The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution?

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International arbitration and mediation are often viewed as opponents in an antagonistic battle for the hearts, minds and wallets of disputants. The fear of arbitration losing its status as the most preferred form of alternative dispute resolution is palpable: Mediation's key disadvantage has long been the difficulty of enforcing mediated settlement agreements. But the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") would promote the widespread international enforceability of settlement agreements, which directly erodes the edge of arbitration, considering that the enforceability of arbitral awards is usually ranked as arbitration's most important feature. In this post, I argue that mediation will not eclipse arbitration anytime soon, but at the same time that the Singapore Convention is a positive development for the dispute resolution system as a whole.

By way of introduction, at the time of writing, the Singapore Convention has been signed by 46 countries including the US, China, India and South Korea. It needs to be ratified by three countries before it comes into force.

Uncertainties in the operationalisation of the Singapore Convention

The first reason why there is room for some healthy scepticism over the Singapore Convention is that there is some uncertainty over how the Singapore Convention will be operationalised. This has several facets, which I will consider in turn.

First, as arbitration practitioners may think with a bit of schadenfreude, the take-up rate of the Singapore Convention is still up in the air. A treaty's effectiveness hinges on its widespread adoption and acceptance, and the Singapore Convention is still in its infancy compared to the New York Convention. While the initial response to the Singapore Convention has been positive, the fate of the UNCITRAL Model Law on International Commercial Conciliation, 2002 ("Conciliation Model Law") provides reason to be circumspect. Legislation based on or influenced by the Conciliation Model Law has been adopted in only 33 States in a total of 45 jurisdictions. The corresponding figures for the UNCITRAL Model Law on International Commercial Arbitration is 80 States in 111 jurisdictions. But this comparison is flawed. The Conciliation Model Law was designed to apply in cases where parties could not agree or had not included on a set of mediation rules into their contract.[fn]Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Kluwer Law

International, 4th Ed, 2019) at p 552.[/fn] This was revised in 2018 by the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) ("Mediation Model Law"), which added, among others, the regime for enforcement that parallels the Singapore Convention. Thus, the slow uptake of the Conciliation Model Law does not necessarily bode ill for the Mediation Model Law or the Singapore Convention.

Second, it is an open question how Article 12(4) of the Singapore Convention will affect its implementation in member states of regional economic integration organisations. Article 12(4) provides that the Singapore Convention "shall not prevail over conflicting rules of a regional economic integration organization" if the settlement agreement is sought to be relied on in a member state, and the states involved that make the mediation "international" under Article 1 of the Singapore Convention are member states. The enforcement regime under the Singapore Convention would therefore be subject to any additional preconditions imposed by regional organisations, such as obtaining the counterparty's consent, as required under the EU Directive on Mediation, before a settlement agreement may be relied on.

Third, Article 5(1)(d) of the Singapore Convention has the potential to greatly limit the applicability of this Convention. Article 5(1)(d) affords a defence if granting relief would be contrary to the terms of the settlement agreement. On this view, which is supported by the *travaux préparatoires,*[fn]See the discussion in T Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 48–49.[/fn] parties would be allowed to "contract out" of enforcement of their settlement agreement under the Singapore Convention by so providing in their settlement agreement. Although Article 5(1)(d) might still be limited in effect if courts adopt a strict approach towards interpreting clauses that purport to contract out of the Singapore Convention, legally advised commercial parties are unlikely to face difficulty drafting a sufficiently clear and enforceable clause.

Arbitration and mediation: Frenemies in mutualistic competition

The second reason why arbitration practitioners need not panic just yet is that arbitration and mediation are not true enemies, but "frenemies".

Although arbitration and mediation compete in the same conceptual space of "alternative dispute resolution" to litigation, this dynamic should be viewed as a manifestation of mutualistic, rather than zero-sum competition. Zero-sum competition involves competing *against* others and according primacy to *outcomes* because one party's loss is another's gain. Mutualistic competition involves competing *with* others and focuses on the *pursuit* of an objective (*e.g.*, winning the game) through trying to surpass the competition. To characterise the arb-med relationship as zero-sum competition would be to make two wrong assumptions: (a) that it is impossible to increase the attractiveness of a jurisdiction as a whole as a dispute resolution hub, such that arbitration and mediation advance in tandem (the "fixed pie" assumption); and (b) that disputant-consumers inevitably choose either arbitration or mediation, but not both (the "either/or" assumption).

First, the "fixed pie" assumption is contradicted by empirical evidence. The availability of mediation at several renowned arbitral institutions has not dampened demand for arbitration services. The ICC, SCC, and LCIA are amongst the institutions which have all recorded robust growth over the years despite offering mediation services. This phenomenon arises from the fundamental differences between arbitration and mediation, and how disputants choose one mode of dispute resolution over another for their different competitive advantages. Arbitration is regarded as a "litigation-substitute"

pathway to a final and binding determination, which carries precedential value in fact if not in law (especially for test cases with multiple similar claims). By contrast, mediation is a less adversarial mode of dispute resolution that saves "face" and preserves relationships at lower financial cost. In view of the different cost-benefit analyses for disputes of different natures (such as complexity and dollar value), the "fixed pie" assumption is incorrect.

Second, the "either/or" assumption underlying a zero-sum mentality is that parties choose arbitration or mediation, but not both. That is disproved by the existence of various combinations of the two under arb-med, med-arb and arb-med-arb protocols (collectively referred to as "AMA protocols"), which are increasingly popular. According to the 2018 Global Pound Conference Series report, the combining of adjudicative and non-adjudicative processes features in the top three ways to improve the future of commercial dispute resolution. The question then is not *whether* AMA protocols should be adopted, but *which* of its forms has the most potential. In this connection, it is significant that the Singapore Convention carves out from its scope of application, under Article 1(3)(b), settlement agreements that have been recorded and are enforceable as an arbitral award.

The New York Convention, the Singapore Convention, and the future of dispute resolution

Speaking in 2016, the Chief Justice of Singapore called for a shift from viewing "ADR" as *alternative* dispute resolution, to *appropriate* dispute resolution. The underlying idea is that modern legal systems should provide a diversified range of dispute resolution options so parties can pick the mode of justice that is most suited to the subject matter, parties and desired outcomes. Taking that perspective, the Singapore Convention is but another piece in the jigsaw of global conventions that work towards this end. It joins the ranks, but does not seek to usurp the place, of the New York Convention for arbitration and the 2005 Hague Convention on Choice of Court Agreements for litigation. All things considered, the Singapore Convention is a development that the arbitration and mediation fraternity alike has cause to celebrate.

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