AFTERMATH OF THE SINGAPORE CONVENTION: A COMPARATIVE ANALYSIS BETWEEN THE SINGAPORE CONVENTION AND THE NEW YORK CONVENTION

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I. Introduction:

In general, litigation is not the most efficient resolution in international commercial disputes. There are various reasons for this claim: Domestic courts usually do not have the expertise to decide such cases; naturally a domestic court will prioritize its own citizens' interest over a foreign national; it will be more advantageous for one party to litigate the matter in their own country, which will put that party in a better position than a foreign national who has more limited means to fight or prove their claims; and such procedure will be time-consuming and expensive for the parties in most cases. Even once parties go through all the procedure in court, enforcement of such court decree is subject to many limitations and needs to be reviewed on a case-by-case basis and depends heavily on the bilateral treaties between the countries in terms of recognition and enforcement of such court decrees. For the reasons mentioned, Alternative Dispute Resolution (ADR) will be preferred in most cases.

The alternative dispute resolution methods that exist are Negotiation, Mediation and Arbitration among others. The challenging part is enforcement of such agreements. Foreign arbitral awards enjoy the benefits of recognition and enforcement of the New York Convention, which so far made the arbitration one of the most favorable dispute resolution methods in international commercial disputes.

The fact that mediation agreements had to be enforced like a foreign agreement in court, puts mediation in a disadvantage compared to arbitration. The United Nations Convention on International Settlement Agreements resulting from Mediation ("the Singapore Convention") aims to cure this disadvantage and facilitate the enforcement of International Commercial Mediation

Agreements in a foreign country. However, the level of credibility of this Convention is dependent on how many countries will sign and ratify the Convention. The scope of the enforcement is broad and once the countries ratify the Convention, any international commercial dispute will fall under the definition (subject to limited exceptions) and will make such agreements enforceable. It also heavily is dependent on to what extent the states ratify the Singapore Convention subject to the reservations of Article 8 as explained below.

Although the Convention initially seems to be a solution for enforcement, it is still not clear if the current text will live up to the standards that the international mediation society expect it to. In this paper, the goal is to compare the Singapore Convention with the New York Convention and predict the possible problems that practitioners might face with in the future. Part II will provide a background of the Singapore Convention. Part III will focus on the scope of the Convention compared to the New York Convention. In Part IV, there will be an overview of the reservations subject to Article 8 of the Convention.

II. Background:

The United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention) is a bilateral treaty. The final draft of the Convention was approved by the United Nations Commission on International Trade Law (UNCITRAL) on June 26, 2018.[1]

The draft of the Convention was the result of three years of deliberations. In the drafting, 85 member states were involved as well as 35 international governmental and nongovernmental entities comprising the commission.[2] Once three member states ratify the Singapore Convention, it will take effect.[3]

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[1] Patrick R. Kingsley, *The Singapore Convention on Mediation: Good News for Businesses,* January 9, 2019, law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/?slreturn=20190314192112.

[2] *Id.*

[3] *Id.*

The goal of the Convention is to promote mediation as a dispute resolution method for cross-border commercial disputes. Mediation is not only a faster and less expensive method, but it also is more likely to preserve the future relationship. [4] One of the barriers in using mediation by parties to an international commercial dispute is the problem with the enforcement.[5] This will be more problematic in the breach of contract cases[6] as parties have to take the outcome of the mediation (in case of settlement) to court for enforcement and end up with litigating a contract claim, while the initial dispute was also a contract claim and in such scenario using mediation does not save much time or costs for the parties.

The Singapore Convention in Mediation is equivalent of the New York Convention in Arbitration. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention[7] guarantees the recognition and enforcement of foreign arbitral awards for 60 years now. One of the reasons for arbitration being employed by international disputants in commercial disputes is the pragmatic mechanism drafted in the New York Convention. If successful, the Singapore Convention will play a similar role in international mediation.

In the interviews I had with the practitioners from different countries, it seems like that the Singapore Convention is going to be as popular with the States as the New York Convention and the general positive approach towards employing the Alternative

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[4] *See, e.g.,* interventions of the United States and Belarus, in UNCITRAL Audio Recordings: U.N. Comm'n on Int'l Trade Law, 48th Session, July 2, 2015, 9:30-12:30, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f3e4531b-7187-411c-a063-27bb8e1bc546. The General Assembly has also noted that it produces savings for states in the administration of justice. G.A. Res. 57/18, U.N. Doc. A/Res/57/18 (Jan. 24, 2003) as cited in Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, Pepp. Disp. Resol. L.J, 2 (2018).

[5] *Id.*

[6] *Id.* at 3.

[7] The New York Convention.

Dispute Resolution will be common between the New York and the Singapore Convention.

"States are relying more and more in the paths to settlement provided by mediation, arbitration and negotiation. Moreover, there are currently 159 parties to the NY Convention which includes 156 of the 193 UN Nations (around 80% of the UN Nations). To this extent we can be certain that the ADR culture in more established than back in 1958 and so the United Nations Convention on International Settlement Agreements Resulting from Mediation will, undoubtedly, be more accepted taking advantage of the NY Convention advantages." [8] If this approach towards ADR be shown by the practitioners from the majority of the jurisdictions, the Singapore Convention will be playing a leading role in enforcement of the settlement agreement in the international commercial dispute resolution.

III. Scope of the Singapore Convention

The scope and definition of the Singapore Convention is a crucial part of this paper. The reason is that knowing to what disputes and to what extent the Convention applies, will be a key in deciding where and when the parties to a dispute can benefit from the Convention.

a. Article 1 of the Convention defines the scope of the Convention.[9]

The Singapore Convention uses the term "international" for the application of the Convention. This is different from the New York Convention that uses the term "foreign" [10] as opposed to

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[8] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).

[9] Article 1. Scope of application "1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: (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."

[10] Article I (1) of the New York Convention States:

"international". According to the New York Convention the arbitral award must be made in a different state. This requires identifying a state that the arbitration award is made at, which results in requiring a seat of arbitration.

The progress in the Singapore Convention is that it does not require a seat[11] for mediation in order for the Convention to apply. Article 1 seems to aim to provide the Convention with a broad application by providing alternatives in order for an agreement to be considered international.

One of the benefits of delocalization of dispute resolution system is that it can promote the use of most cutting-edge methods, which is in line with the requirement of lowering the costs of the process. Although a Seat for arbitration can be a hypothetical place and everything else can happen online, it is still an added requirement that is removed in the Singapore Convention.

This feature can potentially facilitate the use of online dispute resolution as parties do not have to concern themselves with the idea of where the mediation is actually taking place and what procedural, or substantive domestic law might potentially affect the agreement depending on where the mediation is physically happening. Under the New York Convention, unlike the Singapore Convention, the same issue can be much more complicated as the countries are trying to regulate online businesses and in arbitration domestic laws are of more importance and govern certain matters related to the subject matter.[12]

"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

[11] *See, e.g.*, intervention of the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 14, 2016, 9:30-12:30, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f5c9b0ea-5f54-4158-a198-d0ea83b3c9a3 (finding, for example, that too broad a clause risked abuse). as cited in Timothy Schnabel, *supra* at 21.

[12] *See,* Karen Stewart; Joseph Matthews, Online Arbitration of Cross-Border, Business to Consumer Disputes, 56 U. Miami L. Rev. 1111 (2002).

The significance of delocalization in the Singapore Convention that removed the requirement to have a seat goes beyond the facilitation of the process and lowering the potential costs. Under the New York Convention there is a seat requirement. This selection of the seat gives certain jurisdiction to the domestic court of the country where the seat is located. The courts member-state of the Convention that is the venue of the seat have the right to supervise arbitration activities within that state.[13] One of the activities that can be supervised by such court is setting aside of the award.[14] This is an exclusive power of the supervisory court and the other courts where the award is taken to in other member-states can only enforce or refuse to enforce and will not have such power over setting aside awards.[15] According to Article 2(a) of the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, a court could refuse enforcement of an arbitral award based on the fact hat it was set aside in the country where the award was made. [16] The New York Convention discusses refusal of recognition under Article V of the Convention.[17] Similar to the

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[13] William Leung King Wai, Exercise of Residual Discretion under Article V of the New York Convention by Enforcement Court When Award Is Alive, Dead, and Undead in Seat, 7 China Legal Sci. 123 (2019), 123.

[14] *Id.*

[15] *Id.*

[16] Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?", ICSID review (2014) 4.

[17] Article V: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

Geneva Convention, according to Article V(1)(e) of the New York Convention, setting aside in the seat of arbitration can be a ground for refusal of the enforcement by other member-states.[18] Such exclusive competence has been confirmed in different court decisions. For instance, the US Supreme Court did not accept that the award has been set aside while the arbitral award was made in Geneva, Switzerland and was set aside by a court in Indonesia.[19] This holding shows that not only setting aside in a foreign country is an issue that the courts take into consideration while reviewing enforcement of a foreign award, but the exclusivity of such jurisdiction for the supervisory court is something internationally recognized.

One of the differences between the New York Convention and the Singapore Convention will be how the domestic courts will treat the issue of setting aside the assets in the country that the mediation has happened initially. The United States originally offered such recognition of setting aside that would result in similar recognition.[20] But eventually the final draft of the Singapore Convention did not include such proceeding. Thus, setting aside of the agreement is one jurisdiction will not be binding on other jurisdictions.[21] Obviously since there is no seat

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(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[18] *Id.*

[19] Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT Pln (Perseo), 364 F3d 274, 308–10 (5th Cir 2004).

[20] Timothy Schnabel, *supra* at 22.

[21] *Id.*

requirement in the Singapore Convention, the courts will not distinguish between the setting aside of the agreement in the country where the mediation took place or other places. And even in case there is such setting aside, and the courts decide to consider that in order to refuse enforcement, there is no binding rules on the domestic courts like what is entailed in the New York Convention.

The other effect of delocalization is that there is no refusal under that fact that the mediator did not comply with the local mediation requirements[22]. For instance, none of the parties can claim the agreement is not enforceable because there was a certain domestic rule. If a jurisdiction requires a certain license or requires the mediator to sign the agreement, this cannot be a ground for refusal of the enforcement. The only requirement that is in the Article 1 of the Convention other than the appropriate subject matter is that the agreement be written. Such requirement is helpful in international dispute resolution as the burden of proof and evidentiary requirements for oral agreements can be so different across the jurisdictions. The Convention is not even requiring notarized writing or any specific format. This means as long as there is some sort of written proof, that might satisfy the purposes of the Convention. Such a very low bar seems in line with the purposes of the drafters of the Convention in facilitation of the recognition and enforcement of the mediated agreements.

In order for the dispute to be considered international either the places of the businesses of the parties should be in different states[23] or if they have the same places of business their place of business should be different from either the state where a substantial part of the obligation of the settlement agreement is performed or the state where the subject matter is most closely connected to.[24] After stating the definition of "international" the Convention states the areas where the Convention does not apply under parts 2 and 3 of the Article 1. Transactions engaged by a

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[22] *Id.*

[23] Article 1(a) of the Singapore Convention.

[24] Article 1(b) of the Singapore Convention.

party for family or personal uses as well as the transactions related to the family, inheritance and employment law does not fall within the scope of the application of the Convention. The reason for the UNCITRAL Working Group to exclude these issues related to family, inheritance and employment law is that the issues they raise are different from commercial disputes.[25] These categories are amongst the ones that are sensitive for member states that needed to be excluded.[26] The power imbalance in such categories among parties could potentially have dissuaded some states from applying the Singapore Convention.[27] [28]

Despite the default rule that is not requiring more than written agreement, a state while ratifying the Convention can require the parties to clarify that the Convention will apply to their agreement. This opt-in requirement will be explained in detail in the second part of this paper that deals with the reservations. Thus, potentially the member-state can limit the scope of the application of the Convention by using their rights to reservation.

After Article 1 of the Singapore Convention, Part 1 defines the scope of the Convention for the agreements that the Convention will apply, Part 2 and Part 3 of Article 1 define situations where the Convention does not apply. Considering the broad application of the Convention, it seems helpful in preventing disputes, specifically related to application and interpretation of the application, by adding this two last parts to the Convention. By

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[25] Timothy Schnabel, *supra* at 24.
[26] *Id.*
[27] *Id.*
[28] Although the aforementioned categories might raise issues but I think the Convention still could consider them with specific requirements such as a seat of mediation for family law that requires the application of the private international law only for the family-related matters that at least help the enforcement of the family or employment mediation agreement where there is a party who has assets in different jurisdictions. I believe even if the Convention did not want to mix such sensitive issues and separate them from the commercial disputes, there are other efforts that can be done in order to helping the parties enforcing such as assisting states by a model law draft that they can adopt and facilitate the enforcement of the mediated settlements in those areas.

Part 2[29] the Convention is excluding certain subject matters from the application of the Convention, which is in line with the application of the Convention to "Commercial" disputes. While Part 3[30] is more of a procedural exclusion, which carves out the decisions of a court on a mediation agreement and arbitral awards.

b. Mixed-Mode Dispute Resolution under the Singapore Convention:

Mixed-mode dispute resolution can be an effective tool in providing the parties to a dispute with creative solutions. Such methods can be used in a variety of scenarios where the arbitrator sets the stage for settlement; arbitrator setting the stage for settlement of substantive disputes by handling key procedural issues; arbitrators setting the stage by promoting use of mediation; arbitrators setting the stage for settlement of substantive disputes by issuing preliminary views or arbitrator rendering the Consent Award. [31] In all such scenarios there is an interplay between different methods, which can be some binding and some nonbinding.[32] These scenarios can be due to the decision of the parties from the outset to use such methods or due to different stages of dispute resolution the parties select in their agreements and while parties start using these separate resolutions, such scenarios might occur. For example, the International Center for Dispute Resolution and Prevention (CPR), provides the parties with variety of sample clauses and explains the differences in depth. Some of such clauses that are named "CPR Model Multi-

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[29] 2. This Convention does not apply to settlement agreements: (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (b) Relating to family, inheritance or employment law.

[30] 3. This Convention does not apply to: (a) Settlement agreements: (i) That have been approved by a court or concluded in the course of proceedings before a court; and (ii) That are enforceable as a judgment in the State of that court; (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

[31] See, Thomas J. Stipanowich, Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring The Interplay Between Mediation, Evaluation And Arbitration In Commercial Cases,* Fordham Int'l L.J., 846-65 (2017).

[32] *Id.*

Step Dispute Resolution Clause"[33], try to offer the parties some very creative solutions in resolving their disputes. In addition to a "Stand-Alone Mediation Clause"[34], there are multiple different options such as "Negotiation-Mediation Clause with Designated Mediator Option", "CPR Model Two-Step Clause", which entails mediation following negotiation; and "CPR Model Two-Step Clause: Mediation and Arbitration[35]"[36]. Although these creative options are providing parties with multiple dispute resolution mechanisms, it does not necessarily mean that using such methods is the same as using mixed-mode dispute resolution. If the resolutions are using separately by separate neutrals, then such process are just different, unrelated, manners. While when there is some connection by sharing the information of using the same party-neutral, it will fall under the mixed-mode dispute resolution.

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[33] International Institute for Conflict Prevention & Resolution, *CPR Model Clauses and Sample Language*, July 9, 2019, cpradr.org/news-publications/articles/2010-07-09-cpr-model-clauses-and-sample-language

[34] *Id.*

[35] CPR Model Two-Step Clause: "Mediation and Arbitration The parties shall endeavor to resolve any dispute arising out of or relating to this Agreement by mediation under the CPR Mediation Procedure [currently in effect OR in effect on the date of this Agreement]. Unless the parties agree otherwise, the mediator will be selected from the CPR Panels of Distinguished Neutrals. Any controversy or claim arising out of or relating to this Agreement, including the breach, termination or validity thereof, which remains unresolved [[45] days after initiation of the mediation procedure] [[30] days after the appointment of a mediator], shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution ("CPR") Rules for Non-Administered Arbitration [currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three independent and impartial arbitrators, of whom each party shall designate one] [three arbitrators of whom each party shall appoint one in accordance with the 'screened' appointment procedure provided in Rule 5.4] [three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if one party fails to participate in the mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above]. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state]."

[36] *Id.*

According to the Singapore Convention[37], even a mediated settlement that is enforceable as a judgment, it is excluded from the enforcement of the Convention as it is considered a judgment. Without such exclusion the party enforcing the settlement agreement, which was already enforced through judgement would have two avenues to enforce, i.e. the Hague Conference instrument, the 2005 Choice of Court Agreement Convention and the draft judgment convention and the Singapore Convention.[38]
The exclusion of the arbitration award similarly is to avoid the concurrent application of the Singapore and New York Convention.

On the other hand, because the Singapore Convention carves out two other despite resolutions methods, i.e. court proceedings and arbitral awards, it is important to make sure there is no situation in which there is ambiguity on what an outcome of the procedure might be, i.e. a settlement agreement or an arbitral award. At first glance, this seems obvious, but the potential problem can arise in hypothetical scenarios where a dispute resolution proceeding mixes more than one dispute resolution methods. The complexity of the international disputes requires third party neutrals to come up with creative methods to resolve such matters. In order to address such sophistication and complexity, the practitioners have tried to take advantage of the benefits of different methods and use mixed-mode dispute resolution.

The Singapore Convention is clear about the fact that the parties cannot use the Singapore Convention when parties to a settlement agreement ask an arbitrator to incorporate their terms in an arbitral award in order to benefit from the enforcement system of arbitration. The main reason is that such consent awards will be enforceable through the New York Convention.[39] The Convention

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[37] Article 1(3)(a)
[38] *See, e.g.*, intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation as cited in Timothy Schnabel, *supra* at 25.
[39] Thomas J. Stipanowich, Veronique Fraser, *supra* at 861

is trying to avoid overlap between the Singapore and New York Convention the same way they are avoiding such dual enforcement related to a court decree. However, in mixed-mode dispute resolution the enforceability might be an issue.[40] In general, for the scenarios where the parties clearly employ mediation as the whole dispute resolution mechanism but merely ask an arbitrator to render an arbitral award based on the settlement agreement, we might see less of those situation if the Singapore Convention takes effect and a great number of states sign into that. This potentially can solve issues related to enforcement of settlements that are not clearly arbitral award but are the result of mediation.

The more complex scenario is when the same third-party neutral if playing more than one role in dispute resolution. Although there are some scholars who question the possibility of the mediator playing the role of an arbitrator or vice-versa[41], in reality there are some scenarios that this "switching the hat" actually happens.[42] Although in some cultures such practices might seem unacceptable and the same neutral does not take part in mediation once she started arbitration, or start arbitration once she already has commenced mediation, different jurisdictions and legal cultures have different approached towards the same situation.[43] In scenarios of mediation followed by arbitration (med-arb) or arbitration followed by mediation (arb-med), the outcome might not always be recognized as the same by different jurisdictions.

Different jurisdictions also apply different domestic mediation and arbitration laws that will add to the complexity of analysis. As stated above, since the Singapore Convention does not require a seat for mediation, the domestic laws requirements do not

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[40] Gary B. Born, International Commercial Arbitration 3021 (2d ed. 2014).

[41] Kristen M. Blankley, Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case, 63 BAYLOR L. REV. 317, 332-37 (2011).

[42] Thomas J. Stipanowich, Veronique Fraser, *supra* at 850.

[43] *See* Shahla Ali, The Arbitrator's Perspective: Cultural Issues in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES § 6.01-6.08 (Horacio A. Grigera Naon & Paul E. Mason eds., 2010) as cited in Thomas J. Stipanowich, Veronique Fraser, *supra* at 851.

apply to the enforceability under the Singapore Convention. However, it remains unclear if the domestic laws will apply in the initial recognition of mediation under mixed-mode dispute resolution.

As an example, in brazil, according to the article 7[44] of the Brazilian mediation statute of June 26, 2015, it is expressly prohibited for a mediator to serve as the third-party neutral in the same dispute resolution procedure. Since med-arb is not a common practice and the services offered by majority of arbitration services does not lead to a more cost-effective med-arb dispute resolution, the applicability of the Singapore Convention on such scenarios remain unclear. [45][46]

In conclusion, by applying different styles of mediation across jurisdictions and employing more than one method of dispute resolution, there will be some potential conflicts in terms of picking the right enforcement regime and even there might not be a consensus among different jurisdictions.

IV. Reservations to the Singapore Convention

One of the major issues that have been point of disagreement between many states during drafting the Convention was the reservations to the Singapore Convention. Article 8 of the Convention entails the reservations.[47] This Article is giving the

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[44] Article 13. 140: *The mediator shall not become the arbitrator nor will he be able to function as a witness both in judicial and arbitration procedure that are related to the same dispute.*

[45] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).

[46] Since changing roles between mediator and arbitrator for the same parties and same dispute has some ethical considerations, there is not extensive discussions among scholars on that topic. For instance, the party who is sharing confidential information to a mediation, usually have higher incentive to share such evidence or information since s/he does not expect the same party to be the one deciding for the case. In Med-Arb the possibility of the mediator to decide for the same dispute in a future proceeding, might negatively affect the incentive of the parties in collaborating in the initial mediation.

[47] Article 8. Reservations

"1. A Party to the Convention may declare that:

states right to opt-out of the Convention. If a state ratifies the Convention with such reservation, it means the Convention will not apply unless the parties agree otherwise. During drafting the Conventions there were different ideas on opt-in versus opt-out. Some believed the Convention should always automatically apply unless parties out-out.[48] Thus there will be no need to have this reservation in Article 8; while some other believed the opt-in right is in line with party autonomy.[49] During the deliberations this issue was one of the topics that was debated among the Working Group at the UNCITRAL and different approaches were taken throughout the deliberations.[50]

Some of the practitioners are hopeful that the countries will join the Singapore Convention without using any reservations. For instance, in the interview with a Brazilian Professor, he stated the following with regards to the Brazilian practitioners' approach:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
"2. No reservations are permitted except those expressly authorized in this article.
"3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.
"4. Reservations and their confirmations shall be deposited with the depositary.
"5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

[48] Hal Abramson, The UNCITRAL Convention on Cross-Border Mediation Settlement Agreements: The Process and Key Choices, 12

[49] *Id.*

[50] Timothy Schnabel, *supra* at 57.

"Brazil is relatively new to the ADR ways of settling disputes. Our arbitration statute is from 1996 and was only considered constitutional by the Brazilian Supreme Court in the year of 2000. Thus, only after the year of 2000 did Brazilians start relying in arbitration. Since then arbitration has advanced largely throughout the country and trustable and efficient arbitration and mediation chambers have established themselves in the market. Our mediation statute is from 2015 and is largely accepted and applied both by private parties and the judiciary. Therefore, there is no denying that Brazil will be one signatory of the Singapore Convention. Furthermore, I do not think that Brazil will use any reservations since the Singapore Convention and the Brazilian mediation statute are observing and applying the same mediation rules and principles." [51]

Even though the Brazilian approach merely is one jurisdiction, Brazil is a good example for countries who are implementing ADR and developing the use of amicable dispute resolution methods. As it will be explained below, however, the culture of mediation in different countries will be a determinative factor in deciding if the state is going to join the Singapore Convention and if so, will they join subject to reservations of the Article 8 or not.

Although it might seem obvious that promoting mediation requires automatic application of the Convention unless parties agree otherwise, hearing the deliberations[52] made me doubt that default rule that I had in mind. The reason is that one of the main purposes of mediation is to empower parties and to promote mediation, not to impose anything that they could not foresee or expect over the normal course of the dispute resolution. Some of the delegates believe that the application of the Convention would not be a default rule among different cultures.[53] These allegations

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[51] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).

[52] *See, e.g.*, intervention of Germany, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 16, 2016, 14:00-17:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/aa875fca-e13c-49db-83f7-820bbe6dfe74 as cited in Timothy Schnabel, *supra* at 57.

[53] *Id.*

are backed by some scholarly articles that although mediation seems to be the same process throughout different parts of the world can be different due to different legal systems and different cultures. [54] Thus, mediators in different jurisdictions employ different default rules.[55]

Even though I personally believe that this is a legitimate concern that the parties should not be obliged to the consequences that they did not comprehend, but for two reasons I believe that should not be a basis for incorporating such reservation in the Convention.

One is that a party who is entering an agreement in good faith, has no reason to be surprised by a strong mechanism that facilitates enforcement of such agreement. If a party is transferring assets to a different jurisdiction to game the system, and to make those assets not accessible or more difficult to access, especially to enforce an agreement that the very same person volitionally agreed to, then justice does not require lawyers to be worried about such state of mind. Secondly, even if there are lawyers of philosophies who want the parties to be guaranteed to have such information, it is better to educate the parties and mediators and alter the global culture to accepting the enforcement mechanism, i.e. the Singapore Convention as a default not an exception.

Despite the split of ideas among the delegates, the result is the possibility of such reservation. Therefore, under the final draft, a state can change the default to opt-in system, meaning the parties who want the Singapore Convention to apply need to specify that. If a state does not consider such reservation, the default will be an opt-out system, meaning the Convention will apply unless the parties state otherwise in their mediation settlement agreement.

Although the states are able to consider the reservation of opt-in system, it does not mean that the domestic courts can require a very specific language[56] that has to be entailed in the agreement.

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[54] See Stipanowich, The International Evolution of Mediation, supra note 2, at 1204-26 (2015) (discussing data from International Academy of Mediators / Straus Institute Survey of Mediator Practices and Perceptions).

[55] Thomas J. Stipanowich & Veronique Fraster, *supra* at 842.

[56] Timothy Schnabel, *supra* at 58.

So long as the parties mention the Singapore Convention to be applied or in their choice of law refer to a jurisdiction[57] that does apply the Singapore Convention by default, that should suffice.

V. Conclusion

In conclusion, the Singapore Convention is a major step in promoting mediation as a streamline dispute resolution mechanism for international disputes. By defining a broad scope for including any commercial subject matter followed by a narrow exemption, the Convention is applicable to a vast majority of commercial settlement agreements. This broad scope and no requirement for a seat of mediation, unlike the New York Convention, makes it more convenient for the parties to benefit from the application of the Singapore Convention in a more affordable manner. Less formalities and confidentiality in mediation will be another reason for international mediation to be a favorable dispute resolution mechanism, thanks to the enforcement mechanism that the Convention will grant to international mediation agreements.

Moreover, the settlement agreements that are enforced through the New York Convention as they are rendered as arbitral awards, can be directly enforced through the Singapore Convention instead, which will be more in line with the actual intention of the parties and part-autonomy.

The strength of the Convention depends on how many countries will sign into the Convention and ratify it and that is still unknown. Moreover, the reservations if very often used by member states, can negatively affect the Convention. If many member states decide to ratify the Convention with an opt-in reservation, the default will be for the Convention not to apply, which can potentially be a hurdle in promoting the Convention. This will heavily depend on the domestic laws of each member state and how they will amend or change the contradictory domestic laws in the hierarchy of the domestic versus international conventions.

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[57] *Id.*

Reservations can be potentially a hurdle in the general application of the Singapore Convention. This especially can be an issue when one of the parties is from a member state, which ratified the Singapore Convention without reservation, while the other party is from a jurisdiction, which has such reservations.

In conclusion, drafting the Singapore Convention was a big step forward for international mediation and the rest is up to the states to ratify and promote it and to the domestic courts to grant the international mediation agreement subject to the application of the Singapore Convention.