

**Enforcement of International Mediated Settlement Agreements Under Singapore  
Convention in Comparison to Enforcement of International Arbitration Awards Under  
New York Convention**

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## Table of Content

Introduction.....	1
Chapter 1: General Overview of Mediation and Arbitration.....	3
1.1. Involvement of Parties into the Process and Role of Impartial Third Party .....	3
1.2. Outcomes of Mediation and Arbitration Processes.....	4
Chapter 2: Singapore Convention and New York Convention.....	6
2.1. The need for Establishment of Singapore Convention.....	6
2.2. Attempts for Unification of Enforcement of International Mediated Settlement Agreements.....	9
2.3. Uniformity of Enforcement of International Arbitration Awards Under New York Convention .....	10
2.4. Scopes for Application of Singapore Convention and New York Convention.....	11
2.4.1. Terms “International” Under Singapore Convention and “Foreign” Under New York Convention .....	12
2.4.2. Substantive Requirements to be Fulfilled for Application of Singapore Convention and New York Convention .....	17
□ Resulted from Mediation and Arbitration Award.....	17
□ “In Writing” .....	20
□ “Commercial” .....	23
2.5. Reservation.....	25
2.6. “Recognition” and “enforcement” .....	27
Conclusion .....	30

## **Abstract**

The most essential motivation for adoption of Singapore Convention was to establish something similar for mediation as New York Convention is for arbitration. The most important achievement of international arbitration compare to international mediation has always been considered its predictability and the guarantees of enforcement. However, after appearance of Singapore Convention, the international mediation has the perspective to reach the same heights as international arbitration does. Accordingly, the intend of the research is to find out, whether the application of Singapore Convention can potentially become as widely used and as successful as it is in case of New York Convention.

For the mentioned purpose the paper provides the comparative analyzes of core provisions such as scope for application, general principles and reservations of Singapore Convention in compare to the similar Articles under New York Convention. The paper also compares the main terminological differences and its backgrounds in those two Conventions.

## **Introduction**

The thesis refers to analyze of newly adopted United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) which was adopted in December, 2018 and authorized in August, 2019<sup>1</sup> in comparison to Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which has been adopted in 1958 and entered into force in June 1959<sup>2</sup>.

Mediation as well as arbitration are alternative dispute resolution (ADR) methods. Although, they differ from each other, both of them have the same purpose that is to resolve a dispute. However, only the resolution of dispute is not enough. In particular, they are useless if resolutions cannot be properly enforced. New York Convention is considered as the most essential achievement of international arbitration. The latter guarantees the enforcement of international arbitration awards. On the other hand, enforcement of international mediated settlement agreements (IMSA) has always been problematic as there was no a unified tool for its fulfillment. However, Singapore Convention can become a game changer by ensuring the enforcement of mediation agreements.

The main success of New York Convention relates to the trust of businesses built during its existence as well as uniformity and foreseeability of its application. Since the most essential motivation for adoption of Singapore Convention was to establish something similar for mediation as New York Convention is for arbitration, the main goal of the thesis is to find out whether the application of Singapore Convention can potentially become as widely used and as successful as

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<sup>1</sup> 'United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") United Nations Commission On International Trade Law' [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) accessed 5 June 2020

<sup>2</sup> United Nations Treaty Collection  
<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=en)>  
accessed 5 June 2020

it is in case of New York Convention. In order to fulfil the latter, the thesis compares the core Articles of those two Conventions.

To reach the mentioned goal the thesis is divided into two chapters. The first chapter of the thesis refers to the general overview of mediation and arbitration. The latter chapter emphasizes the main features of these two tools of dispute resolution in order to show the differences of processes which affects the outcome itself.

The second chapter of the thesis is more narrow and focuses on differences between the enforcement of IMSAs before and after Singapore Convention and enforcement of international arbitration awards under New York Convention. It also emphasizes the reasons and need for adoption of the Singapore Convention. On the other hand, it emphasizes the long history of existence of uniform tool for enforcement of international arbitration awards in the form of New York Convention. The chapter also provides the specific comparative analyzes of core provisions such as scope of application, substantive requirements under Singapore Convention and New York Convention, reservation option and terminological differences in recognition and enforcement provided in those two Conventions.

## **Chapter 1: General Overview of Mediation and Arbitration**

In order to discuss the differences between enforcement of IMSAs and enforcement of international arbitration awards, it is significant to underline the differences between the mediation and arbitration as institutionally different tools itself. The latter chapter provides the general overview of the mediation and arbitration and emphasizes the main differences between them which are: involvement of parties into the process, the role of the impartial third party (mediator / arbitrator) and the outcome of the processes itself.

### **1.1. Involvement of Parties into the Process and Role of Impartial Third Party**

Mediation can be considered as negotiation with a help of impartial third party (mediator). Since negotiation is mostly held by the parties, the mediator merely leads parties in the process of finding solution which will be beneficial for both parties. The mediator has a passive role in the process of reaching the agreement and resolution of a dispute is placed “in the hands of the parties”.<sup>3</sup> The reason for the latter is that the mediation is a volunteer process and the agreement is / is not reached by the parties, whereas the mediator merely assists parties to reach the mentioned agreement. The outcome of successful mediation is a draft agreement reached by the parties which contains all the terms agreed by them.<sup>4</sup> However, contrary to arbitration, since formation of IMSA depends on parties, not every mediation ends up with a draft agreement.<sup>5</sup>

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<sup>3</sup> Allan Silberman, ‘Mediation is not Arbitration’ (1997) 19(19) Journal of Management in Engineering <<https://ascelibrary.org/doi/10.1061/%28ASCE%290742-597X%281997%2913%3A4%2819%29>>

<sup>4</sup> Bruno Zeller, Leon Trakman, ‘Mediation and Arbitration: The Process of Enforcement’ (2019) 449 (449) Unif. L. Rev., Vol. 24 <<https://academic.oup.com/ulr/article/24/2/449/5511632>>

<sup>5</sup> Ibid. 452

On the other hand, as far as the arbitration is concerned, parties are voluntarily deciding whether to arbitrate by forming an arbitration agreement and choosing the arbitrator, though likelihood to litigation, the decision (award) is made by the arbitrator.<sup>6</sup> In particular, contrary to mediation, the role of the parties in arbitration is to provide evidence to strengthen their position while the final award is made by the arbitrator.

According to the abovementioned, since the mediation is a volunteer process and the agreement is also reached voluntarily, the probability of volunteer enforcement of IMSAs by parties is higher than in case of arbitration. In particular, successful mediation puts parties into win / win situation which means that the outcome should be beneficial for both of them, thus each party is more probably willing to enforce the agreement which benefits him / her. On the other hand, since the arbitration puts parties into win / lose position, the breaching party is unwilling to enforce award and the existence of proper tool which obliges him / her to comply is more crucial.

However, the latter does not mean that the parties are not breaching IMSAs and the existence of proper tool for enforcement is not needed in case of mediation.

## **1.2. Outcomes of Mediation and Arbitration Processes**

As it has already been mentioned, the outcome of successful mediation is the draft MSA reached by the parties, whereas the resolution of the arbitration is made by the arbitrator through the arbitration award.

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<sup>6</sup> ‘Negotiation, Mediation, and Arbitration’ (Calgary Legal Guidance) <<https://clg.ab.ca/programs-services/dial-a-law/negotiation-mediation-and-arbitration/>> accessed 5 June 2020

The arbitration agreement differs from the MSA. The MSA is a final product of mediation, when arbitration agreement is an initial point by which parties are merely deciding to resolve their dispute through the arbitration.<sup>7</sup> Unlike to MSA, the award made by the arbitrator is final and binding, whereas under the domestic laws of various countries the MSA is not binding and may have the similar effect as ordinary private contract does. The mentioned means that after unsuccessful mediation parties may decide to resolve their dispute through litigation or arbitration.<sup>8</sup> From the prospective of international mediation the lack of uniform mechanism to enforce agreements reached by the mediation caused parties to address domestic courts of different countries in order to enforce them<sup>9</sup>. However, the latter appeared as an additional issue as the legislation of different countries establish various types of means for enforcement. On the other hand, the uniform framework for enforcement of international arbitration awards exists since 1958.

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<sup>7</sup> Zeller, Trakman (n 4) 452

<sup>8</sup> Felipe Pavan Callejas, 'The Singapore Convention on Mediation: What Everyone Should Know About It' (Master thesis, Universitat De Barcelona 2019)

<sup>9</sup> Christina G. Hioureas, 'The Singapore Convention on International Settlement Agreements Resulting from Mediation a New Way Forward?' (2019) 217 (215) BJIL <[https://lawcat.berkeley.edu/search?p=035:%5b\(bepress-path\)bjil/vol37/iss2/8%5d](https://lawcat.berkeley.edu/search?p=035:%5b(bepress-path)bjil/vol37/iss2/8%5d)>



## **Chapter 2: Singapore Convention and New York Convention**

The following chapter provides the needs and attempts for establishment of the uniform framework for enforcement of IMSAs. On the other hand, it emphasizes the long history of existence of uniform tool for enforcement of international arbitration awards in the form of New York Convention. Moreover, it provides the comparative analyze of certain core provisions under Singapore Convention and New York Convention.

### **2.1. The need for Establishment of Singapore Convention**

The work regarding to Singapore Convention has been done by Working Group II established by UNCITRAL which was comprised of all member states of the commission.<sup>10</sup> After the debates for more than three years, working group II accomplished negotiations on Singapore Convention and on the Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (“Mediation Model Law”),<sup>11</sup> which amended abovementioned UNCITRAL Model Law on International Commercial Conciliation 2002.<sup>12</sup> Since Model Law establishes the uniformity of mediation process itself, The latter law can be considered as the basis for providing the legislation on mediation that may assist for implementation of Singapore Mediation where needed.<sup>13</sup> Singapore Convention itself is a mechanism which ensures

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<sup>10</sup> Working Group II, Report on the Work of its Sixty-Eight Session (Report, A/CN.9/934, 2018) Ch. 1 United Nations General Assembly, Para 1

<sup>11</sup> Hioureas (n 9) 218

<sup>12</sup> Simon Cheng, Vinceng Yeung, ‘60 Years of Enforceable Arbitration, It’s Now Time For Mediation’ (2018) (Ince Gordon Dadds, 02 October 2018) <<https://www.incegd.com/en/news-and-events/news/60-years-of-enforceable-arbitration-it-s-now-time-for-mediation>>

<sup>13</sup> ‘UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018’ (UNCITRAL) <[https://uncitral.un.org/en/texts/mediation/modellaw/commercial\\_conciliation](https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation)>

parties of cross-border mediation that their agreement resulted from international mediation will be enforceable.<sup>14</sup>

International arbitration and mediation has often been deemed as competitors “in an antagonistic battle for the hearts, minds and wallets of disputants”<sup>15</sup>. Since mediation is considered as fastest and less expensive form of dispute resolution, which unlike to arbitration or litigation also preserves commercial relationship of parties, businesses showed the interest towards the latter.<sup>16</sup> However, the obstacle of enforcement of IMSAs has long been one of the main drawback of international mediation.<sup>17</sup> Diversity regarding to the enforcement of the IMSAs in different countries caused businesses to avoid to be involved in international mediation proceedings.<sup>18</sup> In the Global Pound Conference Survey held from 2016-2017 years the majority of delegates (51%) on the question what would improve commercial dispute resolution answered the “legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation”.<sup>19</sup> The businesses used to put a lot of time, energy and money into resolving disputes by mediation and they would have to start all over again through litigation or arbitration in case the agreement could not be reached.<sup>20</sup> On the other hand, in case the parties managed to reach

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<sup>14</sup> F. Peter Phillips, ‘Concerns on the New Singapore Convention’ (October 2018)

<<https://www.mediate.com/articles/phillips-concerns-singapore.cfm>>

<sup>15</sup> Iris Ng, ‘The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution?’ (Kluwer Arbitration Blog, 31 August, 2019)

<<http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/>>

<sup>16</sup> Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 2(1) 19 Pepp Disp Resol LJ 1

<[https://heinonline.org/HOL/Page?lname=Schnabel&public=false&collection=journals&handle=hein.journals/pepps19&men\\_hide=false&men\\_tab=toc&kind=&page=1](https://heinonline.org/HOL/Page?lname=Schnabel&public=false&collection=journals&handle=hein.journals/pepps19&men_hide=false&men_tab=toc&kind=&page=1)>

<sup>17</sup> Iris Ng (n 16)

<sup>18</sup> Hioureas (n 9) 217

<sup>19</sup> Eunice Chua, ‘Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation’ (2019) 273 (272) SacLJ

<<https://journalonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/Current-Issue/ctl/eFirstSALPDFJournalView/mid/503/ArticleId/1472/Citation/JournalsOnlinePDF>>

<sup>20</sup> Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (n 17) 2

agreement, businesses were compelled to try to enforce the agreement according to domestic legislation that significantly vary from each other.

Domestic legislations are following four means of enforcement of MSAs. In case of absence of specific legislation on enforcement of the MSA the agreement may be enforced as private commercial agreement; on the other hand, legislations that contain such provisions use three types of mechanisms: (1) the agreement may be enforced as court judgments; (2) the agreement can be enforced after its notarization regarding to the “regime applicable to notarized documents”; (3) it can be transformed and enforced as arbitration award.<sup>21</sup>

All the above mentioned reasons together with the growth interest of businesses in international commercial mediation<sup>22</sup> showed the need for establishment of an uniform mechanism for cross-border IMSAs. According to Article 14 of Singapore Convention the convention will enter into force “six months after deposit of the third instrument of ratification, acceptance, approval or accession”<sup>23</sup>, which means that the Convention comes into forth after its ratification by at least three countries<sup>24</sup>. The latter will take place in September after Qatar ratified Singapore Convention in March 13, 2020 by becoming the third country to do so.<sup>25</sup>

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<sup>21</sup> Anna KC Koo, ‘Enforcing International Mediated Settlement Agreements’, in MP Ramaswamy, J Ribeiro (eds), *Harmonizing Trade Law to Enable Private Sector Regional Development* (New Zealand 2017)

<sup>22</sup> Hioureas (n 9) 217

<sup>23</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) [2018] Art 14

<sup>24</sup> Elisabetta Silvestri, ‘The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation’ (2019) 6(5) 2019 *Access to Justice* Eur 5  
<[https://heinonline.org/HOL/Page?handle=hein.journals/ajee2&div=22&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/ajee2&div=22&g_sent=1&casa_token=&collection=journals)>

<sup>25</sup> Dominic low, ‘Singapore Convention on Mediation to come into force on Sept 12’ (the Straits time, March 12, 2020) <<https://www.straitstimes.com/singapore/singapore-convention-on-mediation-to-come-into-force-on-sept-12>> access 5 June 2020

However, the question is whether the unification of enforcement of IMSAs will become a facilitator for businesses to resolve their international commercial disputes by the mean of mediation.

As it has already been mentioned mediation proceeding is cheaper and faster than arbitration or litigation and is more focused on preserving the relationship between parties by providing a possibility to put both parties into win / win position. Moreover, the existence of unified tool for international mediations would probably give businesses the feeling of confidence and foreseeability that IMSAs will be enforced in case of failure to enforce voluntarily. However, the increase in usage of international mediation is also directly connected with the success of Singapore Convention.

## **2.2. Attempts for Unification of Enforcement of International Mediated Settlement Agreements**

Since the need for unification of enforcement of IMSA has been appeared there were some attempts to fulfil the mentioned before Singapore Convention.

The latter issue was raised by United Nations Commission on International Trade Law (“UNCITRAL”) while preparing UNCITRAL Model Law on International Commercial Conciliation 2002. However, even though the Article 14 of the latter law established that the agreement settling a dispute concluded by the parties is binding and enforceable, the mentioned did not fulfil the goal of unification since the issue of enforcement was still left to applicable domestic law.<sup>26</sup>

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<sup>26</sup> Eunice Chua, ‘Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation’ (n 20) 574-575

Another attempt for harmonization of enforcement of IMSAs was conducted in European Union through the EU Mediation Directive.<sup>27</sup> Article 6 of the latter Directive obliged member states to ensure that the agreement resulting from the mediation is enforceable.<sup>28</sup> However, the Directive could not reach the success and its broad formulation left the space for enforcement of agreements under domestic law of the member state.<sup>29</sup>

### **2.3. Uniformity of Enforcement of International Arbitration Awards Under New York Convention**

On the other hand, uniform recognition and enforcement of international arbitration awards has longer history. The latter has been established in 1958 through New York Convention.<sup>30</sup> The initiative to replace Geneva treaties by New York Convention has raised by International Chamber of Commerce (ICC) after the dissatisfaction with Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.<sup>31</sup> The mentioned Convention is considered as “the successful commercial treaty in the world”<sup>32</sup> with 163 participant states.<sup>33</sup> The goal of the mentioned convention is to provide parties of the international arbitration comprehensive tool for recognition and enforcement of awards in every contracting state.<sup>34</sup> The latter means that parties can enforce their international arbitration awards in every

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<sup>27</sup> Eunice Chua, ‘Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation’ (n 20) 575

<sup>28</sup> Council Directive 2008/52/EC of May 21 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L136/3, Article 6

<sup>29</sup> Eunice Chua, ‘Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation’ (n 20) 575-576

<sup>30</sup> Pavan Callejas, (n. 8) 7

<sup>31</sup> ‘History of the New York Convention » New York Convention’

<http://www.newyorkconvention.org/travaux+preparatoires/history+1923+--+1958> accessed 5 June 2020

<sup>32</sup> Pavan Callejas, (n. 8) 7

<sup>33</sup> UN Treaty Collection (n 2)

<sup>34</sup> ‘United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards’ (New York Convention) [1958]

contracting country in the same way. This uniformity of enforcement under New York Convention guarantees parties the enforcement of international arbitration awards if there are no grounds for refusal of the award under the Article V of New York Convention.<sup>35</sup>

The rationale behind the decision not to have sufficient tool for recognition and enforcement for IMSAs contrary to international arbitration awards is clear. In particular, as it has already been mentioned, unlike to arbitration awards, IMSAs are made voluntarily by the parties. The latter means that in case of successful mediation, parties would be willing to enforce the agreement without obliging them to do so, as the latter agreement should be beneficial for both of them<sup>36</sup>.

However, in reality it is not always true and even in case the mediation has been successful it does not mean that parties will not fail to perform. The reason for the latter can be the same as in case of the ordinary private contract. In particular, private contracts as well as IMSAs are usually formed voluntarily, though the breach of obligation by one of the parties still appear.

## 2.4. Scopes for Application of Singapore Convention and New York Convention

Singapore Convention applies to all IMSAs which are concluded in writing by the parties of commercial mediation.<sup>37</sup> The scope of application for Singapore Convention is provided by Article 1 of the latter Convention. According to paragraph 1 of the mentioned Article there are four prerequisites to be fulfilled for its application: (1) the agreement should be **resulted from mediation**; (2) it should be **in writing**; (3) the dispute should be **commercial** (4) and

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<sup>35</sup> Ibid. Art V

<sup>36</sup> Miglė Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019, vol 111) 217 (205) Vilnius University Press <[file:///C:/Users/Username/Downloads/Enforcement\\_of\\_Mediated\\_Settlement\\_Agreements.pdf](file:///C:/Users/Username/Downloads/Enforcement_of_Mediated_Settlement_Agreements.pdf)>

<sup>37</sup> Hioureas (n 9) 219

**international** at the time of its **conclusion**.<sup>38</sup> The terms “mediation” and “in writing” are defined by Paragraph 2 and Paragraph 3 of Article 2<sup>39</sup> (see subchapter 2.5.2. for more detailed discussion). Subparagraphs (a) and (b) of the Article 1(1) also provides what is considered under the term “international”. On the other hand, the definition of the term “commercial” is not provided by Singapore Convention, though the latter is defined in the footnote of Article 1(1) of Model Law<sup>40</sup> (see subchapter 2.5.2. for more detailed discussion).

Likelihood to Singapore Convention, Article 1(1) of New York establishes the territorial scope for application. However, instead of using the term “international” the New York Convention applies to “recognition and enforcement of arbitral awards made **in the territory of a State other than the State** where the recognition and enforcement of such awards are sought”<sup>41</sup>. Furthermore, it establishes that the convention also applies to “arbitral awards **not considered as domestic awards** in the State where their recognition and enforcement are sought.”<sup>42</sup> The Convention also deals with recognition and enforcement of awards arising out the differences between **physical** as well as **legal** persons”<sup>43</sup>.

#### 2.4.1. Terms “International” Under Singapore Convention and “Foreign” Under New York Convention

The term “international” is defined by the subparagraphs (a) and (b) of the Article 1(1) of Singapore Convention. However, the latter raised some issues while working on the draft of the

<sup>38</sup> Singapore Convention 2018 Art 1(1) (n 24)

<sup>39</sup> Ibid. Arts 2(2), 2(3)

<sup>40</sup> Eunice CHUA, ‘The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution’ (2019) 197 (195) AJIL Volume 9 Issue 2 <<https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/singapore-convention-on-mediation-a-brighter-future-for-asian-dispute-resolution/C2325869D7BB7EDC3085D2B325E81C86/core-reader>>

<sup>41</sup> New York Convention 1958 Art 1(1) (n 37)

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

mentioned Convention.<sup>44</sup> In particular, it was discussed that usage of “international” before “agreement” may “raise confusion as that expression often referred to agreements between States or other international legal persons binding under international law.”<sup>45</sup> Accordingly, working group II decided to avoid the term “international agreement” and for this purpose to merge Article 1(1) and 3(1) of the draft Convention.<sup>46</sup> Due to the mentioned, the Article 1(1) was decided to be established as follows: “This Convention applies to agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute (‘settlement agreements’) if, at the time of the conclusion of that agreement...”<sup>47</sup> However, the latter draft has raised another questions. In particular, what would be the reference for the title of article as well as whether the merger of the article related to the scope of application and definition of the term “international” may result the structural flaw.<sup>48</sup> Because of the mentioned reasons the working group II decided to include the term “international” in the Article 1(1) by adding wording “which are international in that...” and to define the term in relation to the places of business of the parties.<sup>49</sup>

The current definition of the term “international” is based on Article 3(2) of Model Law (1(4) before the amendment). However, instead of indication on “subject matter of the **dispute**<sup>50</sup>” that is provided by Article 3(2)(ii) of Model Law, Article 1(1)(b)(ii) refers to the “State with which the subject matter of the **settlement agreement** is most closely connected<sup>51</sup>”.

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<sup>44</sup> Working Group II, Report (n 10) Para IV

<sup>45</sup> Ibid.

<sup>46</sup> Working Group II, Report (n 10) Para IV

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> ‘UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)’ [2018] Art 3(2)(ii) (UNCITRAL Model Law on Mediation)

<sup>51</sup> Singapore Convention 2018 Art 1(b)(ii) (n 24)



The reason for such changes can be various. Firstly, the subject matter of the agreement and the subject matter of the dispute may vary from each other. In particular, due to the flexibility of mediation parties may reach the agreement that may not be connected to the subject matter of the dispute but still creates value for both parties and resolves a dispute in a different manner. Accordingly, since Singapore Convention only deals with the agreement, it is essential to specify that the agreement and not the dispute itself should be international.

Moreover, Article 1(1)(a) defines the international agreement whereas “[a]t least two parties to the settlement agreement have their places of business in different states”.<sup>52</sup> Article 1(1)(b) broadens the term by stating that “[t]he State in which the parties to the settlement agreement have their places of business is different from either: (i) [t]he State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) [t]he State with which the subject matter of the settlement agreement is most closely connected.”<sup>53</sup> In particular, under Article 1(1)(b) the MSA may still be international in case the places of businesses of the parties are located in the same States, though the MSA itself is connected to another jurisdiction.<sup>54</sup>

The term “international” differs from foreign feature of arbitration awards under the New York Convention. Article 1(1) of New York Convention limits the scope of application of New York Convention “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”<sup>55</sup> Moreover, the same Article indicates that arbitral award should not be considered as domestic

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<sup>52</sup> Ibid. Art 1(1)(a)

<sup>53</sup> Ibid. Art 1(1)(b)

<sup>54</sup> Nadja Alexander and Shouyu Chong, Joubin-Bret Anna, *Singapore Convention on Mediation: A Commentary* (Kluwer Law International B.V, 2019)

<sup>55</sup> New York Convention 1958 Art 1(1) (n 37)

under the State where the recognition and enforcement is sought.<sup>56</sup> Accordingly, the “seat” (where the arbitration physically takes place) of arbitration is the main feature for arbitration to be considered either foreign or domestic. However, the “seat” of mediation is not relevant for the MSAs to be considered as “international” and to be enforceable under Singapore Convention. The latter is also clear from the text of Singapore Convention which refers only to MSAs which are international at the time of its conclusion and does not take into account the process of resolution itself.<sup>57</sup>

Apart from the mentioned, the existence of the seat in arbitration gives certain supervisory rights to the domestic courts of the state where the seat is located including the right to set aside.<sup>58</sup> Article 2(a) of the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 establishes the refusal of recognition and enforcement of the award in case “[...] the award was annulled in the country in which it was made”.<sup>59</sup> Article V(1)(e) of New York Convention also determines that the enforcement and recognition of the award may be refused if the 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”.<sup>60</sup> According to the mentioned, the courts where the parties take the award to enforce has only the right to refuse or enforce the award, though the exclusive right of setting aside of the award is remained to the court where the arbitration took place.<sup>61</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ahdieh Alipour Herisi, Wendy Trachte-Hiber, ‘Aftermath of Singapore Convention: A Comparative Analysis between the Singapore Convention and the New York Convention’ (2019) 160 (154) 12 Am J Mediation  
<[https://heinonline.org/HOL/Page?handle=hein.journals/amjm12&div=9&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/amjm12&div=9&g_sent=1&casa_token=&collection=journals)>

<sup>59</sup> Convention on the Execution of Foreign Arbitral Awards [1927] Art 2(a)

<sup>60</sup> New York Convention 1958 Art V(1)(e) (n 37)

<sup>61</sup> Alipour Herisi, Trachte-Hiber 160 (n 61)

On the other hand, Singapore Convention does not establish the possibility for IMSAs to be set aside. Accordingly, if the IMSA is set aside in one jurisdiction the latter will not be binding for the other one.<sup>62</sup> Moreover, unlike to New York Convention, Singapore Convention does not consider the ground for refusal if the mediator does not satisfy domestic requirements.<sup>63</sup>

The possibility of setting aside is one of the most essential right for arbitration, but not so significant for mediation. One of the main feature of arbitration award is that it is final and binding that does not envisages the possibility to appeal. The only way for losing party to avoid the recognition and enforcement of the arbitral award is to challenge it at the seat of arbitration. The procedures for setting aside is provided by the Article 34 of UNCITRAL Model Law.<sup>64</sup> On the other hand, mediation is mostly the starting point for resolving an issue for the parties. The mentioned means that in case mediation is unsuccessful or parties are not satisfied by the IMSA they can always try to resolve their dispute through litigation or arbitration. Furthermore, since unlike to arbitration, the mediation proceeding does not always ends up with a MSA, parties are deciding whether they are satisfied with the offer and whether they are willing to agree. Moreover, there is no losing party in mediation who may set aside the agreement, as the most essential feature of mediation is that MSA should be beneficial for both parties. However, the provisions of setting aside of MSA can lie on domestic legislation of the country<sup>65</sup>.

Even though, as it was discussed above, the possibility of setting aside is way much low in case of mediation than in case of arbitration, the nonexistence of the uniform rules for the latter in international mediation may still raise some issues. In particular, since the laws regarding to

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> UNCITRAL Model Law on International Commercial Arbitration [1985] Art 34 (Model Law on Arbitration)

<sup>65</sup> Felix Wilking, 'The Enforcement and Setting Aside of Mediation Settlement Agreements: A Comparison between German and International Commercial Mediation' (Master Thesis, University of Cape Town 2015) 49

mediation vary from each other from country to country the rules for setting aside may also be unpredictable for parties who may still wish to set aside IMSA.

The reason for such a broad regulation for international mediation may be the flexible and less formal nature of mediation itself. In particular, mediation process does not require particular place, office, or building to be held. The mentioned freedom gives parties way more autonomy to choose the place for mediation or even to conduct it online. Delocalization of the place where IMSA was reached will also reduce the expenses for the parties, since it allows parties to enforce the agreement in any country by their choice.<sup>66</sup>

Moreover, it may become the facilitator for electronic mediation proceedings.<sup>67</sup> Nonexistence of the seat also limits the influence of domestic courts on mediation.<sup>68</sup> However, given freedom may also cause the lack of control towards mediators. Since the influence of domestic courts and legislations are limited by Singapore Convention, there is no body to control the actions of mediators and no legislation to limit them. The only tool for defense for the parties is provided by Article 5(1)(e, f) of Singapore Convention which contains the provisions of refusal of enforcement of MSA in case the failure of the mediator.

#### **2.4.2. Substantive Requirements to be Fulfilled for Application of Singapore Convention and New York Convention**

- ***Resulted from Mediation and Arbitration Award***

As it has already been mentioned, according to the Article 1 of Singapore Convention the agreement should be resulted from mediation the Convention to be applicable. The term

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<sup>66</sup> Nadja Alexander and Shouyu Chong, Joubin-Bret Anna (n 57)

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

“mediation” is defined under the Article 2(3) of the Singapore Convention<sup>69</sup>. Regarding to the mentioned Article, unlike to New York Convention Singapore Convention does not regulate the enforcement of agreements to mediate, but only deals with the enforcement of IMSAs. Moreover, it does not even take into account the existence of such agreement by stating “irrespective of the expression used or the basis upon which...”.<sup>70</sup>

The latter contradicts to Article II of New York Convention which regulates the enforcement of arbitration awards as well<sup>71</sup>. On the other hand, Article V(1)(a) establishes the grounds of refusal for enforcement of arbitration award in case the arbitration agreement is not valid or contains some incapacities.<sup>72</sup>

However, contrary to Singapore Convention, New York Convention does not define what is meant under the term “arbitration award”. The only definition is provided by Article I(2) regarding to which the mentioned term refers to awards made by arbitrators appointed for each case as well as to permanent arbitral bodies which were selected by the parties.<sup>73</sup>

The abovementioned vague definition of arbitration awards may raise question whether New York Convention is applicable when arbitration award is granted as a result of mediation as it has already been mentioned in subchapter 2.2. of the latter thesis. In particular, some jurisdictions allow the mediation agreement to be granted as arbitration award and be enforced as such. E.g. Article 18(3) of Korean Commercial Arbitration Board in case of consent of parties allows the agreement resulted from conciliation (mediation) to be granted as an arbitration award and treated in the same

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<sup>69</sup> Singapore Convention 2018 Art 2(3) (n 24)

<sup>70</sup> Ibid.

<sup>71</sup> New York Convention 1958 Art II (n 37)

<sup>72</sup> Ibid. Article V(1)(a)

<sup>73</sup> Ibid. Article I(2)

manner as an ordinary award.<sup>74</sup> Similar provision is provided by the Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce<sup>75</sup>. However, the mentioned Articles apply in situations when the parties resolved dispute by mediation during the arbitration. The same is established by UNCITRAL Model Law on International Commercial Arbitration by stating that the consent award has “the same status and effect as any other award on the merits of the case”.<sup>76</sup> On the other hand, some jurisdictions remain silent or even reject the consent award to be treated and enforced as an usual arbitration award. The main reason for this restriction is that the arbitration deals with the disputes between parties and in case there is no dispute, MSA cannot be treated as arbitration award, since the arbitration cannot be conducted.<sup>77</sup>

Due to the ambiguity of definition of arbitration award under New York Convention, it is hard to determine whether it was meant the consent award to be enforced under the mentioned Convention. However, Article 1(1) provide that the Convention applies to “differences between persons”.<sup>78</sup> From this perspective, the “difference” between parties is essential in order the New York Convention to be applicable. Accordingly, the IMSA which was reached before initiation of arbitral procedural may not be the subject of New York Convention. However, the agreement reached after arbitration can fall into the mentioned scopes, as there was “difference” between parties before initiation of arbitral procedures.<sup>79</sup>

<sup>74</sup> The Commercial Arbitration Rules of the Korean Commercial Arbitration Board [2000], Art 18(3)

<sup>75</sup> Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [2014], Art 14

<sup>76</sup> Model Law on Arbitration Art 31 (n 67)

<sup>77</sup> Edna Sussman, ‘The New York Convention through a Mediation Prism’ (2009) 11(10) Disp Resol Mag  
<[https://heinonline.org/HOL/Page?lname=Sussman&public=false&collection=journals&handle=hein.journals/disput15&men\\_hide=false&men\\_tab=toc&kind=&page=10](https://heinonline.org/HOL/Page?lname=Sussman&public=false&collection=journals&handle=hein.journals/disput15&men_hide=false&men_tab=toc&kind=&page=10)>

<sup>78</sup> New York Convention 1958 Art 1(1) (n 37)

<sup>79</sup> Yaroslau Kryvoi, Dmitry Davydenko, ‘Consent Awards in International Arbitration: From Settlement to Enforcement’ 2015 867(828) BJIL  
<<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1108&context=bjil>>

According to all abovementioned, Singapore Convention limits its scopes of application only to IMSAs resulted from mediation by directly indicating the latter and defining the term “mediation”. On the other hand, the vagueness of New York Convention leaves the space for arbitral awards that has been resulted from mediation to be enforced as ordinary arbitral awards.

The limitation of Singapore Convention in this manner is clear. The mentioned Convention is trying to avoid overlaps with the New York Convention by limiting the scopes only to **international agreements resulted from mediation**. However, the mentioned limitation may become an issue in case of mixed models such as arb-med or med-arb. In particular, vagueness of New York Convention and limitation of Singapore Convention may cause questions whether mixed model resolutions should be enforced under the Singapore Convention or under the New York Convention.<sup>80</sup>

- ***“In Writing”***

Another requirement for the application of Singapore Convention provides that the agreement should be in writing. According to Article 2(2) of the Convention the mentioned requirement is satisfied if agreement is recorded in any form including electronic communication, if the contained information is accessible for the usage of subsequent reference.<sup>81</sup>

On the other hand, New York Convention also refers to the term “in writing”. However, the mentioned term is used regarding to the arbitration agreement and not to the arbitration award. Article II (2) provides that the term “agreement in writing” includes an arbitration clause included

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<sup>80</sup> Alipour Herisi, Trachte-Huber 167 (n 61)

<sup>81</sup> Singapore Convention 2018 Art 2(3) (n 24)

“in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.<sup>82</sup>

According to the abovementioned, there are some differences in definitions of “in writing” in mentioned two Conventions. In particular, New York Convention specifies that the clause is in writing if it is included in contract or in arbitration agreement and is signed by the parties. On the other hand, since IMSA is a separate agreement reached by the parties there is no need to specify the latter. However, the definition of Singapore Convention regarding to the “in writing” does not contain the requirement for signature of the parties. The mentioned requirement is stated under the Article 4(a) of the Singapore Convention which refers to requirements for reliance on settlement agreements.

However, the purpose of Article 4 is to establish that the mediation took place and determines what can be submitted to the court to prove that the mediation has occurred. Accordingly, the provided Article is reliance on MSA to be enforceable under the Singapore Convention and not the “in writing” requirement to be fulfilled. It means that Article 4 will only be applicable in case there is an issue whether the actual mediation took place.<sup>83</sup>

Another differences between the term “in writing” under Singapore Convention and under New York Convention is “in writing” by using electronic communication. In particular, in case of New York Convention it is essential for parties to exchange letters or telegrams the “in writing” requirement to be satisfied.<sup>84</sup> On the other hand, Singapore Convention merely indicates the information contained in electronic communication to be accessible and useable.<sup>85</sup>

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<sup>82</sup> New York Convention 1958 Art II(2) (n 37)

<sup>83</sup> Allan J. Stitt 1175 (n 85)

<sup>84</sup> New York Convention 1958 Art II(2) (n 37)

<sup>85</sup> Singapore Convention 2018 Art 2(2) (n 24)



There have been various disputes what does the term “exchange” refers to under New York Convention.<sup>86</sup> The most countries will agree that in case one party sends a writing and another one accepts it orally will not be in compliance with the “exchange” requirement of New York Convention since there was not an exchange of documents.<sup>87</sup> However, it is not clear whether the mentioned exchange should be signed by the parties. Regarding to the majority of authorities that the signature of the parties is not required by the Article II(2) of New York Convention. Accordingly, the main purpose of the requirement is the parties to be informed and familiar with the document.

On the other hand, the Singapore Convention tried to satisfy the mentioned goal by providing the different options under Article 4(2) to meet the requirements to “sign” in case of electronic communication.<sup>88</sup> The mentioned is establish in accordance to Article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts.<sup>89</sup> The mentioned Article mostly focuses on identification of parties as well as mediator and indication of their intend. However, the exchange of IMSA is not required under the mentioned Article as well.

The mentioned broad regulation of the term “in writing” may cause various issues in case of mediation proceeding by electronic communication as well as in any other form. In particular, since the definition of “in writing” does not contain the requirement to be signed by parties or by mediator as well to be exchanged in case of electronic communication, abovementioned requirements under Article 4 of the Singapore Convention may not be considered as the scope of

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<sup>86</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International B.V 2010) 84

<sup>87</sup> Ibid. 82

<sup>88</sup> Singapore Convention 2018 Art. 4(2) (n 24)

<sup>89</sup> Shouyu Chong, Felix Steffek, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 467(448) 31 SAclJ  
<<https://heinonline.org/HOL/Page?handle=hein.journals/saclj31&collection=journals&id=863&startid=&endid=901>>

application. Furthermore, even though Article 4 contains the requirement of the existence of signature of the parties as well as of mediator, the absent of the mentioned is not provided as the ground for refusal under the Article 5 of Singapore Convention.<sup>90</sup> Accordingly, it is vague how and when Article 4 will be applicable in practice and whether the mentioned will become a gap of the Convention. However, the latter can prospectively be the ground for a lot of issues as a party may try to enforce the IMSA without even showing it to another party.

- **“Commercial”**

In order to narrow down the application of IMSAs Singapore Convention sets another requirement for application. As it has already been mentioned, Singapore Convention does not provide the definition of the term “Commercial”. However, the mentioned is provided in footnote of Article 1(1) of Model Law<sup>91</sup> which lists but not limits different transactions which are included in the commercial nature of the dispute. As the list is not exhaustive practice will show what type of transactions can be considered “commercial”. The reason for such broad definition is not to limit the term “commercial” by the definition of national law.<sup>92</sup> However, to narrow down such a broad definition Singapore Convention excludes specific type of disputes indicated in Article 1(2). The Article 1(2)(a) states that consumer transactions, as well as transactions for family or household purposes are excluded from the application of Singapore Convention<sup>93</sup>. Moreover, the Convention does not apply to settlement agreement “[r]elated to family, inheritance, or employment law”<sup>94</sup>.

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<sup>90</sup> Singapore Convention 2018 Art. 5

<sup>91</sup> Eunice CHUA, ‘The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution’ (n 43)

<sup>92</sup> Ellen E. Deason, What’s in a Name? The Term “Commercial” and “Mediation” in the Singapore Convention on Mediation in Harold Abramson (ed), *Singapore Mediation Convention Reference Book* (Tuoro Law Center, 2019)

<sup>93</sup> Singapore Convention 2018 Art 1(2)(a) (n 24)

<sup>94</sup> Ibid. Article 1(2)(b)

Likelihood to Singapore Convention, New York Convention does not define the term “commercial”. However, contrary to Singapore Convention, Article I(3) of New York Convention allow countries to limit the scope of application of Convention to the disputes arising out of legal relationships “which are considered as commercial under the national law of the state making such declaration.”<sup>95</sup> The reason for the mentioned is that the definition of the terms “commercial” and “non-commercial” often differs from one jurisdiction to another. However, establishment of such broad definition of the term “commercial” cause some issues in practice.<sup>96</sup>

The High Court of Bombay established the strict scopes for the definition of “commercial” in cases *Kamani Engineering Corp. and Indian Organic Chemical LTD v. Chemtex Fibers Inc.*<sup>97</sup> In case *Organic Chemical LTD v. Chemtex Fibers Inc.* the court stated that even though the agreement itself between parties was commercial it is not enough as the party cannot prove that it was also commercial “under the law in force in India”.<sup>98</sup>

According to the latter even though the definition of “commercial” Model Law is not exhaustive it may be considered more narrowed as it lists some transaction which can flow in the scope of the “commercial”. Moreover, since it does not depend on domestic legislations some issues occurred relating to New York Convention may be avoided. However, the definition is still broad and the prospective practice is yet vague.

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<sup>95</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port 6 (n 89)

<sup>96</sup> Ibid.

<sup>97</sup> Ibid. 33

<sup>98</sup> Ibid.

## 2.5. Reservation

One of the main reason of wide usage of New York Convention has initially become the Reservation established under Article I(3) of the mentioned Convention. In particular, first sentence of the mentioned Article entitles contracting state to declare the Convention to apply only if the recognition and enforcement of award has been made in Contracting country or has some connection to Contracting country (reciprocity), while under the second sentence of the same Article the state may declare that the Convention will also apply to differences arising out of legal relationships, whether contractual or not, deemed as commercial under the national law of the State making such declaration.<sup>99</sup>

On the other hand, Article 8 of Singapore Convention entitles contracting states to opt-in the Convention.<sup>100</sup> In particular, under the mentioned Article if Contracting state ratifies the mentioned Convention with the mentioned reservation the Convention will not apply unless parties agree to do so.<sup>101</sup>

There were a lot of discussion regarding to possibility to opt-out or to opt-in the Singapore Convention. On the one hand, the reasoning of supporters of opt-in option consists in the nature of mediation itself. In particular, since mediation is the volunteer process and parties are experiencing high level of party autonomy, parties should decide by themselves whether they want the Convention to be applicable.<sup>102</sup> Moreover, parties should be fully aware of the possibility of

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<sup>99</sup> New York Convention 1958 Art I(3) (n 37)

<sup>100</sup> Singapore Convention 2018 Art 8(1)(b) (n 24)

<sup>101</sup> Alipour Herisi, Trachte-Huber 154 (n 61)

<sup>102</sup> Ibid.

enforcement of IMSA outside the jurisdiction where it was reached and the mentioned may not be protected in case the Convention is automatically applicable.<sup>103</sup>

However, on the other hand, the opt-in option may reduce the usage of Singapore Convention, as in this case the Convention will only be applicable in case of the consent of the parties. The mentioned also become an issue when one party is from contracting state ratifying the Convention with reservation and the another party from contracting state ratifying it without the mentioned. Contrary to the mentioned in case of opt-out option the Convention is automatically applicable if the parties do not exclude the Convention. The supporters of the mentioned option raise the issue of complication of reaching agreement between parties in case of opt-in option<sup>104</sup>. In particular, parties which have already agreed on all the terms of IMSA would not be willing to be engaged in further discussions regarding to the enforcement regime of the mentioned.<sup>105</sup>

Even though, the Reservation in New York Convention is not very useful nowadays since it counts 163 contracting countries, it played significant role in wide usage of the Convention initially. Accordingly, in my opinion to facilitate the usage of enforcement of IMSAs under Singapore Convention, it would be better to establish the opt-out option for the parties. Moreover, the mentioned will not disregard party autonomy, since the parties are agreeing to mediate that also

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<sup>103</sup> Itai Apter, Coral Henig Muchnik, 'Reservations in the Singapore Convention - Helping to Make the New York Dream Come True' (2019) 1277(1267) 20 Cardozo J Conflict Resol <<https://heinonline.org/HOL/Page?handle=hein.journals/cardcore20&collection=journals&id=1029&startid=&endid=1044>>

<sup>104</sup> Ibid. 1278

<sup>105</sup> Natalie Y Morris-Sharma, 'Constructing the Convention on Mediation the Chairperson's Perspective' (2019) 508(487) 31 SAcLJ <<https://journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/Current-Issue/ctl/eFirstSALPDFJournalView/mid/503/ArticleId/1468/Citation/JournalsOnlinePDF>>

means that they are agreeing on the worldwide enforcement of IMSA<sup>106</sup> and the proper worldwide enforcement of IMSA should not be unforeseeable for the party mediating in good faith.<sup>107</sup>

## 2.6. “Recognition” and “enforcement”

Unlike to New York Convention Singapore Convention does not use the wording “recognition”. By avoiding the usage of the mentioned term the working group tried to avoid confusions because of the differences in interpretation of the term in civil and common law jurisdictions.<sup>108</sup> However, it does not mean that the Singapore Convention does not cover the scope of legal effects of “recognition”.<sup>109</sup> In particular, Article 3.2. covers the concept of “recognition” understood as such in many states including common law system without using the wording itself.<sup>110</sup> By doing so the working group tried to avoid the interpretation of the mentioned term in civil and common law jurisdictions differently by directly establishing the common framework for its interpretation.

On the other hand, Article 3(1) relates to the enforcement of IMSAs by directly indicating that “each Party to the Convention shall enforce a settlement agreement...”.<sup>111</sup> Due to the nature of mediation, the mentioned Article is not limited to enforcement of mere monetary obligations and gives space to creativity that is one of the main benefit of mediation.<sup>112</sup>

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<sup>106</sup> Apter, Henig Muchnik 1278 (n 103)

<sup>107</sup> Alipour Herisi, Trachte-Hiber 171 (n 61)

<sup>108</sup> Hal Abramson, ‘The New Singapore Mediation Convention: The Process and Key Choices’ (2019) 1056 (1037) 20 Cardozo J Conflict Resol

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<sup>109</sup> Morris-Sharma 500 (n 108)

<sup>110</sup> Timothy Schnabel, ‘Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation’ (2019) 1184 (1181) 20 Cardozo J Conflict Resol

<<https://heinonline.org/HOL/Page?handle=hein.journals/cardcore20&collection=journals&id=943&startid=&endid=958>>

<sup>111</sup> Singapore Convention 2018 Art. 3(2) (n 24)

<sup>112</sup> Timothy Schnabel, ‘Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation’ 1182 (n 114)

Article 3 is one of the most essential Article of the Singapore Convention which directly deals with the primary purpose of establishment of the Convention and imposes the duties on the states joined the Convention.<sup>113</sup> Due to the mentioned, the proper interpretation and usage off the latter Article is crucial for success of the Convention.

To determine the importance of “recognition” and “enforcement”, sometimes the metaphors “sword” and “shield” are used. In particular, the “recognition” is a defensive process which is used as a “shield” to obtaining a worldwide recognition of arbitral award / IMSAs to avoid the attempt to resolve the same dispute again through mediation or arbitration.<sup>114</sup> On the other hand, the “enforcement” is a “sword” by which the parties may initiate the proceeding to force the second party to enforce an arbitration award / IMSA.<sup>115</sup>

The same obligation is established under the Article III of New York Convention.<sup>116</sup> However, unlike to Singapore Convention, New York Convention does not define the term “recognition” by giving a vagueness in usage of the mentioned Article. In particular, since different jurisdictions are interpreting the *res judicata* in a different manner the outcome of the arbitration may vary from each other from jurisdiction to jurisdiction. Accordingly, the mentioned differences may cause uncertainty for parties and concern whether the dispute would fall into the scope of the mentioned Article.

As it has already mentioned, by excluding the term “recognition” by directly indicating the function of the mentioned term Singapore Convention establishes the common framework for interpretation. According to the Article 3 of Singapore Convention entitles parties to invoke the

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<sup>113</sup> Ibid.

<sup>114</sup> Chong, Steffek 466 (n 92)

<sup>115</sup> Ibid.

<sup>116</sup> New York Convention 1958 Art. III (n 37)

settlement agreement in case the **matter** has already been resolved. Accordingly, Singapore Convention has covered the confusion and vagueness existed in New York Convention that will assist in mutual understanding of the scope of Article 3 of the Convention.



## **Conclusion**

Singapore Convention has already become a big step forward for international mediation. The enforcement of IMSAs have always been a problem and the attitude of businesses have showed the need for its unification. Even though, there were some approaches for enforcement of IMSAs, variety of domestic legislation caused lack of trust among the businesses towards international mediation, because of uncertainty of its fulfillment.

The mentioned Convention is meant to become for IMSA similar as New York Convention is for international arbitration awards. During this attempt the working group has tried to improve some doubtful provisions from New York Convention and to fit them with the feature of mediation.

The main advantage of Singapore Convention in the contrary to New York Convention may become the higher level of predictability of scope of application for the parties of the dispute. In particular, the Convention narrowed down definition for “commercial” and tried to avoid its connecting to domestic legislation, which has appeared the issue in case of New York Convention. By doing so it would be easier to predict whether the dispute falls under the scope of “commercial” established under the Convention. Moreover, Singapore Convention directly defines the term “mediation” as well to simplify the understanding of requirement of its application. By avoiding the term “recognition” Singapore Convention unlike to New York Convention would also grant predictability to parties to understand what type of disputes may be invoked by the parties.

However, on the other hand the same narrow definition of “mediation” may become confusing in case of mixed-model dispute resolution, since it will be hard to determine by the parties which of the abovementioned Conventions will be applicable.

The working group also tried to grant the wide usage to the Convention by not taking into consideration the seat of mediation unlike to New York Convention. However, the mentioned caused the nonexistence of the provisions regarding to setting aside that may become an issue for party who still wishes to set aside IMSA, since the jurisdictions of contracting states may vary from each other.

On the other hand, the reservation provision contraries to the mentioned attempt, since in case of ratification with opt-in reservation the Singapore Convention will only be applicable if there is a consent of the parties.

However, the desire to change provisions of New York Convention in a manner to fit with feature of mediation and transfer it to Singapore Convention may establish some new gaps which has not existed in New York Convention. The example of the latter may become the definition of “in writing” and non-existence of the “exchange” requirement for electronic communication which may prospectively become the ground for fraud from the parties.

In summary, besides the all above mentioned the success of Singapore Convention is directly connected with the amount of contracting states. As for now it counts 52 signatories among which 4 state has ratified it which means that the Convention will come into force in September 2020 after six months the third country has ratified it.<sup>117</sup> Due to the numbers, the Conventions has a good start and hopefully it will succeed by raising the popularity of international mediation.

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<sup>117</sup> Singapore Convention 2018 Art 14 (n 23)

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