediating" (2002) 87(5) *Journal of Applied Psychology* 978.

96 Donald E Conlon, Henry Moon & K Yee Ng, "Putting the Cart before the Horse: The Benefits of Arbitrating before Mediating" (2002) 87(5) *Journal of Applied Psychology* 978 at 979.

already determines the award before the mediation also makes this process more acceptable from a conflict of interest perspective when the mediator and arbitrator are the same person. However, this study also showed that Arb-Med produced slower resolutions and did not work to reduce pre-dispute measures of disputant outcome expectations,[97] validating the earlier observation about the "chilling effect" of arbitration on negotiation behaviour.[98]

30 Accordingly, Arb-Med may not be an effective process for the majority of international commercial disputes, which would usually involve evidence and witnesses from various jurisdictions, thus leading to a costly arbitration component. Such disputes may also benefit from being resolved more quickly to avoid jeopardising ongoing business projects or relationships and a full-blown arbitration hearing before mediation would not favour a speedy resolution.

C. Arb-Med-Arb

31 Arb-Med-Arb can be viewed as a form of Arb-Med where the mediation takes place before the completion of the substantive arbitration hearings. If parties are able to come to a settlement after mediation, they may return to the arbitral tribunal to have their settlement agreement recorded as a consent arbitral award. If not, the matter proceeds with arbitration. Despite the theoretical uncertainties, there is general agreement that a consent arbitral award obtained through Arb-Med-Arb will likely be enforceable under the New York Convention.[99] The Arb-Med-Arb process avoids the problem that Med-Arb presents because arbitration is commenced in the traditional way, while "differences" still remain between the parties that can be submitted to arbitration. Enforceability is therefore Arb-Med-Arb's greatest advantage. Arb-Med-Arb could also possibly be effective in preserving the relationship between parties (or at least preventing it from worsening), especially where mediation is done at an early stage of the arbitration process.[100]

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97 Donald E Conlon, Henry Moon & K Yee Ng, "Putting the Cart before the Horse: The Benefits of Arbitrating before Mediating" (2002) 87(5) *Journal of Applied Psychology* 978 at 983.

98 See Thomas A Kochan, *Collective Bargaining and Industrial Relations: From Theory to Policy and Practice* (RD Irwin, 1980) at p 291.

99 Edna Sussman, "The New York Convention through a Mediation Prism" (2009) 15(4) Disp Resol Mag 10 at 12; Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 262.

100 Eunice Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure" (2018) TDM 5.

32 On the other hand, Arb-Med-Arb's disadvantages are that it tends to be costlier and less efficient than Med-Arb, especially where there is no settlement. Even where there is a settlement, should different institutions or persons be involved, additional costs such as filing fees and preparation fees may be incurred. Where the arbitrator and the mediator are the same, there could also be problems of potential bias and parties refraining from sharing confidences or making use of the mediation process for collateral purposes.[101]

33 In the Hong Kong case of *Gao Haiyan v Keeneye Holdings Ltd*,[102] a challenge was made to a Mainland China arbitral award on various grounds, including that of apparent bias arising from what a Xian Court had found to be an unsuccessful mediation by the arbitral tribunal. The circumstances of the mediation that were said to give rise to apparent bias included: (a) the tribunal deciding to make a proposal to the parties to settle their dispute by payment of a certain sum by the respondents to the applicants; (b) the tribunal appointing the applicant-nominated arbitrator and a third party from the Xian Arbitration Commission to contact the parties with this proposal; and (c) the conveyance of the proposal over dinner at a hotel where not all the parties were present.[103] The Hong Kong Court of First Instance refused enforcement of the award but was later overturned by the Hong Kong Court of Appeal, where Hon Tang VP remarked that refusing enforcement of an arbitral award on the basis that it would be contrary to the fundamental conceptions of morality and justice of the forum:[104]

> … does not mean, for example, [that] if it is common for mediation to be conducted over dinner at a hotel in Xian, an award would not be enforced in Hong Kong, because, in Hong Kong, such conduct, might give rise to an appearance of apparent bias.

This case illustrates not only how the issue of apparent bias may arise during enforcement of awards obtained through a hybrid process but also the importance of the enforcing court being accepting of cultural variance in mediation practice.

34 Nevertheless, where sufficient care is taken, Arb-Med-Arb may still be attractive for parties concerned about international enforceability

101 Ellen E Deason, "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review" (2013) 5 YB Arb & Mediation 219 at 223.

102 [2011] HKCA 489; [2012] 1 HKLRD 627.

103 See Friven Yeoh & Desmond Ang, "Reflections on *Gao Haiyan* – Of 'Arb-Med', 'Waivers', and Cultural Contextualisation of Public Policy Arguments" (2012) 29(3) J Int'l Arb 285 for a helpful summary and commentary.

104 *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKCA 489; [2012] 1 HKLRD 627 at [105].

of their mediated settlement agreements and maintaining business relationships, and who desire a comprehensive process that responds to the potential failure of mediation to bring about full settlement.

35 At present, Arb-Med-Arb appears most prevalent in Europe and Asia. In Europe, German and Swiss arbitrators have been observed to adopt a more settlement-friendly approach.[105] Arb-Med-Arb is also permitted by the rules of institutions like the German Arbitration Institute[106] and the Swiss Chambers' Arbitration Institution.[107] In Asia, it is common for Mainland Chinese institutions such as CIETAC and BAC to have rules that permit Arb-Med-Arb,[108] and for arbitrators to engage in conciliation. Other Asian institutions like the AIAC publicises an Arb-Med-Arb clause although there are no specific rules relating to this process.

36 The most regulated Arb-Med-Arb procedure on offer by a dispute resolution service provider is the Arb-Med-Arb service jointly offered by the Singapore International Mediation Centre ("SIMC") and Singapore International Arbitration Centre ("SIAC").[109] The hallmarks of this service are, first, a procedural framework to govern the transition between arbitration and mediation as well as financial matters in a document called the Arb-Med-Arb Protocol ("the AMA Protocol"). Under the AMA Protocol, arbitration is commenced by filing a notice of arbitration in accordance with the applicable arbitration rules (either SIAC Arbitration Rules[110] or UNCITRAL Arbitration Rules).[111] An arbitral tribunal is appointed and after the exchange of the notice of arbitration and response to the notice of arbitration, the arbitral tribunal stays the arbitration and the matter is submitted to SIMC for mediation.

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105 Gabrielle Kaufmann-Kohler, "When Arbitrators Facilitate Settlement: Towards a Transnational Standard" (2009) 25(2) Arb Int'l 187.

106 Article 27.4 of the German Arbitration Institute Arbitration Rules 2018 provides that the tribunal shall discuss with the parties at a case management conference the possibility of using mediation or other method of amicable settlement; Art 41 provides for the recording of a consent settlement agreement by the tribunal.

107 Article 24 of the Swiss Rules of Commercial Mediation (April 2007; reprinted 2013) refers to mediation during the course of arbitral proceedings.

108 *Eg*, Art 43(1) of the Beijing Arbitration Commission Arbitration Rules states that during the arbitral proceedings:

> … the parties may enter into a voluntary settlement agreement or may apply to the Mediation Center of the BAC (the 'Mediation Center') for mediation by the mediators of the Mediation Center in accordance with the Mediation Rules of the Mediation Center of the BAC.

109 See Constance Castres Saint Martin, "Arb-Med-Arb Service in Singapore International Mediation Centre: A Hotfix to the Pitfalls of Multi-Tiered Clauses" [2015] Asian JM 35 at 44–46.

110 6th Ed, 1 August 2016.

111 GA Res 68/109, adopted by the United Nations General Assembly, 68th Session (16 December 2013).

The mediation will be completed within eight weeks from the date it commences unless the Registrar of SIAC in consultation with SIMC extends the time. The AMA Protocol further provides for the parties to pay combined fees and deposits to SIAC (the apportionment between SIAC and SIMC is dealt with institutionally). There is minimal additional cost difference between a pure arbitration at SIAC and the Arb-Med-Arb service.

37 Second, there is independent institutional support in the form of case management as well as appointment of suitable arbitrators and mediators for each case from international panels. The mediator and arbitrator will generally be different persons unless the parties expressly agree otherwise.

38 Finally, an important feature of the AMA Protocol is a deeming provision that the parties agree that any dispute settled by mediation at SIMC "shall fall within the scope of their arbitration agreement".[112] This allows the mediation to globally resolve any issues between the parties that may not strictly arise from the contract containing the arbitration agreement. The SIAC-SIMC Arb-Med-Arb service has been described as "combin[ing] the best of both systems, granting the efficiency of mediation and the certainty and enforceability of an arbitral award".[113] Although there are issues that remain to be clarified with the AMA Protocol, including whether jurisdictional challenges may be made after an arbitration has been stayed and referred to mediation at SIAC,[114] the AMA Protocol does offer a generally clear framework for mediation to be conducted in the context of an international arbitration.

39 On balance, using the arbitration route to enforce international mediation settlements is superior to the route of a court judgment due to the large number of countries that will recognise and enforce consent arbitral awards under the New York Convention. However, there remain problems that could potentially surface depending on the precise way mediation and arbitration are combined.[115]

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112 Singapore International Mediation Centre, "SIAC-SIMC Arb-Med-Arb Protocol" at para 1 http://simc.com.sg/dispute-resolution/arb-med-arb/ (accessed 15 January 2019).

113 Christopher Boog & Elisabeth Leimbacher, "The Singapore International Mediation Centre and the New AMA Procedure – Finally What Users Have Always Wanted?" *Schellenberg Wittmer Newsletter* (January 2015) at p 3.

114 See the contrasting views expressed in Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018); and Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018).

115 Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in *Contemporary Issues in International Arbitration and Mediation:*

(*cont'd on the next page*)

III. Enforcement through notarisation

40 Mediated settlement agreements may, finally, be enforced through being transposed into a notarial deed. This path of enforcement is commonly available in civil law countries.[116] For example, in Germany, parties may include the mediated settlement agreement in a public document drawn up by a German notary and add a declaration by the party concerned, in which the party agrees to submit to immediate enforcement in relation to an obligation resulting from that agreement.[117] In Spain, legislation[118] provides for mediation agreements to be recorded in a public instrument in the presence of a notary public and to meet certain requirements before they may be enforceable.[119] In Austria, if a party wants to enforce a right arising out of a contract, including mediated settlement agreements, they may convert their agreement into a "*vollstreckbarer Notariatsakt*" according to s 3 of Austria's Notarial Code.[120] While the legal peculiarities of these notarial deeds vary according to jurisdiction, they do, generally speaking, share a number of features, including that they must be in writing and signed by the parties, and there may be a need for it to be signed by witnesses, lawyers, notaries, or any combination of these parties.[121] There may or may not be a requirement that parties make mutual concessions for the deeds to be valid.[122]

41 At common law, mediated settlement agreements may also be made into a deed. However, this is different from the process of notarisation in civil law countries as deeds are not in themselves enforceable. The main reason of embodying a mediated settlement agreement in the form of a deed is that deeds do not require consideration, whereas ordinary contracts do.[123] The recitals at the

The Fordham Papers 2008 (Arthur W Rovine ed) (Martinus Nijhoff Publishers, 2009) at p 343.

116 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) at p 305.

117 UNCITRAL, *Note by the Secretariat – Compilation of Comments by Governments* (A/CN.9/846/Add.3) (4 June 2015) at pp 13–14 and 16.

118 Spain's Act No 5/2012 of 6 July 2012 on mediation in civil and commercial matters and Act No 1/2000 of 7 January 2000 on civil procedure.

119 UNCITRAL, *Note by the Secretariat – Compilation of Comments by Governments* (A/CN.9/846/Add.3) (4 June 2015) at pp 13–14 and 16.

120 UNCITRAL, *Note by the Secretariat – Settlement of Commercial disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation* (A/CN.9/846) (27 March 2015) at p 5.

121 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) at pp 305–306.

122 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) at pp 306–307.

123 David Spencer & Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) at p 356.

beginning of a deed that set out a brief history of the dispute between the parties and the agreed solution may also be helpful to provide context for the agreement.[124]

42 Because notarisation is purely a matter of domestic law, the requirements of which vary from country to country, and is essentially available only in civil law jurisdictions, this method of enforcement is also of limited usefulness in the international context, particularly where there are multiple parties from different jurisdictions that are a mix of common and civil law traditions. It is further uncertain if the benefit of notarisation would extend to mediations that do not take place within the country in question. Accordingly, this option of an enforcement is probably not a very useful one for consideration by international users, although it may be of some utility in the EU, especially post-Brexit.

IV. Conclusion

43 The enforcement of international mediated settlement agreements without an international instrument is challenging. Of the three generally available options canvassed in this piece, enforcement as an arbitral award seems to emerge as the best choice simply because it depends on the widely ratified New York Convention. Although there is promise in terms of the development of a multilateral instrument for the recognition and enforcement of foreign judgments, it will take time before a convention can be finalised. Unsurprisingly, the combination of mediation and arbitration is on an upward trend.[125] Although this option may be accompanied by some risks and difficulty, particularly in the manner in which mediation and arbitration are combined and whether the same neutral is used for both parts of the combined process, these can be minimised to some degree with a well-drafted dispute resolution clause and using the Arb-Med-Arb or Arb-Med

124 David Spencer & Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) at p 357.

125 See Eunice Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure" (2018) TDM 5, citing International Mediation Institute, "Cumulated Data Results March 2016 – September 2017", Global Pound Conference Series 2016–2017 <http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf> (accessed 15 January 2019); Christopher Bloch *et al*, "Drafting Step Clauses: An Empirical Look at Their Practicality and Legality" (Pace Institute of International Commercial Law) http://www.cisg.law.pace.edu/cisg/newsletter/Pace_IACCM_Step_Clause_Drafting_Manual.pdf (accessed 15 January 2019); and Queen Mary University of London School of International Arbitration, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018).

procedure (although there may be an issue of cost-effectiveness with the latter).

44 Nevertheless, in terms of certainty and simplicity of enforcement requirements and procedure, the existing methods of enforcing international mediated settlement agreements pale in comparison with enforcement under the Singapore Convention on Mediation which provides a clear application procedure, and states the requirements for enforcement, as well as the grounds to refuse enforcement. This author is optimistic that the Singapore Convention on Mediation, combined with educational and other policy initiatives to inform and "nudge" users,[126] would be an important instrument to promote the use of international mediation for the benefit of commercial parties and international trade flows.

126 Nadja Alexander, "Nudging Users towards Cross-border Mediation: Is It Really about Harmonized Enforcement Regulation?" (2014) 7(2) Contemp Asia Arb J 405.