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The Singapore Convention: The Emperor's New Clothes of International Dispute Resolution

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In August 2019, the United States and over forty other nations signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (known as the "Singapore Convention").[1] The Singapore Convention requires each signatory to "enforce a settlement agreement (which is defined as one resulting from mediation) in accordance with its rules of procedure and under the conditions laid down in [the] Convention."

In the months following the United Nations General Assembly's adoption of the Singapore Convention,[2] and through the present, much has been written concerning the new convention. Many commentators have characterized the Singapore Convention as the "mediation equivalent" to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, known as the "New York Convention").[3]

The announcement of the Singapore Convention has been met generally with a *lack* of critical analysis. Specifically, little if any attention by dispute resolution ("DR") specialists has been directed to the following related questions: (a) whether there is a *genuine need* for an international convention that governs the enforcement of settlement agreements arrived at through mediation (such an agreement is referred to herein as a "Mediated Agreement"), and (b) whether some aspects of the Singapore Convention actually do more *harm* than good.[4]

I address these issues below, and my conclusions are that the Singapore Convention is (a) superfluous and therefore largely a waste of time and effort, *and* (b) likely, in many cases, to be counterproductive.

I. The current state of enforcement of Mediated Agreements – the key tools:

In the course of over 27 years of practicing international DR, this author has been involved (as counsel, not as a mediator) in dozens of mediations, almost all of which have had an international element. I have seen good mediators resolve disputes involving (*inter alia*) (a) real property located in a foreign country, (b) shares of a foreign corporation, (c) intellectual property rights registered in a foreign country, and/or (d) bank accounts located in a foreign country.

In many disputes involving parties from more than one country (or property located/registered in a country other than the home country of all the disputants), issues of foreign law and foreign procedure arise. For a mediator in such a case, the foreign law issues make the case more complicated and challenging than in a purely domestic dispute. In an international case, in order to address the complexities caused by foreign law/procedure, a good mediator avails himself of three primary tools, described below (these tools are also used in domestic mediations, but their importance is enhanced in the international context):

a) The first such tool is the use of an *escrow agent*. Sometimes the mediator agrees to serve as escrow agent to hold the signed documentation of transfer (whether with respect to real property, corporate shares, or IP ownership), but more often than not, the mediator encourages counsel for one of the parties to serve as escrow agent. At a minimum, the purpose of an escrow arrangement is to reduce, if not eliminate, the chances that one party will perform, to its detriment, without reciprocal performance by the other party. In large or complex cases, a third party such as a financial institution might be selected to serve as escrow agent. It is also common for certain escrow

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functions (such as holding a signed release) to be carried out by the lawyer for the defendant, while another escrow function (such as holding the settlement consideration) is carried out by the lawyer for the plaintiff;

b) The second tool used by efficient mediators is obtaining the parties' agreement that, in the event of a dispute concerning any alleged (future) violation of the Mediated Agreement, such dispute will be resolved by *arbitration*, and the (former) mediator will serve as the arbitrator.[5] In such capacity, the arbitrator will render a binding award, which can be enforced under the New York Convention. The consent of the disputants to such a DR mechanism is usually accomplished by inserting an arbitration clause in the Mediated Agreement;[6]

c) The third tool used by efficient mediators is including a ("standard") provision whereby each party agrees to sign, as necessary, further documents. A typical "further documents" clause reads as follows:

> Each Party shall do and perform, or cause to be done and performed, all such further acts and things, and shall execute and deliver all such other agreements, certificates, instruments, and documents that the other party may reasonably request in order to carry out the intent and accomplish the purposes of this Agreement and the consummation of the transactions contemplated hereby.

It is difficult to imagine a *good* reason for *any* settlement agreement *not* to include a "further documents" clause – *a fortiori*, it is difficult to imagine a good reason for any Mediated Agreement in the *international* context *not* to include such a clause.

I do *not* believe that my experience is unique – I believe that most experienced international DR practitioners have seen mediators use an escrow clause, an arbitration clause, and a "further documents" clause. These three clauses are collectively referred to herein as the "Three Clauses."

The use of these Three Clauses serves as a "check" on the good faith of the disputants to bring their dispute to a final and complete resolution. The inclusion of the Three Clauses in a Mediated Agreement ensures that the parties' good faith is "proven" not merely through the *execution* of such an agreement but through its *implementation*.

Put slightly differently, a good mediator understands that, in many cases, (a) the very reason that the disputants got to where they are – namely, around the mediator's conference room table – is the lack of trust between the two sides, and (b) because of that lack of trust, the full implementation of the terms of the Mediated Agreement cannot be taken for granted or left to wishful thinking.

Here is an illustration of how the Three Clauses work together to ensure compliance with a Mediated Agreement:

a) assume that a party to an international mediation (the "Transferring Disputant") agrees, pursuant to a Mediated Agreement, to transfer property located in a foreign country;

b) assume further that, *after* the Transferring Disputant deposits the documents of transfer with the escrow agent, both disputants learn that the law of that foreign country has changed such that it is necessary for the Transferring Disputant to execute further documentation – otherwise the transfer that was contemplated by the Mediated Agreement will be able to be carried out only through a court order;

c) assume further that the Transferring Disputant has, pursuant to the Mediated Agreement, *already* received the consideration to which he is entitled for that property – which means that the Transferring Disputant would not appear to have any economic incentive to execute further documentation.

However, the Transferring Disputant presumably remembers that he covenanted to execute any "further documents reasonably requested" to carry out the purposes of the Mediated Agreement. That disputant

also (presumably) realizes that, if he were to resist executing such further documentation, his conduct would constitute a breach of the Mediated Agreement. Therefore, when the Transferring Disputant evaluates whether he should execute the requested documents, it is likely that he understands that, if he resists, (i) he will soon become a defendant in an arbitration, and (ii) the arbitrator will be the *same* person who *already* is familiar with the dispute -- namely, the mediator who facilitated execution of the Mediated Agreement.

It is also reasonable to assume that the Transferring Disputant understands that, if there is *any* arbitrator who is ***un***likely to need much time to resolve a dispute concerning the "further documents" clause of the Mediated Agreement, that arbitrator is the mediator who facilitated execution of that agreement in the first place.[7]

Because the enforcement of an arbitral award is a relatively straightforward procedure in the more than 150 countries that are parties to the New York Convention, the Transferring Disputant knows that, if he were to drag his feet, it would be just a matter of time before (a) an arbitral award is rendered, requiring him to transfer the property, and (b) a legal action is commenced in a court in his home country (or in the country where the property is located/registered) to enforce that arbitral award against him. Because the Transferring Disputant knows that he will likely *lose* the legal fight *and* that the battle will be relatively *short*, he is likely to sign the requisite further documentation without such a fight.

In summary, under circumstances like those described above, the Transferring Disputant has a great incentive to comply with his obligation under the Mediated Agreement and to execute the requisite additional documents, without delay.

More generally, the same decision-making process that is described in the preceding paragraphs would likely characterize *any* disputant who has signed a Mediated Agreement that provides for him to render performance *after* performance by the other disputant – so long as the Three Clauses are included in the agreement. In other words, in any case in which a Mediated Agreement provides for one party to render performance after the other party performs, when the second party considers the pros and cons of possible foot-dragging (such a disputant is sometimes referred to herein as a "Recalcitrant Disputant"), it knows that there could soon be an arbitral award rendered against it and that such award can be enforced in court reasonably promptly.

In summary, when dealing with rational disputants, the inclusion of the Three Clauses in a Mediated Agreement *eliminates, in virtually all cases*, any concern that the agreement might not be implemented in the relevant jurisdiction(s).

With this lay of the land, we can proceed to evaluate the need (if any) for the Singapore Convention.

II. The Rationale For the Convention: So Close -- That It's Superfluous:

In addressing the question of whether an international convention is needed to improve the cross-border enforceability of Mediated Agreements, critical practitioners should ask (at least) two related questions:

a) to what extent is there currently a need for enforcement proceedings after execution of Mediated Agreements? and

b) to the extent that such a need exists, whether the best mechanism for enforcement would be an international legal regime such as that set forth in the Singapore Convention.

As explained below, in the view of this author, the answer to the first question is that generally there should *not* be a significant need, and the answer to the second question is clearly *no*.

a) The "lack" of an enforcement regime:

As indicated above, many of those who advocated for the Singapore Convention see it as the "mediation equivalent" to the New York Convention.[8] Yet few commentators have addressed the precise issue of whether the *potential availability of relief under the New York Convention itself* alleviates the need for *any* international convention governing the enforcement of Mediated Agreements.

The heretofore superficial treatment regarding the "need" for the Singapore Convention is perhaps best

epitomized in a piece from the *European Journal of International Law* (the "EJIL"), as follows:

> [O]nce a mediated agreement is reached, there is no comprehensive legal framework for the enforcement of international settlement agreements. The result is that parties are forced to attempt to enforce such agreements in domestic courts, typically as an ordinary breach of contract claim.
>
> As a result, when a party to a mediated settlement agreement reneges on its obligations or otherwise refuses to uphold [its] terms. . . , the other party has had to commence separate proceedings in court or through arbitration to enforce the agreement. This has essentially meant initiating a new dispute after resolving the underlying one, adding increased costs and delay.[9]

Based on this practitioner's experience, the EJIL's articulation of the "problem" is greatly exaggerated and misfocused – for at least two reason: (a) there is no reason to believe that a breach of Mediated Agreements is anything other than atypical, and (b) the solution to the "problem" is obvious – namely, including an arbitration clause in the agreement.

1. *How frequently are Mediated Agreements breached?*

The EJIL's rationale gives the unverified (to say the least) impression that Mediated Agreements are routinely breached in a manner that leaves the aggrieved party with nothing more than a breach of contract claim to assert in court. As a matter of empirical fact, this assertion is questionable.

One European law firm has gone on record stating that breaches of Mediated Agreements are "rare."[10] If that is correct, then the paucity of breaches – in and of itself – raises the serious question as to whether there is a need for *any* international convention to "rectify the problem."

Yet *if* in fact Mediated Agreements are routinely breached in a manner that leaves one party with no alternative but to commence litigation, then the uncomfortable conclusion for mediators is that they are (apparently routinely) doing only *half* a job.[11] (A corollary of that conclusion is that it is questionable whether there would or should be an international consensus on the need to enforce agreements that are characterized by inadequate draftsmanship or insufficient detail.)

2. *Ignoring the obvious solutions – the use of (A) an escrow arrangement and (B) an arbitration clause:*

(A) Escrow:

There is not even a hint in the negotiative history of the Singapore Convention that its draftsmen considered whether the use of an escrow mechanism to carry out the terms of a settlement agreement would decrease the likelihood of breach. As indicated above, the use of an escrow arrangement is intended (*inter alia*) to minimize the chances that one party to a settlement agreement will perform to its detriment without reciprocal performance by the other party.

A party to a Mediated Agreement will not be able to "enforce" that agreement (whether domestically or internationally, whether under the Singapore Convention or otherwise) unless that party has fully performed. Because the purpose of an escrow arrangement is (*inter alia*) to reduce the chances that one party might fully perform without there being reciprocal performance, the use of escrow reduces the likelihood that any party to a Mediated Agreement might be placed in a situation in which it has no alternative but to sue to enforce that agreement.

It goes without saying that, the less the incidence of breach of Mediated Agreements, the less the need for any international legal regime to enforce those agreements.

The negotiative history of the Singapore Convention indicates that the "need" for such a regime was simply *assumed*.

(B) Arbitration:

Although the Working Group was aware that Mediated Agreements sometimes include arbitration clauses,[12] it failed to acknowledge the significance – both practical and legal – of the arbitration option.

The common feature of mediation and arbitration is the direct involvement of a "neutral" whose job requires (*inter alia*) that he familiarize himself with the parties' dispute. In most successful mediations, the

mediator plays a major role in formulating the Mediated Agreement. Because of that role, the mediator's knowledge as to the intention of the parties concerning their Mediated Agreement is usually second to none.

Perhaps disputants do not (as a matter of course) give thought *prior* to the mediation as to the best mechanism for enforcing the Mediated Agreement that they hope to sign. Nonetheless, *during* the mediation, at the stage where the disputants are engaged with the mediator in crafting such an agreement, the disputants cannot help but realize that the mediator is intimately aware of the mutual understandings that form the basis of their agreement.

When disputants give thought to the most efficient legal mechanism for enforcing their Mediated Agreement (and if the disputants do not devote thought to this issue, then their lawyers should), it should be apparent that the mediator's level of knowledge of the matter is significant. Considering the fact that, in most breach of contract litigation, few issues are more important than determining the *intention of the parties*, the mediator-as-potential-arbitrator is in a uniquely knowledgeable position with respect to any future dispute regarding the interpretation of the Mediated Agreement.[13]

In the event of such a dispute, in almost all cases, the amount of time that it would take the mediator-as potential arbitrator to familiarize him/herself with the facts concerning the dispute would be significantly less than for virtually any other arbitrator. This lower learning curve not only means that the arbitral award is likely to be rendered sooner than it otherwise would, but it also means that, because counsel for the parties will be filing fewer submissions with the arbitrator, the legal fees of the parties' respective counsel should be lower.

All of these factors suggest that the mediator-as-potential-arbitrator is uniquely qualified to serve as the arbiter in any future DR process concerning a Mediated Agreement.[14]

And regardless of the identity of the arbitrator, any ensuing arbitral award could (of course) then be enforced in court, in approximately 150 nations, under the international convention that *already* exists – the New York Convention.

Therefore, in all but the most exceptional cases, the best solution to the "lack" of an international enforcement regime for Mediated Agreements is to include therein an arbitration clause.

This author recommends that, in a Mediated Agreement, the default option for an arbitration clause should be to designate the (former) mediator to serve as arbitrator. Nonetheless, the identity of the arbitrator is secondary to the issue of the redundancy of any international treaty to enforce Mediated Agreements. The advantages of including an arbitration clause in a Mediated Agreement (irrespective of the identity of that arbitrator) in and of themselves show that the Singapore Convention is *superfluous*.

b) Was the arbitration option overlooked?

In light of the widespread belief that the Singapore Convention would be the "mediation equivalent" to the New York Convention, the natural question is: Did those who proposed an international legal regime for the enforcement of Mediated Agreements consider the possibility that, by simply incorporating an arbitration clause in a Mediated Agreement, adequate enforcement relief *would already be available* for Mediated Agreements -- under the *existing* New York Convention?

The use of an arbitration clause in a Mediated Agreement was discussed by the draftsmen of the Singapore Convention:

> It was also stated that the existence of a dispute resolution clause in the settlement agreement should not be a ground for resisting enforcement in the instrument, as there were existing mechanisms to address those issues. For example, it was mentioned that if there was an arbitration clause in the settlement agreement, the enforcing authority would generally refer the parties to arbitration in accordance with article II(3) of the New York Convention.[15]

The Working Group was aware of the fact that there are disputants that include arbitration clauses in their settlement agreements, yet there is no indication in any of the Working Group Reports that the draftsmen considered whether the possibility of *increasing* the use

of arbitration clauses in Mediated Agreements could render the (draft) Singapore Convention superfluous.

Such an increase could come about simply by having leading DR practitioners and organizations call for such an increase.

The blog of one large law firm indicates that, in deciding on the need for a convention to govern the field of Mediated Agreements, the use of an arbitration clause in such agreements was in fact considered but was deemed "inadequate":

> Inspired by the successful New York Convention of 1958, under which many arbitration awards are directly enforceable [internationally], the [Singapore] Convention would ensure the cross-border enforceability of international settlement agreements arising from mediation, through an international framework. Currently, mediated settlement agreements are not enforceable unless the mediation is part of a pending arbitration and they are converted into an arbitral award . . . . This lack of enforceability carries risks for both parties and mediators. A party wishing to enforce a mediated dispute settlement against a reluctant opposing party is forced to engage (again) in proceedings to obtain a court judgment in a foreign jurisdiction – an often lengthy, difficult and costly endeavour. **Mediators, on the other hand, may refuse to serve as sole arbitrators simply to convert a settlement agreement into an arbitral award, since that service is often not covered by their professional insurance**.[16]

This author has *never* encountered a mediator who refuses to serve as an arbitrator in connection with a claim for breach of a Mediated Agreement. Nonetheless, for the sake of argument, let's *assume* that *some* mediators refuse to so serve because of a lack of professional insurance.[17] Is this phenomenon a sufficient reason for dozens of nations to sign and then ratify (presumably after going through the process of enacting implementing legislation) a treaty on the enforceability of Mediated Agreements?

It seems that there are other, simpler ways of addressing the problem (if any) of insurance coverage for a mediator who might become an arbitrator. Here are two suggestions:

a) The major mediation organizations could encourage (lobby) the insurance industry to ease the terms under which coverage could be extended to a mediator who acts as arbitrator to adjudicate disputes arising from an alleged breach of the terms of a Mediated Agreement;

b) Because any issue regarding higher insurance rates would arguably arise only *after* the Mediated Agreement is entered into, the mediator who agrees to serve as arbitrator regarding future disputes (concerning that agreement) should inform the parties that, if he is required in the future to act as arbitrator, his fee will be *increased* – in order to cover his increased insurance premium (if any).

In summary, the concern as to a lack of professional insurance coverage appears to be an *entirely in*sufficient reason to embark on the execution and (global) ratification of a treaty governing Mediated Agreements.

The "lack of insurance" argument appears to be artificial.

III. The Convention Risks Doing More Harm Than Good:

In at least three respects, the Singapore Convention risks *harming* the field of the international enforcement of Mediated Agreements. As explained below, two of those risks concern the convention's defense (to enforcement) of "mediator breach" – (a) the Convention overlooks the importance of good faith reliance in instructing national courts as to the enforceability of Mediated Agreements when the defense of "mediator breach" is raised; and (b) the Convention permits challenges on the grounds of "mediator breach" in very inconvenient *fora*. The third risk stems from the Convention's exception for "employment law," which is drafted in a manner likely to encompass disputes *other* than those between an employer and an employee.

a) Because the "Mediator Breach Provision" Ignores the Issue of Good Faith Reliance, It Is Severely Flawed

The Singapore Convention provides, in Article 5, section 1(e), that enforcement of a Mediated Agreement may be refused upon proof that 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."[18] (Such clause is referred to herein as the "Mediator Breach Provision").[19]

To some it might seem that the appropriateness of the Mediator Breach Provision is self-evident. Presumably the reasoning behind such provision is that, if a Mediated Agreement could be enforced even though it came about after "a serious breach by the mediator of [applicable] standards … without which breach [one] party would not have entered into the settlement agreement," then (i) mediators would have less of an incentive to comply with those standards, and (ii) the "victimized" disputant would be left with no remedy (or with an inadequate one).

Defenders of the Singapore Convention would likely point out that (a) Article 5, section 1(e) states expressly that the disputant who opposes enforcement on the grounds of mediator breach is required to prove that, absent such a breach, the disputant would not have entered into the Mediated Agreement, and (b) therefore, a mediator's breach of standards is a *necessary but insufficient grounds* for refusing to enforce a Mediated Agreement.

However, the mere fact that the disputant who invokes the mediator breach defense would need to prove "but for" causation does not overcome the primary substantive flaw inherent in that defense – namely, the failure of the Singapore Convention to instruct the court to take into consideration *good faith reliance* by the other disputant.

The significance of good faith reliance should be obvious in light of the fact that settlement agreements differ from other agreements (and, for that matter, from court judgments or arbitral awards) in that settlement agreements very often provide for *staged* performance.[20] Consider the following scenario:

i. A Mediated Agreement provides for Disputant A to perform before Disputant B performs;

ii. Disputant A is not aware of any breach by the mediator;

iii. Disputant A indeed performs – in good faith, continuing to have no reason to believe that the mediator committed any breach;

iv. Thereafter Disputant A reasonably expects Disputant B to perform, as per the Mediated Agreement;

v. When Disputant B fails to perform under the Mediated Agreement, Disputant A is forced to seek enforcement under the Singapore Convention – usually in a judicial forum in which Disputant A is not "at home."

Assume further that, at the enforcement stage in court, Disputant B raises, pursuant to the Mediator Breach Provision, the defense of mediator breach. When that issue is litigated in court, to what extent will the good faith reliance by Disputant A be a factor in the court's decision as to whether to exercise discretion to refuse enforcement?

The Singapore Convention is *silent* on the issue of good faith reliance. This is surprising – not least because the significance of good faith reliance in international commercial law is universally recognized. Take for example the United Nations Convention on Contracts for the International Sale of Goods (the "CISG").[21] The CISG is a multilateral convention that establishes a uniform framework for contracts relating to the international sale of goods. The CISG has been ratified by more than ninety countries. Article 16 of the CISG governs generally the acceptance of an offer, and it provides that an offer may *not* be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."[22]

Article 16 of the CISG demonstrates that the significance of good faith reliance is unquestionably accepted as a part of the law governing international commerce.

Yet the Singapore Convention is completely silent on the issue of good faith reliance.[23]

Let's return to our example above. To the extent that the Mediator Breach Provision would be interpreted as requiring a court to disregard good faith reliance by the first-to-perform disputant, it is possible that a

disputant who already performed, in good faith, pursuant to a Mediated Agreement, might be denied the benefit of his/her bargain due to a breach as to which s/he had no knowledge. In such a scenario, it is possible – in many cases, very likely – that an even greater injustice would be carried out than would be the case if the "tainted" Mediated Agreement were enforced.

The Singapore Convention's silence as to good faith reliance should cause concern among DR practitioners that the Mediator Breach Provision might be interpreted in a manner that precludes a court from considering the issue of reliance.

Defenders of the Singapore Convention might counter by pointing to the first sentence of Article 5, which sets forth various grounds under which a court "*may*" refuse to enforce a Mediated Agreement. Those defenders would presumably argue that (i) Article 5 does not *require* a court to refuse enforcement on the grounds of mediator breach but *permits* a court to refuse enforcement, and (b) any court adjudicating a defense asserted under the Mediator Breach Provision would have the discretion to consider (*inter alia*) the good faith reliance by the disputant who already performed.

Such an attempted defense of the Singapore Convention would be weak. Set forth below is an outline of the argument that would be made by the disputant who, on grounds of mediator breach, opposes enforcement and whose position is that the court in which enforcement is sought should ignore the issue of good faith reliance:

a) the draftsmen of the Singapore Convention were aware that settlement agreements frequently provide for *staged* performance;[24]

b) staged performance always means that one party to a Mediated Agreement takes some risk that the other party will not perform (or not fully perform);

c) the draftsmen of the convention were aware of such risks;

d) despite understanding that risk, the draftsmen chose *not* to address the issue of good faith reliance.[25]

The disputant who opposes enforcement on the grounds of mediator breach will conclude his argument by observing that (i) there is not even a hint in the convention that good faith reliance should be a factor in the court's consideration of the applicability of the mediator breach defense, and, (ii) therefore, a court has no discretion to consider reliance in the context of the mediator breach defense.

The absence from the Singapore Convention of any express reference to reliance will undoubtedly be used by Recalcitrant Disputants to argue that, when a court is adjudicating the defense of mediator breach, good faith reliance should not be a factor taken into consideration.

The Singapore Convention's failure to address expressly the issue of good faith reliance will make it more difficult for a party that seeks enforcement to convince a court that reliance should be a consideration when adjudicating the mediator breach defense.

Under the Singapore Convention, a disputant who needs to seek enforcement of a Mediated Agreement – after having already performed – will be relegated to *hoping* that the court in the foreign state will value good faith reliance as much as that disputant does.

International conventions (treaties) are not supposed to be premised on wishful thinking.

In light of the fact that settlement agreements frequently provide for staged performance, and in light of the fact that good faith reliance has long been recognized as a significant factor in international commercial law, the Singapore Convention should have stated that a court that considers the defense of mediator breach needs to take good faith reliance into consideration when adjudicating the issue of "mediator breach."

The convention's failure to so provide is a major flaw.

b) The Convention Allows for Adjudication of the "Mediator Breach" Defense in The Wrong Forum/Fora:

Assuming *arguendo* that it is appropriate for a court – in *some* forum – to refuse to enforce a Mediated Agreement because of "mediator breach" (*see supra,* subsection A), the question that arises is whether it is wise for the Singapore Convention to impose *no limitations* as to the judicial *forum* in which a disputant

who wishes to avoid enforcement may raise that defense. As explained below, (a) the answer is *no*, and (b) the Singapore Convention's failure to impose a limitation as to the forum raises serious questions as to whether the draftsmen of that convention in fact "modelled" it in any significant manner after the New York Convention.[26]

As a practical matter, a proceeding in court to enforce a Mediated Agreement will almost always be brought in a forum in which the Recalcitrant Disputant has assets. In many cases (perhaps the vast majority), that forum is the "home" country of the Recalcitrant Disputant. As a result, the issue of a mediator's alleged breach of applicable standards will usually be raised by the Recalcitrant Disputant in his/her *home* forum. And even though a Recalcitrant Disputant may have more than one "home," in many cases (again, perhaps the vast majority), the issue of mediator breach will be raised in a forum in which the Recalcitrant Disputant feels "more at home" than does the mediator whose conduct would be under scrutiny.

Allowing a Recalcitrant Disputant to raise the issue of "mediator breach" in that disputant's home forum – or in any forum *other* than one to which the mediator has a significant nexus – is very unwise.

But that is precisely what the Singapore Convention does. It does ***not*** require the disputant who asserts that the mediator breached applicable standards to raise that issue (i) in the country wherein the Mediated Agreement was arrived at, or (ii) in the country that defines the standards "applicable to" the mediation.

To illustrate the absurdity, let's look at a simple example:

a) A French citizen and a Spanish citizen are involved in a dispute over ownership of a German company;

b) The two disputants decide to mediate in London, before a mediator who (i) is based in the UK, (ii) is licensed in the UK, and (iii) has no jurisdictional nexus[27] with Germany, France, or Spain;

c) The UK mediator brings the disputants to a Mediated Agreement whereby (*inter alia*) one of them is required to transfer ownership of the German company to the other;

d) The disputant who was required by the Mediated Agreement to carry out the transfer – in Germany – fails to perform;

e) As a result of that breach, the other disputant has no alternative but to bring a legal proceeding for enforcement of the Mediated Agreement, in Germany, pursuant to the Singapore Convention;

f) The defendant/respondent then raises, before the German court, the defense of "mediator breach."

At that stage, the *German* court will be required to adjudicate the allegation of mediator breach – even though the mediator has *no* jurisdictional nexus to Germany.

Will the UK-based mediator be required to travel to Germany (presumably at the cost of the party seeking enforcement) to testify as to his/her alleged breach? If so, that would be a very inefficient result of the Mediator Breach Provision of the Singapore Convention.

Independent of the inconvenience caused by the travel issue, in those (presumably many) cases in which enforcement is sought in a jurisdiction *other* than one with which the mediator has a significant nexus, the Singapore Convention virtually guarantees that, if a Recalcitrant Disputant wishes to raise the defense of mediator breach, that disputant may do so in a forum that is ***in***convenient in at least two respects – (a) it would be inconvenient for the court to receive evidence from the foreign mediator, and (b) in order to understand both the standards applicable to the mediator *and* the standards applicable to the mediation,[28] it would be necessary for the court to receive evidence as to foreign law and/or foreign practice.

This problem did not completely escape the draftsmen of the Singapore Convention. In one of the Working Group Reports, the inconvenient forum problem was summarized as follows:

> . . . subparagraph (e) could lead to many litigations, making the enforcement cumbersome, which would run contrary to the purpose of the instrument; and . . . the court at the place of enforcement might not be best

> placed to consider issues pertaining to the conciliation process which, in most cases, would have taken place in a different State.[29]

The statement that the court at the place of enforcement "might not be best" suited to consider issues pertaining to the mediation process that took place in a different country – possibly even in a foreign language – is a great understatement.

Even though the Working Group was aware of the inconvenient forum problem, the decision was made, essentially, to ignore that problem or wish it away.

That decision was an irresponsible one. The practical effect of the forum-shopping option under the Singapore Convention is that, when a party to a Mediated Agreement has an interest in non-enforcement of that agreement, the convention *makes it easy* for that disputant to delay enforcement by raising the issue of mediator breach – usually in a *very* inconvenient forum.

Any international legal regime that permits non-enforcement of a Mediated Agreement on the grounds of mediator breach should require that such a defense be brought *only* before a court in a country with which the mediator has a meaningful nexus.

The failure of the Singapore Convention to so limit the *fora* for the assertion of mediator misconduct is a major flaw of the convention.

This flaw is surprising because of the prevailing view (as noted above) that the Singapore Convention is intended to be the mediation "counterpart" to the New York Convention, which governs the international enforcement of arbitral awards. According to the official records of the negotiative history of the Singapore Convention, when the draftsmen were crafting Article 5, they looked for guidance to Article V of the New York Convention,[30] which sets forth the circumstances under which the (international) enforcement of an arbitral award may be refused.

Yet the phrase "arbitrator standards" does *not* appear in the New York Convention.

Rather, Article V, section 1 of the New York Convention permits (in subsections (a) through (e)) a signatory nation to refuse recognition and enforcement of an arbitral award on grounds related to (i) lack of party capacity, (ii) invalidity of the arbitration agreement, (iii) inadequate notice or opportunity to be heard, (iv) the award exceeded the scope of the arbitration agreement, (v) a defect in composition of the arbitral authority, or (vi) the award is not yet binding.[31]

These six grounds (referred to herein as the "Administrative Grounds") largely do *not* imply any act of *commission* by the arbitrator, and, therefore, the conduct at issue with respect to such grounds would normally not be considered to constitute "arbitrator breach" of applicable standards.

With respect to the forum for raising any of the Administrative Grounds, the New York Convention does *not* impose any restriction – in other words, any of the Administrative Grounds may be asserted as a defense in *any* court in which enforcement of an arbitral award is sought.

However, Article V, section 1(e) of the New York Convention also sets forth an additional grounds – more accurately, a *set of grounds* – for nonrecognition. Subsection 1(e) provides that recognition may be refused if "[t]he award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." (Subsection 1(e) of the New York Convention is referred to herein as the "Set Aside Clause.")

The scope of the Set Aside Clause has been interpreted broadly. In *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*,[32] the U.S. Court of Appeals for the Second Circuit held that the Set Aside Clause authorizes a court in the country in which, or under the law of which, the award was made to set aside or suspend an award in accordance with the "full panoply of express and implied grounds for relief" of that country.[33]

In *Republic of Argentina v. AWG Grp Ltd.*,[34] the U.S. District Court for the District of Columbia cited to (*inter alia*) *Yusuf Ahmed Alghanim & Sons, supra,* and observed that the "full panoply" of relief under domestic law includes assertions of corruption, fraud, and evident partiality.[35]

To summarize the distinction under the New York Convention – unlike the Administrative Grounds, which may be asserted in *any* forum in which recognition is sought, the grounds referred to in the Set

Aside Clause may be asserted *only* in "*the country in which, or under the law of which, that award was made*."[36]

That distinction is a wise one.

By making such distinction, the New York Convention *precludes* a losing party (usually the debtor) from forum-shopping as to the best court in which to assert a defense of "arbitrator breach of standards" – such as corruption, fraud, or evident partiality. If such a losing party wishes to raise any grounds available under the Set Aside Clause, it may do so *only* in a maximum of two possible fora.

Not only is this distinction under the New York Convention wise – but in order to simplify the dichotomy between the two types of jurisdiction (and perhaps because the phrase "the country in which, or under the law of which" is awkward), American case law on the subject has adopted the terminology "primary jurisdiction" and "secondary jurisdiction." The term "primary jurisdiction" refers to the courts of the country "in which, or under the law of which," the award was made, while the term "secondary jurisdiction" refers to all other New York Convention courts.

Subsequent to the Second Circuit's decision in *Yusuf Ahmed Alghanim*, appellate courts in the Fifth Circuit[37] and the District of Columbia Circuit[38] adopted the "primary"/secondary" terminology to describe the different sets of jurisdictions under the New York Convention.[39]

The Fifth Circuit reiterated the use of the "primary jurisdiction" and "secondary jurisdiction" distinction, in *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum*:[40]

> We have characterized the country "in which, or under the [arbitration] law of which," an award was made as having *primary* jurisdiction over the award. . . . All other signatory countries are then said to be *secondary* jurisdictions. . . .
>
> [T]he Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award." . . . Such courts are "free to set aside or modify an award in accordance with [the country's] domestic arbitral law and its full panoply of express and implied grounds for relief." . . . .
>
> In contrast, the Convention significantly limits the review of arbitral awards in courts of a secondary jurisdiction; essentially, "parties can only contest whether that [country] should enforce the arbitral award." . . .[41]

As observed by the Second Circuit in *Yusuf Ahmed Alghanim & Sons, supra*, under the New York Convention, there are "very different regimes"[42] for (a) the review of an arbitral award in a primary jurisdiction and (b) the review of an award in any secondary juris-diction. And as observed by the Second, Fifth, and D.C. Circuits, *only* in a primary jurisdiction may a court apply the "full panoply of express and implied grounds for relief" – which would include relief arising from a breach by the arbitrator of standards applicable to him/her.

Put slightly differently, outside of a primary jurisdiction, an arbitrator's "breach of standards" is *not* one of the grounds available to a court for refusing to recognize an arbitral award.[43]

In summary, case law under the New York Convention has held that the convention means what it says – even though the convention does not use the terminology "primary jurisdiction/secondary jurisdiction," such distinction is clear, and it means that *only a court of primary jurisdiction* may adjudicate a defense of "breach of standards" by an arbitrator.

In looking to the New York Convention for an analogy to the Singapore Convention's "mediator breach" concept, it seems clear that two conclusions can be drawn regarding the category of "mediator breach": (a) it is similar (perhaps very similar) to the New York Convention's defenses under the Set Aside Clause, including those of "corruption, fraud, and evident partiality," and (b) it is largely dissimilar to the Administrative Grounds. In other words, the defenses under the New York Convention that are the most analogous to the Singapore Convention's category/defense of "mediator breach" may be asserted *only* in a "primary" jurisdiction.

The draftsmen of the Singapore Convention presumably realized that there is a similarity between an arbitrator's breach of standards and a mediator's breach of standards.

It is also reasonable to assume that those draftsman knew that, for sixty years, the New York Convention has required that any challenge on the grounds of "arbitrator breach" be brought *exclusively* in a *primary* jurisdiction. Therefore, one would have expected that, when the draftsmen of the Singapore Convention were formulating the grounds for refusal to enforce a Mediated Agreement, they would have taken note of the New York Convention's rule under which the analogous defenses may be asserted *only* in a primary jurisdiction.

Yet the draftsmen either ignored that distinction – for reasons that have not been explained – or they made a decision to reject it.

There is nothing in the negotiative history of the Singapore Convention indicating an intention to ignore the primary/secondary distinction. This suggests that no conscious decision was made to ignore it, which in turn suggests that the forum-shopping option inherent in Article 5, section 1(e) of the Singapore Convention is not the result of a well thought out process concerning the appropriate forum for the assertion of "mediator breach." Put slightly differently, the decision to allow a disputant to raise mediator breach in *any* forum appears to have been the result of insufficient thought or negligent drafting (or perhaps both).

In summary concerning the forum for asserting mediator breach, the permission given in the Singapore Convention to *any* court to refuse to enforce a Mediated Agreement on the grounds of mediator breach (a) ignores the sound policy embodied in the New York Convention, (b) invites Recalcitrant Disputants to raise the defense of mediator breach in an **in**convenient forum, and (c) is counterproductive to the goal of encouraging the use of mediation to resolve international disputes.

This is a *major* flaw of the Singapore Convention.

c) The Overly Broad "Employment Law" Exception Will Likely Exclude Certain B-2-B Settlements:

The Singapore Convention states expressly that it does not apply to settlement agreements "[r]elating to . . . employment law."[44] Such an "exception" would appear to be consistent with the overall purpose of the convention to govern business disputes. However, as explained below, (a) the phrase "relating to employment law" is overly broad to accomplish the desired goal of "protecting" employees, and (b) like the convention's failure to state that a court is required to consider good faith reliance when adjudicating the "mediator breach" defense to enforcement,[45] the flawed drafting of section 2(b) will almost certainly invite superfluous litigation.

The Singapore Convention sets forth a number of limitations on the scope of its applicability. Subsection 2(a) provides that the convention does not apply to settlement agreements that are concluded "to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes."[46] Subsection 2(b) addresses not only "employment law" but also provides that the Singapore Convention does not apply to agreements relating to "family" law or "inheritance" law.[47]

In light of these exceptions, although the convention does not use the term "business-to-business," it is clear that the primary purpose of the convention is to govern the enforceability of Mediated Agreements that are of a "B-to-B" nature.

The Singapore Convention is not the first international convention designed to regulate contracts the primary subject of which is business-to-business disputes. In this context, it is useful to compare the Singapore Convention's "employment law" exception to a similar (but far from identical) provision in the Convention of 30 June 2005 on Choice of Court Agreements (the "Hague Convention")[48] which was signed in 2005 – approximately thirteen years before the Singapore Convention. Both the Singapore Convention and the Hague Convention deal with the *enforceability* of certain kinds of contracts in the field of international DR.

Article 2, Section 1(b) of the Hague Convention provides that the convention does "not apply to exclusive choice of courts agreements . . . relating to contracts of employment."

The phrase in the Singapore Convention "settlement agreements . . . [r]elating to . . . employment law" is broader than the phrase in the Hague Convention "choice of court agreements . . . relating to *contracts* of employment."[49]

The draftsmen of the Singapore Convention were aware of the Hague Convention,[50] and with respect to certain other provisions of the Singapore Convention, the Working Group attempted to "align" the language of the draft convention with that of the Hague Convention.[51] Yet from the negotiative history of the Singapore Convention, there is no indication that the draftsmen took note of the more narrow language used in the Hague Convention – "relating to *contracts* of employment."

The practical effect of the use of the very broad language "relating to . . . employment law" is that it affords a Recalcitrant Disputant the ability to argue that a business-to-business Mediated Agreement that merely "relates to" employment law falls *outside* the Singapore Convention – and therefore that such an agreement is unenforceable.

A simple example illustrates the problem:

A. Companies A and B form a joint venture, and the JV entity employs certain employees to develop technology;

B. A dispute then ensues concerning technology developed by that JV:

C. As part of a Mediated Agreement between the two companies, (i) Company A covenants *not* to employ certain of the employees who had been involved in developing the relevant technology, (ii) Company A commits to pay money to Company B, and (iii) Company B commits to transfer ownership of certain technology to Company A;

D. Company B performs – it transfers ownership of the technology to Company A;

E. Company A fails to pay the amount that it agreed, under the Mediated Agreement, to pay;

F. Company B is forced to sue Company A for enforcement of the Mediated Agreement – specifically, for payment of the money that is owed under the Mediated Agreement;

G. In the court proceeding to enforce the Mediated Agreement, Company B seeks monetary relief only. Company B does not seek any enforcement of the covenant not to employ the above-referenced employees.

In the above example, no employee is a party – no employee had been a party to the dispute pre-mediation, no employee is a party to the Mediated Agreement, and no employee is a party to the proceeding in court to enforce the Mediated Agreement.

Yet when Company B sues to enforce the Mediated Agreement – pursuant to the Singapore Convention – Company A asserts that, under Article I, section 2(b), the convention does not apply. That argument is based on the (very broad) definition of an agreement "[r]elating to . . . employment law." Company A argues that (a) because it covenanted in the Mediated Agreement not to employ certain employees, *that agreement* is one "relating to" employment law, and (b) because that agreement "relates to" employment law within the meaning of section 2(b) of the Singapore Convention, the agreement is outside the scope of this convention.

Based on the broad language in section 2(b) of the Singapore Convention ("[r]elating to . . . employment law"), Company A would have a reasonable argument that the agreement falls *outside* the scope of the convention and that, therefore, the convention may not be used to facilitate its enforcement. Such an argument could be made even though most readers of the convention would *not* assume that it was the intention of the convention's draftsmen to exclude such a business-to-business dispute from the ambit of the convention.

The above argument would not be possible if the Singapore Convention had used more narrow language, such as that used in the Hague Convention. As indicated above, the Hague Convention excludes from its ambit "*contracts* of employment." In our example above, there is no "contract of employment" between Companies A and B. Therefore, had the Singapore Convention used (in section 2(b)) the more narrow language "contracts of employment," Company A would not be able to argue that the Mediated Agreement between it and Company B falls within any exception to the scope of the convention.

Defenders of the Singapore Convention might argue that it is "clear" that the intention of the convention is not to exclude a B-to-B Mediated Agreement "merely" because one of the provisions therein deals with employment law. If so, such defenders should have to answer the question: *Did the draftsmen of the Singapore Convention take into consideration the more narrow language from the Hague Convention?* The answer is either yes or no:

A. If the answer is "yes," then defenders of the Singapore Convention need to explain why the more narrow language – "contracts of employment" – was not used in the Singapore Convention. Absent a good explanation for the choice of the broader phrase "relating to employment law," (i) it will be impossible to rule out the explanation that the draftsmen intended the exception in section 2(b) to be broad enough to include the kind of B-to-B Mediated Agreement described in the example above (which means that such contracts are to be excluded from the convention), and (ii) Recalcitrant Disputants will have a tool in their arsenal that probably none of the draftsmen intended to provide.

B. If the answer is "no," then it would appear that the draftsmen were lacking in their research concerning the manner by which at least one other multilateral convention on DR succeeded in excluding employment matters.

It is also possible that defenders of the Singapore Convention might argue that there *is* a good explanation – that the nature of the Hague Convention is such that it would have been inappropriate to use its "contracts of employment" language as a guide for a convention governing Mediated Agreements. Such an argument (presumably) could be based on differences in the purposes of the two conventions -- (a) the Hague Convention deals with contracts entered into *before* a dispute has arisen and, therefore, the exclusionary language in that convention could, consistent with the purposes of that convention, be restricted to "contracts of employment," yet (b) because the Singapore Convention deals with contracts that *terminate* disputes, that convention needs exclusionary language that is broader than "*contracts* of employment."

But such an argument only goes so far. Even assuming that the draftsmen of the Singapore Convention were of the view that the language from the Hague Convention – "contracts of employment" – is too narrow, that does not explain the overly broad language in section 2(b) of the Singapore Convention. Had the draftmen of that convention wanted the exclusion to cover Mediated Agreements that relate to *termination of* the employer-employee relationship, they could have drafted section 2(b) not to refer to agreements that "relat[e] to employment law" but rather to those that "*relate to the employer-employee relationship and/or the termination thereof*."

Doing so would have ensured that the kind of B-to-B Mediated Agreement in the example above would not fall within the exception to the convention.

Conclusion

As explained in parts I and II above, the provisions of the Singapore Convention do *not* go any further in ensuring cross-border compliance with Mediated Agreements than does use of the Three Clauses. For these reasons – in *addition to the lack* of data indicating that the breach of a Mediated Agreement is a common phenomenon – the convention is superfluous.

In addition, and as explained in part III, (a) because the convention essentially invites Recalcitrant Disputants to assert the defense of "mediator breach," the convention risks causing harm to the international enforcement of Mediated Agreements, and (b) because of the overly broad exclusion of agreements relating to "employment" law, the convention will likely be interpreted (by at least some courts) to exclude certain B-2-B settlements

The web sites of the Department of Justice and the Department of State provide almost no information concerning the status (if any) of the ratification process of the Singapore Convention.

In light of the flaws described above, it is respectfully submitted that the administration and the senate take *no* action in furtherance of ratification of the Singapore Convention.

Endnotes

[1] Reuters, *U.N. members sign mediation convention to settle trade disputes*, https://www.reuters.com/article/us-un-convention-singapore/un-members-sign-mediation-convention-to-settle-trade-disputes-idUSKCN1UX093 (last visited May 26, 2020).

The text of the Singapore Convention is available at http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf (last visited May 26, 2020).

The web site of the United Nations states that a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) considered the draft convention from its sixty-third to the sixty-eighth sessions. *See* https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/travaux (last visited Jun. 5, 2020).

The web site of UNCITRAL identifies the negotiative history of the convention as being embodied in (a) six Reports that the Working Group issued and (b) two Notes that the Secretariat issued.

Appendix A hereto sets forth the list and URLs of (a) the six Reports of the Working Group and (b) the two Notes of the Secretariat.

The defined terms set forth in Appendix A are used herein to refer to those Reports and Notes.

This article also refers to a third Note of the Secretariat, which appears elsewhere in the UN's web site. *See infra*, n. 26.

[2] The UN General Assembly adopted the Singapore Convention on Dec. 20, 2018. *See* Press Release, General Assembly, *General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation*, UNIS/L/271 (Dec. 21, 2018, the "UN Press Release"), available at http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html (last visited May 26, 2020).

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38; *see* UN Press Release ("[t]he [Singapore] Convention provides a uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign arbitral awards"); *see also The "Singapore Convention": The way forward in international mediation?*, formerly available at https://www.linklaters.com/en/insights/publications/2018/august/the-singapore-convention (last visited Sept. 9, 2019, hereinafter the "Linklaters Post"), available at https://www.lexology.com/library/detail.aspx?g=0f59daed-c3c6-4931-98bc-d6997a47bc4b (it is "hoped that the Convention will . . . quickly become as widely accepted as the New York Convention").

[4] Contemporaneously with the adoption of the Singapore Convention, the United Nations adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (the "New Model Law"). *See* https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (last visited July 26, 2020).

The New Model Law amended certain provisions of the Model Law on International Commercial Conciliation, 2002 (the "First Model Law"). Very few of the major states (those that are very active in international commerce) of the United States adopted the First Model Law – specifically, New York, California, Texas, Florida, Pennsylvania, and Michigan have not adopted it. In addition, several of the major trading partners of the United States – such as the UK, Germany, Japan, and South Korea – have not adopted the First Model Law.

Substantially all of the criticisms voiced herein concerning the Singapore Convention apply as well to the New Model Law.

[5] In many jurisdictions, even an arbitrator who served previously as a mediator and is known to the disputants would be required to make disclosures regarding possible conflicts of interest. *See e.g.* CA Civ

Pro Code § 1281.9 (2016) (requiring arbitrator to disclose "[a]ny matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council"); *Honeycutt v. JPMorgan Chase Bank, N.A.*, 25 Cal. App. 5th 909, 922, 236 Cal. Rptr. 3d 255, 263, 2018 Cal. App. LEXIS 679 at *15; 2018 WL 3654895 at *5 (2d Dist. 2018) (an "arbitrator's duty of disclosure is a continuing one"). Presumably even in the jurisdictions that apply the most strict standards regarding arbitrator disclosure, the fact that the disputants already consented, in writing, to that person's acting as arbitrator would (in all but the rarest cases) constitute a valid and enforceable *waiver* of any possible conflict.

[6] This author has previously argued (in an article published by the Business Law Section of the ABA) that every international arbitration agreement should include a provision for costs to be paid by the losing party. *See* Eric Sherby, *A Checklist for Drafting an International Arbitration Clause*, BUSINESS LAW TODAY (Sept. 20, 2010), available at https://www.sherby.co.il/pdf/BLT_A_Checklist_For_Drafting.pdf (last visited Aug. 2, 2020).

At the same time, the author acknowledges that many mediators discourage counsel from including a costs clause in Mediated Agreements – on the grounds that "anything that suggests a future dispute goes against the spirit" of the Mediated Agreement.

This author tends to reject that advice from mediators.

[7] When the mediator who facilitated a Mediated Agreement later serves as the arbitrator to adjudicate disputes under that agreement, such an arbitration is in the category of "*ad hoc*" arbitration. In contrast to institutional arbitration, agreements that provide for *ad hoc* arbitration frequently are silent regarding the mechanism for replacing the arbitrator if such a need arises. In this context, the International Bar Association Guidelines for Drafting International Arbitration Clauses (2010, the "Guideline") offers the following wise advice:

> The need to designate an appointing authority in the context of ad hoc arbitration constitutes a significant difference between [institutional arbitration] and [ad hoc arbitration]. In institutional arbitration, the institution is available to select or replace arbitrators when the parties fail to do so. There is no such institution in ad hoc arbitration. It is, therefore, critical that the parties designate an 'appointing authority' in the ad hoc context, to select or replace arbitrators in the event the parties fail to do so. Absent such a choice, the courts at the place of arbitration may be willing to make the necessary appointments and replacement. . . .
>
> The appointing authority may be an arbitral institution, a court, a trade or professional association, or another neutral entity. The parties should select an office or title . . . rather than an individual (as such individual may be unable to act when called upon to do so). . . .

See the Guideline ¶¶ 31-32.

[8] *See* Linklaters Post, *supra* note 3.

[9] *A New Legal Framework for the Enforcement of Settlement Agreements Reached through International Mediation: UNCITRAL Concludes Negotiations on Convention and Draft Model Law*, EJIL: Talk!, Posting of Christina Hioureas and Shrutih Tewarie to https://www.ejiltalk.org/a-new-legal-framework-for-the-enforcement-of-settlement-agreements-reached-through-international-mediation-uncitral-concludes-negotiations-on-convention-and-draft-model-law/ (last visited Jun. 22, 2020).

[10] *Mediation on the world stage*, posting of Eilidh Smith to https://brodies.com/blog/dispute-resolution/

mediation-on-the-world-stage/ (last visited Jun. 22, 2020).

[11] *If* Mediated Agreements are routinely breached, it is possible (perhaps likely) that the reason for routine noncompliance is the failure to include one or more of the Three Clauses.

[12] *See infra* text accompanying note 15.

[13] Nothing in this article is intended to express a view concerning the "mediator-arbitrator" process. That process (often called "med/arb") is one under which a dispute is referred to a neutral who attempts, through mediation, to bring the parties to a negotiated settlement but who – *if* the mediation fails -- then takes on the role of arbitrator to render a binding arbitral award.

Med/arb is sometimes criticized for the failure to appreciate the inability of the arbitrator to "forget" that which he was told in *ex parte* communications with the disputants. *See* Brian Pappas *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV 157, 178 ("acting as the mediator harms the arbitrator's impartiality as information learned during the mediation may negatively implicate the neutral's impartiality in rendering the arbitral award").

Yet even the most vehement critics of "med/arb" should not be able to find anything objectionable in designating the (former) mediator to serve as the arbitrator in the event of a dispute concerning the Mediated Agreement. In such a situation, the myriad of issues that had been in dispute, pre-Mediated Agreement, are no longer relevant, which also means that it is irrelevant whether the (former) mediator would be able to "forget" that which he learned in *ex parte* communications that took place *before* the Mediated Agreement was executed. In his new role as arbitrator, the former mediator needs to adjudicate the question of whether the Mediated Agreement has been breached. On that issue, he has conducted no *ex parte* communications, which means that there should be nothing of relevance for him to (need to) "forget."

[14] Exceptions *do* exist – such as when a disputant decides, during the course of the mediation, that s/he does not have confidence in the ability of the mediator to be impartial in an adjudicative role. In such a situation, it is possible (a) that the disputant will be of the view that the lack of confidence in the mediator is *in*sufficient to terminate participation in the mediation process yet *sufficient* to preclude designating that mediator to serve as arbitrator, and (b) the two disputants will sign a Mediated Agreement that includes an arbitration clause that provides for someone *other* than the mediator to serve as arbitrator.

Presumably such situations are exceptional. Mediators are usually selected by counsel, and a lawyer who anticipates that the Mediated Agreement will provide for the mediator to serve as arbitrator (in the event of a future dispute) will try to steer clear of mediators who have a reputation for displaying bias or the like.

[15] Report 896 ¶ 95.

[16] *See* the Linklaters Post, *supra*, n.3 emphasis added). There is no indication in any of the Working Group Reports that the issue of any "lack" of insurance coverage was discussed.

[17] This author's lack of familiarity with mediators who refuse to act as arbitrator because of an insurance coverage issue is not the only reason for assuming that this phenomenon is (at most) rare. Major arbitral institutions – such as the International Chamber of Commerce, the American Arbitration Association, and JAMS (Judicial Arbitration and Mediation Services) – offer mediation services, and most such institutions hold out their "neutrals" as being able to serve in *both* the capacity of mediator and of arbitrator. *See* https://www.adr.org/RosterDiversity (web site of AAA, referring collectively to "Arbitrators & Mediators," last visited May 26, 2020); https://www.jamsadr.com/neutrals/search (web site of JAMS, list of neutrals does not distinguish between mediators and arbitrators; last visited May 26, 2020).

From the published materials of those ADR organizations, there is no indication that they charge more for mediations in which the mediator agrees in the settlement agreement to act as arbitration in connection with future disputes.

[18] Art. 5, section 1(e).

The plain language of section 1(e) of the Singapore Convention (quoted above) makes clear that there might be a difference between (i) the standards applicable to the mediator, and (ii) the standards applicable to the mediation. Because section 1(e) permits refusal to enforce if the mediator committed a serious breach of *either* body of standards, implicitly the convention holds the mediator to the more stringent set of standards.

The "more stringent rule" is not the erroneous aspect of section 1(e). By way of example, a mediator from the UK who travels to South Africa to conduct a mediation there would presumably understand that he is subject to the laws of South Africa – at least for the period of time that he is physically located in South Africa.

It is possible that the "standards applicable [to] the mediation" derive solely from the law of the place where the mediation takes place. But those standards could also derive from the rules of an organization or institute that appointed the mediator. For example, it is not uncommon for the London Court of International Arbitration to appoint a mediator to conduct a mediation in a country *other* than the UK. *See* e-mail correspondence between the LCIA and the author, dated Nov. 21, 2019.

[19] As indicated above, this author believes that most treatment to date of the Singapore Convention has been superficial. *But see* F. Peter Phillips, *Concerns on the New Singapore Convention*, Business Conference Management LLC (2018), http://www.businessconflictmanagement.com/blog/2018/10/concerns-on-the-new-singapore-convention/ (last visited Jun. 22, 2020; criticizing the Singapore Convention for opening the door to motion practice concerning alleged mediator misconduct). Perhaps because Phillips does not support *any* motion practice regarding mediator breach, his analysis is silent as to whether a challenge should take place in a country *other* than the one with which the mediator has a significant nexus.

[20] *See* Scott M. Himes, *A Best Practices Primer For Drafting Settlement Agreements*, NYLJ (Jul. 15, 2013) (available at https://www.ballardspahr.com/~/media/files/articles/2013-07-23-a-best-practices-primer.ashx?la=en (last visited Jun. 7, 2020; "many settlements involve payments over time, or 'installment' payments. In this scenario, the party to be paid does not want to give a release and dismiss the lawsuit before receiving full payment, which might be years away").

The UNCITRAL Working Group itself made a similar observation:

> It was noted that the flexible nature of settlement agreements, which allowed for conditional obligations, was a key feature of conciliation that made it attractive to parties and thus, the need to preserve such a feature was highlighted.

Report 861 ¶ 48; *see also* Report 896 (¶ 89) (referring to the Working Group's understanding that there are "complex settlements [in which] parties would settle parts of their dispute over time"); *see also id.* ¶ 160 ("the place where a substantial part of the obligation under the settlement agreement was to be performed . . . might not be known at the time of conclusion of the settlement agreement").

[21] United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex 1, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 (Apr. 11, 1980).

[22] *Id.* art. 16.

[23] There is no question that the UNCITRAL Working Group took into consideration other aspects of the CISG. *See* Report 896 ¶¶ 58, 132; Report 929 ¶ 22.

[24] *See* note *supra*, n. 20.

[25] If the draftsmen of the Singapore Convention had been of the view that the convention should specify good faith reliance as a factor to be taken into consideration in determining whether to refuse enforcement on the grounds of mediator breach, it would not have been difficult for the convention to so provide expressly, such as by adding:

> When considering whether to exercise its discretion under Article V, Section 1(e), the court should take into consideration any good faith reliance by the party that seeks to enforce the Mediated Agreement.

[26] *See supra* text accompanying note 3; *see also* Note by the Secretariat, UNCITRAL Working Group, A/CN.9/WG.II/WP.198, ¶ 34 (available at https://undocs.org/pdf?symbol=en/A/CN.9/WG.II/WP.198 (Jul. 26, 2016) (the Working Group generally was of the view that the defenses "should not be less favourable than [those] provided for . . . under the New York Convention").

[27] For purposes of this discussion, it is not necessary to define the jurisdictional nexus that could or should be applied to a mediator. That nexus need not be nearly as intensive as the kind that would subject a foreign national to personal jurisdiction.

[28] The Disputant who asserts mediator breach will likely assert that the mediator violated at least one set of standards, if not both.

[29] Report 896 ¶ 106.

[30] *See* Report 861 ¶¶ 86, 92; Report 867 ¶ 171. As indicated above, a proceeding in court to enforce a Mediated Agreement will almost always be brought in a forum in which the Recalcitrant Disputant has assets. The same (obviously) can be said with respect to enforcing an arbitral award – a proceeding in court to enforce an award will almost always be brought in a forum in which the recalcitrant debtor (from the arbitration) has assets.

[31] Section 2 of Article V of the New York Convention sets forth two additional grounds for refusal to enforce – (a) the subject matter is not arbitrable in the state in which enforcement is sought, and (b) recognition would be contrary to public policy. These two grounds are of little relevance to the issues discussed herein.

[32] 126 F.3d 15 (2d. Cir. 1997).

[33] *Id.* at 23.

[34] 211 F. Supp.3d 335 (D. D.C. 2016).

[35] *Id.* at 346 (*citing* grounds enumerated under the Federal Arbitration Act, section 10).

[36] For example, if a Canadian company and a French company agree to arbitrate in the UK under an agreement governed by New York law, then the judicial act of setting aside the award could be within the jurisdiction only of a court in the UK *or* of a court in New York.

[37] It appears that the first court to have used the "primary/secondary" terminology was the Fifth Circuit in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364, 368 (5th Cir. 2003) ("*Karaha Bodas* "). The Fifth Circuit reiterated the use of such terminology in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-88 (5th Cir. 2004).

[38] The Court of Appeals for the District of Columbia adopted the use of the terminology

"primary/secondary" in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. 2007).

[39] The "primary/secondary" nomenclature has been criticized to the extent that it is anything beyond a "shorthand that . . . identifies the nationality of courts that have the power of annulment." Marc Goldstein, *Annulled Awards in the U.S. Courts: How Primary Is "Primary Jurisdiction?"*, 25 AMER. REV. INT'L ARBITRATION 19 (2014).

[40] 512 F.3d 742, 746 (5th Cir. 2008).

[41] *Id.* at 746 (citations and quotations marks omitted).

[42] 126 F.3d at 23.

[43] *See generally* Lea Haber Kuck and Amanda Raymond Kalantirsky *Vacating An International Arbitration Award Rendered in the United States*, 6 NYSBA (2017) (previously available at http://www.nysba.org/Sections/Dispute_Resolution/Materials/2017_Fall_Meeting/Panel_1_Combined.html).

[44] Singapore Convention, art. I, section 2(b).

[45] *See supra*, text accompanying notes 18-25.

[46] *Id.* section 2(a).

[47] *Id.* section 2(b).

[48] https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

[49] In an online article published a few months after the Singapore convention was signed, mediate.com erroneously stated that the convention's list of exclusions includes "employment disputes." *See New Horizon for International Commercial Mediation: The Singapore Convention*, posting of Stanley Santire https://www.mediate.com/articles/satire-new-day-dawning.cfm (last visited June 4, 2020). (The last name of the author of the cited article is "Santire," even though the URL contains the word "satire." Nothing in the article indicates that it is meant as satire.)

As indicated in the text, the language of the convention is *broader* than "employee disputes."

[50] Report 896 ¶¶ 49, 170.

[51] *Id.* ¶ 52; *see also* Report 929 ¶ 62 (certain provisions of the Hague Convention could serve as "a useful model").

Appendix A

Source: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/travau (last visited Jun. 7, 2020)

List of travaux préparatoires by document

- A/CN.9/WG.II/WP.205 - International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation - Note by the Secretariat
- A/CN.9/942 - International commercial mediation: draft convention on international settlement agreements resulting from mediation - Note by the Secretariat
- A/CN.9/934 - Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5-9 February 2018)
- A/CN.9/929 - Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2-6 October 2017, "Report 929")
- A/CN.9/901 - Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017)
- A/CN.9/896 - Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, 12-23 September 2016, "Report 896")
- A/CN.9/867 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016, "Report 867")
- A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015, "Report 861")