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Scrutinizing the Scope of the Singapore Mediation Convention as a foundation for cross-border settlements, and its effect on the Indian Lawscape

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ABSTRACT

Although, Mediation is considered a more flexible, cost effective method, the lack of International Guidelines and the want of decision being binding are the biggest deterrents to its popular usage., The lack of international guidelines, legislations or processes which could ensure that such agreements could be recognized and enforced internationally meant that the result of a Mediation would often be effectively to the status of contracts only and would often require further court proceedings to force the compliance, incase one of the parties defaulted to the agreed terms. This has resulted, in mediation comparing unfavorably to arbitration. And the COVID-19 Pandemic, on the other hand, has accelerated the need for alternate means of Dispute Resolution, since the traditional Justice Systems across the globe have been significantly hit. The Pandemic has resulted in the accelerated meteoric downslide in the global economy, which impacts the investment made by the public in the Judicial Process too.

The Singapore Convention, of which India is a signatory, has been streamlined with the aim to give Mediation the same iron-cast effect that the New York Convention gives to Arbitrations. The Preamble of the Convention aims to make mediation settlements easier to enforce internationally, and binding across the countries that have ratified the same, eliminating the need for the parties to initiate new legal proceedings.

This article attempts to sift through the Convention and attempt to understand and explain how the Convention aims to tackle the process and provide relief. This article also aims to explain how this Convention will affect the Indian lawscape, as India is a signatory of the same and currently does not have a separate legislation dealing with the Mediation Process.

I. INTRODUCTION

Arbitration and Mediation are seen as 'competing options' for Alternate Dispute Resolution. The recent market trends have been changing for the last couple of years, with the change

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being accelerated with the onset of the COVID-19 Pandemic; this has created a major shift in the international view of handling business disputes. Arbitration has always been the preferred form of settling international disputes, due to the enforceability of arbitral awards, but with the ratification of the Singapore Convention (formally, known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) the likelihood of Mediation being used more frequently has been established.

With Mediation being seen as the less formal way of Dispute Resolution, also being cheaper and quicker, it has not been the most preferable option due to the fact that 'mediated settlements are not internationally bonding' due to the want of international guidelines for the same. But this Convention has pioneered the option of Mediation into the forefront. One of the major focuses of the Convention was to ensure that it caters to the market's 'ease of doing business', thus ensuring prompt, cost-effective and most importantly binding solutions to disputes.

II. HOW IS MEDIATION DIFFERENT FROM ARBITRATION?

Mediation can be explained as the engagement of a neutral third party (mediator), to assist the parties in a dispute[2]. The mediator is tasked to assist the parties in exploring their commercial interests, which is in contrast to a legal proceeding where the task is to determine which party is in the right and which party is in the wrong. The mediator is different in the sense, that he/she is neutral as to the merits of the case and impartial with respect to the parties[3], and does not impose a binding decision. Mediation is often considered a pretty flexible process and can take place before, during and after an arbitration proceeding.

Arbitration, on the other hand is when a neutral third party (arbitrator) who acts as a Judge, is assigned to conduct a proceeding, which can be described as formal in nature, to provide the opportunity to the parties provide their sides and evidence, following which a final decision (arbitral award) is announced, which is considered binding on the parties involved. One of the major factors for the popularity of Arbitration over other forms of Dispute Resolution is the fact that arbitral awards are binding.

[2] *Mediação: Uma Solução Judiciosa para Conflitos* by Profa. Dra. Maria de Nazareth Serpa, Editora DelRey, 2018. This is an updated expansion of the original book *Teoria e Prática da Mediação de Conflitos* (Editora Lumen Juris, 1999).
[3] *Mediação: Uma Solução Judiciosa para Conflitos* by Profa. Dra. Maria de Nazareth Serpa, Editora DelRey, 2018, at p. 165.

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III. "United Nations Convention on International Settlement Agreements Resulting From Mediation": International Guidelines to Streamline the Mediation Process

The Convention opened for signature in Singapore on August 7, 2019. It is a uniform framework for '*international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute*.[4]' The Preamble of the Convention indicates that it will facilitate international trade by enabling disputing parties to easily enforce and invoke settlement agreements across borders.

Before the Convention, parties to a mediated settlement would have to commence legal action against the party in breach, to enforce the mediated settlement agreement, this process would result in unnecessary costs and wasted time, thus defeating the purpose of the Mediation process. But, with the Singapore Convention, a mediated settlement agreement 'would be, in and of itself, enforceable between its signatories'[5]. Countries that have ratified the Convention will be obliged to enforce mediated settlement agreements.

A. What does the Convention aim to establish?

The end of the Convention is to promote the use of Mediation as a 'cross-border commercial dispute resolution process' and advance the same as a more likely route to 'preserve commercial relationships'[6]. The lack of cross-border mechanism is recorded as a deterrent by companies and organizations to opt for Mediation. The UNCITRAL (United Nations Commission on International Trade Law) has noted that the lack of any internationally recognized guidelines made it difficult for some companies to convince the other party to opt for Mediation, rather Arbitration was/is more preferred due to the 'international stamp of legitimacy'[7] that the New York Convention provides to it.

The Convention is not designed to provide enforceability to agreements that could not have been enforced in the first place, it aims to put a framework in place for the recognition and enforcement for the alternate dispute mechanism (in this case mediation) that would be more

[4] Singaporeconvention.org, 2020. *About The Convention*. (Oct 4, 2020, 5:40 PM), https://www.singaporeconvention.org/convention/about-convention/

[5] Simc.com.sg. 2020. *The Singapore Convention: A Milestone in Mediation – Singapore International Mediation Centre (SIMC)*. (Oct 4, 2020, 5:40 PM) http://simc.com.sg/blog/2018/07/25/singapore-convention-milestone-mediation.

[6] S. I. Strong, Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 Wash. U. J. L. & Pol'y 011 (2014).

[7] Ankur Khandelwal, 'Assessing the Scope of Mediation in India: Upholding the Principles of Justice', Asian Dispute Review, (Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2010, Volume 12 Issue 2).

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time-effective, cost effective and flexible than a formal legal proceeding.

B. What is an 'enforceable Agreement' under the Convention?

Article 1[8] sets out the types of mediation to which the Convention applies. Importantly, the application is limited to commercial disputes which are international (which achieves a similar effect as the New York Convention which only deals with the recognition and enforcement of foreign and non-domestic arbitral awards).

The requirements that need to be met by the agreement to qualify under the Convention are –

(i) The agreement must in writing or must be recorded in some form that can be provided as tangible proof.

(ii) The settlement agreement must arise out of a proceeding that can be explained as a 'Mediation'(as defined in the Convention)[9] ,

(iii) The Convention is applicable only to a "commercial dispute"[10]. Although the meaning of 'commercial dispute' has not been defined on the Convention, it is meant to have the same meaning under the broad heading as defined in the New York Convention,

(iv) The settlement must not related to subject-matter that includes transactions used by one or both the parties for their personal, family or household purposes, and/or deals with family inheritance or the national employment laws

(v) The agreement must be related to a 'cross-border dispute', which means that –

- Atleast two of the parties involved must have their primary place of business or their primary working office/headquarters in different States or countries,
- The place which is considered the primary headquarters of either of the parties must be different from the place where the obligations regarding the settlement agreement were completed or performed, or different from the State where the subject-matter of the agreement is concerned

[8] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 1.
[9] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 2(3).
[10] *Timothy Schnabel, The Singapore Convention on Mediation- A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements' (September 18, 2018).*

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(vi) The Convention does not include agreements that[11] –

- Have been approved by the Court or concluded by way of court proceedings
- Have been enforced or recorded as arbitral awards

C. Provision of 'General Principles' for enforcement of agreement

Article 3[12] has been crafted very expertly, as it avoids prescribing a specific mode of enforcement, but has provided guidance on the conditions to be fulfilled to enforce a settlement agreement, this nature of the Article is reflective of the style of drafting adopted in the New York Convention. Article 3(2) provides that a State shall allow the party(s) to involve the settlement agreement in accordance to the procedure laid down in the Convention, to provide the proof that the matter has been resolved. It has been noted that the Article avoids using the term 'recognition'[13] which can have different meanings under domestic and international law but instead speaks to the practical effect of recognition, which is 'to allow a settlement agreement to be used as a defense'[14].

D. Formalities to be fulfilled before granting of relief

Unlike the New York Convention which does not contain form requirements for arbitral awards, the Singapore Convention needs to specify form requirements because settlement agreements can be arrived at after mediation, negotiation, or other means of informal discussion. The form requirements of a settlement agreement need to provide certainty and comfort to the state of enforcement, but at the same time need to avoid being overly prescriptive or detailed such that they complicate the enforcement procedure. Article 4[15] prescribes that a party supply to the competent authority of State where relief is sought (a) the settlement agreement, (b) evidence that the same resulted from mediation.

Article 4 does not exhaustively prescribe evidence of an agreement, but it gives several options while leaving it open for interpretation for the competent authority in the state, as to

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[11] Parikh, S., 2019. *The Singapore Convention On Mediation – India'S Pro-Enforcement Run Continues | India Corporate Law*. (Oct 4, 2020, 6:30 PM), India Corporate Law. Available at: https://corporate.cyrilamarchandblogs.com/2019/08/singapore-convention-mediation-india-pro-enforcement-arbitration/.

[12] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 3.

[13] Eunice, C.H.U.A., 2019. The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution. *Asian Journal of International Law*, *9*(2).

[14] AnnaKC KOO,"Enforcing International Mediated Settlement Agreements" in Muruga Perumal RAMASWAMY and João RIBEIRO, eds., Harmonising Trade Law to Enable Private Sector Regional Development (UNCITRAL Regional Centre for Asia and the Pacific,2017).

[15] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 4.

what it attributes to acceptable evidence for the same. This approach has been hailed as very advantageous as it can be flexible for the varied circumstances allowing the procedure to be completed instead of being stuck due to a minor formality.[16]

E. Defenses: Grounds for refusal of relief

The grounds for refusing relief as listed in Article 5[17] are exhaustive. A number of them broadly resemble those in the New York Convention, including where:

- a party to the settlement agreement was under incapacity
- granting relief would be contrary to public policy
- the subject matter of dispute is not capable of settlement by mediation

Other grounds for refusing relief are more specific to the mediation context, including[18]:

- the settlement agreement is null and void, inoperative or incapable of being performed under the law to which it is subject
- the settlement agreement is not binding or is not final according to its terms
- the settlement agreement is not clear or comprehensible

Others focus on the conduct of the mediator; [19]

- where there is a serious breach by the mediator of standards applicable to the mediator or the mediation
- failure by the mediator to disclose circumstances relevant to the mediator's impartiality or independence

F. "Reservations by Signatory Parties"

To ensure that the Convention does not deviate from its aim that it set out to achieve the only reservations that are allowed to the parties are those that are set out under Article 8[20]. The Convention will apply only to the extent that the parties to the settlement agreement have agreed to apply it. Implying that if there is a situation where a Signatory State expresses such a reservation, parties to a settlement involving a party belonging to that State or assets in that

[16] Chang-FaLO and Winnie Jo-Mei MA, "Draft" Convention on Cross-Border Enforcement of International Mediated Settlement Agreements" (2014)7(2) Contemporary Asia Arbitration Journal.
[17] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 5.
[18] Palmer, R., 2019. *The Singapore Convention on Mediation*. (Oct 4, 2020, 6:50 PM) https://www.ashurst.com/en/news-and-insights/legal-updates/the-singapore-convention-on-mediation/
[19] United Nations, General Assembly, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session, A/CN.9/867 (1-5 February 2016).
[20] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 8.

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State would need to "opt-in" to the Singapore Convention. [21]These reservations relate to the "*applicability of the Convention to settlement agreements to which a government agency is party to and there is the existence of an opt-in option"*[22].

IV. MEDIATION: AN INDIAN PERSPECTIVE

Unlike arbitration, mediation has never been dealt with by any separate legislation in India. It is mentioned under Section 89 of CPC and it says that 'whenever there is an element of settlement in a dispute, judges are required to give the parties an option to resolve their disputes through either Arbitration, Mediation, Conciliation, Lok Adalat or Judicial settlement'[23]. The Hon'ble Supreme Court[24] has clarified that 'Courts can *suo moto* order parties to go for mediation and listed out the categories of suitable cases. The court stated that mandating parties participating in mediation does not prejudice the "voluntariness" of mediation as the extent of participation and the outcome of mediation is left entirely to the free will of the parties.'

Almost all High Courts in the country have a Court Annexed Mediation program that is set in place. Some of the courts including the Supreme Court refer cases to private mediation when they feel the need to do so.

A. India becoming a signatory to the Singapore Convention

The Press Information Bureau released a Press Release on 31 July, 2019[25] which notified that India had become a signatory to the Singapore Convention. This move signaled that the Indian economy will now be moving towards bolstering confidence among the foreign investors and will emit a positive signal for India foreign investment sector. This move was hailed as a big step from India towards its commitment towards the adherence and growth of ADR Practices in the global sector.

B. Clarifications provided by the Convention in the 'Indian lawscape'

(i) In India there exists uncertainty relating to the question whether 'mediation' and 'conciliation' can be interchangeably. Although Section 89 of CPC and Section 30 of the Arbitration and Conciliation Act suggest that both are different but the

[21] Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session, UNCITRAL, UN Doc. A/CN.9/934 (2015),at paras.75–77.
[22] Mahmud, S., 2020. *The Singapore Mediation Convention: Raising The Profile Of The Mediation In Cross-Border Disputes*. [online] Fenwick Elliott. Available at: <https://www.fenwickelliott.com/research-insight/annual-review/2019/singapore-mediation-convention> [Accessed 4 October 2020].
[23] Section 89, Civil Procedure Code, 1908.
[24] M/s Afcons Infrastructure and Ors. v. Cherian Varkey Construction and Ors.,2010 (8) SCC 24.
[25] Press Release by Press Information Bureau, 31 July, 2019, New Delhi, Release ID : 1580824.

Supreme Court's judgment in ***M/s Afcons*** have indicated differently. This uncertainty has been answered by the Convention which clearly defines 'mediation'[26].

(ii) Before the Convention there was a general lack of recognition of international mediation agreements, which was reflected in the Indian landscape too. Mediation was conducted under the aegis of the court and was governed by the CPC. But with the Convention there is a direct recognition and enforcement of the settlement agreement arrived upon by a mediation, thus providing it the binding effect as an arbitral award.

C. India's responsibility post signing the Convention

In accordance to Article 253 of the Constitution, the Parliament is required to put in place legislation in order to give effect to any international Convention. As a consequence of signing the Convention, India must enact a law that would govern the Mediation mechanism in the country. Additionally, India is under an obligation to have adequate state machinery in place to ensure smooth functioning of the mediation process.[27] In furtherance of the same, the Government has approved the establishment of New Delhi International Arbitration Centre (NDIAC) as a statutory body. NDIAC was proposed through the New Delhi International Arbitration Centre Act, 2019 in order to[28]-

- Effectively manage ADR mechanisms in India;
- Conduct arbitration, mediation, and conciliation proceedings;
- Promote research and development in the ADR sector;
- Establish and maintain a permanent Panel of Arbitrators, and other committees for provision of administrative support to ADR facilities; and
- Maintain records of grants provided by the Government.

V. CONCLUSION

This Convention is a progression towards Alternate Dispute Resolution in general, and not just Mediation in general. With its specific attention to cross-border disputes, the Convention provides for a more convenient international bargain. And especially during this time of the

[26] United Nation Convention on International Settlement Agreements Resulting from Mediations (adopted 20th December 2018, opened for signature 7th August 2019, effective 12 September, 2020) Article 3.
[27] Paltanwala, D., 2020. *Singapore Mediation Convention: A New Era For The Indian Mediation Landscape - The CBCL Blog*. (Oct 4, 2020, 7:30 PM) The CBCL Blog, https://cbcl.nliu.ac.in/arbitration-law/singapore-mediation-convention-a-new-era-for-the-indian-mediation-landscape-2/
[28] The Preamble, The New Delhi International Arbitration Centre Act, 2019.

COVID-19 Pandemic, the regular working of the market have been disrupted and there is a very urgent need for a more flexible approach to fit the new 'work from home' model of lifestyle. And with this Convention making Mediation simpler, approachable and binding, it is a 'game-changer' in the international community. Another notable fact that needs to be appreciated about the Convention is that it does not bind the process in very strict definitions and processes; instead it provides a flexible guideline that the member States need to follow to ensure a practical and fruitful resolving of disputes. This is extremely necessary to point because keeping in mind the current pandemic, lack of flexibility would defeat the purpose that the Convention sets out to fulfill. This Convention is a great tool to move away from the traditional dispute resolution methods and towards a path of exploring more avenues, which has now become the new way of life.

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