MEDIATION: THE NEW TRUMP CARD IN COMMERCIAL DISPUTE RESOLUTION?

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The search for an appropriate mode of dispute resolution in commercial matters has been the subject of heavy scholarly debate. At a time when privatisation of commercial dispute resolution had started gaining traction, arbitration emerged as the most sought-after mechanism. While it proved to be an improvement upon the existing litigation regime, it was still fraught with hurdles and uncertainties that plagued its growth in the Indian context. This stunted development, coupled with the wide-ranging economic ramifications during the COVID-19 pandemic has prompted the exploration of alternative modes of dispute resolution. While the concept of mediation in international commercial dispute resolution is not novel and enjoys recognition in India as well, the lack of statutory backing to private mediation and barriers in enforcement have prevented it from taking the centre-stage. This paper poses frailties of arbitration in juxtaposition to the beauties of mediation to build a narrative that mediation can emerge as a front-runner in the commercial dispute resolution landscape in India. This paper also builds upon the United Nations Convention on International Settlement Agreements Resulting from Mediation to show how it has the promise to place commercial mediation on a bed of opportunities.

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The authors would like to thank and acknowledge the contribution of Mr. Alok Agrawal, 4th year student, West Bengal National University of Juridical Sciences,Kolkata for his research and editorial assistance.

I. INTRODUCTION

In an attempt to leverage India's standing in the Ease of Doing Business Index, the Government has taken various steps in consonance with its Make in India policy.[1] Consequently, India has spearheaded its Ease of Doing Business rank to 63 in the World Bank's Doing Business Report 2020 as against a rank of 130 in the Doing Business Report of 2016.[2] Considering enforceability of contracts plays a key role in easing out business, recent years have witnessed critical attempts to institutionalise and streamline dispute resolution mechanisms in India — to make India a hub for business and investments.

Amidst the increase in privatisation of commercial dispute resolution, arbitration has emerged as a popular choice. A humble attempt of the Indian legislature to align the arbitration regime in India to incorporate some of the international best practices, is reflected in the amendments[3] introduced to the Arbitration and Conciliation, 1996 ('Arbitration Act'). For instance, the amendments introduced in 2015 incorporate the IBA Guidelines on Conflicts of Interest in International Arbitration by way of detailed Schedules to the Arbitration Act – on arbitrator bias.[4]There is no dearth of literature that highlights the efforts made by the Indian judiciary to make arbitration the most sought-after mode of dispute resolution.[5] As on this date, one might list a catena of judgments of courts across the country that radiate a pro-arbitration approach of the judiciary — ranging from reluctance to grant anti-arbitration injunctions[6] to restricting the scope of resistance to enforcement of foreign arbitral awards.[7]

As positive as these developments may be, the glaring concerns existing in the arbitration landscape in India cannot be completely overlooked. For instance, the two most important phases in the life of an arbitral award,i.e. challenge to an award and enforcement of an award are perceived to be fraught with uncertainties. Further, the transition in the arbitration regime from 1996 till 2020 has not been smooth – spanning over issues related to role of Indian courts in foreign-seated arbitrations and grounds for challenge to arbitral awards.[8] Thus, the arbitration jurisprudence in India has evolved with its own share of good, bad and ugly phases.

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[1] World Bank Group, 'Doing Business 2020' (24 October 2019) 10 <www.doingbusiness.org/en/reports/global-reports/doing-business-2020> accessed 19 July 2020.
[2]ibid.
[3]Arbitration and Conciliation (Amendment) Act 2015; Arbitration and Conciliation (Amendment) Act 2019.
[4]Arbitration and Conciliation Act 1996, schsV, VII.
[5]Amal Ganguli, 'New Trend in the Law of Arbitration in India' (2018) 60(3) J of the Indian L Institute 249; Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the judiciary and legislature rein in the Unruly Horse' (2017) 83(2) CIArbThe International J of Arbitration, Mediation and Dispute Management 157; Anjali Anchayil, 'Bhatia International to Videocon Industries and Yograj Infrastructure: Recasting the Foundations of Arbitration Law in India' (2013) 291(1) Arbitration International 105; SAhuja, 'Arbitration Involving India Recent Developments' (2016) 18 Asian Dispute Review 132.
[6]*Kvaerner Cementation India Limited v Bajranglal Agarwal*[2012] 5 SCC 214; *McDonald's India Pvt. LtdvVikramBakshi*2016 SCC Online Del 3949; *Bharti Tele-Ventures Ltd. v DSS Enterprises Pvt. Ltd.* 2018 SCC OnlineDel 9650; *Himachal Sorang Power Private Limited &Anr v NCC Infrastructure Holdings Limited* 2019 SCC Online Del 7575; *Dr. Bina Modi v Lalit Modi and Ors* 2020 SCC Online Del 901.
[7]*Vijay Karia and Ors. vPrysmianCaviSistemi SRL and Ors*2020 SCC OnLine SC 177;*Shri Lal Mahal Ltd. v ProgettoGrano Spa*[2014] 2 SCC 433.
[8]*Bharat Aluminium Co.v Kaiser Aluminium* [2012] 9 SCC 648.

The first part of the paper explains the existing legal regime surrounding international arbitration and explores the limitations which compromise the efficacy of the process. In that context, it builds into the process of mediation to understand where it stands in the international arena in terms of its prospects as an appropriate mode of commercial dispute resolution. Next, with the United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019 ('Singapore Convention') being the latest addition, the paper analyses the same to show how it improves upon the inherent shortcomings of mediation, most notably in dealing with the biggest critique of the process—its cross-border enforceability.

II. THE EBB AND FLOW OF ARBITRATION

As has been noted by Lucy Reed:

> "*A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration "takes too long" (with 56% of those surveyed strongly agreeing) and "costs too much" (with 69% strongly agreeing).*"[9]

Often the success of an arbitration proceeding is measured in terms of the costs involved (including administrative expenses, legal fees, fees of arbitrators *etc*.) and the time taken. However, such an assessment may be a problematic proposition. Sometimes, higher costs involved in the proceedings act to the advantage of the parties, as they are incentivised to bring the proceeding to a conclusion and not leave it midway. Dr. Abhishek Manu Singhvi, speaking out of his personal experience of appearing as a counsel in arbitration proceedings for over 15 years, has pointed out that while some of the international best practices in arbitration (like finishing arguments in one go, not cancelling dates, imposing strict time-limits for oral arguments *etc*.) are adopted in international arbitrations seated in India, involving Indian judges and lawyers, these are almost never adopted in domestic arbitrations seated in India, primarily owing to the low cost of the proceedings.[10] Thus, according to him, it is the high costs involved in international commercial disputes that automatically bring in a sense of discipline and commitment in the stakeholders, particularly the parties.[11]

Likewise, assessing success of a jurisdiction based on the 'time' factor may be irrelevant since prominent arbitral jurisdictions like Singapore and Hong Kong do not have a time limit for arbitration proceedings,[12] but are still considered popular hubs of arbitration. The position in India, as it stands, post the amendments in 2019, is that though a time limit is fixed for domestic arbitrations, this limit does not extend to international commercial arbitrations.[13]

If cost and time were the only determinants, then parties could opt for expedited arbitration or summary proceedings offered by various arbitral institutions for resolution of

[9]Lucy Reed, 'More on Corporate Criticism of International Arbitration' (*Kluwer Arbitration Blog*, 16 July 2010) <http://arbitrationblog.kluwerarbitration.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/?doing_wp_cron=1595886080.3354880809783935546875#:~:text=A%20recent%20study%20of%20the,with%2069%25%20strongly%20agreeing> accessed 20 August 2020.

[10]Dr. Abhishek Manu Singhvi, 'Memoirs of a Personal Journey through Indian Arbitration Law' (2016) 4(2) Indian J of Arbitration L 15.

[11]ibid.

[12]Singapore Arbitration Act 2001, s 6(1)(b); Hong Kong Arbitration Ordinance 2011, s 72(1).

[13]Arbitration and Conciliation Act 1996, s 29A.

commercial disputes. But expedited arbitration proceedings will fail to offer the host of benefits that mediation offers, as discussed hereafter. The potential consequences of a challenge at the seat and resistance to enforcement, in the country where enforcement is sought, would still endanger an award which is an outcome of an expedited or summary procedure. These potential consequences would also add to the time taken, defying the purpose behind an expedited arbitration.

A. CHALLENGES TO ENFORCEMENT OF AWARDS

Pursuant to an award being passed, it may be subjected to challenge proceedings at the seat of arbitration. Further, even if the award survives the challenge proceedings, in case of non-compliance with the award, it would have to be recognised in India, which would then give way to execution proceedings. Notably, the two most important phases in the life of an arbitral award,i.e. challenge to an award and enforcement of an award, are often fraught with uncertainties.

Sometimes the roadblocks to enforcement may be legitimate, such as in case of awards rendered in non-reciprocating countries;[14] however, there may be roadblocks built on legislative loopholes as well— used as delay tactics by recalcitrant parties. There may also be cases of initiation of insolvency proceedings and declaration of moratorium under the Insolvency and Bankruptcy Code 2016 ('IBC').[15] This protracts the entire journey before enforcement, as the moratorium imposes a bar on the institution or continuation of pending proceedings against the corporate debtor (respondent in arbitral proceedings) including enforcement of the arbitral award, till the completion of the corporate insolvency resolution process.[16] This issue is expected to rise manifold, with the implementation and notification of the law on cross-border insolvency in India.[17]

Challenges to an award may also be premised on an utter disregard of the settled law, which are deployed as mere delay tactics. Such frivolous delays and hurdles in enforcement of an award have resulted in deliberations for waiver of a right to set aside an award.[18] Notably, there is considerable lack of consensus worldwide on such waiver by parties, or allowing party autonomy to override other policy considerations.[19]

B. 'JUDICIALISATION' OF ARBITRATION

When it comes to appointment of arbitrators, appointment of members of the Bar and former members of the Bench is not an uncommon practice in India. Not just the parties, even the courts in India often appoint retired judges as arbitrators, over other professionals, who

[14]See Arbitration and Conciliation Act 1996, s 44(b).
[15]Insolvency and Bankruptcy Code 2016, s 14.
[16]ibid; *Alchemist Asset Reconstruction Company Ltd v Hotel GuadavanPvt. Ltd* AIR 2017 SC 5124; *KS Oils Ltd. v The State Trade Corporation of India Ltd. &Ors*2018 SCC OnLine NCLAT 352; *Power Grid Corporation of India v Jyoti Structures Ltd*(2018) 246 DLT 485.
[17]Ministry of Corporate Affairs, Government of India, *Report of Insolvency Law Committee On Cross Border Insolvency* (October 2018)<https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf> accessed 5 September 2020; Insolvency and Bankruptcy Code 2016, ss 234-235 (yet to be notified).
[18]Olga Boltenko, 'Can or Should Parties be Able to Waive the Right to Set Aside an Arbitral Award?' (2018) 20(3) Asian Dispute Rev 119 – 124.
[19]ibid.

might otherwise be competent as arbitrators.[20] Influenced by this trend, parties tend to appoint former judges of High Courts or the Supreme Court as arbitrators with the hope that the resultant awards would be clothed with better credibility and have a greater chance to withstand judicial scrutiny.[21]

This has led to a gradual 'judicialisation' of the entire arbitral process, particularly in cases of *ad hoc* arbitrations, since the arbitrators yield a greater influence on the procedure as compared to institutional arbitrations.[22] Implying, the arbitrators may bring in their courtroom experience of an adversarial system of trial into the arbitration room— transforming a less formal arbitration set-up into a formal court proceeding. An instance of such adversarial hangover is when arbitrators adopt procedural rules in arbitral hearings, which are otherwise not binding in arbitrations.[23]

In the context of international commercial arbitration, it becomes more problematic when the arbitrators are drawn from different legal systems,i.e. civil and common law systems.[24] The individuals appointed as arbitrators tend to bring with them experiences from their legal backgrounds which sometimes leads to conflict while devising the rules of procedure and evidence-taking by an arbitral tribunal. An arbitrator from a civil law background gives importance to written testimony over oral testimony, whereas an arbitrator from a common law background may be more oriented towards the common law practice of discovery and cross examination.[25]

Such 'judicialisation' of the proceedings may defy the very objective of arbitration as an 'alternate' dispute resolution mechanism, by drawing it closer to litigation. Further, it would also result in parties paying exorbitant fees where the format becomes more of a court hearing with adjournments being granted regularly.[26]

C. SETTING THE CONTEXT

While the issues discussed above do not remain restricted to commercial disputes, they have a cascading adverse effect, specifically in cases of commercial disputes, as what lies at the centre of the dispute is a business relationship, which, had the dispute not arisen, would have been a long-lasting one.

Post the COVID-19 pandemic, parties, counsel and arbitrators worldwide are adapting to the new reality of remote hearings in the arbitration process and numerous issues associated with remote hearings have started being highlighted. The potential challenges to

[20]Badrinath Srinivasan, 'Appointment of Arbitrators by the Designate under the Arbitration and Conciliation Act: A Critique' (May 2014) 49(18) Economic and Political Weekly 59, 62.
[21]BibekDebroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India – Resolve in India', (2016) 15<https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf> accessed 19 July 2020.
[22]Leon Trakman and Hugh Montgomery, 'The Judicialization of International Commercial Arbitration: Pitfall or Virtue' (2017) 30(2) Leiden Journal of International Law 405.
[23]Arbitration and Conciliation Act 1996, s 19.
[24]Leon Trakman and Hugh Montgomery, 'The Judicialization of International Commercial Arbitration: Pitfall or Virtue' (2017) 30(2) Leiden J of Intl L 405; Vijay Bhatia, 'Judicialiation of International Commercial Arbitration Practice: Issues of Discovery and Cross-Examination' (2011) 1 Lapland L Rev22-23.
[25]Javier H. Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004)5(1) Chicago J of Intl L304, 309; Joachim Zekoll, 'Comparative Civil Procedure: Procedural Harmonisation through International Arbitration'in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 1349.
[26]Law Commission of India, *Report No. 246 Amendments to the Arbitration and Conciliation Act 1996* (August 2014) 12.

awards based on remote hearings, allegations of breach of parties' right to be heard and treated equally is being discussed.[27] With this backdrop and in light of the fact that parties have already been facing an economic setback due to the ongoing crisis, it becomes imperative to explore other dispute resolution mechanisms which are not only cost effective, but also bereft of the uncertainties and challenges discussed above.

This paper is an attempt to explore if mediation could be the front-runner in commercial dispute resolution in India— filling the gaps perceived in arbitration. This narrative will base itself upon reasons other than high cost, inordinate delay and judicial interference and uncertainty associated with arbitration. Therefore, arguments in this paper will hold relevance not just in the context of the current pandemic but beyond as well.

III. DECODING AN 'APPROPRIATE' DISPUTE RESOLUTION MECHANISM – MEDIATION

Hon'ble Chief Justice Sundaresh Menon in the Supreme Court of Singapore has pointed out that it is time to shun the practice of understanding ADR as 'alternative' dispute resolution and transform it into 'appropriate' dispute resolution.[28]While 'arbitration' and 'litigation' continue to be extensively preferred as a mode of dispute resolution, it is imperative for disputing parties to explore the more 'appropriate' or 'proportionate' method of dispute resolution instead merely an 'alternate' mode. In the view of Justice Menon, while 'alternative' is often misunderstood to mean a traditional and rigid adjudicatory or Court based form of resolution, 'appropriate' denotes a flexible approach where parties are free to choose from a wide range of options, and customise it to their case depending on the subject matter or the desired outcome.[29]

In cases of disputes arising out of commercial contracts, it is commonplace for parties to attempt settlement and/or mediation prior to arbitration or litigation, as the case may be.[30]In a significant number of commercial disputes, parties end up settling the dispute for myriad reasons ranging from preservation of business relations to saving time and resources.[31]Therefore, identification of interests of the disputing parties *vis-à-vis* the outcome, is of paramount importance. This would be absent in an adversarial form of adjudication. Conversely, facilitative or evaluative dispute resolution such as mediation would consider the interests of parties, and lay down a range of possible solutions to arrive at a suitable agreement.

Successful mediations and settlement agreements are, inherently self-executing, at least in the short-term and do not require enforcement, which is a considerably arduous phase in international dispute resolution. This is because parties in a business relationship who have willingly arrived at a mediated settlement, would expectedly, in most cases, not wriggle out

[27]Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37(4) J of Intl Arbitration407 – 448.

[28]Justice Sundaresh Menon, 'Shaping the Future of Dispute Resolution & Improving Access to Justice' (Global Pound Conference Series, Singapore 17 March 2016) <https://www.supremecourt.gov.sg/Data/Editor/Documents/Global%20Pound%20Conference%20Series%202016,%20Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice.pdf> accessed 30 April 2020.

[29]ibid 14; Jeffrey Scott Wolfie, 'Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate) Dispute Resolution' (2001) 36(4) Tulsa L Rev 785.

[30]See United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018, opened for signature 7 August 2019), Preamble.

[31]ibid.

of their obligations as this would undoubtedly jeopardise their relations with the opposite parties as well as their reputation in the commercial world.

Further, a survey conducted by Singapore International Dispute Resolution Academy shows that compared to arbitration users, mediation users consider costs to be more important, and are more satisfied with it.[32]This stems from the fact that arbitration users weigh other factors like enforceability and finality more than costs as a factor for choosing their mode of resolution. Consequently, their satisfaction with enforceability overrides their dissatisfaction with the high associated costs. Whereas, when coming to mediation users, since enforceability is not really a cause of concern, as discussed above, costs remain the only relevant consideration. This appears to suggest that mediation is the choice of dispute resolution for parties who are cost-sensitive.[33]

Incorporation of mandatory mediation clauses may also extend a certain degree of assurance or certainty to parties of the possibility of negotiations or settlement, which would in-turn support a continuing business relationship. Therefore, mediation clauses are generally incorporated as a pre-cursor to litigation or *in tandem* with arbitral clauses— in the form of hybrid clauses such as 'Med-Arb' or 'Arb-Med-Arb', or as multi-tier dispute resolution clauses.[34]

In light of the above, there have been suggestions by the High-Level Committee, chaired by Justice B.N.Srikrishna ('the Srikrishna Committee'), to review the institutionalisation of arbitration mechanisms so as to incorporate 'Med-Arb' or 'Arb-Med' clauses in the procedure of arbitral institutions in India.[35] The Srikrishna Committee has also suggested that each arbitral institution must mandatorily maintain a mediation cell, with a panel of mediators, where parties must be prompted to resort to mediation, within a limited time frame.[36]

As to the stage at which parties should resort to mediation— the Srikrishna Committee has recommended that "the possibility of parties seeking mediation, before or during the course of the arbitral proceedings, may be through a limited stay of arbitral proceedings (barring hearings on interim measures) for a specified time, when the parties should make intensive efforts to arrive at a mutually acceptable settlement".[37]

For brevity, this part has been divided into three sections. The first section explains the nuances of the mediation process and shows how it offers a whole array of benefits to the parties — ranging from confidentiality to flexibility and party autonomy. The second section charts out the existing legal framework surrounding mediation, especially in the Indian context. It exposes how there does not exist a uniform code on mediation which inadvertently

[32]Singapore International Dispute Resolution Academy, *Preliminary Report, International Dispute Resolution Survey: Currents of Change* (2019) 7 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf> accessed 30 April 2020.
[33]ibid.
[34]Brian A. Pappas, 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20 Harvard Negotiation L Rev 157.
[35]Ministry of Law and Justice, Government of India, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) 85 <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 30 April 2020.
[36]ibid 87.
[37]ibid.

creates a legislative vacuum. The last part analyses the drawbacks of the mediation process, especially with respect to the point on enforceability of mediation settlements.

A. PROCESS OF MEDIATION

A mediator's job remains restricted to facilitating the parties to arrive at their self-designed solution (facilitative model) or evaluating the claims of the parties using his legal and commercial expertise (evaluative model), without giving a binding decision.[38] Mediation is often aimed at a durable win-win solution as opposed to arbitration and litigation that often result in a win-lose situation. While the parties oscillate between the Best Available Alternative to Negotiation Agreement ('BATNA') and Worst Available Alternative to Negotiation Agreement ('WATNA'), the mediator tries to steer the parties to arrive at a Most Likely Alternative to Negotiated Agreement ('MLATNA').[39]

As to the form of mediation, the mediator may restrict himself to being 'facilitative' or 'advisory' and focus on facilitating solutions that are driven by the interests of parties.[40] Parties may also choose to expand the role of the mediator to being more 'evaluative' or 'directive'[41] — where mediators along with the lawyers of the parties drive the legal issues and implications thereof (including advice and guidance to the parties on a resolution which would be consistent with their options in arbitration or litigation).

It is incumbent on parties to engage a mediator, equipped with the requisite expertise and experience in international investment, and applicable laws. This may be achieved with the help of organisations such as the International Mediation Institute,[42] or mediators empanelled with leading institutions such as Singapore International Mediation Centre.

One of the greatest benefits that mediation offers, and which is seen largely missing in other adversarial dispute resolution methods, is the ability to create an enduring relationship between the parties, subsequent to the settlement. This feature of mediation attracts commercial entities who are willing to engage in long-term relationships with the other party.

The conduct of a caucus session (private session with each of the parties) by the mediator in a mediation ensures that the parties' interests and concerns are best known to the mediator, while the opposite party continues to remain largely unaware of confidential information shared with the mediator during the caucus.[43] The use of caucus in mediation makes it more suitable for resolution of commercial disputes as parties like to keep some of their business/commercial information and concerns confidential.

Therefore, besides the cost and time determinant, mediation proves to be beneficial in various other determinants like flexibility, certainty of outcome and the prospect of continuing business relationships. Notwithstanding the above, arbitration continues to be a preferred choice for dispute resolution, for which, a significant reason may be attributed to

[38]David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2006) 9.
[39]Roger Fisher and William Ury,*Getting to Yes: Negotiating Agreement Without Giving In* (rev edn, Penguin 2011).
[40]'Article 2. Definitions' in Nadja Alexander and Shouyu Chong (eds), *The Singapore Convention on Mediation: A Commentary*, vol 8 (Kluwer Law International, 2019) 45, 53.
[41]Leonard L. Riskin, 'Decision-Making in Mediation: The New Old Grid and the New New Grid System' (2003) 79(1) Notre Dame Law Review 1–53.
[42]Patrick Deaneet al 'Making Mediation Mainstream' in Arnaud Ingen-Housz (eds), *ADR in Business: Practice and Issues Across Countries and Cultures*, vol 2 (Kluwer Law International, October 2010).
[43]Susan Silbey and Sally Merry, 'Mediator Settlement Strategies' (1986) 8(1) L and Policy 10.

the lack of a comprehensive legal framework for mediation and enforcement of mediated agreements, as discussed below.

B. AN OVERVIEW OF THE EXISTING LEGAL FRAMEWORK

Colloquially, conciliation and mediation are often used interchangeably. Even the UNCITRAL Model Law on International Commercial Conciliation, 2002 ('Model Law on Conciliation') defines 'conciliation' to include mediation.[44] However, India refrained from adopting the same. In fact, it clarified that as per Indian domestic law, 'mediation' and 'conciliation' are not synonymous.[45] In India, conciliation is governed by Part III of the Arbitration Act, which makes the settlements enforceable as 'consent awards'.[46]

The Model Law on Conciliation was subsequently amended by the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 ('Model Law on Mediation'). This refers to the term 'mediation' instead of 'conciliation',[47] to help parties adapt to the actual and practical use of the terms and enhance the prominence of the Model Law.

While India has not adopted the Model Law on Mediation,[48] 'mediation' as a mode of dispute resolution, finds place in broadly three situations. First, court-referred mediation under Section 89 of the Code of Civil Procedure, 1908 ('CPC'),[49] wherein a court may refer a case for mediation, to be conducted in accordance with the applicable rules (such as Mediation and Conciliation Rules, 2004 framed by the High Court of Delhi). Upon the parties successfully arriving at a settlement, the court issues a final and binding decree granting enforceability to the settlement.[50] Second, mediation under a statute like the Commercial Courts Act, 2015 ('Commercial Courts Act') which requires parties to exhaust the remedy of pre-institution mediation before institution of a commercial suit.[51] If the parties successfully arrive at a settlement, it would be enforceable as a consent award under the Arbitration Act.[52] Other statutes such as the Industrial Disputes Act, 1947,[53]the Companies Act, 2013,[54] and the recently notified Consumer Protection Act, 2019,[55] also provide for mediation; however, their applicability is restricted to cases of industrial disputes, disputes pending before the company law tribunals and consumer disputes, respectively. Third, there is also private mediation offered by mediators or institutional mediation centres, beyond the reference of the court.

While 'mediation' is yet to be accorded with a statutory definition in India, it has undergone a significant transition in the recent past, as a dispute resolution mechanism.

[44]UNCITRAL Model Law on International Commercial Conciliation, art 1(3).
[45]UNGA, United Nations Commission on International Trade Law Sixty Third session (Vienna 7-11 September 2015) A/CN.9/WG.II/WP.191.
[46]Arbitration and Conciliation Act 1996, s 74.
[47]UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018, art 1.
[48]'Status: UNCITRAL Model Law on International Commercial Conciliation (2002)' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status> accessed 26 September 2020.
[49]Code of Civil Procedure 1908, s 89.
[50]*Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24; Code of Civil Procedure 1908, Order XXIII, r 3.
[51]Commercial Courts Act 2015, s 12A.
[52]ibid, s 12A(5).
[53]Industrial Disputes Act 1947, s 4.
[54]Companies Act 2013, s 442.
[55]Consumer Protection Act 2019, s 37.

Starting from the Supreme Court's categorisation of cases suitable for alternative dispute resolution processes[56] to the enactment of the Commercial Courts Act, along with the Pre-Institution Mediation and Settlement Rules 2018 — India has come a long way, ushering in new prospects in the mediation landscape.

Notably, the first and second types of mediation discussed above are court-directed mediations and/or pre-cursors to litigation under the respective statutes. Therefore, in the absence of free consent of parties to mediate or party autonomy in the mediation process, the possibility of christening such mediation as an 'effective' or 'appropriate' dispute resolution mechanism appears bleak. Further, the resultant settlement under the Commercial Courts Act would be enforceable as a 'consent award' under the Arbitration Act.[57] Accordingly, the threats of challenge at the seat of arbitration and resistance to enforcement of arbitral awards would continue to haunt.

Therefore, though the situation in India with regards to mediation has been encouraging, the prospect of private mediation remains grim. Contracting parties still await a comprehensive law governing private mediation in case of contractual disputes.

The CPC comes into play if a mediator has been appointed by the court. Consequently, the rules governing mediation like the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 or the Civil Procedure Mediation Rules do not apply to private mediations. Even 'mediator' denotes mediators operating under the court's mediation scheme as no law accords such status to a private mediator.[58] Likewise, there is no regulation in place providing for certification or code of conduct of a mediator in a private mediation.[59] Additionally, courts are not obligated to mandatorily refer parties to mediation in cases of mediation clauses in the underlying contracts, as in the case of arbitrations.[60]

The legislative vacuum in enforcement of settlements in private mediations was further widened by the Delhi High Court in *Shri Ravi Aggarwal* v. *Shri Anil Jagota.*[61]It observed that settlement agreements arising out of private mediations are not enforceable as settlement agreements arising out of conciliations under Part III of Arbitration Act.[62]

Recently in January 2020, the Supreme Court has reportedly set up a panel headed by senior mediator Niranjan Bhatt, to supplement a draft legislation on mediation by recommending a code of conduct for mediators.[63] The panel has been appointed by the Supreme Court's Mediation and Conciliation Project Committee, set up in 2005, headed by Hon'ble Mr. Justice Rohinton Fali Nariman, and is expected to work *in tandem* with the

[56]*Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. Pvt. Ltd. and Ors* (2010) 8 SCC 24.
[57]Commercial Courts Act 2015, s 12A(5).
[58]SriramPanchu, *Mediation Practice & Law: The Path to Successful Dispute Resolution* (2nd edn, Lexis Nexis 2015) 321.
[59]Mediation and Conciliation Project Committee, Supreme Courtof India, Delhi, *Mediation Training Manual of India* 42
<https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> accessed 19 July 2020.
[60]Arbitration and Conciliation Act 1996, s 8.
[61]*Shri Ravi Aggarwal v Shri Anil Jagota*2009 SCC OnLine Del 1475.
[62]ibid.
[63]Ajmer Singh, 'Supreme Court forms Committee to draft mediation law, will send to Government' The Economic Times (19 January, 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms> accessed 19 July 2020; NITI Aayog, *Catalyzing Online Dispute Resolution in India* (12 June 2020) <https://niti.gov.in/catalyzing-online-dispute-resolution-india> accessed 19 July 2020.

latter. It has taken up the task to draft a possible central legislation for mediation to give legal sanctity to disputes settled through mediation which can be proposed to the Central Government.[64]

The Supreme Court had in a previous instance impressed upon the Government to consider the feasibility of enacting Indian Mediation Act catering to mediation, in general.[65] Referring to laws on mediation enacted in jurisdictions such as Australia, Brazil, Italy, Malaysia and Singapore, similar thoughts were echoed by the Srikrishna Committee in the year 2017 for a standalone legislation for mediation in India.[66]

C. POST-MEDIATION ENFORCEMENT AND ROADBLOCKS

Generally, an enduring challenge in resorting to mediation in case of an international commercial dispute is that the outcome is recorded in the form of a 'settlement agreement' which is given the legal status of a contract.

However, as afore-mentioned, successful mediations and negotiated agreements are often perceived as self-executing, without the need for enforcement proceedings. The requirement for enforcement proceedings, on the other hand, proves to be burdensome in case of international arbitrations and litigations.

In cases where an arbitration proceeding finally yields an award (including consent awards), they are ridden with the risk of challenge at the seat of arbitration. In case the challenge does not sustain, the award is then exposed to the risk of being resisted at the enforcement stage.[67]It is only after these risks are subverted that an arbitral award reaches the execution stage. However, in cases of a mediation settlement, the grounds for resisting enforcement of the settlement remain fairly restricted, as discussed below. With this, mediation in the dispute resolution clause will instil confidence and faith in parties for a continued amicable relationship and resolution of disputes, if any.Therefore, enforceability of mediation settlement agreements would rarely be a cause of concern for pro-mediation jurisdictions. Nonetheless, provisions for enforceability of mediation settlements is perceived as a tool to enhance credibility and leverage mediation as a way of settling international commercial disputes.[68]

A study has indicated that international commercial mediation users did not press upon enforceability as a key criteria, but rather focused on impartiality/neutrality (86%), speed (85%) and confidentiality (83%) as 'absolutely crucial' factors determining their choice.[69] However, in determining the mode of dispute resolution, the top three important

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[64]ibid.

[65]*M. R. Krishna MurthivThe New India Assurance Company* Ltd. AIR 2019 SC 5625.

[66]Ministry of Law and Justice, Government of India, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) 85 <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 30 April 2020.

[67]Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 330 UNTS 3,art V.

[68]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17, Preamble.

[69]Singapore International Dispute Resolution Academy, *Preliminary Report, International Dispute Resolution Survey: Currents of Change* (2019) 11 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf> accessed 19 July 2020 (80% of users of international commercial mediation indicated impartiality/neutrality as the most important factor); S. Strong, 'Realising Rationality: An Empirical Assessment of International Commercial Mediation' (2016) 73(4) Washington and Lee Law Review 1973, 2030.

considerations for survey participants (external counsel and corporate users involved in international commercial disputes from 2016 to 2018) were enforceability (71%), neutrality/impartiality (56%) and cost (48%).[70]

A cumulative assessment of the above-mentioned results indicates that for parties that are inclined towards mediation, the lack of requirement for enforceability of the outcome does not deter them from indulging in the voluntary process. However, enforceability does play a role generally in determining the choice of dispute resolution mechanism for parties who are not inherently inclined towards mediation, and are considering all other forms of dispute resolution. Thus, for mediation to succeed as the most favourable forum for resolution of commercial disputes, it is important to accord enforceability to the outcome.

Before the advent of any framework for enforcement of cross border mediation settlements, enforcement of international mediation settlement agreements was primarily by way of:

(i) Enforcement proceedings by way of litigation or in accordance with the dispute resolution clause provided in the settlement agreement; or

(ii) Proceedings for enforcement of consent award, in case the terms of settlement had been crystallised into a consent award by an arbitral tribunal;[71] or

(iii) Remedies under any enabling legislation, if applicable (for instance the Swiss Civil Procedure Code[72] or the Italian Decree on Mediation in Civil and Commercial Disputes).

However, all the three options are marred by certain limitations. For instance, enforcement proceedings by way of litigation/dispute resolution mechanism would effectively defeat the underlying mediation. This is because the primary purpose behind parties resorting to mediation was to subvert the risks associated with litigation/arbitration and not to litigate/arbitrate even after the settlement is reached. Enforcement of such obligations in the courts of one jurisdiction may also yield different results from another.[73] Similarly, in case of enforcement of consent awards, they may still be subjected to subsequent challenge, as per the law of the seat or face resistance in the enforcement process, as per the law of the place of enforcement.[74] Thus, before recording a settlement in the form of a consent award, an arbitral tribunal would have to ensure that the resultant award is 'enforceable'.[75]

[70]Singapore International Dispute Resolution Academy, *Preliminary Report, International Dispute Resolution Survey: Currents of Change* (2019) 4 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf> accessed 19 July 2020.
[71]Arbitration and Conciliation Act 1996, s 30.
[72]Swiss Civil Procedure Code 2008, art 217.
[73]'Article 3. General Principles', in Nadja Alexander and Shouyu Chong (eds), *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution*, vol 8 (Kluwer Law International 2019) 67, 70.
[74]UNCITRAL Model Law on International Commercial Arbitration 1985, arts 34,36.
[75]YaraslauKryvoi and Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40(3) Brooklyn J of Intl L 827, 831.

Concerns of this nature and magnitude have paved way for the Singapore Convention.[76] It defines 'mediation' as:

> *a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.*[77]

Article 14(1) provides that the Singapore Convention shall come into force six months from deposit of the instrument of ratification, acceptance, approval or accession by at least three member states.[78] With six nations (namely, Singapore, Fiji, Saudi Arabia, Qatar, Belarus and Ecuador) having deposited their respective instruments of ratification/acceptance/approval the Singapore Convention entered into force on 12 September 2020.[79] India signed the Singapore Convention in August 2019 thereby leveraging its position in the international mediation plane.[80]

Though India is a signatory to the Singapore Convention, it would have to be incorporated into the municipal law of India, as in case of the Arbitration Act incorporating the UNCITRAL Model Law on International Commercial Arbitration and Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

IV. THE SINGAPORE CONVENTION: JUST ANOTHER NEW YORK CONVENTION OR MUCH MORE?

The basic thrust of the Singapore Convention is to create a regime which binds the contracting parties to recognise and enforce settlement agreements resulting from mediations in 'international commercial' disputes.[81]

The Preamble of the Singapore Convention recognises that:

> *…the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.*
>
> *…the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations*.[82]

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[76]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17.
[77]ibid art 2(3).
[78]ibid art 14(1).
[79]'Press Release', *Singapore Convention on Mediation enters into force* (12 September 2020) <https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force> accessed 24September 2020.
[80]See United Nations Treaty Collection, 'Commercial Arbitration and Mediation: United Nations Convention on International Settlement Agreements Resulting from Mediation' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 24 September 2020.
[81]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17, Preamble.
[82]ibid.

A settlement agreement would be considered 'international' if, at the time of the conclusion of the settlement agreement, the place of ordinary business of at least two of the parties to the settlement agreement was located in different States.[83] Moreover, the scope of the Singapore Convention extends only to disputes that are 'commercial' in nature, though it does not define the term 'commercial'.

It is noteworthy that this is not the first attempt towards cross border recognition and enforcement of international mediated settlement agreements. To bolster the usage of mediation in dispute resolution in the European Union, the European Parliament in the year 2008 adopted the EU Mediation Directive ('EU Directive') to allow for recognition and enforcement of mediated settlement agreements within the member states.[84] The EU Directive provided that member states should translate its terms into their domestic laws.[85] It also provided that mediated settlements arrived at in one member state shall be recognised and made enforceable in other member states as if they were judgements of the Court, by means of a 'mediation settlement enforcement order'.[86]

This explains why none of the EU Member States have signed the Singapore Convention. The Singapore Convention is narrower in scope than the EU Directive as the former applies only to commercial mediation settlements. However, the Singapore Convention does not operate on the basis of reciprocity unlike the EU Directive and, therefore, provides for a more direct enforcement. Hence, it has been argued that even the EU should ratify the Singapore Convention on behalf of its member states to ensure greater enforceability of cross-border mediation settlement.[87]

A. RECIPROCITY REQUIREMENTS: NEW YORK CONVENTION V. SINGAPORE CONVENTION

When it comes to enforcement of foreign judgements or awards in India, 'reciprocity' is a quintessential feature, implying that recognition and enforcement are contingent on the reciprocal arrangement between India and the country where the judgment/award is rendered.[88] Therefore, judgments/awards only from reciprocating territories would be recognised and directly executable under Indian law, as a decree of an Indian court.[89]

In the context of execution of foreign judgements, a 'reciprocating territory' refers to any country or territory outside India which has been declared by the Central Government, by notification in the Official Gazette, to be a 'reciprocating territory' for the purposes of execution of foreign judgments under Section 44A of the CPC.[90] In the absence of such a

[83]ibid art 1(1).
[84]EU Mediation Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (EU Mediation Directive).
[85]EU Mediation Directive, Preamble.
[86]EU Mediation Directive, art 6.
[87]HarisMeidanis, 'Singapore Convention Series: A plea for the Adoption of the Singapore Convention by the EU' (*Kluwer Mediation Blog*, 20 March 2019) <http://mediationblog.kluwerarbitration.com/2019/03/20/singapore-convention-series-a-plea-for-the-adoption-of-the-singapore-mediation-convention-by-the-eu/> accessed 25September 2020; HarisMeidanis, 'International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements' (2019) 85(1) CIArb International Journal of Arbitration, Mediation and Dispute Management 47.
[88]Code of Civil Procedure 1908, s 44A; Arbitration and Conciliation Act 1996, s 44(b).
[89]Code of Civil Procedure 1908, s 44A; Arbitration and Conciliation Act 1996, ss 44, 49.
[90]Code of Civil Procedure 1908, s 44A Explanation 1.

notification, a fresh civil suit would have to be filed in India for execution of the underlying foreign judgment.[91]

Likewise, the New York Convention operates on the basis of reciprocity reservation.[92] Importing that into the Indian law, the Arbitration Act provides for a reciprocity requirement.[93] Thus, enforceability of a foreign award, would depend on the reciprocal arrangement between India and the country where it was rendered. As is the case with foreign judgments, a notification is required to be published by the Central Government in the Official Gazette, declaring such 'reciprocal territories'.[94] Though reciprocity has its justifications deep rooted in international comity and principle of co-operation between sovereign states,[95] it often creates more challenges for the parties that seek execution of a judgement or enforcement of an award.

Though India has notified almost all major trading nations, issue arises with respect to countries not notified by the Central Government. Out of the 195 countries recognised by the United Nations, only about 50 countries have been notified as 'reciprocating territories', keeping the number abysmally low.

By way of illustration, India and UAE entered into the 'Agreement on Juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Commissions, Execution of Judgements and Arbitral Awards' on 25 October 1999, which was ratified on 29 May 2000.[96] However, the relevant notification under Section 44A of the CPC was issued only on 17 January 2020.[97] Prior to such notification, UAE was a non-reciprocating territory and judgments from UAE could not be directly executed in India.Notably, this notification declares UAE as a 'reciprocating territory' only for the purpose of execution of foreign judgements and not for foreign arbitral awards.[98] Therefore, enforcement of UAE-seated arbitral awards in India will continue to face resistance on the ground of emanating from a non-reciprocating country, notwithstanding the bilateral arrangement between UAE and India since 1999 for enforcement of arbitral awards.[99] Considering publication of notifications declaring 'reciprocating territories' is a purely administrative process, sometimes latches or administrative glitches may impede the process of enforcement of a judgment/award.

Unlike most other multilateral enforcement regimes like the New York Convention, the Singapore Convention does not operate on the basis of reciprocity. The *travauxpreparatoires* or preparatory works of the Singapore Conventionsuggest that though a

[91]*Marine Geotechnics LLC v Coastal Marine Construction & Engineering Ltd*.,[2014] 3 AIR Bom R 193.
[92]Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959, art I(3).
[93]Arbitration and Conciliation Act 1996, s 44(b).
[94]ibid.
[95]Young-JoonMok, 'The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958' (1989) 21 Case Western Reserve J of Intl L 123.
[96]Reparation, 'Agreement between India- UAE on Juridical and Judicial Cooperation' (1 November 2012) <http://reparationlaw.com/caselaw/agreement-between-india-uae-on-juridical-and-judicial-cooperation/> accessed 5 October 2020.
[97]Department of Legal Affairs, Ministry of Law and Justice, Government of India, *Notification* (17 January 2020).
<http://egazette.nic.in/WriteReadData/2020/215535.pdf> accessed 24 September 2020.
[98]ibid.
[99]Shweta Sahu, 'UAE judgements find their way to execution in India' (*Lexis PSL*, 27 February 2020) <www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5Y9F-RMN3-GXFD-81C9-00000-00/UAE%20judgments%20find%20their%20way%20to%20execution%20in%20India> accessed 19 July 2020.

reciprocity reservation similar to that of the New York Convention was discussed, it did not garner enough support from the member states.[100] It was debated that in a scenario where reciprocity reservation was allowed and a state formulated a reciprocity requirement, it would give rise to 'legal uncertainties'.[101] Legal uncertainty may also relate to the applicability of the Singapore Convention, since under certain circumstances it might be challenging to ascertain the country of origin of a settlement agreement.[102]It was pointed out that settlement agreements could not be treated in a similar fashion as arbitral awards as it was not always easy to identify the factor connecting settlement agreements to a specific place or legal seat of settlement, whereas arbitral awards usually had a place of issuance.[103]

The scope of the Singapore Convention will thus extend to mediations conducted in any jurisdiction, irrespective of the fact that the country where the mediation was held or the agreement was signed, has ratified the Mediation Convention or not, thereby discarding a reciprocity requirement. This, apart from eradicating the scope for resisting enforcement of a mediation settlement on the ground that the settlement was reached at in a non-reciprocating country, also ensures that parties to an international commercial dispute can freely choose a jurisdiction to arrive at a settlement. Therefore, their choice would not be impaired by any reciprocity requirement. By implication, it means that a mediated settlement would be freely enforceable in India without facing any of the issues flagged above.

B. RESERVATIONS UNDER THE SINGAPORE CONVENTION

The Singapore Convention provides for two different reservations that a contracting party can avail.[104] It further restrains the scope for any subsequent reservations to be formulated by a party.[105]

Under the first reservation, a party may preclude the application of the Singapore Convention, to a settlement agreement to which it is a party or any governmental agency is a party.[106] This reservation would give leeway to the States to grant immunity to their governments or governmental agencies, who may presumably use sovereign immunity for prudent reasons of national security or public policy.[107] States may also choose to not expand such protection to instances where the government is acting in a purely commercial capacity such as in infrastructure and defence contracts.[108]

Under the second reservation, contracting parties or member states may provide for application of the Singapore Convention on an 'opt in' basis, implying that the Convention

[100]Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York 5–9 February 2018) A/CN.9/934 para 81.
[101]ibid.
[102]ibid para 83.
[103]Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna 7–11 September 2015) A/CN.9/861 para 35.
[104]United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018, opened for signature 7 August 2019) A/73/17 art 8.
[105]ibid art 8(2).
[106]ibid art 8(1)(a).
[107]United Nations, Working Group II (Intervention of Singapore, in Audio Recording) Sixty-Third Session(09:30–12:30, 8 Sep 2015).
<https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/6a94b1c8-31e4-44ba-9345-bb106caa53a2> accessed 20 May 2020.
[108]Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Third Session (2015) A/CN.9/861 para 46.

would apply to only those parties in a settlement who specifically consented to its application.[109] However, there are certain ambiguities on the manner and stage at which the parties to a mediation should agree to the application of the Singapore Convention. Implying whether the 'opt in' needs to be indicated by the parties before the commencement of the mediation proceedings or can be indicated at a later stage, remains unanswered. Also, since the Singapore Convention does not refer to a specific formulation regarding words or phrases that may be used by parties to indicate their intention to 'opt in', an undue burden is placed on the mediator to identify the intention objectively from the terms of the international mediation settlement agreement.[110]

The reservation under Article 8(1)(b) of the Singapore Convention is crucial to the extent that it helps in assessing the intention of the parties. Hypothetically, if one of the parties to the mediation opts out of the application of the Singapore Convention at the beginning of the mediation proceedings, it sends out a strong message about the intention of the party, which does not support enforcement of the settlement. In such a situation, the other party can draw adverse inference about the party's intention and may consider resorting to other methods of resolution, like arbitration, in case the mediation fails. This is because mediation is inherently a consensual and non-determinative process and its success is contingent upon the good faith participation of the parties.

Given the consensual nature of mediation coupled with the context of the 'opt in' provision, John Rawls' 'veil of ignorance' theory can be effortlessly applied to parties. A noted American and a moral and political philosopher, Rawls's theory provides that individuals in a nascent stage operate under veils of ignorance, unaware of their natural abilities, and in-turn act in the most prudent manner and naturally promote policies and allocation of resources that is advantageous and fair to all.[111] Talking in the context of a mediation, parties in the nascent stage of a mediation proceeding, in most cases, tend to operate under a veil of ignorance, since they are unaware of their bargaining power and standing *vis-à-vis* the other party and unaware of the chances of obtaining a favourable settlement. Under such circumstances, prudent parties may choose a solution that is advantageous to both the parties, i.e. granting enforceability to the outcome. Nonetheless, if at this stage a party opts out of an enforcement regime, then it casts doubts on the intention of the parties, assessment of bargaining power and the idea of fairness. In this paradigm, the reservation under Article 8(1)(b) may inadvertently help parties.

C. GROUNDS FOR REFUSAL OF ENFORCEMENT: NEW YORK CONVENTION V. SINGAPORE CONVENTION

The New York Convention confers the courts of the contracting states with the discretion to refuse to recognise and enforce an award. Such discretion can be exercised on the basis of the grounds listed under Article V thereof. Commentaries on the New York Convention state that the grounds for refusal under Article V are exhaustive in nature.[112]Further, the judicial response to grounds of refusal has failed to keep the same in

[109]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17 art 8(1)(b).

[110]'Article 8. Reservations', in Nadja Alexander and Shouyu Chong (eds), *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution*, vol 8 (Kluwer Law International 2019) 157, 164.

[111]John Rawls, *A Theory of Justice* (Harvard University Press 1971) 217.

[112]Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3426-27; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015)

line with the objective of the New York Convention,[113]i.e. to facilitate recognition and enforcement of arbitral awards. One such ground is that recognition and enforcement of a foreign award may be refused, if such recognition or enforcement would be contrary to the public policy of the country where the award is sought to be enforced.[114]India particularly, has witnessed a turbulent growth of arbitration jurisprudence over decades in determining the shaky contours of 'public policy'.[115]The Indian legislature has taken the much-needed step to rationalise the concept of public policy by introducing an explanation under Section 48(2) of the Arbitration Act to deter tactics deployed to delay enforcement proceedings on ground of public policy.[116] However, 'public policy' as a ground for refusal of enforcement remains a matter of much consternation for the judiciary in the country. Irrespective of a pro-enforcement approach adopted by Indian courts, recalcitrant parties continue to try bringing cases within the pigeonhole of 'public policy of India'.[117]

The analogous provision under the Singapore Convention is Article 5 which provides for grounds for refusal to grant relief.[118] If compared in absolute quantitative terms, the number of grounds for refusal to grant relief under the Singapore Convention is higher than its arbitration counterpart. Grounds under Article 5(1)(d), (e) and (f) of the Singapore Convention have no analogous provisions under the New York Convention, as they are applicable only in the context of mediation. For instance, Article 5(1)(d) of the Singapore Convention provides for refusal of enforcement on the ground that granting relief would be contrary to terms of the settlement agreement.[119] This goes to the root of the mediation because the settlement agreement, unlike an arbitral award, is based on consent of both the parties.

But, arguably these specific additional grounds for refusal, typical to the mediation context, sometimes mean that the scope for refusal is less and that of enforcement is high. For instance, Article 5(1) of the Singapore Convention provides for 'serious breach by mediator of standards applicable to him or the mediation' as a ground for refusal.[120] However, the provision also clarifies that the breach will be a ground for refusal only if it directly impacts the settlement agreement, thereby limiting the scope of the ground.[121] Also, use of words like

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para 11.57; Marike R.P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 166.

[113]Paulson, 'The New York Convention Misadventures in India' (1992) 7 Mealy's International Arbitration Reports 6; F.S. Nariman, 'Application of the New York Convention in India' (2008) 25 J of Intl Arb 893; J. Canfield, 'Growing Pains and Coming of Age: The State of International Arbitration in India' (2014) 14 Pepperdine Dispute Resolution Law Journal 335; Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the judiciary and legislature rein in the Unruly Horse' (2017) 83(2) CIArbThe International Journal of Arbitration, Mediation and Dispute Management 157.

[114]Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959, art V(2)(b).

[115]Moazzam Khan, 'India's Arbitration Act – the turbulent teenage years' (*Lexis PSL*, 2 November 2016) <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5M31-M521-DYW7-W30K-00000-00/India_s_Arbitration_Act_the_turbulent_teenage_years> accessed 19 July 2020; Daniel Matthew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2016) 3(1) Journal of National Law University Delhi 105.

[116]Arbitration and Conciliation Act 1996, s 48(2).

[117]Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the judiciary and legislature rein in the Unruly Horse' (2017) 83(2) CIArbThe International Journal of Arbitration, Mediation and Dispute Management 162,163.

[118]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17 art 5.

[119]ibid art 5(1)(d).

[120]ibid art 5(1)(e).

[121]ibid.

'serious'[122] and 'material'[123] in the provision indicate that the threshold for the breach needs to be high, again limiting the scope of the ground.

Moreover, refusal to enforce on ground of lack of a 'due process' during the mediation has not been included in the Singapore Convention, primarily because in case of mediation, the settlement is arrived at voluntarily and the process by which it was arrived at, becomes less relevant.[124] Implying, the parties do not have scope for invoking grounds of refusal on procedural issues, as is in case of arbitration where parties can claim refusal on procedural grounds like composition of arbitral tribunal or the arbitral tribunal being inconsistent with the agreement of the parties. This corroborates the proposition that scope for refusal under the Singapore Convention remains narrow.

Further, enforcement of arbitral awards under the New York Convention depends on the 'seat' of arbitration as the Convention recognises the possibility of annulment of arbitral awards under the law of the seat. But the Singapore Convention by decoupling the concept of 'seat' from mediation settlements wipes out the possibility of an annulment proceedings before enforcement. Thus, the Singapore Convention restricts the grounds of refusal of enforcement, since the grounds are exposed to judicial review from only one court, i.e. the court of enforcement, as compared to two courts under the New York Convention.[125] Thus, a cumulative assessment of the ease of enforcement under both the Conventions indicate that the scope for enforcement is going to be higher in Singapore Convention, as compared to its arbitration counterpart.

Arguably, such an assumption about the ease of enforcement of mediated settlements may portray them as a more lucrative option when compared to consent awards or awards arising out of fast-track procedure[126] or summary procedure,[127] even though they might be at par, in terms of the time and cost factor. This is because, though a fast track procedure or a summary procedure might cost less, in terms of time and money, than that of a mediation proceeding, awards arising out of such procedure may still be subjected to the rigours of challenge and enforcement as any other arbitral award. For instance, arbitral awards passed in case of summary disposition processes may be challenged on the ground that the party was not able to present its case,[128] since a summary procedure would entail an adjudication based on documents or along with a short oral hearing but without examination of evidence.

[122]ibid.
[123]ibid art 5(1)(f).
[124]Timothy Schanbel, 'The Singapore Convention on Mediation: A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements (2019) 19(1) Pepperdine Dispute Resolution Law Journal 42-43.
[125]Ming Liao, 'Singapore Convention Series: Refusal Grounds in the UN Convention on International Settlements Agreements resulting from mediation' (*Kluwer Mediation Blog*, 12 April 2020) <http://mediationblog.kluwerarbitration.com/2020/04/12/singapore-convention-series-refusal-grounds-in-the-un-convention-on-international-settlement-agreements-resulting-from-mediation/#:~:text=Mediated%20settlement%20agreements%20have%20no,mediated%20settl> accessed 19 July 2020.
[126]Arbitration and Conciliation Act 1996, s 29B.
[127]Singapore International Arbitration Centre Rules 2016, r 29; Arbitration Rules of Arbitration Institute of the Stockholm Chamber of Commerce 2017, r 39; Hong Kong International Arbitration Centre Administered. Arbitration Rules 2018, r 43.1; American Arbitration Association Commercial Arbitration Rules 2013, r 33.
[128]Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959, art V(1)(b); UNCITRAL Model Law on International Commercial Arbitration 1985, art 34(2)(a)(ii).

This assumption may suffer from over-generalisation, as we need to wait for the enforcement jurisprudence under the Singapore Convention to evolve over the years. Moreover, for the assumption to be true, efforts have to be undertaken by the member States to clarify and narrow down the ambit of some of the grounds under the Singapore Convention, by means of legislative enactments or judicial decisions. Only when the scope of enforcement under the Convention remains wider, can the objective of the Convention be achieved.

Further, akin to the New York Convention, the Singapore Convention refers to refusal of enforcement of a mediated settlement if it would be contrary to the 'public policy' of the country where such enforcement is sought.[129] It may be safe to expect that the arbitration jurisprudence would be a guiding light, and lessons learnt from the ebb and flow of arbitration would be implemented in case of mediated settlements as well. Implying, as much as the concerns arising from interpretation of public policy need to be looked into, one must not overlook the attempts made by the judiciary and the legislature to streamline the contours of public policy and the uncertainties resulting therefrom.

V. STRIKING THE RIGHT CHORD

In the recent past, the international commercial dispute resolution landscape has arrived at its turning point, owing to many factors like emergence of international commercial courts in Singapore[130] and Dubai,[131] adoption of the Singapore Convention and attempts to reform arbitration at international and domestic levels. Given the inherent uncertainties in international commercial litigation and international commercial arbitration, coupled with layers of challenges before enforcement, parties will feel encouraged to steer towards quicker and more efficient and effective dispute resolution methods. Though arbitration continues to be the oft-chosen mode for international commercial disputes,[132] the Singapore Convention will provide an impetus for parties to a commercial dispute to adhere to mediation to resolve disputes. Apart from the benefits that the Singapore Convention has in store, choosing mediation over other modes of dispute resolution will also lead parties towards other benefits as discussed above.

Uncertainty in achieving the expected result or outcome exists in even the most predictable legal processes. But, particularly in a situation where both the parties are not equally confident about the merit of their claims and defenses, mediation may be a preferred choice, as it does not result in a win-lose situation and the scope for challenge remains fairly restricted. For instance, in an arbitration where a party is not confident of the merits of its case or does not have a strong claim or defence, the outcome or the award is more prone to challenges than otherwise. In light of the latest addition to the arbitration jurisprudence, speculative litigation may result in costs imposed by courts.[133]Thus, in order to subvert the risk of costs being imposed or any other sanctions, parties not confident about merits of their case may consider mediation as a prudent choice.

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[129]United Nations Convention on International Settlement Agreements Resulting from Mediation 2020, A/73/17 art 5(2)(a).

[130]Singapore International Commercial Court <https://www.sicc.gov.sg> accessed 19 July 2020.

[131]Dubai International Finance Centre Courts <https://www.difccourts.ae> accessed 19 July 2020.

[132]Singapore International Dispute Resolution Academy, *Preliminary Report, International Dispute Resolution Survey: Currents of Change* (2019) 6 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf> accessed 19 July 2020.

[133]*Vijay Karia and Ors. v Prysmian CaviSistemi SRL and Ors*2020 SCC OnLine SC 177.

As regards 'judicialisation' of the mediation process, though there is no minimum qualification prescribed for the role of a mediator in case of a private mediation, the common practice has been to appoint legal practitioners who may or may not possess the required skill set but may go around referring to themselves as mediators. However, this preference accorded to legal professionals does not generally result in 'judicialisation' of the mediation proceedings inherently because of the non-adjudicatory nature of the process. The mediator does not take control of the process and merely facilitates the process, with none or negligible application of judicial mind.

Further, finality of a dispute by way of adjudicatory proceedings is marred by various procedural issues ranging from jurisdictional hurdles to reciprocity arrangements between India and the foreign country. Likewise, as already discussed, with the Singapore Convention doing away with the reciprocity requirement, unlike the New York Convention, finality of a mediation settlement is much higher than finality of an arbitral award.

While mediation in a commercial dispute is expected to create a conducive relationship besides saving costs which might have been incurred in arbitral and court proceedings, its efficacy and feasibility may be questioned when the efforts do not result in a settlement. It is also the case that, in many instances, mediation is seen to be used by an otherwise unwilling party to protract the proceedings or by a financially stronger party to drain out the resources of the financially weaker party, by prolonging the sessions, without making any meaningful attempt to resolve the dispute and subsequently dishonoring the settlement agreement reached, if any. This was made possible by the absence of an enforcing mechanism for mediation settlements. But the enforcement mechanism under the Singapore Convention will definitely downgrade such efforts by unwilling parties and disincentivise them. This is typically because when two business entities/commercial entities come together for a mediation exercise and reach at a 'mutually agreeable and amicable' solution, they gain some reputation in the business fraternity and any attempt to dishonor the settlement will tarnish the image of the defaulting entity, thereby affecting its future prospects in the particular industry or sector. However, the Singapore Convention is of no avail in a situation where mediation is being used by an otherwise unwilling party to protract the proceedings and the party deliberately does not arrive at a settlement.

Considering the results of commercial mediation as a stand-alone mechanism are not enforceable, hybrid dispute resolution practices came to the fore.[134]Such hybrid clauses including 'Med-Arb' or 'Arb-Med-Arb' clauses were primarily inserted to accord enforceability to the mediated settlement by converting it into a consent award.[135] However, with the adoption of the Singapore Convention, this is also expected to change— by clothing settlements arising out of stand-alone mediation clauses with enforceability, implying settlements arising out of stand-alone mediations do not have to be converted into a consent award anymore for achieving enforceability and such 'settlements' will be enforceable *per se*.

Needless to say, commercial mediation today is sitting on a bed of opportunities. In line with Chief Justice Sundaresh Menon's suggestion of choosing an 'appropriate' mode of resolution, instead of just another alternative, it is time to understand that arbitration and

[134]DidemKayali, 'Enforceability of Multi-tiered Dispute Resolution Clauses' (2010) 27(6) Journal of International Arbitration 551; Dilyara Nigmatullina, 'The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study' (2016) 33(1) Journal of International Arbitration 37.

[135]Singapore International Mediation Centre, *Arb-Med-Arb*, <http://simc.com.sg/dispute-resolution/arb-med-arb/> accessed 29 July 2020.

mediation are not true enemies, but rather 'frenemies', and must work in a mutualistic competition.[136]

VI. CONCLUSION

With the divergence of practice and experience of commercial mediation in different jurisdictions, the Singapore Convention is believed to bring some convergence by enforcing international mediated settlement agreements. Given the current draft of the Singapore Convention, the ground is ripe for some productive scepticism over the Singapore Convention.

India, at the outset, needs to gear towards a new legislative framework embodying the principles and obligations under the Singapore Convention. Pursuant to the EU Directive, most European countries enacted a specific legislation for enforcement of cross border mediation settlements. However, such adoption of laws did not automatically result in broader acceptability of mediation as a mode of resolution. Therefore, it remains to be seen if a statutory framework in place will change the mediation landscape in India.

In a situation where mediation is introduced as a mandatory pre-litigation or pre-arbitration stage, the forthcoming legislation needs to address the question if the time taken for mediation will be excluded from the limitation period. For example, in case there is no exclusion and parties decide to initiate mediation proceedings, they will reel under undue pressure to reach at a settlement as early as possible. Because an unsuccessful mediation at that juncture would mean parties' limitation period to file a suit has been cut short and no settlement has been reached. On the other hand, this might also mean that parties will take the mediation process seriously and not engage in delay tactics, as it may jeopardise their chance of moving to the Courts, in terms of time.

Further, in order to accord finality to a settlement agreement as given under the Singapore Convention, the agreement must be drawn up like a decree, be full-proof, and have meticulous inclusion of recitals. This will place a greater responsibility on the mediators who will need to be trained about nuances of drafting an enforceable settlement agreement. With the commercial world soon adopting mediation, we will need a greater number of mediators with domain specific knowledge. Many such concerns may arise at this stage, but the developments in India have been assuring.

[136]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/?print=print&doing_wp_cron=1597818386.3689680099487304687500> accessed 29 July 2020.