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Enforcement of mediated settlement agreements in Asia – A path towards convergence

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Enforcement of International Mediated Settlement Agreements in Asia – A Path towards Convergence

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In 2014, the United Nations Commission on International Trade Law (UNCITRAL) first considered a proposal for the development of a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation (defined to include mediation). The goal of this project was to encourage international mediation in the same way that the New York Convention facilitated the growth of arbitration. UNCITRAL Working Group II has since completed its work on a convention on international settlement agreements resulting from mediation and amended model law on international commercial mediation and international settlement agreements resulting from mediation. The UNCITRAL Commission has also approved these instruments. In Asia, where continued growth of cross-border trade is expected, the potential for these UNICTRAL instruments to facilitate the resolution of cross-border commercial disputes and support economic growth is immense. With a focus on jurisdictions such as China, India, Hong Kong and Singapore, this paper discusses the convention and amended model law, and examines how far down Asia is on the path towards convergence in the enforcement of international mediated settlement agreements.

Keywords: UNCITRAL Convention on International Settlement Agreements Resulting from Mediation; UNICTRAL Model Law on International Commercial Mediation; enforcement of settlement agreements; dispute resolution

I. INTRODUCTION

In 2011, the International Institute for Conflict Prevention and Resolution conducted an exploratory survey. Of 122 respondents comprising in-house counsel and external counsel from the Asia-Pacific region, 72% indicated that their company or firm generally had a positive attitude to mediation (compared to 69% for arbitration) and 78% indicated that their company or clients used mediation to resolve disputes in the last three years.[1] Apart from users and lawyers, governments and judiciaries in Asia also hold positive attitudes towards mediation, with these manifested through the establishment of mediation infrastructure, legislation and institutions. China, India, Hong Kong, and Singapore, are excellent examples of jurisdictions that have invested in promoting and encouraging the use of mediation.

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[1] International Institute for Conflict Prevention and Resolution, 'Attitudes Towards ADR In the Asia-Pacific Region: A CPR Survey' (*CPR*, 2011) <https://www.cpradr.org/programs/international-initiatives/asia/asia/_res/id=Attachments/index=0/asia-pacific-survey.pdf > accessed 30 June 2018, 9–10.

This is not surprising given the many perceived benefits of mediation, including its ability to resolve disputes in a cost-effective and flexible manner, allow parties to determine and control their outcomes, and preserve business relationships. Nevertheless, the use of mediation to resolve cross-border disputes in Asia remains infrequent although there appears to be a growing trend of mixing modes by combining arbitration and mediation.[2] In an international survey conducted by Professor Stacie Strong with 221 participants, including 13% from Asia, a significant majority of respondents (63%) had been involved in a relatively small number of mediations (meaning one (20%), two (13%) or three (30%) proceedings) in the previous three years.[3] The small group of respondents who had experience with 20 or more mediations all came from non-Asian countries.[4] This suggests that Asian respondents are likely to have very little experience with using mediation to resolve cross-border disputes. A survey commissioned by the Singapore Academy of Law and published in 2016 of 500 respondents including commercial law practitioners, in-house counsel and public sector legal professionals in Singapore and around the region, showed that 71% preferred to use arbitration, 24% litigation and a mere 5% mediation, with enforceability, confidentiality and fairness as leading factors for choosing arbitration.[5]

What could improve the rate of use of mediation to resolve international commercial disputes in Asia? Apart from educational and information-sharing initiatives, and improving choice architecture to 'nudge' users towards cross-border mediation,[6] a regional comparison of the data gathered from the Global Pound Conference Series suggests another solution that may be particularly effective in Asia.[7] The data showed that in Asia, more than in any other region, there

[2] Thomas Stipanowich and Veronique Fraser, 'The International Task Force on Mixed Mode Dispute resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases' (2017) 40(3) Fordham Int'l LJ 839, 850–856 (discussing the practice of arbitrators and mediators switching roles and other mixed modes); Eunice Chua, 'A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure' (discussing the trend of growing use of mixing arbitration and mediation for international commercial disputes).

[3] Stacie I Strong, 'Realizing Rationality: An Empirical Assessment of International Commercial Mediation' (2016) 73 Wash & Lee L Rev 1973, 1999.

[4] ibid 2000–2001.

[5] Singapore Academy of Law, 'Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions' (*Chartered Institute of Arbitrators Singapore*, 2016) <http://www.ciarb.org.sg/wp-content/uploads/2016/02/SAL_Singapore_Law_Survey.pdf> accessed 30 June 2018. The extremely low numbers for mediation in this survey may be attributed to a limitation in the possible survey responses, as there was no option relating to mediation being used in combination with arbitration or litigation. Alastair Henderson, Daniel Waldek and Yosuke Homma, 'Trends in Choice of Governing Law & Jurisdiction in Cross-Border Transactions in Asia: Singapore Academy of Law Publishes Study' (*Herbert Smith Freehills Arbitration Notes*, 20 January 2016) <https://hsfnotes.com/arbitration/2016/01/20/trends-in-choice-of-governing-law-jurisdiction-in-cross-border-transactions-in-asia-singapore-academy-of-law-publishes-study> accessed 30 June 2018. However, even so, it is unlikely that there will be such a difference in the figures that international mediation will emerge as preferred over international arbitration in Asia.

[6] Nadja Alexander, 'Nudging users towards cross-border mediation: Is it really about harmonized enforcement regulation?' (2014) 7(2) Contemp Asia Arb J 405.

[7] There have been various international studies, including a 2014 survey by the International Mediation Institute, which indicate a preference for greater certainty in the enforcement of international mediated settlement agreements through an international enforcement mechanism, but these have not offered comprehensive analysis of regional trends.

is a desire for increased regulation of mediation. In response to a question about what would most improve commercial dispute resolution, 64% of Asian respondents chose the option 'legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation'.[8] It could well be that in Asia mediation continues to be perceived as a less robust way of resolving disputes despite governmental and judicial efforts, and regulation of enforcement of mediated settlement agreements could help to enhance the status and value of mediation.[9]

The United Nations Commission on International Trade Law (UNCITRAL) Convention on International Agreements Resulting from Mediation (the Enforcement Convention),[10] and amended Model Law on International Commercial Mediation (the Amended Model Law)[11] have the potential to address this gap between the positive attitude towards mediation and its actual use in Asia. Prompted by a proposal made by the United States in 2014, these instruments emerged from the work of UNCITRAL Working Group II (the Working Group) with the aim of encouraging international mediation in the same way that the New York Convention facilitated the growth of arbitration. In June 2018, the UNCITRAL Commission approved the final drafts of the Enforcement Convention and the Amended Model Law. I have argued elsewhere that Asian countries would do well to support and sign the Enforcement Convention as this will facilitate the resolution of cross-border disputes in Asia in a more effective and efficient way that aligns with Asian sensibilities and culture.[12] In this paper, I examine how far Asia has to go before reaching the standards laid down in the Enforcement Convention and Amended Model Law, with a focus on the jurisdictions of China, India, Hong Kong and Singapore.

II. Key Elements of the Enforcement Convention and Amended Model Law

The Enforcement Convention and Amended Model Law are remarkable works of negotiation and compromise. Despite being completed within the relatively brief timeframe of four years, they address many of the major issues relevant to international enforcement of mediated settlement agreements, including: (1) definitions of 'international', 'commercial' and 'mediation'; (2) the form requirements for a mediated settlement agreement to be enforced; and (3) defences to enforcement.

These are summarised helpfully in Dorcas Quek Anderson, Nadja Alexander and Anna Howard, 'UNCITRAL and the enforceability of iMSAs: the debate heats up – Part 3' (*Kluwer Mediation Blog*, 22 September 2016) <http://mediationblog.kluwerarbitration.com/2016/09/22/uncitral-and-the-enforceability-of-imsas-the-debate-heats-up-part-3> accessed 30 June 2018.

[8] Herbert Smith Freehills, PwC and the International Mediation Institute, 'Global Pound Conference Series: Global Data Trends and Regional Difference' (2018) <https://www.globalpound.org> accessed 30 June 2018, 19.

[9] ibid.

[10] UNCITRAL, 'International commercial mediation: draft convention on international settlement agreements resulting from mediation', Note by the Secretariat, A/CN.9/942 (2 March 2018) [Enforcement Convention]. The exact text of the approved Enforcement Convention was at the time of writing not available, hence, the reliance on the version placed before the UNCITRAL Commission in its June 2018 meeting.

[11] UNCITRAL, 'International commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation', Note by the Secretariat, A/CN.9/943 (2 March 2018) [Amended Model Law]. The exact text of the approved Amended Model Law was at the time of writing not available, hence, the reliance on the version placed before the UNCITRAL Commission in its June 2018 meeting.

[12] Eunice Chua, 'The Proposed UNCITRAL Convention on International Agreements Resulting from Mediation – A Brighter Future for Asian Dispute Resolution' (5th Asian Law Institute Conference, Seoul, 10 May 2018).

A. Definitions

Article 1(1) of the Enforcement Convention and Article 4 of the Amended Model Law define 'international' in similar terms. A settlement agreement under both instruments is 'international' if:

> (a) At least two parties to the settlement agreement have their places of business in different States; or
> (b) The State in which the parties to the settlement agreement have their places of business is different from either:
> (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
> (ii) The State with which the subject matter of the settlement agreement is most closely connected.

This definition is aligned with Article 1(4) of the existing UNCITRAL Model Law on International Commercial Conciliation (the Model Law),[13] which defines when a conciliation is 'international' based on the place of business of the parties.[14] To take into account that it is the settlement agreement's internationality being defined instead of the conciliation's internationality, paragraph (b)(ii) refers to the State with which 'the subject matter of the settlement agreement' is most closely connected, instead of 'the subject matter of the dispute'. The Amended Model Law retains both definitions of 'international' because the Model Law deals with matters beyond enforcement of settlement agreements and the parties may not necessarily conclude a settlement agreement.[15]

The Working Group had discussed expanding the definition of 'international' to cover situations where parties have their places of business in the same State, but the settlement agreement nevertheless contains an international element, for instance, where the parties' parent company or shareholders were located in different States.[16] The rationale for this proposal was to 'reflect current global business practices as well as complex corporate structures'.[17] Nevertheless, this proposal was rejected in the interests of having clear and objective criteria bearing in mind the difficulties that would be associated with trying to capture complex corporate structures.

The Enforcement Convention does not define 'commercial' but a footnote to Article 1(1) of the Model Law, which remains unchanged, does. Article 1(1) explains that 'commercial' should be 'given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'. It goes on to list examples of relationships of a commercial nature, including trade transactions for the supply of goods or services, distribution agreements, commercial representation, leasing, construction of works, consulting, engineering, licensing,

[13] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 [Model Law].
[14] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session' A/CN.9/896 (30 September 2016), para 29.
[15] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session' A/CN.9/929 (11 October 2017), para 39.
[16] ibid, para 32.
[17] ibid.

investment, banking, insurance, joint ventures and other forms of industrial or business cooperation, and carriage of goods or passengers.

Article 2(3) of the Enforcement Convention and Article 1(3) of the Amended Model Law define 'mediation' in broad terms, with the parties attempting to reach an amicable settlement of their dispute with the assistance of a third person (or persons) who does not have the authority to impose upon the parties a solution to the dispute. There is no substantive difference between this definition and the existing Model Law, save that 'mediation' is used instead of 'conciliation'. A footnote to the Amended Model Law explains the reason for this as being 'to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law'. The Working Group had further considered modifying the existing definition to include a reference to a 'structured/organized process' in order to bring more confidence and certainty to the enforcing authority by encompassing processes that were: (1) governed by a legal framework; (2) administered by an institution; or (3) regulated in some manner (for example, conducted under specific rules).[18] However, there was no eventual consensus on this change.[19] The result is that the definition of mediation in the Enforcement Convention and Amended Model Law is broad enough to encompass most models of mediation, including the facilitative and evaluative models, and different degrees of formality.

B. Form requirements

Under Article 4 of the Enforcement Convention and Article 18 of the Amended Model Law, a party relying on a settlement agreement shall supply to the competent authority of the State where relief is sought:

> (a) The settlement agreement signed by the parties; and
> (b) Evidence that the settlement agreement resulted from mediation, such as:
> (i) The mediator's signature on the settlement agreement;[20]
> (ii) A document signed by the mediator indicating that mediation was carried out;
> (iii) An attestation by the institution that administered the mediation or;
> (iv) In the absence of (i), (ii) and (iii), any other evidence acceptable to the competent authority.

This Article reflects a balance between the formalities that would be required to ascertain that the settlement agreement resulted from mediation and the need for the instrument to preserve the flexible nature of the mediation process.[21] There are only two requirements, first, a signed settlement agreement, and second, some evidence that the settlement agreement resulted from mediation. The requirement for signature by the parties may be through electronic communication if there is a sufficiently reliable method to identify the parties or the mediator and to indicate their

[18] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session' A/CN.9/896 (30 September 2016), para 42.
[19] ibid, paras 167–168.
[20] ibid, para 75. It was clarified that a signature or an attestation by the mediator would simply be to prove the mediator's involvement in the process and should not be construed as an endorsement of the settlement agreement nor as an indication that the mediator was a party to the agreement.
[21] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session' A/CN.9/896 A/CN.9/867 (10 February 2016), para 144.

intention through the electronic communication. This allows for settlement agreements reached through online mediation to be included, which is particularly useful and convenient for cross-border disputes. Although there are three types of evidence that are explicitly recognised as being sufficient to show that the settlement agreement resulted from mediation, where these are absent for whatever reason the competent authority of the State in which enforcement is sought has the discretion to accept any other evidence it deems appropriate. This practical approach takes into account that various exigencies may arise and render the preferred types of evidence unavailable.

C. Defences to enforcement

The defences to enforcement are contained in Article 5 of the Enforcement Convention and Article 19 of the Amended Model Law. These defences are exhaustive. In addition to the two defences that are independent of the mediation process contained in paragraph 2, that enforcement would be contrary to public policy and that the subject matter of the dispute was not capable of being settled by mediation, the other defences in paragraph 1 are as follows:

> (a) A party to the settlement agreement was under some incapacity; or
> (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 …;
> (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.

These defences were the subject of extensive consultation, and were formulated to be limited, exhaustive, stated in general terms, and not cumbersome to implement.[22] Many of the defences have been drawn from Article V of the New York Convention with appropriate modifications for the context of mediation. For example, paragraphs 1(a) to 1(c) above are similar to Article V(1)(a) and (e) of the New York Convention, which deals with incapacity to enter into an arbitration agreement or other invalidity of the arbitration agreement, as well as when the arbitral award has not yet become binding on the parties or has been set aside or suspended. Paragraph 2 mirrors Article V(2) of the New York Convention, which allows refusal of enforcement if the 'subject

[22] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session' A/CN.9/861 (17 September 2015), para 93.

matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition and enforcement is sought]' and where recognition or enforcement 'would be contrary to the public policy of that country'. Paragraph 1(d) has no equivalent in the New York Convention but that is because it is unique to the mediation context, where a mediation agreement could possibly preclude or limit enforceability as one of its terms. Paragraphs 1(e) and (f) are also unique to the mediation context and relate to mediator misconduct.

There were various unsuccessful attempts in the Working Group for regrouping the first few grounds.[23] In particular, the discussions centred on the relationship between paragraph 1(b)(i), which was considered to be of a generic nature, and paragraphs 1(b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative.[24] Because of the need to accommodate the concerns of different domestic legal systems, the current drafting represents an understanding that there might be overlap among the various grounds and competent authorities should take this into account when interpreting the various grounds.[25]

More substantive discussions in the Working Group focused on paragraphs 1(e) and (f), an earlier draft of which referenced the mediator's failure to 'maintain fair treatment of the parties' or to disclose circumstances 'likely to give rise to justifiable doubts as to its impartiality or independence'.[26] This drafting arose from the desire to maintain consistency with Articles 5(4), 5(5) and 6(3) of the Model Law.[27] Many representatives in the Working Group argued for the removal of these defences as they were then drafted, highlighting the differences between mediation and arbitration, including the practice of having private communication with one party in mediation as well as the limited number of procedural rules governing the mediation process.[28] These features together with the confidentiality of mediation meant that it would be difficult to assess whether the parties were treated fairly.[29] The fact that mediators did not impose any

[23] Amended Model Law (n 11), p 12.
[24] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session' (19 February 2018), A/CN.9/934, paras 60–63.
[25] ibid, paras 64–65.
[26] UNCITRAL, 'Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation, Note by the Secretariat' A/CN.9/WG.II/WP.198 (30 June 2016), draft provision 8(1)(e), para 35.
[27] Model Law (n 13) paras 52, 55. This was not, however, necessary because the Guide to Enactment and Use clarified that the mediator's failure to disclose information likely to raise doubts as to his or her impartiality or independence did not create a ground for setting aside a settlement agreement. It also stated that the reference in the Model Law to maintaining fair treatment of the parties was not intended to govern the contents of the settlement agreement, only the conduct of the mediation.
[28] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session' A/CN.9/896 (30 September 2016), para 192.
[29] Academic commentary has also raised the question of whether 'fairness' is a suitable concept for the mediation process. Dorcas Quek Anderson, Nadja Alexander and Anna Howard, 'UNCITRAL and the enforceability of iMSAs: the debate heats up – Part 2' (*Kluwer Mediation Blog*, 21 September 2016) <http://mediationblog.kluwerarbitration.com/2016/09/21/uncitral-and-the-enforceability-of-imsas-the-debate-heats-up-part-2> accessed 30 June 2018. Also see Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns' (1990) 2 J Disp Resol 347, 349 ('Theoretically, mediator accountability is satisfied by ensuring a procedurally fair process that treats parties with dignity and respect and stops intimidating or abusive behavior'); Joseph B Stulberg, 'Fairness and Mediation' (1998) 33 Ohio St J Disp Resol 909, 910–914 (describing a rich concept of fairness, within a jurisprudential framework and with substantive and procedural dimensions, and relating it to the mediation context).

outcome on the parties and that mediation was a voluntary process from which parties were free to withdraw at any time also prompted some views that it was rare for the mediator to make disclosures as to circumstances that may affect the mediator's impartiality or independence.[30] Others argued that these defences were superfluous given that there was overlap with some of the existing defences and also because mediators were subject to terms of the agreement to mediate and codes of conduct.[31] There were concerns that the inclusion of these defences could lead to ancillary disputes, especially where the standards were subjective and could lead to different interpretations.[32]

However, in response, other representatives argued that the retaining of the defences acknowledged the significant role of the mediator in concluding the settlement agreement, even if it might be difficult to prove unfair treatment of a party in the process.[33] If the parties were not fully informed of any conflict of interest or if there had been some misconduct by a mediator, there should be legal consequences, particularly at the enforcement stage, because unlike arbitration, there was no means to challenge the process or the conduct of the mediator.[34]

The current drafting reflects a compromise and does not reference 'fair treatment'.[35] It limits the scope of the defences to instances where the mediator's misconduct or failure to disclose directly affects the settlement agreement in that the 'party would not have entered into the settlement agreement' without the misconduct or failure to disclose. The current draft also contains language to highlight the exceptional nature of the circumstances in which the defences could be raised, adding adjectives such as 'serious' to describe the breach of applicable standards applicable to the mediator or mediation, and 'material' to describe the impact on a party of a mediator's failure to disclose. Finally, it was agreed that the text accompanying the instrument would provide an illustrative list of examples of applicable standards.

III. How far away is Asia from convergence

Although the use of mediation to resolve commercial disputes is a process that many governments in Asia support and encourage, the regulation of mediation is usually piecemeal or limited to certain aspects of the mediation process. This section examines the legal framework for commercial mediation in four Asian jurisdictions – China, India, Hong Kong and Singapore – so selected because they comprise two of Asia's largest economies as well as its leading international dispute resolution hubs.[36]

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[30] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session' A/CN.9/896 (30 September 2016), para 106.
[31] ibid, para 192; UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session' A/CN.9/901 (16 February 2017), para 50.
[32] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session' A/CN.9/901 (16 February 2017), para 50.
[33] ibid, para 193.
[34] ibid.
[35] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session' A/CN.9/929 (11 October 2017), paras 96–98.
[36] Singapore and Hong Kong have been the only two Asian jurisdictions ranked in the top five most preferred seats of arbitration by the Queen Mary University of London International Arbitration Surveys. The recent 2018 survey places Singapore the third as -most preferred seat in the world after London and Paris, with Hong Kong following in fourth

A. China

Although the use of what is recognisable as modern mediation in China has grown over time, with the most common and well-regulated being 'People's Mediation' carried out for local civil disputes,[37] China does not have a specific framework or legislation governing commercial mediation. Hence, such mediations may be carried out in various contexts, including in the process of a commercial arbitration,[38] a civil case before the courts, or a stand-alone mediation by a mediator appointed privately or through an institution, such as the Mediation Centre of the China Council for the Promotion of International Trade/China Chamber of International Commerce (CCPIT/CCOIC Mediation Centre)[39] and Beijing Arbitration Commission Mediation Centre.[40]

When mediation is conducted in the course of a foreign arbitration, any settlement agreement will generally be recorded as an arbitral award. Foreign awards may be enforced in China by the party seeking enforcement applying to the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located.[41] The court will then deal with the matter in accordance with the international treaties concluded or acceded to by China, including the New York Convention, or with the principle of reciprocity.[42] Foreign judgments

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place. Queen Mary University of London School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration' (*Queen Mary University of London*, 2018) <http://www.arbitration.qmul.ac.uk/research/2018> accessed 30 June 2018.

[37] The People's Mediation Law of the People's Republic of China came into force in 2011 and is a comprehensive piece of legislation addressing issues such as the establishment of People's Mediation Commissions, the qualifications for People's Mediators, the mediation proceedings, the mediation agreement and a process for judicial confirmation to enforce the mediation agreement. Unofficial English Translation of the People's Mediation Law (*International Labour Organization*, 17 January 2011) <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=85806&p_country=CHN&p_count=1183> accessed 30 June 2018.

[38] This is common in China, where the experience has been that combining mediation and arbitration makes mediation more likely to produce a settlement than when it is conducted separately. Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why it Works in China' (2008) 25(4) Journal of International Arbitration 479, 490; Wang Shengchang, 'CIETAC's Perspective on Arbitration and Conciliation Concerning China' in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond* (ICCA Congress Series No. 12, 2005) 27.

[39] The CCPIT/CCOIC Mediation Centre was first established in the 1980s to solve disputes arising from international trade activities and specialises in resolving commercial disputes. The caseload of the CCPIT/CCOIC Mediation Centre has grown significantly in recent years. From 2001 to 2009 the annual caseload was around 500 cases, but in 2010 this reached 1,200, in 2011 2,500 and since 2012 the annual caseload has consistently exceeded 4,000 cases and involves parties from more than 50 countries and regions. Wang Chengjie and Li Xiao, 'China' in Raymond H M Leung (ed), *Asia Mediation Handbook* (Sweet & Maxwell 2015), 81; Ministry of Law Singapore, 'Singapore and China Mediation Centres Work Together to Help Businesses Resolve Disputes along Belt and Road' (*Ministry of Law Press Release*, 19 September 2017) <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html> accessed 30 June 2018.

[40] The Beijing Arbitration Commission Mediation Centre was established by the Beijing Arbitration Commission in 2011. Wang Chengjie and Li Xiao, 'China' in Raymond H M Leung (ed), *Asia Mediation Handbook* (Sweet & Maxwell 2015), 82.

[41] UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Addendum' A/CN.9/846/Add.2 (22 April 2015), 5.

[42] ibid.

embodying international mediated settlement agreements may also be enforced in China either by the relevant party applying to the intermediate People's Court that has jurisdiction, or by a foreign court making a request in accordance with the provisions of relevant international treaties or with the principle of reciprocity.[43]

These two avenues for enforcement are also available when the arbitration or court proceeding occurs in China. For domestic arbitrations, Article 51 of the Arbitration Law of the People's Republic of China permits the tribunal to carry out 'conciliation' prior to giving an arbitration award. If the conciliation leads to a settlement agreement, the tribunal will render a written conciliation statement or an award in accordance with the result of the settlement agreement. Both these instruments have equal legal effect for the purposes of enforcement.[44] For cases in the domestic courts, the Civil Procedure Law of the People's Republic of China permits the court to conduct 'conciliation' between the parties on a voluntary basis[45] and to draw up a 'conciliation statement' when a settlement is reached.[46] The conciliation statement shall clearly set forth the claims, the facts of the case, and the result of the conciliation; it shall also be signed by the judges and the court clerk, sealed by the People's Court, and served on both parties.[47] The conciliation statement becomes legally effective when the two parties concerned sign for receipt.

Although mediated settlement agreements are not in and of themselves enforceable in China, agreements arising from independently conducted mediations by institutions like the CCPIT/CCOIC Mediation Centre may be subject to institutional rules that allow parties to jointly apply for judicial confirmation and enforcement.[48] This procedure of judicial confirmation of mediated settlement agreements could be one route in which the enforcement obligation under the Enforcement Convention and Amended Model Law may be fulfilled. This can be done without too much difficulty by extending the availability of the procedure already available to domestic mediated settlement agreements to international commercial ones under the Civil Procedure Law of the People's Republic of China. However, because the Enforcement Convention and Amended Model Law also stipulate certain conditions for enforcement, further amendments are required to the Civil Procedure Law to stipulate definitions of key terms, form requirements and defences to enforcement.

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[43] ibid.

[44] Under Article 52 of the Arbitration Law of the People's Republic of China, a written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and then served on both parties. The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof. If the written conciliation statement is repudiated by a party before he signs for receipt thereof, the arbitration tribunal shall promptly make an arbitration award. UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Addendum' A/CN.9/846/Add.2 (22 April 2015), 6.

[45] Civil Procedure Law of the People's Republic of China, Article 93.

[46] Civil Procedure Law of the People's Republic of China, Article 97.

[47] UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Addendum' A/CN.9/846/Add.2 (22 April 2015), p 6.

[48] CCPIT/CCOIC Mediation Rules, Article 26.

There is presently mention of defences to enforcement in the context of domestic settlement agreements in a document entitled 'Certain Provisions of the Supreme People's Court on Procedures for Judicial Confirmation of People's Mediation Agreements' issued by the Supreme People's Court in 2011.[49] Article 7 of that document provides as follows: [50]

> If the mediation agreement is under any of the following circumstances, a people's court shall not confirm its force:
> (1) Violating the mandatory provisions of any law or administrative regulation;
> (2) Infringing upon the national interests or public interests;
> (3) Infringing upon the legitimate rights and interests of any non-party;
> (4) Impairing the public order or good custom;
> (5) Having unclear contents; or
> (6) Other circumstances under which the agreement shall not be confirmed.

There is some degree of overlap with the defences under the Enforcement Convention and Amended Model Law. However, paras 1(e) and (f) noticeably have no equivalent. Nevertheless, the existence of Article 7(6) of the document issued by the Supreme People's Court suggests that there is openness to including other defences and this may not present too much difficulty. I also do not foresee that changing the defences to enforcement from an open list to a closed list will pose problems as China has also adopted a closed list of defences to enforcement of arbitral awards in line with the New York Convention.[51]

The legal framework for mediation in China has developed rapidly in recent times. Following the enactment of the People's Mediation Law in 2010, in 2011, the Chinese government issued the 'Guidance on Further Advancing Mediation System to Resolve Disputes', providing specific measures for establishing mediation organisations, guidelines on the mediation process, quality assurances and places focus and importance on the role of mediation in resolving social conflicts and disputes. In 2012, the Civil Procedure Law of the PRC was amended to adopt the principle of 'mediation first' and confirm the validity of mediation settlement agreements.[52] In the international context, mediation is viewed as a valuable tool for resolving disputes arising from the Belt and Road Initiative (BRI). In September 2017, the Singapore International Mediation Centre (SIMC)

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[49] UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Addendum' A/CN.9/846/Add.2 (22 April 2015), p 6.

[50] 'Certain Provisions of the Supreme People's Court on Procedures for Judicial Confirmation of People's Mediation Agreements, Unofficial English translation (*International Labour Organization*, 27 June 2011) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89806/103245/F91543076/CHN89806.pdf> accessed 30 June 2018.

[51] Civil Procedure Law of the People's Republic of China, Article 217.

[52] Wang Chengjie and Li Xiao, 'China' in Raymond H M Leung (ed), *Asia Mediation Handbook* (Sweet & Maxwell 2015), p 87. Article 122 stipulates that 'unless refused by the parties, civil disputes brought to the People's Court that are suitable for mediation should be mediated first'. Articles 194 and 195 provide for the judicial confirmation procedure for settlement agreements. Article 194 states that 'parties may jointly apply for judicial confirmation to the local People's Court for judicial confirmation within 30 days after the mediation settlement agreement becomes effective'. Article 195 states that 'after acceptance of the application, the People's Court shall examine and confirm the effect of the agreement if complies to the law; if one party concerned refuses to perform or fails to fully perform the agreement, the other party may apply to the People's Court for enforcement'.

and the CCPIT/CCOIC Mediation Centre agreed to cooperate on assisting businesses to resolve cross-border disputes arising out of the BRI.[53] More recently, The Supreme People's Court announced in June 2018 that it will launch two international commercial courts in Shenzhen and Xi'an targeted at BRI disputes. To lend credibility and guarantee the neutrality of these courts, a 'high-level document on the arrangements to promote international commercial cooperation within the [BRI]' also called for the establishment of an International Commercial Expert Committee with members from different legal systems and jurisdictions to provide consultation and mediation services upon the approval of relevant parties.[54] Given the potential importance of mediation to supporting international economic activity, the Chinese government may be open to amending existing legislation for civil and commercial mediations consistent with the Enforcement Convention and Amended Model Law.

B. India

Amongst the jurisdictions examined in this paper, India probably has the least developed ecosystem for international commercial mediation although there has been support for mediation from the legislature and judiciary in the domestic context. A 2014 decision of the Supreme Court of India, *Vikram Bakshi v Ms Sonia Khosla*, highlighted the need for early resolution of dispute to 'stop the negative factor from growing and widening its fangs which may not be conducive to any of the litigants' and highlighted the benefits of mediation, including its ability to bring about a win-win solution that cannot be achieved by means of judicial adjudication.[55] There have also been a growing number of court-connected mediation centres, like the Delhi Mediation Centre and Mumbai Law Hub and Mediation Centre, as well as private mediation service providers, including the Indian Institute of Arbitration and Mediation established in 2009, the Centre for Advanced Mediation Practice in 2014, and the Bombay Chamber of Commerce Centre for Mediation and Conciliation in 2018. These developments reflect positively on the beginnings of a mediation movement in India that could lead to more widespread acceptance and use of mediation across contexts.

However, despite its relative inexperience with mediation, India does have a number of pieces legislation that mention both 'mediation' and 'conciliation'. These will require rationalisation and amendment before they are aligned with the Enforcement Convention and Amended Model Law.

There is no legislation in India defining 'mediation' but various references to it. Most relevant in the context of commercial mediations are, first, section 89 of the Code of Civil Procedure 1908, which was introduced in 1999 to empower the court to refer disputes for settlement outside court, including through mediation. Under this section, the court has to see whether any element of settlement exists in a case, which is acceptable to the parties before formulating the terms of settlement for the observation of the parties. After receiving the observations of the parties, the

[53] Ministry of Law Singapore, 'Singapore and China Mediation Centres Work Together to Help Businesses Resolve Disputes along Belt and Road' (*Ministry of Law Press Release*, 19 September 2017) <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html> accessed 30 June 2018.

[54] 'China to launch two international commercial courts' (*Xinhua News*, 28 June 2018) <http://www.xinhuanet.com/english/2018-06/28/c_137287616.htm> accessed 30 June 2018.

[55] 2014 (2) ILR (Ker) 658.

court may reformulate the terms of a possible settlement before referring the case to mediation or other methods of out-of-court dispute settlement.[56] Where a dispute is referred to arbitration or conciliation, the provisions of the Arbitration and Conciliation Act 1996 will then apply.[57] Second, the proposed section 12A of the Commercial Courts Act. In May 2018, the Central Government issued an ordinance to amend the Commercial Courts Act 2105 to make pre-institution mediation mandatory prior to instituting a commercial suit for matters that do not require urgent interim relief.[58] Any settlement agreement arrived at shall be reduced into writing and signed by the parties to the dispute and the mediator.[59] The settlement arrived at under this provision shall have the same status and effect as an arbitral award on agreed terms.[60] These provisions would apply for disputes heard in India and lend enforceability to mediated settlement agreements whether concluded before or after litigation is commenced. Nevertheless, the frameworks in these pieces of legislation still fall short of those established in the Enforcement Convention and Amended Model Law because they do not address international mediated settlement agreements arrived at outside of India and do not provide for defences to enforcement.

'Conciliation' in India is more comprehensively regulated by the Arbitration and Conciliation Act. Under the Arbitration and Conciliation Act, there can be a valid reference to conciliation if both parties to the dispute agree to have negotiations with the help of a third party either by an agreement or by the process of invitation and acceptance.[61] The role of the conciliator is described in section 67 of the Arbitration and Conciliation Act as being to 'assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute', with the conciliator being guided by 'principles of objectivity, fairness and justice'. It is also stated that the conciliator has the ability to conduct the proceedings as the conciliator deems fit, taking into account the circumstances of the case, the wishes the parties may express, and the need for a speedy settlement of the dispute. Under section 73(1) of the Arbitration and Conciliation Act, when there appears to be elements of a settlement, the conciliator shall formulate the terms of a possible settlement and submit them to the parties for their observations. After 'receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations'.

All these demonstrate that the concept of conciliation embodied in the Arbitration and Conciliation Act appears to have the conciliator play a directive and even evaluative role although the process is still essentially non-adjudicatory. The Supreme Court of India in *Salem Advocate Bar Assn. (II) v Union of India* has observed that in India, 'a fine distinction is tried to be maintained between conciliation and mediation' with 'conciliation' being a process with 'more latitude' such that the

[56] Anil Xavier, 'India' in Raymond H M Leung (ed), *Asia Mediation Handbook* (Sweet & Maxwell 2015), pp 133–134.
[57] UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Note by the Secretariat' A/CN.9/WG.II/WP.191 (4 August 2015), p 3.
[58] K Giriprakash, 'How private mediation helps corporates solve disputes faster' (*The Hindu Business Line*, 11 June 2018) <https://www.thehindubusinessline.com/news/how-private-mediation-helps-corporates-solve-disputes-faster/article24138432.ece> accessed 30 June 2018.
[59] Commercial Courts Act (Amendment) Ordinance, No 3 of 2018, cl 11.
[60] ibid.
[61] Arbitration and Conciliation Act 1996, s 62.

'conciliator can suggest some terms of settlements too' instead of merely facilitating discussion between parties, assisting them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options, and emphasising that it is the parties' own responsibility for making decisions which affect them.[62] Nevertheless, the process of 'conciliation' under the Arbitration and Conciliation Act is still recognisable as 'mediation' as defined in the Enforcement Convention and Amended Model Law because of the reference to an independent third party assisting disputants to settle their dispute without adjudicating it.

Section 73 of the Arbitration and Conciliation Act governs settlement agreements. Section 73(2) provides that if the parties to a dispute reach a settlement, 'they may draw up and sign a written settlement agreement'. The signed agreement is final and binding on the parties and persons claiming under them respectively.[63] The conciliator is obliged to authenticate the settlement agreement and furnish a copy to each of the parties.[64] The form requirements of a settlement agreement are in line with the Enforcement Convention and Amended Model Law and do not require modification.

In terms of enforceability of the settlement agreement, section 74 of the Arbitration and Conciliation Act provides that the 'settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal' under section 30 of the Arbitration and Conciliation Act. Notably, section 30 of the Arbitration and Conciliation Act references a form of Arb-Med, similar to China, where the arbitral tribunal may with the agreement of the parties use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.[65] If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.[66] An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.[67]

The provisions of the Arbitration and Conciliation Act described above only relate to conciliations in India. If the place of settlement is outside India, then assuming the mediated settlement agreement is embodied in an arbitral award as recognised by section 44 (for New York Convention awards) or section 53 (for Geneva Convention awards) of the Arbitration and Conciliation Act, the award can be enforced under sections 49 and 58 of the Arbitration and Conciliation Act respectively.[68]

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[62] (2005) 6 SCC 344 at [61], cited in UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Note by the Secretariat' A/CN.9/WG.II/WP.191 (4 August 2015), p 2.
[63] Arbitration and Conciliation Act 1996, s 73(3).
[64] Arbitration and Conciliation Act 1996, s 73(4).
[65] Arbitration and Conciliation Act 1996, s 30(1).
[66] Arbitration and Conciliation Act 1996, s 30(2).
[67] Arbitration and Conciliation Act 1996, s 30(4).
[68] UNCITRAL, 'Settlement of Commercial Disputes, Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Compilation of Comments by Governments, Note by the Secretariat' A/CN.9/WG.II/WP.191 (4 August 2015), 4.

The Arbitration and Conciliation Act is, however, silent on the grounds for refusing enforcement of a mediated settlement agreement. This will be an area that the legislation needs to address to be consistent with the Enforcement Convention and Amended Model Law. Nevertheless, India may be willing to adopt the framework in the Enforcement Convention and Amended Model Law as it has adopted the UNCITRAL Conciliation Rules 1980 and the UNCITRAL Model Law on International Commercial Arbitration 1985. Additionally, with the trends towards promoting commercial mediation that are supported by the government and judiciary, India's adoption of the Enforcement Convention or Amended Model Law may be a significant possibility.

C. Hong Kong

Hong Kong has a well-developed mediation ecosystem, with support for mediation palpable from the government, judiciary and legislature.[69] There are numerous institutions in Hong Kong offering commercial mediation services, including the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre. As part of efforts to enhance public confidence in mediation in Hong Kong, the Hong Kong Mediation Accreditation Association Ltd was established in 2012 to consolidate accreditation of mediators in a single professional body.

In terms of legal frameworks, the most significant developments surrounding mediation stemmed from Hong Kong's civil justice reform efforts in the 2000s. Along with a revised approach towards case management that envisaged proactive encouragement of settlement,[70] the Hong Kong Judiciary issued Practice Direction 31 in 2010, which strongly encouraged pre-trial mediation by putting in place procedures for mediation to be considered and attempted before trial.[71] Practice Direction 31 also provided for the court to make adverse costs orders when a party has not engaged in mediation to a minimum level of participation or provided a reasonable explanation for not engaging in mediation. In 2012, Hong Kong promulgated the Mediation Ordinance (the Ordinance), with the stated aims of promoting, encouraging and facilitating the resolution of disputes by mediation and to protect the confidential nature of mediation communications.

Mediation is defined in section 4 of the Ordinance in a manner that is roughly consistent with the UNCITRAL instruments as follows:

> a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following:-
> 1. identify the issues in dispute;

[69]Danny McFadden, *Mediation in Greater China: The New Frontier for Commercial Mediation* (Wolters Kluwer, 2013), 218–219; Raymond HM Leung and Jeff Liang, 'Hong Kong' in in Raymond H M Leung (ed), *Asia Mediation Handbook* (Sweet & Maxwell 2015), 100–102.

[70] Rules of the High Court (Cap 4A, Sub Leg) O 1A r 4(2).

[71] *Report of the Working Group on Mediation* (Department of Justice, The Government of Hong Kong Special Administrative Region, February 2010), 3. There is a requirement to file a Mediation Certificate within 28 days after close of pleadings to state the parties' positions on mediation. The Certificate 'helps to focus the minds of parties on exploration of mediation, facilitates lawyers in advising clients on mediation and to provide information to the court for assessing whether mediation is appropriate and whether refusal is reasonable'. There is also a mechanism for filing a Mediation Notice and Response that can facilitate parties' discussions on mediation, identify areas of agreement and disagreement, and assist the court to make the appropriate directions.

2. explore and generate options;
3. communicate with one another;
4. reach an agreement regarding the resolution of the whole, or part, of the dispute.

One particular requirement in the Ordinance had been deliberately excluded from the UNCITRAL instruments – the reference to mediation being a 'structured' process. Nevertheless, the key idea of impartial individuals assisting parties to negotiate a settlement rather than imposing a settlement on the parties is embedded in the Hong Kong legislation. Hong Kong may wish to consider tweaking the definition of mediation to remove the reference to 'structured' so that it does not unduly limit the application of the Ordinance. Types of mediation not meant to be addressed by the Ordinance can be expressly carved out without affecting commercial mediation.

The Ordinance does not address the issue of enforceability at all and is therefore silent on what the form requirements are for a mediation settlement agreement to be enforceable or defences to enforcement. The only allusion to enforcement is in the context of confidentiality, with section 8(3) of the Ordinance expressly authorising disclosure of mediation communications 'for the purpose of enforcing or challenging a mediated settlement agreement', and 'for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity'. It is therefore apparent that the Ordinance does contemplate that mediated settlement agreements may require enforcement.

The failure to provide for a specific mode of enforcement was a deliberate one. At the time, a Working Group on Mediation (the Hong Kong Working Group) had discussed whether provisions for enforcement of mediated settlement agreements should be included in proposed mediation legislation. The Hong Kong Working Group considered the benefits of a separate enforcement mechanism, including providing a speedy and less costly alternative to contract litigation that could offer greater confidentiality protection, but concluded that it did 'not find it necessary' to recommend the inclusion of such a mechanism for various reasons.[72] First, unlike arbitral awards that are imposed on the parties, mediated settlements are voluntarily agreed to and effective reality testing conducted by mediators during the mediation process would assist in ensuring the settlement reached is reasonable and will be complied with. The chances of parties to a mediated settlement agreement refusing to perform their obligations is accordingly low. Second, even if a statutory mechanism for enforcement were to be introduced, there would be a need to provide grounds upon which parties could resist enforcement and there was no model for providing what these could be.[73]

Accordingly, in Hong Kong, should there be a need to enforce a mediated settlement agreement, one would have to enforce it as a contract in court, unless the settlement was arrived at in the context of arbitration and made into an arbitral award, or after proceedings had been commenced and recorded as an order or judgment of the court. Where the award or court judgment is a foreign one, these may be enforced through the New York Convention or other reciprocal treaty relationships that Hong Kong may have entered into for the recognition and enforcement of foreign judgments depending on where the award or judgment was made.

[72] ibid, 119–120.
[73] ibid.

However, circumstances have now changed and the Hong Kong legislature may be willing to revisit the issue of providing for a direct enforcement procedure for mediated settlement agreements in the Ordinance. First, Hong Kong stands to benefit by positioning itself as a destination for the resolution of BRI disputes. The Hong Kong government is developing eBRAM.hk, an internet-based dispute resolution platform incorporating mediation targeted at BRI disputes. Although the Hong Kong Working Group observed that enforcement is not generally an issue with mediated settlement agreements, it did not separately study and consider *international* mediated settlement agreements. It is arguable that because of the international dimension to these agreements, with both parties hailing from different jurisdictions and not necessarily having long-term relationships, there may be fewer disincentives to breach settlement agreements. There are also other benefits to tackling the enforcement issue in legislation, including enhancing the status of mediation in the perception of the public and hence promoting the use of mediation for commercial disputes. Second, with the Enforcement Convention and Amended Model Law, there is now precedent for defences to enforcement, which is a product of the discussions of experts and government representatives from all over the world. Accordingly, it should not pose too much difficulty to amend the Ordinance to align it with the Enforcement Convention and the Model Law.

Where additional consideration could be required is in the precise procedural mechanism Hong Kong may wish to adopt to implement the instruments and whether Hong Kong wishes to extend this platform to other types of mediation settlement agreements not addressed by the UNCITRAL instruments. In relation to a procedural mechanism, an obvious choice appears to be to mirror the process for the enforcement of arbitral awards through the judicial system, as this would have the advantage of being familiar to dispute resolution practitioners. In relation to whether to extend the platform to other mediation agreements, Hong Kong could take reference from Singapore's new Mediation Act, which had not been existence at the time it was considering the Ordinance, in determining how to draw the line.

D. Singapore

Like Hong Kong, Singapore has a well-developed mediation ecosystem that reflects the deliberate and comprehensive efforts to develop Singapore as an international dispute resolution hub.[74] In terms of infrastructure, Singapore has Maxwell Chambers, an integrated dispute resolution facility for arbitration and mediation services that is also leveraging on technology to develop itself into a 'smart' hearing facility.[75] To meet growing demand for its services, an extension of Maxwell Chambers, Maxwell Chambers Suites is currently under development and will add 50 new offices over four floors for international dispute resolution institutions, arbitration chambers, law firms and ancillary services in 2019.[76] In terms of institutions supporting international commercial mediation services, SIMC offers international mediation services, the Singapore International

[74] Keynote speech by the Minister for Law, Mr K Shanmugam, at the 26th LAWASIA Conference 2013 (29 October 2013) <https://www.mlaw.gov.sg/news/speeches/keynote-speech-by-Minister-at-LAWASIA-conference-2013.html> accessed 30 June 2018.
[75] 'Maxwell Chambers Innovates to become World's First Smart Hearing Facility' (*Ministry of Law Press Release*, 4 April 2018) <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/maxwell-chambers-world-first-smart-hearing-facility.html> accessed 30 June 2018.
[76] ibid.

Mediation Institute (SIMI) sets standards for mediators and the Singapore International Dispute Resolution Academy is a research and training centre. The establishment of SIMC and SIMI in 2014 was part of three key recommendations made by a Working Group on International Commercial Mediation tasked by the government in 2013 to propose plans to develop the international commercial mediation space in Singapore building on its well-established litigation and arbitration services.[77] The third key recommendation was to enact legislation to strengthen the entire mediation framework. This came into fruition in 2017 when the Parliament passed the Mediation Act after a process of public consultation.[78] Singapore's Mediation Act is a comprehensive piece of legislation that draws from the Ordinance in Hong Kong but goes even further by providing a process for the enforcement of mediated settlement agreements as court orders and stipulating the defences to such enforcement.

'Mediation' is defined in section 3 of the Mediation Act to mean:

> a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:
> (a) identify the issues in dispute;
> (b) explore and generate options;
> (c) communicate with one another;
> (d) voluntarily reach an agreement.

This definition is based on section 4 of the Ordinance but omits reference to a 'structured' process. Like the legislation in China, India and Hong Kong there is no definition of 'international' or 'commercial'. As provided by section 6, the Mediation Act applies only to a mediation wholly or partly conducted in Singapore or where the mediation agreement provides that the Mediation Act or Singapore law is to apply to the mediation. Amendments to this section will be required to allow for the enforcement of international commercial mediated settlement agreements as contemplated by the Enforcement Convention and Amended Model Law.

Section 12 of the Mediation Act governs the process of recording a mediated settlement agreement as an order of court. The form requirements before a mediated settlement agreement may be recorded as an order of court are: (1) the mediation is 'administered by a designated mediation service provider or conducted by a certified mediator'; (2) the 'agreement is in writing and signed by or on behalf of all the parties to the agreement'; and (3) the 'agreement contains such information as may be prescribed'. These requirements are broadly aligned with the Enforcement Convention and Model Law, but with a significant limitation – the Mediation Act only contemplates enforcing agreements resulting from mediations administered by a designated mediation service provider (these are presently the Singapore Mediation Centre and SIMC) or conducted by a mediator certified by SIMI. These requirements are important to ensure that the

[77] 'Executive Summary – Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation' (*Ministry of Law Singapore*, 3 December 2013) <https://www.mlaw.gov.sg/news/press-releases/icmwg-recommendations.html> accessed 30 June 2018.
[78] George Lim SC and Eunice Chua, 'Development of Mediation in Singapore' in George Lim SC and Danny McFadden (eds), *Mediation in Singapore: A Practical Guide*, (Sweet & Maxwell, 2nd edn, 2017), 18–22.

quality of the mediations and mediation agreements are appropriate to be enforced by a court,[79] but will need to be broadened in order to be consistent with the spirit and purpose of the Enforcement Convention and Amended Model Law.

Under section 12(4) of the Mediation Act, the court may refuse to record a mediated settlement agreement as an order of court if:

> (a) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;
> (b) the subject matter of the agreement is not capable of settlement;
> (c) any term of the agreement is not capable of enforcement as an order of court;
> (d) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or
> (e) the recording of the agreement as an order of court is contrary to public policy.

Although worded differently, there is a large extent of similarity between these defences and those available in the Enforcement Convention and Amended Model Law save for paragraph (d), which would not apply to the international commercial mediation context. However, like China, there is a significant absence of anything like sub-paragraphs (e) and (f) of Article 5 of the Enforcement Convention and Article 19 of the Amended Model Law relating to a serious breach of standards by the mediator or a failure to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence. During the public consultation phase of the Mediation Bill, feedback was given that the Mediation Bill should provide a regulatory framework for mediator standards and the conduct of the mediation proceedings.[80] The Ministry of Law had declined to do so, stating that the Bill 'will set out a broad framework to support mediation proceedings, it does not seek to regulate the conduct of mediation itself, or set out mediator standards'. Declining enforcement on the basis of the conduct of the mediator could be viewed as one form of regulation of mediator's conduct. Nevertheless, it may be argued that given the narrow scope of the defences relating to mediator's conduct, amending section 12(4) to include these additional defences will not be equivalent to regulating the conduct of mediation or setting out mediator standards. They are only to be used in the exceptional situation that without the misconduct, the mediation settlement agreement would not have been entered into. This could be interpreted to be consistent with the common law contractual vitiating factors already included in the Mediation Act.

The process for making the application for recording a mediated settlement agreement under the Mediation Act only applies to mediations in disputes for which no proceedings have been

[79] Senior Minister of State for Law Ms Indranee Rajah, Second Reading of the Mediation Bill (Parliament, 9 January 2017), para 19(b).
[80] 'Summary of Key Feedback from Public Consultation on the draft Mediation Bill' (*Ministry of Law Singapore*, 25 October 2016) <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/responses-to-feedback-received-from-public-consultation-on-the-d.html> accessed 30 June 2018.

commenced in court and requires both parties to the agreement to consent to the application to the court.[81] The application must be made within 8 weeks after the mediated settlement agreement is made, but the court has discretion to extend the time.[82] This process is relatively straightforward and simple and strikes a balance between providing an expedited procedure for enforcement of mediated settlement agreements and ensuring that the agreements enforced are not disputed as to their terms, which would need to be ventilated at a trial.[83] This mechanism will also be an attractive option for enforcing international mediation settlement agreements given the efficiency of the Singapore courts.

IV. CONCLUSION

There is great divergence in the level of experience with and regulation of commercial mediation in Asia. Accordingly, there is some way to go before convergence may be achieved in the enforcement of international mediated settlement agreements in accordance with the Enforcement Convention and Amended Model Law.

It is also important to bear in mind that there are still issues on which the Enforcement Convention and Amended Model Law are silent. First, there is no specific procedure for enforcing mediated settlement agreements prescribed by either instrument, the general principle of the instruments being that State Parties can enforce mediated settlement agreements or allow them to be used as a defence in accordance with their own rules of procedure. However, they remain constrained by the conditions laid down in the Enforcement Convention and Amended Model Law.[84] This was one area where the divergence of practice and the range of experience levels of the States with mediation made it impossible for agreement. In the interests of making the instruments more acceptable to more states, the Enforcement Convention allows some leeway in this regard just as the New York Convention does.[85] Second, the issue of whether a State Party can apply the Enforcement Convention only to the extent that the parties to the settlement agreement have agreed to its application. This has been left to individual States to decide on and is one of the permissible reservations contained in Article 8 of the Enforcement Convention. Nevertheless, it is a positive that the default position is for the Enforcement Convention to apply regardless of the agreement of the parties to the settlement agreement. Third, in relation to the issue of confidentiality and the enforcement process, the overwhelming view in the Working Group was that there was no need to address this as it was a matter to be covered by the domestic legislation in the respective enforcing jurisdictions.[86] The Working Group then agreed that no separate provision on confidentiality and enforcement would be included. It is beyond the scope of paper to consider these issues, but it can safely be said that the divergence in these areas would be more difficult to overcome than those addressed by the Enforcement Convention and Amended Model Law.

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[81] Mediation Act, s 12(1).
[82] Mediation Act, s 12(2).
[83] Dorcas Quek Anderson, 'A Coming of Age for Mediation in Singapore? Mediation Act 2016' (2017) 29 SAcLJ 275, 288.
[84] Enforcement Convention (n 10), Art 3; Amended Model Law (n 11), Art 17.
[85] UNCITRAL, 'International Commercial Conciliation: Enforceability of Settlement Agreements, Note by the Secretariat' A/CN.9/WG.II/WP.195 (2 December 2015), para 45.
[86] UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session' A/CN.9/896 (30 September 2016), para 121.

Nevertheless, what is common in the four Asian jurisdictions examined in this paper is a desire to promote the growth of mediation, in large part because of its ability to facilitate the resolution of international trade and commercial disputes in line with the growth ambitions of these jurisdictions. In this regard, the guidance offered by the Enforcement Convention and Amended Model Law is likely to be a significant impetus for them to review their legislative frameworks in relation to enforcement of mediated settlement agreements and take steps towards harmonisation.