

ENSURING ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENT AGREEMENTS- A SPOTLIGHT ON THE OPTIONS

*Angshuman Hazarika**

The possibility for use of mediation to resolve disputes’ arising from international commercial relations by providing global enforceability of international mediated settlement agreements (IMSAs) is now considered a possibility, after the Singapore Convention has come into force. The Singapore Convention paves the path for enforceability of such IMSAs in all parties to the Convention much like the New York Convention (NYC) for international arbitration awards, raising hopes that it would popularise international mediation. The Singapore Convention is however not the sole path for enforcement of IMSAs and other options already available include enacting a domestic law based on the UNCITRAL Model Law on International Commercial Mediation, or even relying on independent domestic legislation delinked from either the Model Law or the Singapore Convention.

The article provides a comparative evaluation of key features of the three aforementioned paths which states could take to ensure enforceability of IMSAs with a view to identify the most acceptable path. It discusses the interlinkages between the three paths and possibility for their independent existence. The article concludes with an observation that to fulfil the target of harmonising the enforcement process, states will have to promote a standard procedure for formation and enforcement of IMSAs.

Keywords: Singapore Convention, Mediation, IMSA, Model Law, Settlement Agreements.

TABLE OF CONTENTS

I.	BACKGROUND	16
II.	MEDIATION, SETTLEMENT AGREEMENTS AND ASSOCIATED ISSUES	18
III.	SINGAPORE CONVENTION	21
IV.	MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION, 2018.	24
V.	INDEPENDENT DOMESTIC LAWS	25
VI.	WHICH PATH SHOULD A COUNTRY CHOOSE? –COMPARING THE SUITABILITY AND INTERDEPENDENCE OF THE THREE MECHANISMS	26
A.	UNDERSTANDING THE LINKAGES BETWEEN THE THREE APPROACHES.....	26
B.	POSSIBILITY FOR INDEPENDENT EXISTENCE OF THE THREE APPROACHES	31
C.	SELECTING THE PREFERRED MECHANISM AND WHETHER RATIFICATION OF THE SINGAPORE CONVENTION IS ESSENTIAL.....	32
VII.	CONCLUSION.....	34

I. BACKGROUND

The British Sociologist Martin Albrow defines globalization as “all those processes by which the people of the world are incorporated into a single world society”.¹ International trade exemplifies this singularity as nations and businesses today, are no longer restrained by physical boundaries and are increasingly going international.

As trade dilutes international borders, commercial transactions between businesses of different countries often lead to disputes between parties leading to a crack in the singularity. In such cases, parties have often found national courts to be inadequate in dealing with such disputes for reasons ranging from cost and delay to lack of qualification of national judges and their inability to deal with complex international disputes.² Resultantly, the international community has established other methods of alternative dispute resolution which provide for a quick, inexpensive, and more harmonious resolution.³ These methods, namely arbitration, negotiation, and mediation/conciliation allow parties more flexibility and the liberty to design their own dispute resolution process. Amongst these, arbitration is the most popular method in resolving cross border disputes, mostly due to its ability to enforce awards issued by International arbitral tribunals across 169 jurisdictions which are party to the New York convention (“NYC”).⁴

While the spotlight remains on arbitration, mediation is considered to offer more flexibility, and requires lesser time and costs compared to arbitration. This emanates from minimal pre and post arbitration proceedings and the possibility to avoid challenges or appeals based on a mutually acceptable settlement.⁵ A mediated settlement ensures benefit to both the sides in terms of cost and time, along with the benefit of avoiding an undesirable outcome.⁶ It also increases the chance for continued profitable relations,⁷ preserves goodwill in front of

*Angshuman Hazarika is an Assistant Professor for Business Law and Ethics at IIM Ranchi. The author acknowledges the support of Ms. Geetanjali Sharma (Free University, Berlin) and Sri Hari Mangalam (NUJS, Kolkata) in preparing the draft of this article. The comments received from anonymous reviewers have been of immense help. All errors and omissions are solely of the author.

¹ Martin Albrow and Elizabeth King (eds), *Globalization, Knowledge and Society: Readings from International Sociology* (1st edn, SAGE Publications 1990) 8.

² Thomas Gaultier, ‘Cross Border Mediation: A new solution for International commercial Dispute Settlement?’ (2013) 26(1) NYSBA International Law Practicum 38
<<https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf>> accessed 25 January 2021.

³ Jean R Starlight, ‘Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad’ (2007) 56 DePaul L Rev 569, 592.

⁴ UNCITRAL, ‘Status: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958’ <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 25 November 2021; Christina G Hioureas, ‘The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?’ (2019) 37 Berkeley Journal of International Law 215, 219.

⁵ Findlaw, ‘Alternative Dispute Resolution: Which Method Is Best For Your Client’ <<https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html>> accessed 24 February 2022.

⁶ Circuit Court of Cook County, ‘Court-Annexed Civil Mediation Process’ <https://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Law-Division/Court-Annexed-Civil-Mediation/Mediation-Process-Overview> accessed 24 February 2022.

⁷ Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19 Pepp Dis Resol L J 1, 2.

uninvolved but interested business partners and customers⁸ and provides wider ambit of confidentiality than even arbitration.⁹ According to 2010 International Chamber of Commerce (“ICC”) figures on comparative costs and time frames associated with arbitration and mediation cases, based on the disputes that the ICC had handled, the total average costs of a commercial mediation was less than five percent of the total average cost of arbitration and the time allocated to mediation ranged between ten to fifteen percent of the time usually taken for arbitration.¹⁰

However, despite its seemingly clear advantage over arbitration, the latter remains as the first choice of parties to resolve cross border disputes. In a 2018 study by the Queen Mary University, London conducted in collaboration with White and Case, 97% of the surveyed persons prefer arbitration as their preferred method of resolving cross border disputes. The same survey revealed that while mediation could be included in the process along with arbitration, arbitration is finally the preferred method for enforcement of awards owing to the ease of enforceability of the awards across the globe owing to the ratification of the New York Convention by countries across the globe.¹¹ The observation that arbitration is preferred over mediation for dispute resolution due to ease of enforceability is strengthened through a survey undertaken in 2016–2017, where, the absence of ‘cross-border mechanism for enforcement of mediated settlement agreements’ was cited as the major drawback by stakeholder groups.¹²

In a nutshell, it could be implied that to compete with arbitration, or even be considered as an alternative, international mediation would have to offer similar convenience in the enforcement process for settlement agreements as seen for arbitration awards, especially in relation to avoiding specific legal or national systems, flexibility, cost and time efficiency.¹³ In the absence of such a mechanism, the non-breaching party is frequently required to enforce a settlement agreement as a contract in a foreign jurisdiction.¹⁴ This puts up the problem of not only going through re-litigation but dealing with country specific law and remedy under general contract law. It has been observed that parties are very disinclined to initiate litigation in case of breach of a settlement agreement, especially if they are forced to do so abroad and are required to re-litigate a merits phase.¹⁵

⁸ Clemens Treichl, ‘The Singapore Convention: Towards a universal standard for the recognition and enforcement of International Settlement agreements?’ (2020) 11 *Journal of International Dispute Settlement* 409–429.

⁹ *ibid.*

¹⁰ Timothy Martin, ‘International Mediation: An Evolving Market’ in Arthur W Ravine (ed), *Contemporary Issues In International Arbitration And Mediation: The Fordham Papers* (MartinusNijhoff, 2011) 404.

¹¹ QMUL and White & Case, ‘2018 International Arbitration Survey: The evolution of International Arbitration’ (*Queen Mary University of London*, 2018)

<<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed 25 January 2021.

¹² Global Pound Conference series, ‘Cumulated Data Results March 2016- September 2017’ (*Global Pound*, 2017) <<https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf>> accessed 25 January 2021.

¹³ Nadja Alexander, ‘Nudging users towards cross- border mediation: Is it really about harmonised enforcement regulation?’ (2014) 7(2) *CAAJ* 405, 409.

¹⁴ Hassan Faraj Mehrabi and Hosna Sheikhattar, ‘The Singapore Convention: A promising start, an uncertain future’ (*Leiden Law Blog*, 5 September 2019) <<https://leidenlawblog.nl/articles/the-singapore-mediation-convention-a-promising-start-an-uncertain-future>> accessed 25 January 2021.

¹⁵ Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, ‘Initial Survey Report on the UNCITRAL Model Law Regarding Conciliation’ (*International Bar Association*, 2007) [¶34–35] <<https://www.ibanet.org/Document/Default.aspx?DocumentUId=974ACD9E-BEE6-4F8D-8A3F-4627B156EC1B>> accessed 25 January 2021.

The focus, therefore, shifts to international mediated settlement agreements (“IMSAs”)¹⁶ and whether enforceability can be ensured for these IMSAs linked to commercial disputes, in a manner similar to an international arbitral award.¹⁷ An IMSA is a result of a successful conclusion of mediation proceedings in a cross border setting, much like the arbitral award in an international arbitration.

Against this background, on 26 June 2018, the United Nations Commission on International Trade Law (“UNCITRAL”) approved a Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)¹⁸ in pursuance of its aim to create a mechanism to enforce IMSAs reached through mediation, in the same way that the New York Convention does for international arbitral awards.¹⁹ The Singapore Convention is in fact being touted as the equivalent of the NYC for mediation.

The Singapore Convention is, however, yet to achieve universal reach similar to the NYC and has only been signed by 55 parties and ratified by 9 parties as of 24 February 2022 compared to the global adoption of the NYC as mentioned above. It is also not unique in terms of its subject area and the UNCITRAL in itself had previously brought a Model Law on international mediation (“Model Law”),²⁰ and some countries had also enacted domestic laws or have pre-existing laws to enforce Settlement Agreements (“Domestic Mediation Laws”) thereby leading to a discussion on the need to ratify the Singapore Convention by all states.

Against this background, this article is an attempt to understand the path for creating a global mechanism for enforcement of the IMSAs linked with the selection of the most suitable path among the three mentioned above. It begins by providing an introduction to international commercial mediation and Settlement agreements, followed by an explanation of the Model Law, Domestic Mediation Laws and the Singapore Mediation. This is followed by an attempt at answering two questions, firstly, among the three options of the Singapore Convention, Model Law and Domestic Mediation Laws, which path should countries choose to enable recognition and enforcement of IMSAs? Secondly, are these mechanisms capable of an independent existence or is it a must for countries to ratify the Singapore Convention to enable enforcement of IMSAs in their jurisdiction? This article limits its discussion to the topic of ‘mediation’ as defined in Art. 2(3) of the Singapore Convention, specifically for disputes on ‘commercial’ disputes as defined under Footnote 1 of the Model Law.

II. MEDIATION, SETTLEMENT AGREEMENTS AND ASSOCIATED ISSUES

“Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach

¹⁶ The Singapore Convention uses the term ‘international settlement agreements resulting from mediation’.

¹⁷ The term ‘international’ and ‘commercial’ are both understood as provided under the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation, 2018. See Footnote 1, Art 1 and Art 2 of the said Model Law.

¹⁸ United Nations, ‘Report of UNCITRAL, Fifty-first session’ (25 June – 13 July 2018) UN Doc A/73/17, Annex I.

¹⁹ United Nations, UNCITRAL forty-seventh session, ‘Planned and Possible Future Work—Part III, Proposal by the Government of the United States of America: Future Work for Working Group II, Note by the Secretariat’ (7-18 July 2014) UN Doc A/CN.9/ 822.

²⁰ ‘UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation’ (2018) UN Doc A/73/17, Annex II.

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.”

-Article 2(3), Singapore
Convention

As defined above, mediation is a process where a mediator assists parties to arrive to a solution amicable to both of them. It offers parties the opportunity to either resolve matters before moving to more combative procedures (arbitration and litigation) or reach a settlement at any point of time and also gives them the liberty to customize solutions beyond the limited remedies ordinarily present under litigation or arbitration.²¹ The process of mediation, albeit in the domestic sphere mostly, has been recognised in over 170 jurisdictions²² and it also finds a special mention in Article 33 of the Charter of the United Nations. Even prominent international organizations such as the WTO, WIPO, ICSID, ICC have rules for international mediation for cross border disputes.²³ Additionally, in a 2011 survey by the European Union (EU), corporations and lawyers indicated that close to 75% of filed mediation cases are successful and save costs as well.²⁴ However, only 0.5% of total filed cases go for mediation.²⁵

Presently, mediation settlement agreements, arising in a purely domestic setting, depend on recognition and enforceability in the domestic legal system of the respective jurisdiction.²⁶ In contrast to this, IMSAs are a completely different beast with numerous hurdles on enforcement and recognition in another jurisdiction. These restrictions emanate from the lack of a uniform system of recognition of IMSAs across borders and the absence of a defined mechanism for enforcing IMSAs in many jurisdictions, including India till date.

A primary qualification for any mediation settlements agreement to be qualified as an IMSA is that the mediation must be cross-border in nature.²⁷ The exact nature of when a dispute would fulfill this requirement would be determined by the requirements present under the laws through which it is enforced.

²¹ Karen K Klein, ‘Representing Clients in Mediation: A twenty-question preparation guide for Lawyers’ (2008) 84 N D Law Rev 877, 885.

²² Chitra Narayan, ‘Encouraging mediation to settle disputes’ (*The Hindu*, 28 June 2018) <www.thehindu.com/opinion/op-ed/encouraging-mediation-to-settle-disputes/article24273149.ece> accessed 25 January 2021.

²³ *ibid.*

²⁴ Guiseppo De Palo et al, ‘Quantifying the cost of not using mediation- a data analysis’ (*European Parliament*, 2011) [4] <<https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>> accessed 25 January 2021.

²⁵ *Alexander* (n 13).

²⁶ Nadja Alexander and ShouYu Chong, ‘Singapore Case Note : Whathappenswhen a party to an MSA has a change of heart?’ (*Kluwer Mediation Blog*, 17 October 2018) <<http://mediationblog.kluwerarbitration.com/2018/10/17/singapore-case-note-happens-party-msa-change-heart>> accessed 25 January 2021.

²⁷ Laurence Boulle, ‘International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework’ (2014) 7(1) CAAJ 35, 60.

There is no common mechanism for enforcement of IMSAs,²⁸ and in the absence of a system of recognition and enforcement of IMSAs in many jurisdictions, a workaround has been developed under which

- i) IMSAs are enforced as a contract, or
- ii) an IMSA is sent to a court to be recognized as an order/ judgment of a court, or
- iii) an IMSA is placed before an arbitral tribunal which then issues it as an arbitral award.²⁹

In the first method, the process of entering into a contract is normally through a notarial deed in civil law countries and in a similar form of enforceable deed or a registered agreement in a common law country.³⁰ The exact format which is used depends on the law of the country where the proceedings are being undertaken.

In the last two of the aforementioned mechanisms, involvement and support of a court or an arbitral tribunal is generally obtained by first bringing the dispute in front of a court or an arbitral tribunal and then temporarily pausing the proceedings in that forum while the alternative of mediation is pursued. In case the mediation process is successfully completed, the IMSA is taken back to the court or the arbitral tribunal for declaration as a settlement decree or a settlement award.³¹

As of date, many countries may not have a procedure for recognition and enforcement of an IMSA.³² This means that all the three mechanisms of enforcement as an arbitration award, a court decision or even as a contract may face their own unique hurdles as discussed below.

Firstly, the system of entering into a settlement agreement which is then converted into a consent award may not be acceptable in certain jurisdictions where there is a requirement for existence of a 'dispute' between the parties for a tribunal to be able to decide on a case. In such jurisdictions, courts have refused to accept such consent awards for enforcement based on the reasoning that there was no 'dispute' for the tribunal to decide for purposes of jurisdiction

²⁸ Edna Susman, 'Final Step: Issues in Enforcing The Mediation Settlement Agreement' in Arthur W Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (MartinusNijhoff, 2008) 347.

²⁹ Edna Sussman, 'The New York Convention through a Mediation Prism' (2009) 15(4) *Dispute Resolution Magazine* 10.

³⁰ Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation' (2019) 31 *SAC LJ* 572, 595.

³¹ Eunice Chua, 'The future of international mediated settlement agreements: Of conventions, challenges and choices' (2015) *Tan Pan Online: A Chinese-English Journal on Negotiation* 1, 5.

³² Bruno Zeller and Leon Trakman, 'Mediation and arbitration: the process of enforcement' (2019) 43 *Uniform Law Review* 1.

which led to the award.³³ This refusal may be based on the provisions of their local laws,³⁴ or on the basis of the requirements of the New York Convention itself.³⁵

Secondly, in relation to IMSAs as court decisions, the enforcement mechanism is faced with the pre-existing limitations on enforcement of foreign judicial decisions themselves, since, there is no global mechanism for the same. To put things into a perspective here, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2019 ('Hague Convention') has only 5 signatories and is not in force.³⁶ So, in the absence of a global mechanism for enforcement of judicial decision, an IMSA converted into a court decision would also lack worldwide enforceability.

Thirdly, for an award enforced as a contract, the typical problems with enforcement of a contract remain and the party against whom the contract is sought to be enforced may restart defending the IMSA again on the typical grounds of breach of a contract.³⁷ While there may be genuine grounds to defend the enforcement, it is expected that a party who had entered into a settlement agreement had signed the agreement in good faith knowing about the consequences after a prolonged mediation procedure and is then expected to comply with its enforcement. Challenging the enforcement of the contract would mean that the mediation process turns out to be cumbersome, expensive and time consuming.

The discussion above indicates that recognition and enforceability of IMSAs is a primary concern across the globe which acts as a barrier to the popularity of mediation. Based on this issue, the three mechanisms of Singapore Convention, Model Law, and Independent Domestic Laws, discussed in this article, all have the common aim to remove the aforementioned hurdles in recognition and enforcement of IMSAs with an ultimate target to provide an effective and reliable enforcement process as currently seen for international arbitral awards.³⁸ In the next part, we discuss these three mechanisms.

III. SINGAPORE CONVENTION

The Singapore Mediation Act, 2017³⁹ and the EU Mediation Directive⁴⁰ were preliminary steps towards true cross-border recognition and enforceability and remained as the

³³ *Castro v. Tri Marine Fish Co.*, 921 F.3d 766 (9th Cir. 2019); Yarik Kryvoi, 'Enforcement of Settlement Agreements Reached in Arbitration and Mediation' (*Kluwer Arbitration Blog*, 25 November 2015) <http://arbitrationblog.kluwerarbitration.com/2015/11/25/enforcement-of-settlement-agreements-reached-in-arbitration-and-mediation/?doing_wp_cron=1596267129.4944870471954345703125> accessed 25 January 2021.

³⁴ *Sussman* (n 29) 11.

³⁵ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (effective 7 June 1959) 330 UNTS 3 art V.

³⁶ 'Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (*Hague Conference on private International law*, 2 July 2019) <<https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>> accessed 28 November 2021 (not yet in force); 'Status of ratification and enforcement' (*Hague Conference on private International law*, 2 July 2019) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>> accessed 25 November 2021.

³⁷ *Sussman* (n 29) 10.

³⁸ Michael Hwang and Yeo Chuan Tat, 'Recognition and Enforcement of Arbitral Awards' in Michael Pryles and Michael J Moser (eds), *Asian Leading Arbitrators Guide to International Arbitration* (Juris Net 2007) 407, 408.

³⁹ Mediation Act 2017 (*Singapore Statutes Online Plus*, 12 May 2017) <<https://sso.agc.gov.sg/Act/MA2017>> accessed 25 January 2021.

⁴⁰ European Parliament and the Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136, 3-8 ('Mediation Directive').

main models for enforcement of IMSAs, but no global mechanism had emerged.⁴¹ To move further on the path to worldwide recognition and enforceability of IMSAs, countries were first required to come to a common agreement on what constituted mediation under the laws of the country and find the subjects on which a mediation process could be undertaken.

Enter the Singapore Convention, which was expected to establish a common international framework for enforceability of IMSAs.⁴² Much like the New York Convention, the Singapore Convention was expected to provide common grounds on the basis of which the process of recognition ('reliance' in Singapore Convention) and enforcement could be challenged at the place where the agreement or sought to be enforced.⁴³ It is seen as a conduit to encourage mediation of disputes with an aim to obtain a settlement agreement which could be enforced more easily than a normal contract.⁴⁴ This was then expected to ultimately provide a pathway to bring parties to the table who would otherwise not consider mediation as an option. The parties would be assured that due to the presence of a harmonized mechanism based on the convention, under an ideal situation, an IMSA would be enforceable in countries across the world. While even with the Convention, the domestic rules and procedures may still be framed by the individual countries, but the process of formation and enforcement would be harmonized according to the global convention.⁴⁵

The convention came into force in September, 2020, six months after ratification by the third state party.⁴⁶ The Convention evoked much excitement as a game changer for international commercial mediation and prime reason for heralding the Singapore mediation Convention as the 'New York convention of Mediation' is due to its ability to enforce internationally settled mediation enforcements across borders. Thereby, the convention allows mediated settlements to be elevated from a private contractual act to a *sui generis* status, like that of arbitral awards.⁴⁷

With the Singapore Convention, IMSAs from across the globe which fulfil the requirements of a "settlement agreement" under the Convention,⁴⁸ would be eligible for enforcement in the ratifying country through the process prescribed under the Convention. The convention provides mediating parties with both the right to seek enforcement and to invoke a settlement agreement. Therefore, it can be used in homologation as a first step of enforcement or as a defence in other proceedings.⁴⁹

It is noticeable that the convention does not use the word 'recognition' as provided in the New York Convention but follows the pattern seen in the Model Law and mentions that the parties will enforce a settlement agreement according to their rules of procedure.⁵⁰ Using the

⁴¹ Migle Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019) 111 *Teisė* 205, 206.

⁴² *Sussman* (n 29) 10.

⁴³ *Zeller and Trakman* (n 32) 3; *Narayan* (n 22).

⁴⁴ *Schnabel* (n 7) 4.

⁴⁵ *Chua* (n 31) 4; On this, See also, *Žukauskaitė* (n 41) 206.

⁴⁶ UNTS, 'status of treaties' (UNTS) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII4&chapter=22&clang=_en> accessed 25 January 2021.

⁴⁷ *Schnabel* (n 7).

⁴⁸ *United Nations* (n 18) art 1(1).

⁴⁹ Haris Meidanis, 'International Enforcement of Mediated Settlement Agreements: Two and a Half Models— Why and How to Enforce Internationally Mediated Settlement Agreements' (2019) 85(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 49-64.

⁵⁰ *United Nations* (n 18) art 3(2); Eunice Chua, 'The Singapore Convention on Mediation- A Brighter Future for Asian Dispute Resolution' (2019) 9 *Asian Journal of International Law* 195, 198; *Hioureas* (n 4) 220.

settlement agreement for enforcement has been referred to as ‘relying on a settlement agreement’ and the requirements for relying on a settlement agreement are laid down.⁵¹ Although the provision does not expressly use the word ‘recognition’, it effectively performs the same function. A term (here, ‘relying on a settlement agreement’) conveying the ability to use the IMSA solely beyond enforcement was considered necessary at the time of drafting. This is linked to the fact that, if parties were not allowed to also rely on the IMSA for defence, it would render the purpose of the Convention incomplete.⁵²

As a bonus, in a major development which should be a welcome sign for the numerous dispute resolution centres such as SIAC, ICSID, DIAC, HKIAC, IIAC and LCIA, the attestation by the institution has also been considered as a part of evidence which can be used to indicate that an IMSA emerged from mediation. This would encourage parties to take the services of such a dispute resolution center for administration of the mediation instead of conducting pure ad hoc proceedings in a makeshift venue.

One of the key challenges in the enforcement for any IMSA is the possibility for a challenge before a court in the enforcement process.⁵³ These challenges to settlement agreements are considered a routine part of the enforcement process for domestic proceedings and are based on grounds of alleged coercion, fraud and mistake.⁵⁴ Within the Singapore Convention, the grounds on which relief may be refused are divided into two groups, much like the NYC.⁵⁵

- i. grounds on which relief may be refused at the request of the party against whom relief is sought;⁵⁶

⁵¹ *United Nations* (n 18) art 4(1).

⁵² *Schnabel* (n 7) 35-36.

⁵³ Jacqueline M Nolan-Haley, ‘Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent’ (2013) 5 YB Arb & Mediation 152, 153.

⁵⁴ *ibid.*

⁵⁵ *Hioureas* (n 4) 220.

⁵⁶ *United Nations* (n 18) Art. 5(1) “The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.”

ii. grounds on which relief may be refused based on findings by the forum through which relief is sought.⁵⁷

Within these two groups, the grounds on which the relief (recognition and enforcement in case of the NYC) may be refused vary between the Singapore Convention and the NYC within the first category while remaining virtually the same within the second category. However, like the NYC, the grounds are limited and courts cannot provide relief on additional grounds except those listed in Art. 5 Singapore Convention.⁵⁸

The Singapore Convention also includes learnings from the experience of arbitration in laying down provisions on disclosure requirement from mediators. Further, in order to prevent forum shopping and litigation on an issue where parties have already entered into an IMSA, the Singapore Convention allows invoking the settlement agreement before courts of a state party to prevent a restart of litigation in a settled dispute.⁵⁹

Finally, the convention does not require reciprocity for operation i.e. even if a country has not signed or ratified the Convention; parties involved in international commercial mediation from the country can still have mediation settlements under the convention.⁶⁰ For example, although Canada has not signed the convention, Canadian parties can still enforce an IMSA, fulfilling the Convention conditions in a country which has ratified the convention, namely Singapore.

Cumulatively, the Singapore Convention checks most boxes in its goal to provide an enforcement mechanism of IMSAs in the states which have ratified the convention.

IV. MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION, 2018

In 2002, the UNCITRAL adopted the first Model Law on International Commercial Conciliation in 2002 ('Model Conciliation Law') to further the 'progressive harmonization and unification of the law of international trade'.⁶¹ This was at a time when Conciliation and Mediation were considered to be interchangeable.⁶² Fast forward to 2018, with mediation having an independent identity, the UNCITRAL launched a revised model law on Mediation alongside the Singapore Convention. This model law was released in July, 2018, half a year before the Singapore Convention, was adopted by the United Nations General Assembly on 20 December 2018.

Sections 1 and 2 of the Model Law contain provisions on creation of a system through which international commercial mediation may be conducted. Section 3 of the UNCITRAL

⁵⁷ *United Nations* (n 18) art 5(1).

⁵⁸ Piotr Wojtowicz and Franco Gevaerd, 'How the Singapore Convention will Enforce Mediated settlement Agreements across Borders' (2020) 38 (1) *Alternatives* 9, 10.

⁵⁹ *United Nations* (n 18) Art. 3(2); Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?' (2019) 3(4) *Access to Justice in Eastern Europe* 5, 9.

⁶⁰ Australian Government Attorney General's department, 'Singapore Convention on Mediation- Consultation Paper' (12 October 2020) <<https://www.ag.gov.au/legal-system/publications/singapore-convention-mediation-consultation-paper>> accessed 25 January 2021.

⁶¹ *Treichl* (n 8).

⁶² *UNCITRAL* (n 20).

Model Law called ‘International Settlement Agreements’ virtually mirrors Articles 1 to 6 of the Singapore Convention. The only difference between this Section 3 of the Model Law and the Singapore Convention is that the latter also contains discussion on reservations by the state parties and the possibility to enforce settlement agreements through other laws, beyond the Singapore Convention.⁶³

The Model Law provides an alternate path for ratification of IMSAs. Compared to the ratification of the Singapore Convention which would only mean the creation of an enforcement framework for “settlement agreements” from other countries, enactment of the Model Law would also lead to building a domestic framework for conduct of international mediation in countries which do not have such a mechanism already in place.

V. INDEPENDENT DOMESTIC LAWS

States and regional economic integration organizations have brought about different legislations for recognition of mediation settlement agreements without any direct linkages to the Singapore Convention and Model Law. Within the European Union (EU), a Directive on certain aspects of mediation in civil and commercial matters was enacted in 2008,⁶⁴ which covered mediations where at least one of the parties was domiciled or habitually resident in an EU member state and the other party was from another state. Enforceability of a mediation award was however subject to a few conditions laid down in the directive such as its compliance with the law of the state where it is sought to be enforced and a provision for enforceability in the law of the member state.⁶⁵ This Directive was implemented across the EU including the two common law countries of the EU (Ireland and UK).

Among common law countries, Singapore enacted a new legislation in 2017 called the Mediation Act, 2017 (‘Singapore Mediation Act’) under which a possibility for a recording of a mediated settlement agreement as an order of court was provided when:

- (i) the mediation was conducted only partially in Singapore, or
- (ii) it was conducted outside Singapore when the mediation agreement referred to the concerned act or the law of Singapore as applicable law.⁶⁶

This meant that parties (even international parties) could benefit from a settlement agreement which would be enforced as a judgment of a court in Singapore by conducting their mediation proceedings in Singapore or by subjecting their mediation proceedings to this act or to Singapore law.⁶⁷ The applicable law in a mediation proceeding is mainly related to the scope

⁶³ *United Nations* (n 18) arts 7-8.

⁶⁴ *Mediation Directive* (n 40).

⁶⁵ *ibid* art 6.

⁶⁶ *Singapore Mediation Act* (n 39) s 12(1) and s 6(1). While it is clear that mediation as such is not an adjudicative proceeding, law applicable to the dispute must still be chosen to govern the contractual relationship between the parties. The mediator as such can then assess whether each party has fulfilled their side of the obligation as required in law or not. See Patricia Orejudo Prieto de los Mozos, ‘The Law Applicable to International Mediation Contracts’ (2011) 1 *InDret* 5.

⁶⁷ *Singapore Mediation act*, *ibid*. See also, Joel Lee, ‘Singapore Developments – The Mediation Act 2016’ (*Kluwer Mediation Blog*, 12 March 2017) <<http://mediationblog.kluwerarbitration.com/2017/03/12/singapore-developments-the-mediation-act-2016/>> accessed 25 January 2021.

of freedoms which are provided to the contracting parties and the validity of the terms of the mediation contract.⁶⁸

The US State of Colorado also enacted a new legislation called the Colorado International Dispute Resolution Act ('Colorado Law') through which a dispute between two residents of different counties or relating to interests in more than one country can be resolved through mediation.⁶⁹ The parties can then enter into a settlement agreement which can be presented to the court, and if approved by the court, it will be enforceable as an order of the court.⁷⁰

Finally, this method of enactment of an Independent Domestic Law to recognise and enforce IMSAs means the possibility to enact a legislation which would be based on the understanding of 'settlement agreements' or IMSAs within the country. While the understanding may be similar to the Singapore Convention or even the Model Law, what exactly will be inserted in an Independent Domestic Law is not governed by either of them. Through the Independent Domestic Law, countries may choose to have only an enforcement framework for IMSAs or alternatively even create a mechanism for also conduct of mediation and entering into IMSAs, without the need to adhere to either the Singapore Convention or the Model Law.

VI. WHICH PATH SHOULD A COUNTRY CHOOSE? –COMPARING THE SUITABILITY AND INTERDEPENDENCE OF THE THREE MECHANISMS

The enforcement of an IMSA can be ensured by having a domestic mechanism in place for the same. This domestic mechanism can be based on an independently developed standalone domestic legislation like the Colorado Law, through a ratification of the Singapore Convention based on a ratifying legislation,⁷¹ or by enacting a domestic legislation based on the model law. The presence of the three mechanisms for enforcement of IMSAs raises the questions as to which among them would be the ideal path for a country that wants to project itself as a mediation friendly jurisdiction and whether they can exist independently. These questions are sought to be answered in a two-step process. The process involves, a comparative discussion of the linkages between the three methods, followed by a second step of by understanding the possibility of their independent existence, before making a final recommendation on preferring any of these approaches.

A. UNDERSTANDING THE LINKAGES BETWEEN THE THREE APPROACHES

With the features of the three mechanisms known, it is now required to understand the linkages between all of them. This evaluation is done through a one on one comparative analysis of each of the three mechanisms.

⁶⁸ *Mozos* (n 66).

⁶⁹ Colorado Revised Statutes (2016), Title 13 - Courts and Court Procedure, Art 22 - Age of Competence-Arbitration – Mediation, Part 5 - Colorado International Dispute Resolution Act.

⁷⁰ *ibid* sec 13-22-505 and sec 13-22-308.

⁷¹ For an example of a ratifying legislation for the Singapore Convention, see Singapore Convention on Mediation Act 2020 (Act No 4 of 2020) of Singapore.

1. Model Law and Singapore Convention

The Model Law and the Singapore Convention were released in close succession and are closely inter-related.⁷² For countries which wanted to bring about a framework for recognition of IMSAs, enactment of the Model Law was expected to be the initial step which will ultimately pave the path for the country to adopt the Singapore Convention.⁷³ In practice, since Section 3 of the Model Law almost mirrors the Singapore Convention, adoption of the Model Law may effectively be equivalent to implementation of the Singapore Convention.⁷⁴

In practice, without the presence of an effective domestic mechanism for mediation or entering into IMSAs, ratifying the Singapore Convention may present procedural hurdles later since a number of provisions of the Convention rely on domestic law for their interpretation. For instance, under Article 5(1)(b)(i) of the Singapore Convention, the validity of the IMSA itself may need to be evaluated under the domestic law of the country where it is sought to be enforced. Additionally, Articles 5(1)(e) and 5(1)(f) of the Convention linked with mediator integrity and independence, also depend upon the interpretation of the domestic law in the country where the enforcement process of the IMSA is underway.⁷⁵ The presence of a domestic legislation based on the Model Law would be extremely beneficial under these situations.⁷⁶

Last but not the least, in addition to being a path to implement the Singapore Convention, the Model Law is also linked to the Singapore Convention as a document which explains the meanings of certain key terms such as ‘commercial’ and ‘international’, used in the Convention.⁷⁷ This further strengthens the understanding of their close linkage which aims at creating an effective mechanism for enforcement of IMSAs.⁷⁸

While they might be closely linked, it is, however, incorrect to state that the Model Law and the Singapore Convention are exactly coherent. To begin with, it must be understood that IMSAs arising from a country which has enacted the Model Law may not be enforceable under the Singapore Convention since the Model Law does not specify the exact nature of framing a settlement agreement.⁷⁹ States may maintain their own domestic law requirements for creating a valid settlement agreement which may involve arbitral tribunals and courts. While such a procedure may be compliant with the Model Law in terms of creating an IMSA, but the same IMSAs may not be enforceable under the Singapore Convention.⁸⁰

Additionally, even an IMSA created through the Model Law in compliance with the procedural requirements of a valid settlement agreement under Art. 4(1) of the Singapore

⁷² Natalie Y Morris-Sharma, ‘Constructing the Convention On Mediation- The Chairperson’s Perspective’ (2019) 31 SAclJ 487, 515.

⁷³ *ibid.*

⁷⁴ *ibid.*; *UNCITRAL* (n 20).

⁷⁵ *Mehrabian and Sheikhattar* (n 14); Jelita Pandjaitan and Jane Larner, ‘The Singapore Convention on Mediation’ (*Linklaters*, 12 September 2020), <<https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/the-singapore-convention-on-mediation>> accessed 25 January 2021.

⁷⁶ *UNCITRAL* (n 20) ss 1 and 2 deals with International Commercial Mediation and provide guidance on these issues. See also, Alison FitzGerald and Thomas Hatfield, ‘The Singapore Mediation Convention- An update on developments in enforcing mediated settlement agreements’ (2019) 13 Norton Rose Fulbright International arbitration report 14.

⁷⁷ *UNCITRAL* (n 20) Footnote 1, Art 1 and Art 2; See also, *Chua* (n 50) 195-205, 206.

⁷⁸ *FitzGerald & Hatfield* (n 76).

⁷⁹ *UNCITRAL* (n 20) Art 15.

⁸⁰ *United Nations* (n 18) Art 1(3).

Convention may not fulfil the definition requirements prescribed in Art. 1(1) of the same Convention. This emerges because the meaning of the term ‘international’ varies between the second section of the Model Law which regulates the process of creating an IMSA, and the Singapore Convention.⁸¹ In fact, the definition of the term international under the Second Section of the Model Law is wider than the Singapore Convention. Similar minor variations are also seen under Art. 2(1) of the Singapore Convention and Art.3(3) of the Model Law dealing with the relevant place of business of the parties.

These differences make it clear that while an unedited enactment of the text of the entire Model Law may be sufficient to implement the Singapore Convention, but merely having the Model Law in place will not ensure that IMSAs produced in that country would be enforceable under the Singapore Convention unless other legislative requirements are in place to enable execution of IMSAs which are compliant with the guidelines under the Singapore Convention.

2. Model Law and Independent Domestic Laws

The Model Law and Independent Domestic Laws both work with a common goal of providing a smooth framework for conduct of international commercial mediation proceedings which can result in IMSAs, and later providing an efficient mechanism for enforcement of the IMSAs.

As discussed above, a few states have tried to bring about a framework to recognize IMSAs through independent domestic legislation (not based on the Model Law).⁸² These provisions provided limited enforceability and had different requirements for formation of IMSAs and recognition of such IMSAs. More crucially, they provided emphasis on development of the IMSAs according to the requirements of their own domestic laws. This meant that parties willing to enter into an IMSA to take advantage of the mediation friendly domestic laws of a country, had to conduct their proceedings strictly under the framework of the applicable domestic law. For instance, an IMSA under the Singapore Mediation Act was not necessarily enforceable under the Colorado Law on the same issue. A true harmonized international framework like the NYC for arbitration was still missing.

While the Model Law does not completely solve this problem since it does not prescribe the procedure for formation of a settlement agreement, enactment of the Model Law at the very least would provide a clear guidance to mediating parties on what they must fulfil in an IMSA to get it enforced in a particular country. Hence, compared to Independent Domestic Laws, the Model Law through its Section 3 would at the very least ensure that IMSAs from other countries could be expected to be enforced if they fulfil the conditions laid therein and not force mediating parties to select a particular jurisdiction merely to benefit from enforcement possibilities under the Independent Domestic Law.

Finally, the Model Law may be very valuable as a tool for guidance in understanding the terms such as ‘commercial’ and ‘international’ when enforcing IMSAs even in countries which have not enacted it, since it provides a global understanding on these terms.⁸³

⁸¹ Art 3(4) of the Model Law provides an option for the parties to make an own determination that a mediation is international. No such option is provided in the definition provided under Art 1(1) of the Singapore Convention.

⁸² For ease of understanding, they have been designated, for the purposes of this article, as “Independent Domestic Law”.

⁸³ Chua (n 50) 198.

3. Independent Domestic Law and Singapore Convention

The requirement of ratifying the Singapore Convention for countries which have a well-functioning domestic system for mediation is an issue which evokes varied responses. While it is appreciated and agreed that the Singapore Convention promotes global enforceability of IMSAs and encourages mediation, opponents argue that jurisdictions with well-established and functioning systems for entering into and enforcing IMSAs, particularly in the Americas, do not identify a need for ratification of this convention.⁸⁴ In fact, it was felt that the Convention may place an additional burden for certain countries in the region such as USA and Canada which already have well entrenched mediation traditions.⁸⁵

At least a part of the aforementioned argument is however not very satisfactory, since the Singapore Convention does not prescribe the procedure which needs to be followed to come to an enforceable IMSA but only needs that an IMSA which is brought for enforcement in a state party comply with its requirements of content and structure.⁸⁶ Hence, for states which feel that they have a well-functioning mechanism for conduct and enforcement of IMSAs, they can continue with procedures laid under their independent domestic laws even after ratifying the Convention. In short, the Singapore Convention will cover only the conditions for enforcement of eligible IMSAs under the Convention and in no way interferes how states choose to regulate formation of IMSAs in their own territory.

If states choose to ratify the Singapore Convention, they can choose to provide a separate recognition to the IMSAs and the specified enforcement procedure therein without affecting their existing Independent Domestic Law. This procedure is already seen in Singapore which brought about a law for ratifying the Singapore Convention but also decided to continue with its existing legislation on international mediation.⁸⁷ Beyond mediation, the co-existence of a special mechanism for enforcement is also seen for ICSID awards in international investment arbitration wherein these awards are enforced directly through a self-contained mechanism which elevates them to the level of a decision of the final judgment of a court in the country and minimizes possibilities for raising any defense at the time of enforcement.⁸⁸

As a final point, it is essential to understand that while states may seek to protect their own independent domestic laws regarding procedure for entering into IMSAs, they may at least seek to amend them to a point where the IMSAs executed in their territory satisfy the qualifying conditions of an IMSA enforceable under the Singapore Convention. This would provide an option to the mediating parties to enforce the IMSA in another country instead of merely depending on enforcement in the same country. Ultimately, it could serve to promote the

⁸⁴ Anthony B Ullman and Diora M Ziyeva, 'The Singapore Mediation Convention and its potential impact on mediation in the Americas' (*Global Arbitration Review*, 13 November 2020) <<https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/the-singapore-mediation-convention-and-its-potential-impact-mediation-in-the-americas>> accessed 25 January 2021.

⁸⁵ Michael Erdle, 'Canada not among 46 nations Signing UN Mediation Convention' (*Slaw*, 1 October 2019) <<http://www.slw.ca/2019/10/01/canada-not-among-46-nations-signing-un-mediation-convention/>> accessed 25 January 2021.

⁸⁶ *United Nations* (n 18) Art 1 and 4.

⁸⁷ See, *Singapore Mediation Act* (n 39) s 12.

⁸⁸ See, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 54(1). See also, Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edn, Springer 2019) 135; Amazu A Asouzu, *International Commercial Arbitration and African States-Practice, Participation and Institutional Development* (Cambridge University Press 2001) 368.

country as an attractive mediation destination even without implementing the Singapore convention.

4. Understanding the flipside of the Singapore Convention

Considering that the article places the spotlight on Singapore Convention as the centre of the debate among the various options, it would be worthwhile to understand the shortcomings of the Singapore Convention before making the assessment of the suitability.

Even with all its positives discussed above, the Singapore Convention has some major shortfalls. Firstly, the Convention covers only commercial disputes which may mean excluding numerous other disputes including mixed commercial and family disputes, which could potentially be resolved through mediation, thereby limiting its effectiveness.⁸⁹

Next, the Convention permits reliance only on a very specific form of 'settlement agreement' which falls within the parameters laid down by the Convention to be enforced through it. This effectively means that settlement agreements in the form of court decree or arbitral awards would be excluded.⁹⁰ Even though, this provision has been inserted so as to not clash with the Hague Convention and the New York Convention, the limitation of instruments which could be enforced may be inconvenient for the settling parties since many states where the mediation proceedings might take place may require the settlement agreement to be finalised as an arbitral award or a court decree. Opening the Convention for enforcement of these instruments rather than only the *sui generis* settlement agreements could have given parties more power to choose an instrument which would have been more convenient.

Moving ahead, the Convention does not mention a procedure for implementation or the forum, but only mentions competent authority. Although this gives the semblance of ample freedom, it becomes especially difficult for countries which are not that well versed with the process of mediation or might not have a competent authority with the specific know how to implement complex cross border settlements. Even if they do, these settlements would have to necessarily be able to be enforced according to the local law, curbing the inherent advantage of mediation to be creative, to an extent since it would now be limited by the local law.⁹¹

In practice, adopting the Convention would require harmonising it with pre-existing domestic law and procedures. The ground mentioned in Article 5.2(b) of the Convention is hardly enforceable in the absence of a domestic legal context for mediation. The ground addresses the mediability of the dispute settled by mediation and enables the competent authorities of the contracting States to dismiss the relief sought, *suasponte*. Therefore, a country (its competent authority) could only determine whether the 'subject matter of the dispute is not capable of settlement by mediation' only by reference to the law of that contracting state.⁹²

In the absence of a solid domestic framework for mediation, this ground may barely be applicable because the legal system of the jurisdiction, in question, has not yet defined the boundaries for referring a dispute to mediation. In such circumstances, the competent authority from which the relief is sought is unable to assess if the subject matter of the dispute is undeniably capable of being settled by mediation.⁹³

⁸⁹Ullman and Ziyeva (n 84).

⁹⁰United Nations (n 18) art 1(3).

⁹¹Mehrabi and Shekhattar (n 14).

⁹²Treichl (n 8).

⁹³Alexander (n 13).

Finally, the Singapore Convention evokes wariness from mediators and parties to mediation agreements. Mediators fear potential liabilities from signing a mediation agreement if a particular enforcing court determines that they breached standards applicable to them.⁹⁴ For parties entering into a mediation agreement, the fact that the Convention can operate on an opt-in basis in some states but not in others could lead to an imbalance between the mediating parties. This is especially possible if an agreement is enforceable against one party because the jurisdiction of the place where its assets are located/home state did not apply opt in through reservation as provided under Article 8.1(b) and implemented the Convention in full. On the other hand, the opposite party is protected because and an IMSA is unenforceable against it another because its home country/ or the jurisdictions where its assets are located did apply for opt in, and blocked the enforcement of the IMSAs.⁹⁵ In such events, parties may be wary of entering into mediation agreements, thereby, nullifying the entire goal of popularising mediation.⁹⁶

B. *Possibility for independent existence of the three approaches*

The Singapore Convention and the Model Law were developed concurrently but were not brought in with an aim that states should adopt both of them together or even any of them.⁹⁷ This understanding is clearly reflected in the fifth preambulatory paragraph of the Singapore Convention which states that,⁹⁸

‘Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument.’

The aforementioned paragraph also clarified that while states may be interested to provide a path for enforcement of IMSAs, it is not required that either the Singapore Convention or Model Law is enacted.

States which want to only provide an enforcement mechanism for IMSAs may choose to develop and implement their own legislation which covers the subjects included in the Singapore Convention without actually ratifying it. Alternatively, as mentioned before, some states may already have sufficient mechanisms in place to deal with enforcement of IMSAs, negating the need for ratifying the Convention.⁹⁹

⁹⁴ See, *United Nations* (n 18) art. 5(1)(e); *Chua* (n 50) 200.

⁹⁵ *Chua*, *ibid.*

⁹⁶ Jan O’Neill, ‘The New Singapore Convention: will it be the New York Convention for mediation?’ (*Practical Law Dispute Resolution Blog*, 19 November 2018), <<http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/>> accessed 25 January 2021.

⁹⁷ *Morris-Sharma* (n 72).

⁹⁸ See also, ‘United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")’ (*UNCITRAL*, 7 August 2019), <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 31 December 2021.

⁹⁹ *Ullman and Ziyaeva* (n 84).

For states, which do not have adequate mechanisms in place for conduct of international commercial mediations and for enforcement of IMSAs, enactment of the Model Law can be a path to deal with the situation.¹⁰⁰ This, however, does not mean that the states are required to only follow this approach. They may also choose to enact an independent domestic law for the procedural aspects of mediation which can also govern enforcement of IMSAs.

Lastly, an independent domestic law can also be brought about only for the specific aspects of recognising and enforcement of IMSAs or alternatively, only for governing conduct of international commercial mediation proceedings in the state. Legislations for both these issues need not be interconnected. In practice this means, a state may have a system where under the independent domestic law, an IMSA entered into in the state might need a judicial sanction, but a foreign IMSA which is produced for enforcement may not need to fulfil such a requirement.

This analysis reveals that each of the following types of laws can exist independently with a great deal of flexibility provided to the countries on how they choose to enact them: (a) law ratifying the Singapore Convention; (b) law enacting the Model Law; and (c) law enacting a domestic legislation on mediation not related to the Model Law and Singapore Convention.

C. Selecting the preferred mechanism and whether ratification of the Singapore Convention is essential

The evaluation of the mechanisms above reveals that internationally, there are a number of mechanisms to enable enforcement of IMSAs and this variance is expected to continue.¹⁰¹ There is no one size fits all approach and the path to be chosen by a country would depend on their domestic law compulsions. However, with a view to promote uniformity in enforcement of IMSAs, states should identify the current state of their legal framework and at least adopt the third section of the Model Law to provide global enforceability for IMSAs, irrespective of whether they want to adopt the entire Model Law or ratify the Singapore Convention later.

Adoption of this third section under domestic mediation frameworks would mean that two primary goals would be fulfilled. Firstly, there would be a common international standard for challenging the enforcement of IMSAs, and secondly, any parties across the globe would now be clear about the standards to fulfil in the mediation process and while entering into the IMSA, in case they want to make it globally enforceable in all Model Law and Singapore Convention parties.¹⁰²

The Model Law which has been updated along with the Convention aids in its implementation.¹⁰³ The Singapore Convention in contrast to the Model Law only contains provisions on recognition and enforcement of IMSAs which are present in Section 3 of the Model Law as mentioned above. So, ideally a state which wants to do both promote international commercial mediation proceedings in its territory and also provide a mechanism for recognition of IMSAs arising from such mediations may choose to enact domestic legislation based on the entire Model Law.

¹⁰⁰ *Morris-Sharma* (n 72); *FitzGerald & Hatfield* (n 76) 14.

¹⁰¹ *Morris-Sharma*, *ibid* 496.

¹⁰² See, *UNCITRAL* (n 20) art 16, 18 and 19.

¹⁰³ *Chua* (n 50) 197; Gibson, Dunn and Crutcher, 'The Singapore Convention on Mediation and the Path ahead' (*Mondaq*, 4 September 2019) <<https://www.mondaq.com/arbitration-dispute-resolution/839980/the-singapore-convention-on-mediation-and-the-path-ahead>> accessed 25 January 2021.

For countries which do not have a developed mechanism for enforcement of IMSAs, adoption of the complete Model Law could be a viable step to provide a fertile ground for growth of mediation, whether they want to ratify the Singapore Convention or not. If they do decide to accede to the Convention in the future, they will be ready. The Model Law can, thus, be seen as the one stop solution to create a framework for enforcement of IMSAs in any country which may or may not be a party to the Singapore Convention, but wishes to benefit from the harmonization brought about through it.

Beyond adopting the third section of the Model Law, states may choose a variety of approaches depending on their individual circumstances to support the fulfilment of the aforementioned two goals.

States which only want to recognize IMSAs which conform to the Singapore Convention without entering into the additional burden of enacting the Model Law, may choose to ratify only the Singapore Convention. These states, not enacting the Model Law but only ratifying the Singapore Convention, may opt not to have any domestic mechanism for conduct of international commercial mediation or alternatively have their own unique mechanism for conduct of the proceedings to arrive at an IMSA which is different from the pathway prescribed in the Model Law.

An added advantage of ratifying the Singapore Convention is that it is expected to cover a wide range of disputes due to the very wide definitions of international mediation and commercial disputes as provided under the Convention.¹⁰⁴ As such the Convention is also likely to encourage the use of IMSAs and mediation in general in sectors like trade disputes and investor-state disputes which were hindered till date due to the lack of an effective enforcement mechanism.¹⁰⁵ Ultimately, if the Singapore Convention is successful in fulfilling in making IMSAs easily enforceable globally, mediation may emerge as a serious challenger to international commercial arbitration since parties in a commercial relationship may want to take every chance to arrive at an amenable resolution to disputes in the interest of continuation of their relationship.¹⁰⁶ Implementation of the Singapore Convention will effectively place mediation as a realistic alternative to international commercial arbitration.¹⁰⁷

States who are wary of the Convention may prefer to implement the provisions of the Convention relating to the mechanism of creation and enforcement of IMSAs without actually ratifying it on paper. Since the Singapore Convention does not require an IMSA to emerge from a state party which has ratified it, countries might choose not to ratify the Singapore Convention at all, while still bringing about a domestic law which may create IMSAs which can be enforced under the Convention.

For states which choose not to ratify the Singapore Convention or enact an equivalent domestic law without ratifying it, they would lose the key benefit of the Convention wherein, it removes the requirement of a territorial link to a seat where the mediation takes place or where the IMSA is signed.¹⁰⁸ This means that an IMSA can be executed at any place (it does not need to be a state party to the Singapore Convention) and it would be only subject to

¹⁰⁴ Piotr Wojtowicz and Franco Gevaerd, 'A New Global ADR Star is Born: The Singapore Convention on Mediation' (2019) 37 (9) *Alternatives* 141, 143.

¹⁰⁵ *Chua* (n 30) 597; *Hioureas* (n 4) 222; WeixiaGu, 'The Dynamics of International Dispute Resolution in the Belt and Road' (2019) 113 *ASIL Proceedings* 370, 372.

¹⁰⁶ *Silvestri* (n 59).

¹⁰⁷ *Hioureas* (n 4) 219.

¹⁰⁸ *Silvestri* (n 59) 7.

scrutiny under the domestic law of the court where the relief is sought when it is submitted to the court for the purpose of seeking such relief.¹⁰⁹ Without the Singapore Convention, parties must first rely on the law of the initial country where the IMSA was executed as it is the state granting the enforcement effect,¹¹⁰ and subsequently would depend and expect the recognition of the specific IMSA in the country where it is sought to be enforced, leading to a twin level enforcement procedure. For the moment, India seems to have chosen this approach in the Mediation Bill, 2021 wherein it has not provided any recognition to IMSAs and has also not provided a path for ratification of the Singapore Convention.¹¹¹ This is a marked departure from a previous draft of 29 October 2021 which included a separate section for ratification of the Singapore Convention.¹¹²

The adoption of any of the three paths to recognise an IMSA, i.e. the Model Law, an independent domestic law with similar provisions, or ratifying the Singapore Convention, would impart greater enforcement and would be beneficial for all countries.

The path for development of a domestic framework which differs from the Third section of the model law or the Singapore Convention is not recommended. A disconnected and completely independent domestic system which is not in sync with global standards means that, any parties who enter into an IMSA with an aim to enforce it such a country would have to specifically evaluate the criteria for recognition and enforcement in that country and choose any of the three modes (contract/arbitral award/ court decree) described above based on their suitability. It is also recommended that even these states which choose to rely on an Independent Domestic Law delinked from either from both the Singapore Convention and the Model Law still at least adopt a common definition for the terms ‘mediation’ and ‘commercial’ which is found in the aforementioned documents, so that harmonisation on understanding of the mediation process could be ensured.

Finally, countries which choose not to promote and recognise the *sui generis* IMSA under the third section of the Model Law, would need to be ready with their own independent legal framework to enforce the three forms of settlement agreements (as a contract, as a judgment and as an arbitral award) to ensure that they cater to all possible forms of IMSAs which might be brought before their courts.¹¹³ While such an open enforcement mechanism could be attractive for international parties which can now utilise the enforcement mechanism in that country to enforce their IMSA, it would not help their domestic parties to deal with enforcement problems across their borders since they would be out of sync with the global standards.

VII. CONCLUSION

The Singapore Convention is a milestone in international mediation and the element of uniformity that the Convention has brought to fore cannot be denied. It has resolved most of the concerns regarding cross border enforceability of IMSAs while also paying due deference

¹⁰⁹ *Wojtowicz and Gevaerd* (n 58) 10.

¹¹⁰ Haris Meidanis, ‘Singapore Convention Series: A Plea for the adoption of the Singapore Mediation 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 25 January 2021.

¹¹¹ Department of Legal Affairs, ‘Mediation Bill, 2021, Bill No. XLIII of 2021’, <<https://legalaffairs.gov.in/sites/default/files/mediation-bill-2021.pdf>> (accessed 24 February 2022).

¹¹² PRS India, ‘Draft Mediation Bill, 2021’ <<https://prsindia.org/files/parliamentary-announcement/2021-11-10/DRAFT-MEDIATION-BILL-29.10.2021.pdf>> (accessed 24 February 2022).

¹¹³ *Chua* (n 30).

to the local law of the state where an IMSA is sought to be enforced.¹¹⁴ It has rightly been described as a ‘watershed in the development of international commercial mediation’, and ‘a milestone for multilateral cooperation and for international commerce.’¹¹⁵

The Singapore Convention is likely to promote enforcement of IMSAs and make them a viable option by providing a direct path to enforcement instead of having to take the indirect route of a court order or an arbitration award.¹¹⁶ It will also prevent hurdles to enforcement through its fixed set of grounds, much like the NYC did for international arbitration and ultimately lead to more emphasis on mediation and IMSAs as a viable alternative. Parties will now be encouraged to use the system of mediation for commercial emphasis due to the availability of assurance for enforcement.¹¹⁷

Implementing the soul of the Convention, i.e. having a common framework for recognition and enforcement of IMSAs is, however, a challenge which would require coordinated efforts from countries across the globe. Thankfully, as discussed above, there are multiple paths to achieve this goal as and states may choose to join the movement even without ratifying the Convention.

Achieving such a common minimum global recognition framework for IMSAs would definitely count as the next big boost for alternative dispute resolution after the very successful NYC and promote mediation as the next big thing.

¹¹⁴ *Chua* (note 50) 205.

¹¹⁵ ‘The Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore speech at the Supreme People’s Court of Vietnam Workshop On Mediation’ (*Supreme Court Singapore*, 17 September 2019) <<https://www.supremecourt.gov.sg/docs/default-source/default-document-library/vietnam-spc-mediation-workshop---for-publication.pdf>> accessed 25 January 2021.

¹¹⁶ *Chua* (n 50) 205.

¹¹⁷ Parliament of the Republic of Fiji, ‘United Nations Convention on International Settlement Agreements resulting from Mediation- Written Analysis’(2019) [Part 4] <<http://www.parliament.gov.fj/wp-content/uploads/2019/04/Written-Analysis-for-Singapore-Convention.pdf>> accessed 25 January 2021.