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SINGAPORE CONVENTION ON MEDIATION: THE SOLUTION TO INTERNATIONAL MEDIATION?

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Abstract

This article aims to understand why international mediation has been under-utilised in the practice of international dispute resolution and whether the Singapore Convention can aid in that trend. The main objective of this article is to assess whether the Singapore Convention can rise to the stature of the New York Convention while analysing the potential benefits.

This article will first study the reasons behind the remarkable success of international arbitration and highlight the benefits of using mediation for commercial disputes. The article will also undertake an in-depth analysis on the need for the Convention, any potential obstacles is likely to face and lastly and how the Convention can aid the international business community.

This article will conclude that the Singapore Convention is a milestone in international dispute resolution and that its overall promotion will leave both commercial parties and dispute resolution user better off.

1. Introduction

The Singapore Convention on Mediation ("SCM") marks a significant development in the field of mediation and the promotion of amicable settlement. To quote Mr.Lee Hsien Loong, the Prime Minister of Singapore, "The Singapore Convention on Mediation is the missing third piece in the international dispute resolution enforcement framework" and a strong showcase of multilateralism.[1] Commercial parties tend to gravitate towards international arbitration and litigation to resolve cross-border disputes due to the comprehensive structural framework in place and its ease of enforceability. The SCM seeks to establish a similar structural framework, with the hope that it will rise to a similar stature as that of international arbitration.

This article seeks to discuss the rise of mediation and how international arbitration has gained its dominance for resolving cross-border disputes but at the same time also suffers from important disadvantages. International mediation can offer a way to offset such disadvantages and better cater to the needs of certain disputes and commercial goals. The article will further provide a brief commentary on the important provisions of SCM, so that there is better clarity as to what the Convention seeks to achieve. In addition to this the article also emphasises the demand for an international enforcement mechanism for cross-border mediation using empirical data.

This article will then go on to explore the important reasons as to why the SCM is needed, highlighting the issues of enforceability, why mediated settlement agreements should not be seen under the same light at regular private contracts and the inadequacy of the popular hybrid processes. The article further addresses the issue of 'prisoner's dilemma' in mediation and how the psychological theory has hampered the use of intentional mediation. Additionally, the article argues that the past missteps in establishing an international framework for mediation makes it a necessity that there is now a harmonised enforcement mechanism that learns from past failures.

After exploring the need for the SCM, it is then important and highly relevant to discuss whether the SCM will propel international mediation to the same level of popularity as arbitration. The answer is not straightforward as dispute resolution users are likely to suffer from status quo biases, risk aversion and an initial

[1] PM Lee Hsien Loong At Singapore Convention Signing Ceremony And Conference' (*Prime Minister's Office Singapore*, 2020) <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference> accessed 22 September 2020.

reluctance to try mediation. However, the theory of choice architecture purports that if an appropriate framework is established and there is an increased awareness of the benefits of cross-border mediation, such status quo biases and risk aversion may be displaced.

Lastly, the article also argues that the SCM will be a powerful tool to protect business relationships. The SCM will aid in the development of a better dispute system within organisations and assess how specific industries and regions are well-positioned to reap the benefits of the SCM. It is then relevant to discuss how the SCM may promote the use of investor-state mediation and better foster business relationships with investors and host States.

2. The rise of mediation

Every outcome in history has a defining moment, and for the mediation and alternative dispute resolution movement, such a moment was a the Pound Conference.[2] Leaders of the field, scholars and judges gathered to discuss the fairness and efficiency of the justice system and the adversarial court-based system. [3] Since the Pound Conference, there has been four decades of spectacular transformations, in both the common-law and civil-law world.[4] There have been a willingness to accept informal dispute resolution procedures such as arbitration, mediation and negotiation.[5] This encompasses, in the words of Mauro Cappeletti, the "third wave" of the Access to Justice Movement.[6]

The preferred tool for commercial dispute settlement has long been international arbitration. After World War II there was a dramatic increase in international trade and economic growth, which prompted the creation of the World Bank.[7] Such development alongside further lobbying from the global commercial and legal community led to the development of the New York Convention in 1958.[8]

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[2] L Camille Hebert, 'Introduction--The Impact of Mediation: 25 Years after the Pound Conference' (2002) 17 Ohio St J Disp Resol 527.
[3] Ibid.
[4] Joachim Zekoll, Moritz Bälz and Iwo Amelung, Formalisation And Flexibilisation In Dispute Resolution (2014).
[5] Ibid.
[6] Ibid.
[7] Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press 2011).
[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. XVI, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3

The New York Convention propelled international arbitration to a primary source for international dispute resolution.[9] The New York Convention allowed the enforcement of binding arbitral awards in States where enforcement is sought. The certainty of having an award upheld in a foreign jurisdiction, coupled with private and autonomous nature of arbitration, made it a popular choice for resolving international commercial disputes.[10] Additionally, the neutrality of location was a great advantage to parties as it enabled them to settle disputes in a neutral venue with an impartial tribunal.[11]

The popularity of commercial arbitration led to the creation of the International Centre for Settlement of Investment Disputes ("ICSID") Convention.[12] ICSID was specifically devised for investor-treaty arbitration, wherein a private investor from a foreign state would be able to bring an arbitration claim against the host state.[13] The number of investment cases being administered has drastically since ICSID's incorporation and it has established itself as one of the most important international dispute settlement mechanisms.[14]

However, despite international arbitration's many successes and frequent use, there has been a form of disenchantment with its process.[15] This is for three main reasons. Firstly, the once inexpensive dispute mechanism is now no longer so.[16] Unlike litigation, the parties to an international arbitration proceeding are required to pay an arbitrator for their services, and for international arbitration such fees can be significant.[17] There are also likely to be additional costs relating to administrative fees borne by the parties to arbitral institutions that are administrating the case.[18] Such consensus are reflected by empirical studies, where parties have indicated that the costs associated with arbitration are by far

[9] Gary Born, *International Commercial Arbitration* (2009) 68.
[10] Ibid.
[11] Nigel Blackaby and others, Redfern and Hunter On International Arbitration (6th edn, Oxford 2015).
[12] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 54-55 (the ICSID Convention), Oct. 14, 1966, 575 U.N.T.S. 159.
[13] Rudolf Dolzer and Christoph Schreuer, Principles Of International Investment Law (2nd edn, Oxford University Press).
[14] Greenberg (n 7) pg 13.
[15] Strong, S.I., Applying the Lessons of International Commercial Arbitration to International Commercial Mediation: A Dispute System Design Analysis (2018).
[16] Redfern (n 11).
[17] Redfern (n 11).
[18] Redfern (n 11).

its worst feature.[19] Secondly, its lack of speed is another detrimental factor.[20] It may take a considerable amount of time to even begin an arbitration proceeding and for the case to then move forward. Furthermore, arbitrators may take a long time with rendering the arbitral award, with month or sometimes a year being taken to generate a decision.[21]

The last critique is the increasing "judicialisation" of the arbitration process which was noted as the single greatest concern for commercial arbitration in the Queen Mary University of London Survey 2013.[22] This means, and in the words of Brower, that "arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts and that they are more often subjected to judicial intervention and control".[23] In this sense, arbitration has evolved from its simple and innovative solution driven exercise to a litigious mechanism that draw little differences from that of its court litigation counterpart. This 'external' criticism is directed at the middle point where arbitration and national laws must meet with the necessary adherence to national law primacy of the seat of arbitration results in lack of fluidity, speediness and cost-effectiveness of the arbitration process.[24] Arguably, there is also the 'internal' problem of "judicialisation" in international arbitration whereby most arbitrators that are selected are primarily former judges who bring their years of court experience into the management of the arbitration, making it more akin to a trial than anything else.[25] Philips adequately remarked that "one arbitrator attributed the problem to lack of arbitrator training, citing many retired judges who have become arbitrators who simply do in arbitration what they did in court… however, many respondents said that lawyers fall back on methods they know and have difficulty getting out of the litigation paradigm".[26]

[19] 2018 International Arbitration Survey: The Evolution Of International Arbitration - School Of International Arbitration' (*Arbitration.qmul.ac.uk*, 2018) <http://www.arbitration.qmul.ac.uk/research/2018/> accessed 22 September 2020.
[20] Ibid.
[21] Redfern (n 11).
[22] Bruno Zeller and Camilla Andersen, 'Discerning the Seat of Arbitration – An Example of Judicialisation of Arbitration, Vindobona Journal of International Commercial law and Arbitration'(2015) 192, 195
[23] Brower, "W(h)ither international commercial arbitration?" (2008) 24 Arb Into 181, at 183.
[24] Bruno Zeller 'Judicialization of the Arbitral Process' (2019) 4 Perth International Law Journal.
[25] Zeller (n 24).
[26] Remy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration'(2014), The American Review of International Arbitration, 25.2, 223.

Elsewhere, investment arbitration has come under increased scrutiny due to, its lack of consistency and predictability in case law, and transparency in its process.[27] In particular, host States have been displeased with the interference of the State's right to regulate.[28] As such, a number of States, especially those in South America have denounced the ICSID Convention as an applicable tool for resolving investor-state disputes.[29] More recently, the Comprehensive Economic and Trade Agreement ("CETA") has proposed a multilateral court system to decide on disputes as opposed to investment arbitration.[30]

Due to these apparent drawbacks, there are several commentators advocating for the promotion of international commercial mediation as a legitimate alternative to international arbitration. It is not an outright suggestion that mediation should replace arbitration altogether, as it would be a failure in taking account of the different nature of disputes. Indeed, many experts agree that mediation, although not appropriate for some disputes, can be very useful if dealing with a dispute where:

I) The preservation of contractual relationships is key factor;
II) Where the crux of the issue is the determination of damages and not a legal principle;
III) Where the ramifications of a potential decision is high;
IV) Complex case with many interweaving factors and technical expertise;
V) The need for more creative solutions and remedies;
VI) High emotional elements. [31]

Mediation is known to be a method of dispute resolution that can be completed in a more time saving and cost-effective manner.[32] Thomas Walde once stated that mediation is "not for determining the dispute in increasingly legalistic and highly formalistic rituals and procedures, but by facilitating communication and building a deal between the disputing parties. Mediation in its best form does not

[27] August Reinisch, 'THE FUTURE OF INVESTMENT ARBITRATION' [2009] International Investment Law for the 21st Century.
[28] Ibid.
[29] Reinisch (n 27).
[30] Comprehensive Economic and Trade Agreement 2017, OJ L 11, 14.1.
[31] John Lande & Rachel Wohl, Listening to Experienced Users, (2007) 13 DISP. RESOL. MAG. 18, 19.
[32] Linda Reif, "The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes", (2007) 45 Can. Bus. L.J. 20.

simply aim at ending a dispute, but at creating additional value by restructuring the relationship so it becomes as profitable for both parties as possible".[33]

The core attributes of mediation reside with its main selling points namely, participation of parties and self-determination. These attributes lend itself to creative problem-solving that creates individualised justice that fits the interests and values of the disputants.[34] Adjudicative processes such as arbitration and litigation involve remedies and injunctive relief that are limited in nature, ordinarily in terms of money and nothing more.[35]

Conversely, mediation allows the contemplation of a variety of remedies such as creatively solving a monetary issue whilst simultaneously agreeing to preserve and extend a mutually beneficial business relationship by also signing a new agreement thus leading to the creation of greater value that goes to the root wants and needs of the parties at dispute.[36]

The importance of voluntary participation in mediation should not be understated, as parties are encouraged to work towards a mutual solution that may then go on to preserve party relationships. [37] In this sense, the interest-based nature of mediation means that settlement agreements are usually more likely to be voluntarily complied with than most other forms of dispute resolution mechanisms. [38]

The increased importance of international commercial mediation and its use is largely also because of the growing influence and dominance of East Asian countries such as China, Singapore and Japan who can all be regarded as new economic hubs.[39] Asia has deep roots that give preference to consensual based

[33] Thomas Walde, "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" (2006), 22 Arb. Int'l 205 at p. 206.
[34] Jacqueline M. Nolan-Haley, "Mediation: The 'New Arbitration'" Harvard Negotiation Law Review, Forthcoming Fordham Law Legal Studies Research Paper No. 1713928.
[35] Thomas D. Cavenagh & Lucille M. Ponte, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 93.
[36] Cavenagh (n 35) pg 93.
[37] Jacqueline (n 34).
[38] Eunice Chua, "Enforcement of International Mediated Settlements without the Singapore Convention on Mediation", (2019) Singapore Academy of Law Journal.
[39] Veronika Vanisova, "Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the light of the Singapore Convention", (2019) Prague Law Working Papers Series No. 2019/II/5.

dispute resolution and a strong cultural indisposition to adversarial dispute forums.[40]

The culture in China for example still pays particular attention to the Confucianist principles of social harmony and relationships, both of which are key reasons as to why mediation remains a popular mode for dispute resolution in China. PRC (People's Republic of China) legal codes suggest a preference to employing mediation at first instance before continuing with other adjudicative methods when involving intentional business and investment law.[41] Additionally, the rise of China International Commercial Court ("CICC") ensures that there is better integration between arbitration, mediation and litigation and acts as a "one-stop-shop" for commercial parties to utilise.[42]

Elsewhere, Italy in 2012, enacted a decree that made mediation mandatory for civil disputes before access to litigation is allowed.[43] Such a decree seems unnecessarily strict, but it was a well-thought-out solution towards backlogged court cases. The judge will then assume the role of enforcing the settlement agreements presented.[44] Further developments can be seen with the EU Mediation Directive that will be explored further in the later sections,[45] or the Indian Commercial Courts Act 2015 which mandates pre-suit mediation for cases where there is no interim relief being contemplated.[46]

3. A commentary on the Singapore Convention

The SCM is a revolutionary multilateral treaty created by UNCITRAL to promote cross-border mediation. The SCM sought to provide an efficient mode of enforcing foreign mediated awards in a uniform and coherent way. It may therefore be useful to discuss the reasons behind the enactment of the

[40] Ibid.
[41] Xiangzhuang Sun, "A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court", (2020) The Chinese Journal of Comparative Law, Vol. 8 No. 1 pp. 45–54.
[42] Ibid.
[43] Herbert, William A., et al. "International Commercial Mediation." (2011), *The International Lawyer*, vol. 45, no. 1, pp. 111–123.
[44] Herbert (n 43), pg 111-123.
[45] Directive 2008/52/EC.
[46] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

Convention and a provide a brief commentary on the key provisions before undertaking a further analysis on its effect.

Mediation has been an unpopular tool to resolve international disputes due to the difficulty of enforcing a mediated settlement in domestic courts. If a party refuses to adhere to the mediated settlement terms, then the aggrieved party will bring an ordinary breach of contract claim.[47] This, means that the parties would have to pursue additional litigation (an outcome they wanted to avoid in the first place), incurring additional costs and delay. The lack of certain enforceability for cross-border mediation has resulted in companies opting to disregard mediation as a genuine way of settling disputes, despite the perceived advantages of cost-effectiveness and preservation of commercial relationships.[48]

Therefore, the establishment of a concise, universal, and a clear international framework is an important development in international dispute resolution as it promotes the use of cross-border mediation. After three years of intense debate and deliberation between 90 participating member states and various international organisations, the UNCITRAL Working Group II (Dispute Settlement) presented the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). The SCM currently has 52 signatory parties, with Fiji, Belarus, Ecuador, Honduras, Turkey, Qatar, Saudi Arabia and Singapore having already ratified the treaty.[49] It is noteworthy that the signing of the SCM boasted a number of signatories that far exceeded the initial 10 signatories to the New York Convention in 1958, which signifies the SCM as a key missing puzzle to the overall international dispute resolution mechanism. [50] The New York Convention went on to gain 161 ratifications from States, which hopefully the SCM can soon replicate.[51]

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[47] Christina G. Hioureas, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" (2019), 46 Ecology Law Quarterly 61 37 Berkeley Journal of International Law 215.

[48] Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp. Disp. Resol. L.J. 1.

[49] 'UNTC' (*Treaties.un.org*, 2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII 4&chapter=22&clang=_en> accessed 11 September 2020.

[50] Quek Anderson, " The Singapore Convention on Mediation: Supplying the Missing Piece of the Puzzle for Dispute Resolution" Journal of the Malaysian Judiciary (2020) Singapore Management University School of Law Research Paper No. 1/2020.

[51] Ibid.

Empirical research suggests that there is clear demand and support for an international enforcement mechanism for mediation akin to the New York Convention. SI Strong conducted a recent large-scale survey for UNCITRAL, stating that an enforcement convention for successful mediated outcomes would encourage parties in the respondent's home jurisdiction to use mediation or conciliation in international commercial disputes".[52] Furthermore, the survey indicated that it was fairly difficult to enforce an international mediated settlement in the home country of the respondents, with only 14% indicating that it would be easy and straightforward.[53] Additionally, an overwhelming majority of respondents felt that they would be far more likely to utilise cross-border mediation if an international enforcing mechanism was in place.[54]

In another albeit smaller-scale study conducted by the International Mediation Institute, the majority of respondents stated that they would be inclined to use international mediation when dealing with a foreign party if the country where enforcement is sought has ratified the SCM.[55] Similarly, regarding the question of whether the absence of any kind of international enforcement mechanism for mediated settlements present an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 38.1% indicated it was a major impediment, and 52.4% indicated that it fell within the category of a deterring factor.[56]

Therefore, the empirical data makes it clear that many, in both the legal and commercial community, strongly feel that an international enforcement instrument such as the SCM would prompt and encourage the use of cross-border mediation. Roland Schroeder probably best encapsulates the current data and survey consensus with his own experience with convincing clients to mediate.[57] He argued that it can be difficult to convince clients and the opposing

[52] S. I. Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016), 73 Wash. & Lee L. Rev. 1973.
[53] Ibid.
[54] ibid.
[55] 'IMI Survey Results Overview: How Users View The Proposal For A UN Convention On The Enforcement Of Mediated Settlements — International Mediation Institute' (*International Mediation Institute*, 2020).
[56] Ibid.
[57] Intervention of the Corporate Counsel International Arbitration Group (CCIAG), in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 62nd Session, Feb. 3, 2015, 10:00-13:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f7f8fc60- 434c-4965-9b2d-79dee3f85403; intervention of Canada, in UNCITRAL Audio Recording: Working Group II (Dispute Settlement), 66th Session, Feb. 6, 2017, 15:00-18:00,

counsel to engage in mediation because it lacks the international traction and enforceability that is associated with international arbitration.[58] Admittedly there is considerable difficulty in enforcing mediated settlements internationally, and parties have, more often than not, been forced to re-litigate the merits of the case.[59]

The SCM in essence creates a new level of international enforceability and attains a *sui generis* status for mediated settlements, that would otherwise be ordinarily interpreted as mere contractual obligations.[60] This is not dissimilar from the New York Convention. It is thus useful to go through the key provisions in the SCM to better ascertain how the Convention is intended to be used and comparatively analyse what makes the SCM similar or different from the New York Convention.

To fall within the scope of the Convention, the dispute must first be a commercial one and between parties from two different jurisdictions, in other words international.[61] The UNCITRAL Working Group II decided early on to limit the scope of the Convention to only commercial disputes. Like the New York Convention, the SCM deliberately refrains from defining disputes of commercial nature leaving room to interpret the same in a broad manner to even encompass investor-state disputes.[62] However, the definition specifically excludes disputes relating to personal, family or household purposes.[63]

The Working Group II also made the pragmatic and cautious decision to limit the applicability of the Convention to disputes that are in some manner or form, international.[64] This will largely depend on the identities of the parties involved.[65]

https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/5dcec24f-22b1-4ed7-a978-e3cb0ce765e6.

[58] ibid.

[59] Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements", (2015)TDM 6 , in Mediation & ADR.

[60] Schnabel (n 48).

[61] Article 1, UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.

[62] See, e.g., interventions of Colombia, Argentina, Israel, and Germany, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 14, 2016, 14:00-17:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/d1fab47a-af70-4883-95d6-e149d8dea7

[63] Article 1(2) UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.

[64] Article 1 (n 61).

[65] Schnabel (n 48).

Thus, disputing parties from businesses in two separate countries will ordinarily be sufficient to satisfy this definition.[66] In the event that both parties originate from the same country, the Convention may still apply if the disputing parties seek enforcement of the mediated settlement in a different State.[67]

The Convention, unlike the New York Convention, also ensures to disregard the concept of a seat of mediation.[68] This is because a mediated dispute may involve parties in two different jurisdictions but also operate in two other separate jurisdictions, and may cause additional complications with the increase in use of Online Dispute Resolution.[69] This has important implications, as the mediated settlement agreement need not adhere to domestic legal requirements of any State before it falls within the ambit of the Convention.[70]

Article 3 is a key provision of the SCM which states that mediated settlement agreements presented to a court of a State that has ratified the Convention, will be treated as an enforceable and binding agreement.[71] This, however, omits mediated settlement agreements that are being enforced as an arbitral award or a court judgement.[72] There were some initial disagreements on whether terms such as enforcement and recognition should be used in the Convention, similar to the New York Convention.[73] The inclusion of the latter was divisive, as some of the delegates felt that recognition was only to be used for State acts and not private agreements, as mediated settlements necessarily are.[74] Another issue was the fact that the meaning of recognition differs from one jurisdiction to the

[66] Schnabel (n 48).
[67] Schnabel (n 48).
[68] See, e.g., intervention of the United States, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 16, 2016, 14:00-17:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/aa875fca-e13c-49db-83f7-820bbe6dfe74.
[69] Schnabel (n 48).
[70] Schnabel (n 48).
[71] Article 3 UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[72] Article 1(3) UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[73] See, e.g., interventions of Germany, Bulgaria, and the European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 9:30-12:30, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/62da59e8-138e-4226-9753-0ea15c3b706f.
[74] Quek (n 50).

next.[75] To avoid any upset, the Working Group II adopted a more pragmatic description of the function of recognition with the term enforcement.[76]

Article 5 of the SCM sets out grounds for refusal drawing inspiration from the New York Convention[77], by setting out an exhaustive list of grounds for which a court may reject the enforcement of a mediated settlement agreement.[78] All the grounds stated under Article 5 are permissive, in that courts have absolute discretion in applying the grounds of refusal.[79] Hence, a State cannot empower additional grounds of relief to the courts that go beyond what has already been stated in the SCM.[80]

Some grounds for refusal warrant some discussion, such as Article 5(1)(b)(i), which draws inspiration from the New York Convention, allowing a court to deem a mediated settlement agreement null and void, inoperative or incapable of being performed under the law.[81] This is interpreted broadly and will apply in cases of fraud or misrepresentation.[82] This ground does not then, however, allow a court to provide relief for an agreement where it does not meet certain domestic law requirements, such as the requirement to conduct the mediation under certain rules, selection of a mediator or other formal requirements.[83]

Article 5(1)(b)(ii) it is also important as agreements that are not intended to be binding will declared to be unenforceable.[84] Similarly, article 5(1)(d) prevents the granting of relief where it is directly inconsistent with the intentions of the parties and the mediated settlement, thus, for example, if the parties expressly agree on certain limitations for seeking relief, then such limitations must be respected.[85]

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[75] Schnabel (n 48).
[76] Quek (n 50).
[77] Article 5, UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[78] Schnabel (n 48).
[79] Schnabel (n 48).
[80] Schnabel (n 48).
[81] Article 5(1)(b)(i), UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[82] Schnabel (n 48).
[83] Schnabel (n 48).
[84] Article 5, UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[85] Article 5(1)(d), UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.

Alternatively, grounds 5(1)(c)(ii) prevents an agreement from being voided merely on account of poor drafting rendering unclear terms.[86]

Perhaps the most controversial and distinct ground under Article 5 relates to (1)(e) and (f). The former relates to a breach in the standards applicable to the mediator and only applies if the aggrieved party can demonstrate that the breach was of a serious nature, but for the breach, the party would not have agreed to enter into the settlement agreement.[87] It is important to demonstrate some causal link between the decision to enter into the mediated settlement and the breach; this is an objective test. This sets a high bar, which is sensible considering the fact that a lower bar would lead to setting aside settlement agreements easily. Such applicable standards are based on domestic law standards or codes of conduct, or on the SCM Model Law.[88] However, if no such binding standards apply, the court cannot then apply a principle on a post hoc basis.[89]

Article 5 (1)(f) applies in circumstances where the mediator has failed to be impartial or independent.[90] Substantively, this clause relates less to the agreement by the parties and focuses on the conduct of the mediator as a third party. This provision is controversial and represents a paradigm shift of the role of a mediator, as unlike arbitrators, mediators generally do not have a duty to disclose such information as they do not make the final decision.[91] This is an important difference, as it was argued by some delegations of the working group that there might be good reasons to choose a mediator that is not completely impartial to the dispute as such a person would already have full knowledge of the situation and know the parties involved, being better equipped to convince parties who are closed to the mediation process to consider alternative outcomes.[92] Furthermore, it was also argued by some delegations that a mediator should be able to treat parties differently as they see fit: for example,

[86] Article 5(1)(c)(ii) UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[87] Article 5 (1)(e), UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[88] Schnabel (n 48).
[89] Schnabel (n 48).
[90] Article 5 (1)(f), UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[91] Schnabel (n 48).
[92] intervention of the International Law Association (ILA), in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 64th Session, Feb. 4, 2016, 15:00- 18:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/83bbcdba-28c4-4368-bab6-e8d17b3fbcb6; intervention of Canada, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 16, 2016, 9:30-12:30

they may spend 5 minutes with one party but much longer with another in order to displace any form of power disparity.[93] This is not to say that a mediator is not neutral as to the negotiated outcome, as Stulberg pointed out "the mediator must be neutral with respect to the negotiated outcomes but not neutral to the process".[94] It would be impossible for a mediator to stay impartial in the process of attempting a mutually acceptable outcome whilst also addressing power imbalances between parties.[95] As such, the SCM has introduced a seismic shift in the role of mediator from one of flexibility to one of formality. This provision creates an autonomous standard that is to be applied in all mediations. Like the previous provision, the failure to disclose must be significant and important.[96] Similarly, there must also be a form of causal relationship between the failure to disclose information and the agreement to settle.

Lastly, and rather unusually, the SCM requires parties to make a declaration that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.[97] In this sense, parties must show awareness of the existence of the Convention in order for the provisions to apply by "opting-in", even if the State for which enforcement is sought has ratified the SCM.[98] It was of the intention of the Working Group II that such opt-in procedures would serve the dual purpose of informing parties of their obligations to the Convention and also raising awareness of the Convention's existence.[99] For some of the delegation, such a procedure speaks to the autonomous and consensual nature of mediation.[100]

However, for other delegations, such an opt-in procedure is paradoxical and runs contrary to the broad nature of the SCM, raising what is otherwise unnecessary complexities.[101] It was argued that it would deter the promotion of the Convention and ease of enforceability, both of which represent the primary objective of the

[93] Schnabel (n 48).
[94] Stulberg, 'Must a Mediator Be Neutral? You'd Better Believe It' (2012) Marquette Law Review Volume 95 Issue 3 Spring 2012 p829-858
[95] Moore C. W. 'The Mediation Process: Practical Strategies for Resolving Conflict' (2003) 3rd Edition.
[96] Schnabel (n 48).
[97] 8(1)(b) UN Convention on International Settlement Agreements Resulting from Mediation C.N.154.2019.TREATIES-XXII.4 of 8 May 2019.
[98] Eunice Chua, 'The Singapore Convention On Mediation—A Brighter Future For Asian Dispute Resolution' (2019) 9 Asian Journal of International Law.
[99] Eunice Chua (n 98).
[100] Morris-Sharma, 'Constructing the Convention on `mediation- The chairperson Perspective', (2019) SAcLJ 487.
[101] Ibid.

Convention.[102] There is certainly some truth in this. Morris-Sharma points out that in practice, parties who have already agreed to a mediated settlement are unlikely to undertake further discussions on the applicability of SCM and would generally expect the other party to adhere to the terms of the settlement agreement.[103] The lack of popularity with opt-in procedures of this kind contemplated under the SCM is best illustrated by the failure of the ICC Pre-Arbitral Referee Procedures 1990 in relation to emergency arbitrations with the procedure rarely being used in its first 15 years.[104] This unpopularity of the 1990 rules can be attributed to the fact that it mandated parties to agree to a referee once a dispute had already arisen which can be seen as a unpractical obstacle.[105] Contrastingly, in January 2012, the ICC introduced emergency arbitration provisions that applied automatically to all arbitration agreements utilising ICC rules unless the parties to the agreement decided to 'opt-out'.[106] The 2012 rules more successful amongst those who utilized ICC rules with 95 emergency arbitrators being appointed between 2012 and 2020.[107] It is also noteworthy to point out that the New York Convention omits such an opt-in requirement.

4. The Necessity of the Singapore Convention

This section seeks to discuss the practical need for a uniformed and harmonised enforcement mechanism and argue why the SCM is needed. This section will pay particular attention to the promotion of international mediation, the displacement of the prisoner's dilemma in mediation, and lastly, to address past missteps to establish an international framework to mediation.

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[102] Ibid.

[103] Ibid.

[104] James Hosting and Erin Valentine, 'Pre-Arbitral Emergency Measures of Protection: new Tools for an Old Problem', (2011) Commercial Arbitration 2011: New Developments and Strategies for Efficient, Cost-Effective Dispute Resolution at 199 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-865, 2011).

[105] Victoria Clark and Nadia Hubbuck, "The Emergency Arbitrator Is Officially a Teenager" (*Arbitration Blog*April 15, 2020) <http://arbitrationblog.practicallaw.com/the-emergency-arbitrator-is-officially-a-teenager/> accessed January 22, 2023

[106] "Rules for a Pre-Arbitral Referee Procedure - ICC - International Chamber of Commerce" (*ICC*December 6, 2022) <https://iccwbo.org/publication/rules-pre-arbitral-referee-procedure/> accessed January 22, 2023

[107] Victoria Clark and Nadia Hubbuck, "The Emergency Arbitrator Is Officially a Teenager" (*Arbitration Blog*April 15, 2020) <http://arbitrationblog.practicallaw.com/the-emergency-arbitrator-is-officially-a-teenager/> accessed January 22, 2023

4.1 The need for a harmonised enforcement mechanism

Empirical data and commercial consensus discussed in the earlier section highlight the issue of enforceability of international mediated agreements, which is one of the main driving factors for the creation of the SCM. Enforcement should however not be confused with compliance.[108] Compliance denotes that the parties voluntarily perform the settlement agreement. While such may be the outcome in many international cases, it cannot be overlooked that such an enforcement regime may act as a significant inducement for disputants to perform the obligation stated in the settlement agreement and in essence, changes the agreement to one of a quasi-compulsory nature.[109]

The status of mediated settlement agreements is found within the laws of contract. The principles of contract law provide remedies and defences for the terms enshrined in the mediated settlement agreement for the non-compliant party.[110] The issue with this is that parties are required to return to the domestic litigation system that they intended to avoid in the first place, where principles of domestic law are applied.[111]

Despite the common notion that mediated settlement agreements are in essence, merely private contracts, they differ in three important ways.[112] Firstly, an international mediated settlement is a result of a consensual dispute resolution process that is reached voluntarily and in good faith.[113] In other words, there must have been a dispute and said dispute must have been amicably resolved with a full and final settlement agreement. In contrast, however, the creation of a commercial agreement does not mandate that such elements are present or that any legal mechanism need be employed.[114] It is illogical and undesirable to go

[108] Laurence Boulle, 'International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework', (2014) Contemporary Asia Arbitration Journal Vol. 7, No. 1, pp. 35-68.
[109] Boulle (n 108).
[110] Boulle (n 108).
[111] Edna Sussman, 'Final Step: Issues in Enforcing the Mediation Settlement Agreement', CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2008) 343, 347.
[112] A.K.C Koo, 'Enforcing International Mediated Settlement Agreements', Harmonising Trade Law to Enable Private Sector Regional Development (New Zealand: UNCITRAL Regional Centre for Asia and the Pacific and New Zealand Association for Comparative Law 2017).
[113] Ibid.
[114] Chang-Fa Lo "Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements" (2014) 7 Contemporary Asia Arbitration Journal 119 at 123-124.

through a dispute resolution mechanism for the sole purpose of resolving a dispute to then have to go through a different set of dispute settlement in order to enforce the outcome of the original dispute procedure.[115] Therefore, it makes sense to give international mediated agreements a *sui generis* status, as the SCM necessarily does.

Secondly, on a procedural note, there are structured processes and rules that are required to be completed in order for there to be an international mediated settlement. Amongst other rules, most domestic legal systems set out requirements of neutrality, confidentiality, and the voluntary nature of the mediation.[116] This differs from commercial contracts because such agreements are not subjected to similar rules.[117] Such mediation rules and procedures ensure fairness in the system and such procedural justice in itself also supports an exclusive enforcement mechanism that the SCM now provides.[118]

Lastly, treating settlement agreement as a contract will promote the use of more adjudicative dispute resolution processes in the expense of peaceful modes of dispute resolution such a mediation.[119] An enforcement mechanism is needed to respect the autonomy of parties who choose to utilise mediation as their preferred forum of dispute resolution and the finality of the mediated settlement that comes with it.[120]

On a more practical viewpoint, the lack of an international enforcement mechanism may also result in parties being tempted to delay or refuse performance for economic reasons or otherwise.[121] It is human nature that parties may feel aggrieved by the settlement terms post mediation or that there is a change in business ownership who feel a new position or relationship with the opposing party to the mediated settlement.[122] It is therefore in the best interest of the international commercial community that there is an element of finality to mediated settlements.

[115] Ibid.
[116] Ibid.
[117] Chang-Fa Lo (n 114).
[118] Koo (n 112).
[119] Koo (n 112).
[120] Koo (n 112).
[121] Chang-Fa Lo (n 114).
[122] Chang-Fa Lo (n 114).

There is also an important international reason for the support of an enforcement for cross-border mediated settlements.[123] Foreign disputants have a hard time understanding the jurisdictions of foreign countries. Disputing parties will need to travel abroad and pay for local fees to enforce a mediated settlement.[124] Therefore, on that note, an enforcement mechanism will aid international trade and foreign direct investment.[125] Allowing for direct enforcement will ensure that there is a stable mechanism and sufficient trust between traders to facilitate effective international trade.[126]

4.2 The Hybrid Process is not the best of both worlds

Additionally, one of the attractions of mediation is its cost-effective nature. The lack of an enforcement mechanism has resulted in what can be called an arbitral award of convenience.[127] In order to achieve this result, parties rely on hybrid processes such as Arb-Med-Arb, and Med-Arb to allow mediated settlement agreements to be transformed into binding arbitral awards.[128]

In Med-Arb, if there is a mediated settlement agreement achieved in the mediation phase, it is then recorded as an arbitral consent award.[129] The arbitrator may be the same individual as the mediator as the case often tends to be. If no such settlement agreement is reached, then the case proceeds to an arbitration hearing.[130] There is an element of efficiency as it can be cost-effective and time-saving. Even in the scenario that a settlement agreement is not reached, the prior mediation would help narrow down the issues for the arbitration hearing.[131]

However, Med-Arb proceedings can be criticised for its uncertainty. Firstly, the arbitral consent order is not recognised under the New York Convention if the arbitrator is appointed after the formation of a mediated settlement agreement as there was no difference between the parties. In other words, there was no dispute to begin with. This is the case in certain jurisdictions such as Brazil and New York. Commentators exploring this issue have reached varying conclusions, with

[123] Chang-Fa Lo (n 114).
[124] Chang-Fa Lo (n 114).
[125] Chang-Fa Lo (n 114).
[126] Chang-Fa Lo (n 114).
[127] Chang-Fa Lo (n 114).
[128] Chang-Fa Lo (n 114).
[129] Eunice Chua (n 38).
[130] Eunice Chua (n 38).
[131] Eunice Chua (n 38).

some saying it is enforceable,[132] some arguing it is not,[133] and others that it is unclear.[134] The *travaux préparatoires* of the New York Convention indicate that the issue were considered but ultimately left without a decision.[135]

Another issue pertaining to the Med-Arb hybrid process is the fact that there may be allegations of actual bias due to the arbitrator being the same person as the mediator. For example, confidential information disclosed in the mediation may hold sway on an arbitrator when he or she is making his final decision. In this sense, parties may be hindered from reaching an amicable solution as they may be wary of such perceived biases.[136] Such sentiments were shared in *Glencot Development and Design Co Ltd v Ben Barrett & Son*,[137] where Judge Humphrey warned against the dangers of one person wearing two hats.[138]

The SCM provides a specific regime for tackling mediation that offers more certainty and clarity when enforcing mediated settlement agreements. Additionally, providing for mediation specifically is beneficial because defences to the challenging of a mediated settlement agreement or an arbitral award may at times, conflict.[139] For example, although the SCM specifically provides for defences for mediated settlement agreements, the New York Convention remains silent on the matter.[140]

In regards to Arb-Med-Arb, it is a process whereby the mediation takes place after the notice of arbitration is served, but there then is an immediate stay in proceedings to attempt mediation.[141] This hybrid method avoids the issue of enforceability that the Med-Arb procedure suffers from as there exists a dispute between the parties before the arbitration is commenced and is generally

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[132] Harold I Abramson, "Mining Mediation Rules for Representation Opportunities and Obstacles" (2004) 15 Am Rev Int'l Arb 103.
[133] Christopher Newmark & Richard Hill, "Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?" (2000) 16(1) Arb Int'l 81 at 81.
[134] Sussman (n 36).
[135] Travaux préparatoires: United Nations Economic and Social Council, Recognition and Enforcement of Foreign Arbitral Awards: Report by the Secretary-General (E/2822) (31 January 1956) Annex I (Comments by Governments) at pp 7 and 10.
[136] Bobette Wolski, "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of Its Parts?" (2013) 6(2) Contemp Asia Arb J 249 at 259–260.
[137] [2001] All ER (D) 384; [2001] EWHC
[138] Eunice Chua (n 38).
[139] Eunice Chua (n 38).
[140] Eunice Chua (n 38).
[141] Wolski (n 136).

accepted as enforceable under the New York Convention.[142] If mediation is commenced early, such a procedure could represent an effective tool in preserving the commercial relationships of the disputing parties.[143]

However, Arb-Med-Arb, although the more effective than the other hybrid processes can be regarded as particularly inefficient and costly if no settlement agreement is reached.[144] It also does not avoid the disadvantage of potential bias as the arbitrator and mediator tend to be the same individual. [145]

Thanks to the New York Convention, the use of hybrid mechanisms is on an upwards trend. However, the SCM now means that such existing modes of enforcing mediated settlement agreements are ineffectual in comparison. The SCM offers clear procedure guidelines that tailor itself to international commercial mediation and there is optimism that it will be an important instrument to commercial parties and international trade.[146]

4.3 Combating the Prisoners Dilemma in international mediation

Without a cross-border enforcement mechanism, mediation is currently seen as a risky endeavor due to the uncertainty behind the enforceability and the validity of the international mediated settlement.[147] Parties to a dispute need assurance of the binding nature and enforceability of a particular dispute resolution process once opted. In the realm of alternative dispute resolution, it is counterproductive for parties to seek recourse of the very litigation system which the parties eschewed in the first place.[148] The basis of commerciality is economic efficiency, and such is the same for resolving commercial disputes. In this sense, international mediation offers very little for cross-border litigants.[149]

The well-known prisoner's dilemma theory may explain the reluctance in parties viewing international mediation as a legitimate tool to resolve their commercial

[142] Edna Sussman, "The New York Convention through a Mediation Prism" (2009) 15(4) Disp Resol Mag 10 at 12.
[143] Eunice Chua (n 38).
[144] Eunice Chua (n 38).
[145] Eunice Chua (n 38).
[146] Eunice Chua (n 38).
[147] Veronika Vasinova (n 37).
[148] Boulle (n 108).
[149] Veronika Vasinova (n 39).

disputes.[150] The theory explains a paradox where two prisoners under interrogation who act on their own self-interests will not lead to the most optimal outcome because there would be a zero-sum gain or loss by each party.[151] However, if both parties act cooperatively to help each other, the optimal position would be achieved as both the prisoners would be free to go. Putting this in the context of international mediation, although it may be in the best interests of disputants to solve the dispute in an amicable way and adhere to the settlement agreement, they may rationally decide against it and act on their own self-interest.[152]

The reasoning for such a phenomenon in mediation is two-fold. Firstly, a circumstance may very well arise where a party pretends to work together and demonstrate cooperativeness but had ulterior intentions to attempt and achieve the best solution for themselves.[153] Secondly, even if one party seems genuine, they may easily change their mind after the conclusion of the settlement agreement.[154]

The lack of certainty regarding the enforcement of the settlement agreements then means that parties when considering commercial mediation would keep the above concerns in mind when making their decision.[155] This is especially true for international dispute resolution due to the costs attached to it. Therefore, the adoption of a cross-border enforcement mechanism such as the SCM would help dispel the concerns attaching itself to psychological uncertainty of the prisoner's dilemma.[156]

4.4 The SCM is needed to address past missteps

Wolski argued that the attraction of international arbitration lies with its "comprehensive legal system of bilateral and multilateral conventions and treaties and national laws and arbitration rules which support it".[157] Till the SCM, the same could not have been said about international mediation, and ultimately, it was the domestic law of countries that determined the enforceability to

[150] Veronika Vasinova (n 39).
[151] Effective Choice in the Prisoner's Dilemma ROBERT AXELROD
[152] Veronika Vasinova (n 39).
[153] Veronika Vasinova (n 39).
[154] Veronika Vasinova (n 39).
[155] Veronika Vasinova (n 39).
[156] Veronika Vasinova (n 39).
[157] Bobette Wolski, '*Recent Developments in International Commercial Dispute Resolution: Expanding the Options'*, (2001) 13 BOND L. REV. 245, 248.

mediated settlement agreements. This is not to say that there are little international rules governing mediation, but it fails in achieving any type of harmony, uniformity, or consistency amongst these various domestic regimes.[158]

In 2002, UNCITRAL introduced the Model Law on international Commercial Conciliation to develop a harmonised enforcement mechanism.[159] The goal was to provide certainty to international conciliation and for it to be "treated as or similarly to an arbitral award".[160]

Although the Model Law uses the term 'conciliation' and not mediation, in this instance, it is referring to the same process. Notwithstanding this, the Model Law's aim was not achieved and can be seen largely as disappointing in its effect. The main issue with the Model Law was that the settlement agreement was only enforceable by virtue of contract law, thus providing no alternative remedies if one of the parties failed to comply with the agreement.[161] In practical terms, this proved too little for commercial parties as there always remained the risk that a party would just take on the contract breaches. The use of contract law principles to enforce settlement agreements are also time-consuming, costly, and burdensome.[162] As discussed earlier, mediated settlement agreements should be differentiated from regular private contracts, and as such a binding regulation such as the SCM, instills an element of certainty within the international mediation scene.[163]

Furthermore, the 2002 Model Law merely provides a framework for mediation such as confidentiality and disclosure but fails to provide a mode of enforcement. This has since been remedied by the newly introduced UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, that was introduced alongside the SCM.[164]

Additionally, and rather crucially, the 2002 Model Law was not consistently adopted by States. Even if they were, often than not, only a transplantation of certain text and rules would be used, as seen in Singapore. This can be

[158] Boulle (n 108).
[159] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.
[160] UNCITRAL, 2004, p.55; UNGA, A/CN.9/514, p.25, para.77.
[161] Yunus Emre Gül, 'Singapore Convention and Mediation at the Transnational Level', (2020) Asian Journal on Mediation 2020 TLI Think! Paper 08/2020.
[162] Koo (n 112).
[163] Gül (n 161).
[164] (n 159).

differentiated from the UNCITRAL Model Law on International Commercial Arbitration, where many States not only used it as a guideline to implement their own domestic legislation. In many cases, States would use the identical text of the Commercial Arbitration Model Law, which is why the term 'model law jurisdiction' is a commonly used phrased. Such consistency in adoption is a large reason why commercial parties feel safe in using arbitration as a dispute resolution mechanism as most laws in foreign jurisdictions would be relatively harmonised and universal. The hope is that the newly introduced 2018 UNCITRAL Mediation Model Law will follow a similar pathway.

The next attempt at achieving a harmonised mediation framework came in the form of the European Mediation Directive.[165] The European Union recognised that the enforcement of mediated settlement agreement should not be reliant on the goodwill of parties.[166] Article 6 of the Directive asks that Member States allow for the enforcement of a mediated settlement agreements unless it is contrary to the laws of the country where enforcement is sought.[167]

However, the Directive proved rather disappointing and its success rather limited in solving the "EU Mediation Paradox".[168] The paradox is that although the benefits of mediation is well recognised and is likely to lead to a saving in both cost and time, there was a severe underutilisation of mediation to solve commercial disputes.[169] From a legal viewpoint, this could be because of the broad formulation of Article 6 and how it leaves the mode of enforcement to the domestic law member states, including the available defences. This can be contrasted with the SCM where although the mode of enforcement is not specified, it harmonises the available defences that can be used by the parties during enforcement.

A more important reasoning, however, lies with the lack of promotion of cross-border mediation in the EU: lack of environmental and incentive rules, uncertainty with quality of mediators or institutions, and a general absence of awareness

[165] (n 45).
[166] Eunice Chua, 'The future of international mediated settlement agreements: Of conventions, challenges and choices' (2015) Tan Pan Online: A Chinese-English Journal on Negotiation. 1-11. Research Collection School Of Law.
[167] Article 6 European Union Mediation Directive 2008/52/EC.
[168] European Union Mediation Directive 2008/52/EC.
[169] Giuseppe de Palo, 'A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More …Directive' (2018), <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf>.

amongst parties.[170] A resolution proposed by the European Parliament in 2017 detailed this issue and highlighted the need for its Member States to increase its efforts in encouraging mediation for civil and commercial disputes, such as informational campaigns and increased cooperation between dispute resolution users.[171] The resolution also detailed the need to establish consistent quality standards within the EU and a national registrar for mediators.[172] Despite this proposed resolution however, in 2018, the Legal Affairs Committee of the European Parliament concluded that the EU directive "remains very far from reaching its stated goals of encouraging the use of mediation".[173] This is a reasoning that will be explored further in the next section, and one that the SCM is hoped to overcome.

5. Will the Singapore Convention reach the popularity of the New York Convention?

It is human nature to cultivate innovation and develop novel ways to settle common issues. This is no different in dispute resolution, where years of practice and pragmatism has led to the development of a multi-door dispute resolution scheme: arbitration, conciliation, negotiation, mediation, and litigation.[174] Such a multi-door dispute resolution scheme is logical, as "if a patient is ill, does the doctor always operate? Of course not. The doctor and patient discuss all possible solutions. Likewise, with the legal field - for each legal ailment, a variety of options need to be discussed".[175]

It is disappointing that lawyers have exhibited reluctance in considering mediation for commercial disputes despite the fact that its characteristics may require as such. For example, a survey pointed out that out of 600 companies in the US,

[170] De Palo (n 169).
[171] Texts Adopted - Implementation Of The Mediation Directive - Tuesday, 12 September 2017' (*Europarl.europa.eu*, 2020) <https://www.europarl.europa.eu/doceo/document/TA-8-2017-0321_EN.html> accessed 20th August 2020.
[172] Ibid.
[173] De Palo (n 169).
[174] Address by Frank E.A. Sander, Bussey Professor of Law at Harvard University, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976). reprinted in The Pound Conference, 70 F.R.D. 79, 111 (1976).
[175] Larry Ray, 'The Multi-Door Courthouse Idea: Building the Courthouse of the Future... Today', (1985)Ohio State Journal on Dispute Resolution, vol. 1, no. 1, 7-54.

only 19% of them utilise mediation frequently.[176] In another example, a survey of 158 German companies showed that although the companies see the benefits of mediation, it's use is rare.[177]

One explanation for the lack of use for mediation can be attributed to the resistance on the part of the lawyers in resorting to mediation. This obviously does not mean all lawyers contribute to this resistance since many have contributed to the development of international mediation. However, it appears that a large number of lawyers across the globe have an aversion towards recommending mediation to resolve commercial disputes.

Lawyers are generally perceived as logical and rational, but such a representation may not be necessarily accurate. Lawyers also suffer from anchoring and framing choices that may nudge them away from the uncertainty of mediation and seek instead for processes they are more familiar with such as arbitration or litigation.[178] Lawyers may also be loss adverse, in the sense that mediation can be seen as a lessening the chance to maximise gain.[179] It is also why mediation is sometimes seen by lawyers as a "euphemism for taking less money".[180]

Lawyers in both civil and common law jurisdictions are also trained in adversarial methods of resolving disputes. It has been repeatedly argued that the traditional legal curriculum places an unjustified emphasis on courts, legal formality, and the judiciary. [181] Hunt argued that: "Thinking like lawyers' was a conceivable educational objective when the ideal model was that of mooting as a preparation for a career as an advocate. But this model embodies only a small part of what only a few graduates will end up doing. Once we recognise that lawyering is more

[176] David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. PA. J. LAB. & EMP. L. 133, 145 (1998).
[177] PricewaterhouseCoopers, Comparative Study of Resolution Procedures in Germany: Summary, http://cpradr.org/Portals/0/summaryCommercialDisputeResolution.
pdf (2005) (last visited Sept. 8, 2020)
[178] Don C. Peters, 'It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes', (2010) 9 Rich. J. Global L. & Bus. 381.
[179] Ibid.
[180] Ibid.
[181] Linda Mulcahy, 'Can leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation', (2001), International Journal of the Legal Profession, 8:3, 203-224.

about interviewing skills, negotiating strategies, financial and office management etc., the orthodox model is less than satisfactory".[182]

Psychological literature also supports the conception that users of dispute resolution will exercise status quo bias and consequently make them slow to welcome any sort of change.[183] The status quo bias purports that users of dispute resolution would prefer to stick with the mechanism and procedures that are already familiar to them, such as arbitration, rather than newer systems that they are less familiar with.[184] This is even the case where the potential benefits of using the new mechanism outweigh that of the old procedure. Such behavior can be classified as risk aversion, where because it may be difficult to calculate the exact costs and benefits of the new procedure, parties choose to simplify their thinking, sticking to the more familiar path. The EU mediation paradox is an excellent example of such a line of thinking, where despite the commercial benefits mediation offers, it is still severely underutilised. [185]

Adapting such a win-lose mindset drives lawyers to advise their clients in adopting adversarial means of dispute resolution rather than collaborative modes of settling disputes. Therefore, such biases and judgmental heuristics explain why lawyers resist mediation. However, studies tell us that education and the actual participation of mediation demonstrate the value of pursuing mediation to lawyers and why it may be preferable in some commercial disputes. This leads to the initial point on the importance of carefully choosing "each legal ailment", as lawyers must recognise that there is never a one-size-fits-all approach when dealing with complex commercial disputes.

While this makes it seem like the future of international mediation is bleak, there is an apparent silver lining: choice architecture. Choice architecture purports two principles, first being that people like choices due to the human desire of being in control and the second being that when offering another a choice, the choice inevitably influences the ultimate outcome.[186] Thaler and Sunstein conducted an experiment in order to get people to eat less junk food and consume more fruits.[187] They found that the simple act of placing fruit on shelves where it

[182] A. Hunt, Critique and law: legal education and practice, in: I. Grigg-Spall & P. Ireland (Eds) The Critical Lawyers' Handbook (London, Pluto Press, 1992), p. 63.
[183] Nadja Alexander, 'Nudging Users towards cross-border mediation: Is it really about harmonised enforcement regulation', 7 CONTEMP. ASIA ARB. JOUR.405 (2014).
[184] Ibid.
[185] Ibid.
[186] Alexander (n 183).
[187] Richard H Thaler and Cass R Sunstein, *Nudge* (Penguin 2009).

becomes more visible increased its consumption by 25%, whilst placing junk food in less visible places reduced its consumption by 25%. In a similar sense, the promotion of mediation and its benefits, particularly with the SCM as an enforcement mechanism will likely 'nudge' parties to better consider mediation for their commercial disputes.[188]

For international mediation to achieve a comparable stature and popularity amongst commercial parties, there must be an establishment of a multi-lateral framework that goes beyond the requirements laid down under the SCM. It is clear that the success of international arbitration can largely be attributed to the establishment of the New York Convention and such a similar outcome is hoped for the SCM.[189] However, it is important to remind ourselves that the ratification of the New York Convention by 80% of the world's countries was a 60-year process, and therefore, the SCM although unlikely to take as long, still has a long road ahead.[190] Nevertheless, the SCM is likely to lay down the regulatory framework "to help springboard mediation into the main dispute resolution arena alongside arbitration".[191] In order to increase the confidence in cross-border mediation and its process, it is not enough that States merely sign the dotted lines but also go on to implement other regulatory frameworks and incentives in order to displace the psychological biases associated with mediation.[192] This article will use Singapore as an example throughout the arguments made herein.

Firstly, it is important that States develop a comprehensive framework for cross-border mediation. It is important that foreign lawyers can quickly and easily identify the mediation laws in another jurisdiction.[193] This is likely to be key in identifying the attractiveness of mediating in a particular jurisdiction.[194] In addition to developing appropriate laws for cross-border mediation, it is important that domestic legislations are congruent to the SCM rather than separate. It may be difficult for parties to consider cross-border mediation where different set of rules are applicable to different mediations.[195] For example, in Singapore, the recently

[188] Alexander (n 183).
[189] Nadja Alexander, The Singapore Convention: What happens after the ink has dried?, (2020) American Review of International Arbitration (ARIA) Vol. 30, No. 2.
[190] Chua (n 36).
[191] Nadja Alexander & Shouyu Chong, The Singapore Convention on Mediation: A Commentary, 9 (Wolters Kluwer) 2019.
[192] Alexander (n 183).
[193] Alexander (n 183).
[194] Alexander (n 183).
[195] Alexander (n 183).

enacted Mediation Act 2020 applies to both domestic and international mediation, ensuring an element of certainty and flexibility in utilising mediation.[196]

Secondly, it is equally as important that there is an appropriate infrastructure of mediation services for commercial parties to access.[197] International arbitration is very successful in this regard, as premium services from institutions such as the London Court of International Arbitration, Permanent Court of Arbitration, International Chambers of Commerce, Singapore International Arbitration Centre, and others ensure that disputes are handled efficiently. In similar regard, States must develop mediation services to aid parties and promoting the use of international mediation in their jurisdiction.[198]

Thirdly, there is a need for skilled domestic and foreign mediators capable of handling complex commercial disputes. Debora Massuci, Co-Chair of the International Mediation Institute ("IMI"), has advocated for a pool of skilled international mediators that are skilled and experienced, with the backing from reputable institutions.[199] Such an institution leading this initiative is the IMI.[200] In order to archive this, international and local mediators can undertake the same credentialing procedure or the State can recognise a qualification of mediators under a mutual recognition scheme.[201] For example, in Singapore, the Singapore International Mediation Institute ("SIMI"), offers a four-tier accreditation system to mediators who wish to be involved in both domestic and cross-border mediation, and additionally accredits private organisation who are then able to carry out mediation training.[202]

Fourthly, it is important that the local court's attitude and relationship with mediation is a positive one.[203] Effective regulation is more than just what is written on paper or a contract, but is brought to life through the courts, lawyers and its parties.[204] In this regard, it is important that jurisprudence on mediated settlement agreements is consistent, and will be one of the key factors when judging the institutional and regulatory robustness of a State when choosing a

[196] SINGAPORE CONVENTION ON MEDIATION ACT 2020 (No. 4 of 2020).
[197] Alexander (n 183).
[198] Alexander (n 183).
[199] Alexander (n 183).
[200] Alexander (n 183).
[201] Alexander (n 183).
[202] 'Overview Of The SIMI Partner Scheme' (*Simi.org.sg*, 2020) <https://www.simi.org.sg/What-We-Offer/Mediation-Organisations/The-SIMI-Partner-Scheme> accessed 22 September 2020.
[203] Alexander (n 183).
[204] Alexander (n 183).

mediation venue.[205] In Singapore, courts are heavily vocal about their support of mediation and advocate for its use.[206]

Fifth, legal advisors must play an active role in the development of mediation as they are often the gatekeepers for the utilisation of the process.[207] The more experience and exposure that legal advisers have with mediation, the more skilled they will be at drafting mediated settlement agreements, mediation clauses and at advising on mediation laws.[208] In this regard, having an effective, transparent and consistent mediation legal framework will create an incentive to advise their clients to use mediation for cross border disputes. In Singapore, for example, foreign lawyers are permitted to represent their clients for mediations in Singapore, which makes it similar to international arbitration in this regard.[209]

Lastly, for international mediation to rise to the level of popularity as arbitration, there must be ongoing monitoring and review of the broader international dispute eco-system.[210] The relevant stakeholders must be consulted and developed progressively. For example, the Singaporean Ministry of Law played a large part in coordinating the working groups and public consultations, alongside organisations such as the Singapore International Dispute Resolution Academy for the appropriate implementation of the SCM.[211]

6. The Impact of the Singapore Convention: future opportunities

The impact of SCM on business systems worldwide will largely depend on its ability to be seen as a powerful tool to protect business relationships.[212] This section seeks to discuss how SCM will aid in the development of a better dispute system design within organisations and assess how specific industries and regions are well-positioned to reap the benefits of the SCM. Lastly, this section

[205] Alexander (n 183).
[206] Alexander (n 183).
[207] Alexander (n 183).
[208]Alexander (n 183).
[209]Alexander (n 183).
[210] Alexander (n 183).
[211] Alexander (n 183).
[212] Joséphine Hage Chahine, Ettore M. Lombardi, David Lutran and Catherine Peulvé, 'The Acceleration of the Development of International Business Mediation after the Singapore Convention', (2020) Volume Year 2020, issue 4 of the European Business Law.

will discuss the applicability of the SCM to investor-state disputes and how the Convention may promote the use of investment mediation.

6.1 Development of a more effective Dispute Design System for businesses

The SCM will help propel international mediation as a legitimate choice for commercial parties to settle their dispute, and with that, aid in the development of the dispute system design ("DSD") within their organisation. DSD represents the internal processes used to evaluate, design, prevent and resolve any disputes connected to an organisation.[213] Such a system may encompass a single process, such as binding arbitration, or more commonly, multiple processes.[214]

The term DSD was coined by Ury, Brett and Goldberg and argued that stakeholders should focus on settling disputes through interests-based processes (such as negotiation or mediation) and only use right-based processes (such as litigation or arbitration) as a last resort.[215] Lipsky, Seeber and Fincher later went on to develop a framework that organisations could use to assess their conflict management strategy to efficiently handle workplace disputes.[216]

In this sense, the recognition of a cross-border enforcement mechanism for mediated settlement agreements will allow organisation to better tackle their disputes using first interest-based processes as opposed to right-based processes. The problem with using the mediation framework before is the fact that there was no certainty that the settlement agreement would be enforced in court, and in this sense, organisations would not consider international mediation as part of their DSD model due to the perceived uncertainty and the expensive costs if the case had to be re-litigated.

An important element in ensuring that there is an effective DSD model is that the relationship between domestic laws is well developed, for which the SCM seeks to harmonise.[217] This is an interesting argument when looking at public

[213] Stephanie Smith & Janet Martinez, 'An Analytic Framework for Dispute Systems Design', (2009) 14 Harvard Negotiation Law Review 123.
[214] Ibid.
[215] William L Ury, Stephen B Goldberg and Jeanne M Brett, *Getting Disputes Resolved* (Jossey-Bass Publishers 1989).
[216] Lisa B. Bingham and others, 'Emerging Systems For Managing Workplace Conflict: Lessons From American Corporations For Managers And Dispute Resolution Professionals' (2004) 57 Industrial and Labor Relations Review.
[217] SI Strong (n 15).

international law, as arbitration has always benefited from a well developed international framework, and as such, if mediation is able to achieve a similar level of structural strength, it would benefit the overall DSD mechanism in many organisations.[218] If the autonomy of parties truly represents an important element of dispute resolution, then it is necessary that litigation, arbitration and mediation all benefit from a similar structural playing field.[219] The elimination of the issue of enforcement for mediated settlement agreements is one such effort to do so, and the further hope is that the SCM propels a further development of international mediation in the public international law realm.

6.2 Regions that could benefit from the Singapore Convention

Firstly, one of the key benefits of the SCM is its ability to offer developing countries opportunities to develop a more comprehensive mediation framework. Most developing jurisdictions have mediation laws that are merely at its infant stage.[220] In most developing jurisdictions there has been a lack of domestic mediation laws, dedicated mediation institutions, and an over-reliance on court-annexed mediation as opposed to an informal, out of court mediation process.

In many of the developing countries, however, despite the lack of mediation laws, the conceptual understanding of peaceful dispute resolution is not new. Peaceful informal resolution is well-rooted into the history of these countries and was used to settle disputes before the establishment of modern law. For example, in Thailand, monks and kings used to informally mediate family disputes due to the respect they garnered in the local society,[221] or in Rwanda and Kenya, where tribe leaders would mediate local disputes.[222]

[218] SI Strong (n 15).
[219] SI Strong (n 15).
[220] Kariuki Muigua 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States', (2020) Journalofcmsd Volume 4(3)).
[221] 'Pasit Asawawattanaporn – Thailand And The Singapore Convention' (*Simi.org.sg*, 2020) <https://www.simi.org.sg/News/Singapore-Convention-Seminar-Series/Pasit-Asawawattanaporn-Thailand-and-the-Singapore-Convention> accessed 22 September 2020.
[222] Singapore International Mediation Institute > News > Singapore Convention Seminar Series > Justice Aimé Muyoboke Karimunda - Rwanda And The Singapore Convention On Mediation' (*Simi.org.sg*, 2020); 'Singapore International Mediation Institute > News > Singapore Convention Seminar Series > Dr Kariuki Muigua And Beryl Ouma - Kenya And The Singapore Convention On Mediation' (*Simi.org.sg*, 2020)

Despite this, in many of these countries, private mediation laws have been largely underdeveloped. Kenya and Rwanda both have laws relating to court-annexed mediation but a lack of mediation laws for private mediation on both the domestic and cross-border level. Similarly, in countries such as Thailand, out-of-court mediation have only just received statutory support in 2019.[223] The SCM also launched with the newly updated UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ("Mediation Model Law 2018"). The Mediation Model Law 2018 will allow countries an easy avenue for developing a mediation framework that meets international standards.[224]

Secondly, if we are to look at the effect of the New York Convention as a comparison, the wide adoption of the Convention led to the development of many prestigious arbitral institutions to cater for its demand. Similarly, the hope is that with further ratifications by the signatories, developing countries will see the benefit in adopting the SCM and place the appropriate structures to support both domestic and international mediation.[225]

Thirdly, The Asia-Pacific region is a fertile area for mediation, owing to the cultural similarities of mediation with the general Asian business values and sensibilities.[226] Positive efforts to promote mediation in Asia can be seen, such as China's with their 2012 amendment of the Civil Procedure Law,[227] the Hong Kong mediation Ordinance and Apology legislation,[228] Malaysian Mediation Act 2012, and the Singapore Mediation Act 2017.

In this sense, the Asia-Pacific region may benefit greatly from the implement of the SCM. First, the SCM will provide an additional arrow to the quiver of international dispute resolution by allowing the region to structure and continue to grow business relationships if a dispute were to arise.[229] Secondly, the SCM will aid the region to promote its ADR institutions to get further recognition and increased popularity in the international dispute resolution fraternity. Lastly, the unification of enforcement laws for mediated settlement agreements arising from

[223] DISPUTE MEDIATION ACT, B.E. 2562 (2019).
[224] Muigua (n 220).
[225] Muigua (n 220).
[226] Chahine (n 212).
[227] Civil Procedure Law of the People's Republic of China 2012
[228] Hong Kong mediation Ordinance and Apology Ordinance (Cap.631).
[229] Chahine (n 212).

the implementation of the SCM will act as a useful political and diplomatic tool in the region.

The Belt and Road Initiative ("BRI") is a global infrastructure development strategy launched by the Chinese President Xi Jinping in 2013 with the aim of connecting over 70 countries across Asia, Africa and Europe to promote international trade.[230] Mediation has quickly become the favored choice of method for dispute resolution in Asia owing to primarily the influence from China and the BRI.[231] The SCM represents a promising opportunity to resolve BRI disputes involving Chinese parties and foreign parties.[232]

China has long preferred consensus-based dispute resolution due to its goal of preserving party relationships.[233] Notably, prior to the launch of SCM, the China Council for the Promotion of International Trade and the Singapore International Mediation Centre signed a Memorandum of Understanding establishing an international pool of mediators to deal with BRI disputes, with the aim of developing a set of bespoke rules.[234] Elsewhere, the Singapore International Mediation Centre and the China Council for the Promotion of International Trade established an Expert Committee specifically for mediating BRI disputes relating to a foreign company.[235]

The lack of a "seat" requirement under the SCM allows for immense flexibly when choosing the place of mediation, which may attract China's attention. For example, China recently opened mediation hearing rooms in Kazakhstan and are easily able to refer local BRI dispute back to Beijing regarding issues such as mediation appointment, which may then be easily enforced under the SCM in both China or Kazakhstan.[236] In fact, the lack of a mediation "seat" may also mean that online mediation proceedings may be conducted for BRI disputes. For example, recently, Hong Kong established the eBRAM, which is an online

[230] Andrew Bur and Zuo Jia, 'One Belt One Road disputes: does China have dispute avoidance and resolution methods fit for purpose?', (2020) Journal Article Construction Law Journal Const. L.J., 36(5), 374-385.
[231] The Singapore Mediation Convention: Raising The Profile Of The Mediation In Cross-Border Disputes' (*Fenwick Elliott*, 2020) <https://www.fenwickelliott.com/research-insight/annual-review/2019/singapore-mediation-convention> accessed 22 September 2020.
[232] Shang, Shu and Huang, Ziyi, 'Singapore Convention in Light of China's Changing Mediation Scene', (2020) Asia Pacific Mediation Journal (forthcoming March 2020).
[233] (n 230).
[234] (n 230).
[235] Chahine (n 212).
[236] Shang (n 232).

platform aimed at utilising alternatives dispute resolution to resolve BRI disputes.[237]

International mediation may also be primed to tackle the nature of BRI disputes. For example, in June 2019, a failure to consult local communities led to the Kenyan courts blocking the construction of the nation's first coal-fired power station.[238] Experts contend that the use of mediation between the Kenyan government and the Chinese investors may have led to a more mutually beneficial outcome.[239] Many BRI disputes are likely to stem out of construction contracts, and therefore mediation may provide a fast and cost-efficient way of resolving the dispute without harming the contractual relationships of Chinese investors and the host State.[240]

There currently is no multilateral dispute resolution mechanism to handle BRI disputes.[241] China already has Bilateral Investment Treaties with most BRI nations, but for many of the early generation treaties, investor-state arbitration clauses only apply to compensation-related matters.[242] Chinese parties have been reluctant to utilise investment arbitration for investment disputes due to their preference in maintaining business relationships.[243] This is evident in the fact that to date, there has only been five investment arbitration cases involving Chinese investors.[244]

Furthermore, China has shown an increased inclination to promote investor-state mediation in recent treaties such as the Closer Economic Partnership Agreement ("CEPA").[245] CEPA included a list of mediation institutions as well as a pool of renowned mediators. This is a good example for future investment mediation

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[237] https://www.scmp.com/news/hong-kong/law-and-crime/article/3005025/howhong-kong-plans-take-arbitration-online-new-ebram (last visited September 11, 2020).

[238] Bruce Love, 'China Belt And Road Disputes Set To Fuel Mediation'S Global Rise' (*Ft.com*, 2020) <https://www.ft.com/content/71288fe2-9e6f-11e9-9c06-a4640c9feebb> accessed 22 September 2020.

[239] Ibid.

[240] (n 230).

[241] Shang (n 232).

[242] Shang (n 232).

[243] Shang (n 221).

[244] 'The Rise Of Chinese Investors As Claimants: What Are The Likely Impacts On International Arbitration? | China Law Insight' (*China Law Insight*, 2020) <https://www.chinalawinsight.com/2018/06/articles/dispute-resolution/the-rise-of-chinese-investors-as-claimants-what-are-the-likely-impacts-on-international-arbitration/> accessed 22 September 2020.

[245] Closer Economic Partnership Arrangement 2000.

mechanisms between China and its BRI partners. However, the issue then becomes working out a deal or treaty as the negotiating process may be difficult and long. In this sense, the SCM will offer an adequate option to utilise investment mediation for BRI disputes[246]

6.3 Industries that could benefit from the Singapore Convention

There are several industries that could benefit greatly from the adoption of the SCM. One such industry would be construction. Construction projects are usually very time-sensitive, where the performance of all contractual obligations is key.[247] However, the reality of things is that disputes can occur at various cycles throughout the performance of contractual obligations such as failure to meet deadlines, overcharging and overspending, errors in documentation and others.[248] The construction industry is always in search of an efficient ways to settle disputes. The ratification of the SCM would significantly alter the international construction dispute resolution landscape. First, adversarial means of settling contractual construction disputes are likely to be long, costly and cause irreversible damage to party relationships.

Second, the construction supply chain contains various actors of different economic strengths and sizes. In such a case, adversarial means of dispute resolution may mean that the actor collapses or initiates liquidation process before the dispute is settled, resulting in a lose-lose scenario for both the disputants.[249] The need for efficiency and swift means of settlement cannot be understated, as a default in any performance or payment obligation may result in severe cash flow problems for a company. The SCM will act as a useful mechanism to settle cross-border construction disputes in a speedy and efficient manner.[250]

Another industry that may benefit from the ratification of the SCM is the shipping industry. It is already predicted that there would be a stark increase in international maritime disputes along the BRI sea route.[251] Mediation has seen a recent surge in popularity in the international shipping community even before

[246] Shang (n 221).
[247] Chahine (n 212).
[248] Chahine (n 212).
[249] Chahine (n 212).
[250] Chahine (n 212).
[251] Chahine (n 212).

the signing of the SCM. Such an example is *Eleni Shipping Limited v Transgrain Shipping BV*, where Treare J reviewed the mediation clause expressly provided for in the Baltic and International Maritime Council ("BIMCO") and argued for the increased use of mediation in the maritime industry and commended it as an effective tool to tackle such disputes.[252] Aside from BIMCO's clause expressly referring to mediation, there is a noticeable transformation in the way in which maritime arbitration institutions are handling dispute resolution selection. [253] For example, the London maritime Arbitrators Association ("LMAA") updated their Terms of arbitration in 2017, now requesting parties to consider whether mediation is an appropriate forum to resolve their dispute.[254]

In summation, many disputes will not benefit from adversarial means for dispute resolution such as litigation or arbitration, and in some instances contribute to the worsening of businesses. Wide ratification of the SCM could bode well for the international commercial community and for business development in many States.

6.4 The dilemmas of ISDS: The Singapore Convention a solution?

The investor-State dispute resolution system ("ISDS") is a mechanism whereby investors may sue States for certain forms of discriminatory practices.[255] It is a powerful mechanism and an important cog that facilitates foreign direct investment. ISDS is commonly invoked through Bilateral Investment Treaties (BITs) or Multilateral treaties, with such popular examples being the Energy Charter Treaty ("ECT") and the North American Free Trade Agreement ("NAFTA").

Various states, including that of the European Union and Canada have expressed reservations regarding the current framework of ISDS.[256] It is argued that the current ISDS system invokes high cost and delay, a lack of certainty and consistency in awards, and partiality in arbitral appointments.[257] Such concerns

[252] *Eleni Shipping Limited v Transgrain Shipping* (The ELENI P) [2019] EWHC 910 (Comm).
[253] Chahine (n 212).
[254] LMAA Terms 2017.
[255] Schreuer (n 13).
[256] Lee M. Caplan, 'ISDS Reform and the Proposal for a Multilateral Investment Court' (2019), 46 ECOLOGY L. Q. 53, 37 BERKELEY J. INT'L L. 207.
[257] U.N. Comm'n on Int'l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS), ¶¶ 22–25, U.N. Doc. A/CN.9/WG.III/WP.142, at 6 (Sept. 18, 2017), https://daccessods.un.org/TMP/486511.215567589.html.

had led to efforts for possible reform, including most recently, the establishment of the UNCITRAL Working Group III.[258] Some states have even advocated for a total abandonment of investment arbitration and the establishment of a multilateral investment court to handle investment disputes.[259]

International mediation may very well be the solution to some of the issues associated with investment arbitration and may also aid the Working Group III in developing a reform. Investment disputes fall within the scope of the SCM as long as it is "commercial" in nature, such as expropriation.[260] At a more foundational level, the SCM may very well help parties better utilise the 'cooling-off period' provided for under most BITs. At a broader level, investor state mediation structure has existed for quite a while,[261] but until now, there has not been an extensive enforcement mechanism for mediated settlement agreements.[262]

Conventional wisdom tells us that States often don't settle.[263] However, statistics from ICSID tells us that in 2017, one-third of cases filed were settled or withdrawn.[264] These statistics of course needs future analysis, but what it also tells us is that States do indeed settle, in which case, the benefits of international mediation is a worthy exploration.[265]

International mediation may also be uniquely positioned to handle investment disputes as in such disputes, the desired outcome would ordinarily be the continuance of operation, therefore making the restoration of contractual relationships of paramount importance.[266] In such cases, determining a winner or loser may not always be the right approach, as stated by the arbitral tribunal in Achmea BV v Slovakia: "a settlement in this case would be ideal, in that the aims of both sides seem approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not

[258] Hioureas (n 47).
[259] European Commission, Trade Policy Committee (Services and Investment), UNCITRAL Working Group III, at 1, WK 3675/2018 INIT (Mar. 26, 2018).
[260] Hioureas (n 47).
[261] see e.g the international bar association Investor-State IBA rules
[262] Hioureas (n 47).
[263] Mark Appel, 'A "done deal" for states and investors? The new United Nations Convention on International Settlement Agreements Resulting from Mediation', (2018) Journal of Enforcement of Arbitration Awards (JEAA), No.2.
[264] See 2017 ICSID Statistics https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf [Accessed 12 September 2020]
[265] Appel (n 263).
[266] Chunlei Zhao, 'Investor-State Mediation In A China-EU Bilateral Investment Treaty: Talking About Being In The Right Place At The Right Time' [2018] Chinese Journal of International Law.

the optimum outcome in this case".[267] Further evidence of this can be seen with Metaclad's long-journey in Metaclad v Mexico,[268] where the CEO of Metcalad admitted that he was largely unsatisfied with outcome of the award and regretted not contemplating or considering informal non-arbitration based options.[269] Investor-state arbitration brings with it the likelihood that the bridges will be burnt and the alienation of the host country.[270] Rarely are the funds recovered by an investor through investor-state arbitration reinvested in the host state.[271]

Additionally, the promotion of mediation may be favored by States as one of the key obstacles that prevent States from settling is the fear of public scrutiny.[272] By way of a solution, States should contemplate assimilating the strategy of their corporate counterparts of avoiding public criticism by utilising non-adversarial methods of settling disputes such as mediation.[273]

Notably, investor-State mediation has seen recent encouragement, with its inclusion being expressly provided for in the Comprehensive Economic and Trade Agreement.[274] Elsewhere, in 2016, the IBA rules on investor-state mediation was used for the first time to settle a dispute regarding unpaid invoices under the France-Phillipines BIT.[275] The SCM will likely promote the use of international mediation for investment disputes and may even encourage parties to further include it as an option in future investment treaties.[276]

The second option, instead of including an express provision for the SCM in treaties, would be for States to allow the application on a case-by-case basis.[277] This provides an element of flexibility and assurance to the parties that if political

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[267] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13
[268] *Metalclad Corporation v Mexico*, (1997) ICSID Case No ARB(A/F)/97/1
[269] Jack J Coe, 'Should Mediation of Investment Disputes Be Encouraged, And, If So, By Whom and How?' *in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2008 ed.) 339
[270] Daniel Weinstein and others, 'Making Mediation More Attractive For Investor-State Disputes - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2020) <http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/> accessed 22 September 2020.
[271] Ibid.
[272] Seraphina Chew, Lucy Reed and J. Christopher Thomas QC, "Report: Survey on Obstacles to Settlement of Investor-State Disputes" (2017), NUS Centre for International Law Working Paper Series 2017/001.
[273] Appel (n 263).
[274] Article 8.2 Comprehensive Economic and Trade Agreement 2019
[275] Systra v. Philippines.
[276] Hioureas (n 47).
[277] Appel (n 263).

needs or economic interests deem is more worthwhile to mediate, there would be finality in the settlement agreement. Such an approach could provide a useful and new bargaining chip for States and investors alike, especially in the hands of skilled mediators.[278]

Additionally, Von Kumberg has recently argued that the recent proposal by the Columbia Centre on Sustainable Investment for a moratorium to eliminate the bringing of investor-state claims due to COVID-19 may very well aid in the growth of investment mediation as arbitration has its limitation, namely its costliness.[279] On the 5th of May 2020, Member States of the EU also signed for the termination of the intra-EU BITs,[280] following the *Achmea* decision where the European Court of justice found that they were incompatible with the EU treaties.[281] A group of stakeholders recently held a colloquium at Harvard University to further discuss how to encourage the use of international mediation for investor-state disputes.[282]

International institutions have also advocated for the support and use of investor-state mediation. In 2016, a Guide on Investment Mediation was developed in the Energy Charter Conference, where it was recognised as "a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes".[283] The guide explained the foundational aspects of the mediation process, the mediation rules available for investor-state disputes, and also the potential roles that the Energy Charter Secretariat may play in developing the investment mediation framework.[284] Additionally, in 2017, ICSID held a training course specifically for investor-state mediation.[285]

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[278] Appel (n 263).

[279] Kumberg WV, "The Time for Investor State Mediation Has Come: A Concept Paper" (*Quraysh*March 12, 2021) <https://quraysh.com/the-time-for-investor-state-mediation-has-come-a-concept-paper/> accessed January 22, 202

[280] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/INIT OJ L 169, 29.5.2020, p. 1–41

[281] Slovak Republic v. Achmea B.V. (Case C-284/16)

[282] 'Harvard Investor-State Mediation Report — International Mediation Institute' (*International Mediation Institute*, 2020) <https://imimediation.org/2020/06/18/harvard-investor-state-mediation-report/> accessed 22 September 2020.

[283] International Energy Charter, Guide on Investment Mediation, CCDEC 2016 12 INV, 2016 (www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf).

[284] Ibid.

[285] 'Investor-State Mediator Training | ICSID' (*Icsid.worldbank.org*, 2020) <https://icsid.worldbank.org/news-and-events/news-releases/investor-state-mediator-training> accessed 22 September 2020.

Generally, it can be easily put forward that investor-state arbitration is the preferred mechanism over investment mediation, and such an argument may very well be because of the New York Convention and its ability to establish a coherent and stable framework for the enforcement of arbitral awards and agreements.[286] Therefore, in a similar sense, it could be argued that the lack of popularity amongst the International dispute resolution community for investment disputes regarding mediation rests on the lack of a similar universal enforcement mechanism such as the New York Convention. This is a logical argument, since, prior to the world-wide ratification of the New York Convention, international arbitration stood on similar grounds.[287] If we then accept this argument as correct, the SCM has the potential to propel international mediation to a similar level of popularity and usage as we are currently seeing with international arbitration, albeit not immediately.[288]

However, ultimately, the use of Investor-State mediation will depend on the factual pattern of the case and is unlikely to be a viable solution in cases where there is substantial animosity between the State and the investor. ICSID has produced a useful guideline of factors for parties to consider when deciding whether mediation is suitable to resolving a particular Investor-State dispute:

"1) Is there a desire to continue the relationship of the parties?

2) Do the parties wish to manage (or terminate) their relationship amicably?

3) Is there a willingness to enter into negotiations or have a dialogue?

4) is there hostility or distrust between disputing parties?

5) Do the parties want a rapid resolution of the dispute or a more rapid resolution than might be achieved through other processes?

6) Do the parties prefer to keep control over the outcome?

7) Do the parties seek tailored solutions other than the relief available in accordance with the applicable provision (usually monetary relief)?

8) Are there multiple conflicts or issues in dispute between the parties, some of which could be negotiated/mediated?; and

[286] Chahine (n 212).
[287] Chahine (n 212).
[288] Chahine (n 212).

9) Are there multiple parties involved with different interests?".[289]

Further, the ease of mediating an investor-state dispute may also depend on the timing of which the mediation takes places.[290] If mediation takes place at a relatively early stage whereby the dispute has not yet had the time to crystallise itself into a position of irreversible animosity, mediation can be used as an effective solution to any monetary disputes and any potential future issues that goes beyond the financial aspects of the claim.[291]

Another key factor is a State's political will to settle. Egypt and Argentina are notable examples of having been involved in several settlement discussions that proved to be widely successful.[292] It was seen by both countries that it was preferable to settle the case rather than drag it out through a long dispute settlement process.[293] Some countries even appear to suggest that mediations done in private improve a State's positive credit rating.[294]

7. Conclusion

The SCM should be seen as a milestone and in many ways can also be seen as a missing jigsaw puzzle to the international dispute resolution regime.[295] This essay has discussed the need for an international enforcement mechanism for mediated settlement agreements and the benefits it presents to commercial parties. The SCM represents a golden opportunity for mediation to take its place within the international dispute resolution fraternity and to develop a comprehensive eco-system framework.[296]

In the coming years, it is likely that the SCM will promote international trade and be a common tool used in industries such as construction, BRI disputes and even for investor-state disputes. We must not be overly optimistic as the SCM is still likely to endure a long road ahead and will still have to displace status quo biases and its success will largely be dependent on the amount of ratification by States.

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289 "Background Paper on Investment Mediation" (*ICSID*) <https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation>.
290 Kessedjian C and others, "Mediation in Future Investor–State Dispute Settlement" [2022] Journal of International Dispute Settlement.
291 Kessedjian (n 290).
292 Kessedjian (n 290).
293 Kessedjian (n 290).
294 Kessedjian (n 290).
295 Quek (n 50).
296 Alexander (n 183).

However, with a sufficient framework in place and increase awareness in the benefits of mediation, the SCM is likely to be a huge success. The mood is certainly positive.

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PRIVATE-PUBLIC ARBITRATION: STRIKING A BALANCE

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1. Introduction

In commercial transaction with State or its agencies when dispute arises, a major barrier to dispute settlement by means of the Court or tribunals for individuals or private sector organisations is state or sovereign immunity.

State immunity originate in the era of kingships. Sovereign or a Sovereign state cannot be judged by any Court or tribunal without its unequivocal consent. Post World War Two, as States engaged in more commercial transactions, both domestic and overseas, State immunity has evolved from absolute to a restrictive approach. Waiver of State immunity maybe through an arbitration agreement in individual contracts or Bilateral Treaty (BIT) or Multilateral Treaty (MIT) but is this a waiver of execution too?

This article aims to analysis the nuance of State immunity, the current state of international arbitration; commercial and investor-state dispute settlement (ISDS), protection of foreign investment and the right to regulate, the debate on reforming ISDS.

2. State Immunity

State immunity or sovereign immunity, originate in the sanctity of kingship[297]. State immunity may be pleaded by a foreign state when a natural or legal person wishes to make it a party to legal proceedings in the court of another state, usually as the defendant. A sovereign state cannot be sued before the courts of another sovereign state without its unequivocal consent. The rationale *"par in parem non habet imperium"* (equals have no sovereignty over each other).

State immunity is a doctrine of customary international law but unlike the law of state responsibility, which has been developed almost entirely by international courts and tribunals, state immunity is much more the product of judgments of domestic courts. Their approaches to state immunity reflect differences between their legal, political and economic systems.

3. Evolution of State Immunity: Absolute and Restrictive

Originally, state immunity was absolute, until the second half of the twentieth century with governments and state corporation becoming more active in commercial activities, domestically and abroad, did a restrictive or qualified approach evolved – removing commercial matters from immunity. According to this principle, immunity from the jurisdiction of national courts would be granted in respect of acts *jure imperii* (government public acts) and not in respect of *jure gestionis* (i.e., commercial activities).[298]

The restrictive approach has gained wide support in treaties, domestic legislation and foreign tribunals. It is codified in the United States with the by passing of the Foreign Sovereign Immunities Act of 1976, in the United Kingdom the State

[297] https://www.cambridge.org/core/books/abs/handbook-of-international-law/state-immunity/C0ECCA0E88F598818D7BADC6E035B959
[298] Is a Foreign Government Immune to Malaysian Employment Law? | Donovan & Ho (dnh.com.my)

Immunity Act of 1978, in Singapore the State Immunity Act of 1979 and in Malaysia the International Organisations (Privileges and Immunities) Act of 1992.

There still continued to be differences in the practice of states in applying the two approaches. It was this uncertainty in international law that prompted the introduction of the United Nations Convention on the Jurisdictional Immunities of States and Their Property in December 2004, which will come into force once it has been signed and ratified by 30 states. If this treaty is adopted, which so far it has not, it may serve as the new international norm in the area of sovereign immunity. Nonetheless it has been influential on the development of the law of State immunity, and certain of its provisions are regarded as codifying customary international law. A point to know is that this Convention is restricted to immunity from civil (not criminal) jurisdiction of foreign courts.[299]

While the past decades have seen a shift in the doctrine of sovereign immunity from absolute to restrictive, claims of sovereign immunity remain available to States brought before the courts of another State.

3.1 Hong Kong

Prior to the handover of Hong Kong to the PRC in June 1997, Hong Kong followed the English approach of restrictive immunity. After 1997, Hong Kong was required by the Hong Kong Basic Law to adopt the PRC position on "foreign affairs" and the PRC's position is one of absolute immunity. This represented a fundamental change to Hong Kong's approach to state immunity. Foreign states are now absolutely immune from suits brought against them in the Hong Kong courts. [300]

3.2 Malaysia

Malaysia takes a restrictive approach to State immunity. However, on matter related to the employment law, State immunity is not automatic.

On 20th June 2022, Malaysia highest appellate court, the three judges Federal Court led by the Honourable Azahar Mohamed CJM affirmed the earlier decision of the Court of Appeal that the US embassy has no automatic immunity against an unfair dismissal claim, and that such claims must still be determined by the

[299] https://legal.un.org/avl/ha/cjistp/cjistp.html
[300] https://www.hfw.com/Crown-immunity-and-sovereign-immunity

Industrial Court.[301] The Court of Appeal reversed the High Court's earlier findings that the US embassy was immune, and ordered the employee's unfair dismissal claim to be remitted to the Industrial Court for determination.

The one paragraph that succinctly sums up the Federal Court decision was:

[45] The cases that I have discussed above demonstrated that the respective Employment Tribunals or Adjudicator had the opportunity to consider the facts of the respective cases and the evidence adduced thereat in order to decide on whether such doctrine of "sovereign immunity" applies. Whether restrictive doctrine of immunity applies would depend on the facts and circumstances of the particular case. The Industrial Court, as is the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the restrictive doctrine of sovereign immunity applied to exclude its jurisdiction.

4. States Granting Arbitration Agreements - Individual Contracts or Treaties

A State or a state entity may sign a contract with a private party that includes a dispute resolution provision specifying arbitration, or two or more States may conclude a multi-lateral investment treaty (MIT) or bilateral investment treaty (BIT), which includes a provision permitting the national of one state to seek arbitration against the other for certain treaty violations.

The enforceability of an international arbitral award in national courts depends upon a series of international treaties, two of the most prominent among them are;

i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and

ii) the Convention on the Settlement of Investment Disputes (ICSID) between States and Nationals of Other States ("Washington Convention"), make enforceable in all of the signatory countries arbitration awards rendered.

The New York Convention (NYC) has been governing the majority of confirmation

[301] The United States of America v. Menteri Sumber Manusia & Ors and Another Appeal 134 [2022] 5 MLRA

and enforcement proceedings arising out of international arbitrations since its signing in 1958. The NYC specifies the exclusive grounds on which a party can contest an arbitral award. Domestic courts may evaluate awards pursuant to provisions of the treaty to determine enforceability.

Unlike the NYC, any appeal against an ICSID award is to the ICSID ad hoc committee, unless otherwise specific.

When a party seeks to enforce before a national court, an ICSID award must be treated "as if it were a final judgment of a court in that State." ICSID awards are, therefore, not open to challenge on public policy or procedural grounds. Sovereign immunity remains one of the few bars to their enforcement.

In the United Kingdom, immunity is codified by statute - the State Immunity Act (SIA) 1978. It provides a general immunity from jurisdiction subject to the exceptions set forth in the statute. SIA obviates immunity for proceedings in U.K. courts that

i) "relate to" an arbitration to which a state has agreed

ii) including arbitral enforcement proceedings and for

ii) any "commercial transaction entered into by the State.

In countries that have adopted the restrictive theory of sovereign immunity, exceptions for arbitration and commercial activities are common, though some of the provisions may differ between jurisdictions.

5. Attractions of International Arbitration

International arbitration is increasingly a popular way to settle disputes between parties of different nationalities and of particular valuable tool for private parties engaged in commercial transactions with States.

Of significant to private parties engaged in commercial transaction or investment with State, preferring arbitration as mean of dispute settlement are:

a) Choice of applicable laws including seat of arbitration in a neutral jurisdiction.

b) Neutral and impartial adjudication venue and tribunal

c) Cross border enforcement in foreign State other than the host State.

d) Thus, avoiding the real or perceived tendency of national Courts to favour own Government or investors in judgement and enforcement.

The potential for enforcement in multiple jurisdictions is valuable because it allows the prevailing party to collect on its award either in the Respondent's home jurisdiction or a third-party jurisdiction where Respondent's has assets.

6. A Case for Reforms

a) State Incapacity[302]

States seeking to evade arbitration to which they have agreed sometimes invoke either State immunity or provisions of their internal law that purport to prohibit the State or its agencies from entering into an arbitration agreement with a private party (State incapacity). In the context of international trade today, the clear and widely recognised trend is to refuse to give effect to such domestic prohibitions. The prevailing view is that it would be contrary to fundamental principles of good faith for a state party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreement to arbitrate. This principle of good faith has been applied by international arbitrators as an imperative norm perceived without reference to any specific national law.

A leading precedent is an award rendered in 1971 under the Rules of Arbitration of the International Chamber of Commerce, in which the tribunal stated that: *. . . international ordre public would vigorously reject the proposition that a State organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires the co-contracting parties confidence, could thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its own promise.*

[302] May a state invoke its internal law to repudiate consent to international commercial arbitration? Reflections on the Benteler v. Belgium Preliminary Award by JAN PAULSSON*

b) Abuse of Process – Forum shopping and Public Policy (Public Health)

Case Study No. 1

US-based Philip Morris Tobacco company first sued Australia in the Australian High Court, for compensation due to Australia's 2011 plain packaging legislation, lost but did not accept the High Court decision.

Philip Morris shifted some assets to Hong Kong, claimed to be a Hong Kong company and sued the Australian Government for compensation under the Hong Kong-Australia investment contained an ISDS provision which is absence in the US-Australia FTA. [303]

In December 2015, after four years and millions in legal fees the tribunal decided on the threshold issue that Philip Morris was not a Hong Kong company.

Case Study No. 2 [304]

On 23rd March 2018, an international investment tribunal heard a under the Investor-State Dispute Settlement provisions of the Canada-Peru Free Trade Agreement.

The tribunal ordered the government of Peru to pay Bear Creek Canadian mining company $18.2 million in compensation and $6 million in legal costs because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous landowners about the mine, leading to mass protests.

Both cases highlights:

i) Forum shopping – Not satisfied with the domestic Courts decision, the claimants – Philip Morris proceeded on another forum, in this instance ICSID arbitration based on one of the many BIT.

ii) Public health – In spite of extensive medical research confirming

[303] Investor-State Dispute Settlement — A Cut Above the Courts? Supreme and Federal Courts Judges' Conference Chief Justice RS French AC 9 July 2014, Darwin
[304] http://aftinet.org.au/cms/node/1551

smoking is detrimental to public health and the solemn duty of States to protect the public health of its citizens/residents, Philip Morris persisted in pursuing this medically and socially unethical matter, manifesting a total lack of corporate social responsibilities.

iii) Special rights to foreign investors (compared to local investors)
ISDS gives special rights to foreign investors, either bypassing national courts or having recourse to tribunal, (an option that is not open to local investors) to sue host State claiming that a change in law or policy will harm their investment.

iv) The need for "Summary Judgement" – Manifestly without legal merit!
It is reasonable *a priori* that Philip Morris is not a Hong Kong based company but it took four years to decide on this threshold issue that Philip Morris is not a Hong Kong company. Without delving into the details of the case, establishing the facts of this issue should have been the first priority of the party legal counsels as well as the tribunal.

v) A case for right of appeal against tribunal decision
In Case Study No.2, it doesn't seem right, to be penalising the host State for investor's own failure to obtain the necessary informed consent from the indigenous landowners but without right to appeal, Peru was burdened with US$24.2 million.

c) ISDS and national regulatory measures

There is ample data to demonstrate that investors in countries which are parties to BIT and FTAs use arbitral processes to challenge regulatory change affecting their interests.

This is borne out by some of the cases mentioned in last year's UNCTAD Review. [305] A quarter of all the arbitrations commenced in 2013 involved challenges to regulatory action by the Czech Republic and Spain affecting the interests of the providers of renewable energy.

[305] United Nations Conferences on Trade and Development, Recent Developments in Investor-State Dispute Settlement (ISDS) (No 1, April 2014)
http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

Environmental laws that were subject of ISDS processes;

Lone Pine Resources Inc. instituted a claim against Canada last year in response to a moratorium imposed by Quebec on hydraulic fracturing (fracking), which led to revocation of the claimant's gas exploration permits.[306]

Windstream Energy LLC instituted a claim against Canada on the basis of a moratorium imposed by Ontario on offshore wind farms.[307]

The Swedish company, Vattenfall, is suing Germany under the Energy Charter Treaty over Germany's decision to phase out nuclear energy power plants.[308]

d) Public Interest Treaties under "Siege" – Climate Change[309]

The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources.

The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and Contracting Parties to the treaty, this includes both the European Union and European Atomic Energy Community.[310]

The Energy Charter Treaty (ECT) ISDS provisions enable corporations to sue governments if they can argue that changes in law or policy reduce their profits. As part of global commitment to reduce carbon emissions, European signatory nations of the Paris Climate Accord, signed in December 2015 are legislating more stringent emission and environmental standard. Hence, in recent years, there have been many cases by fossil fuel companies against such legislations. The ECT has in a sense protecting the fossil fuel giants against the EU making

[306] Lone Pine Resources Inc v Government of Canada (Notice of Arbitration) (UNCITRAL, 6 September 2013)
[307] Windstream Energy LLC v Government of Canada (Amended Notice of Arbitration) (UNICTRAL, 5 November 2013).
[308] Vattenfall AB and Others v Federal Republic of Germany (Notice of Arbitration) (ICSID Case No ARB/12/12, 31 May 2013).
[309] http://aftinet.org.au/cms/aftinet.org.au/cms/latest-news/EU-rejects-%27reformed%27-Energy-Charter-Treaty
[310] https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

greater progress achieving its “Green” objectives.

Germany, France, Spain, Netherlands, Poland, Slovenia and Luxemburg have announced their decision to withdraw from the ECT, Italy left the ECT in 2015 and other EU Member States are considering the option of leaving the ECT. EU Commission are pressured to urgently design a plan to leave the ECT and solve the current political and legal confusion.

Besides the ECT, there are still thousands of bilateral investment agreements with ISDS clause that can be used to stifle climate action and UN Sustainable Development Goals (SDG), which need to be reviewed and amended.

e) The “Consistent” Winners and Losers

According to the UNTACD ISDS Cases: Facts and figure, [311] the overall outcomes by the end of 2020 at least 740 ISDS proceedings had been concluded. About 37 per cent of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), about 29 per cent were decided in favour of the investor, with monetary compensation awarded. About 20 per cent of the cases were settled; in most cases, the terms of settlement remained confidential.

According to a report by the Corporate Europe Observatory[312], the arbitrators and the lawyers “profit from injustice”, regardless of the outcome. Both parties hire lawyers, who charge anything from US$500 to US$1,000 an hour. The claim is judged by three arbitrators, who need no specific qualification or experience, authorised or appointed by a court of law. They are paid between US$375 and US$700 an hour and as cases can take more than 500 hours to resolve, there is no shortage of candidates. Most arbitrators are also legal counsels, male, grey-haired, mostly of North American or European origins. Clearly a very select groups, that lack in diversity and is representative of the global nature of ISDS cases.

Each case brings in over $8m to the arbitration system and developing economies with limited resources may not have this kind of money, not being able to assert counter claims are therefore not attractive to third party funders.

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311 Investor-State Dispute Settlement Cases: Facts and Figures 2020

312 Profiting from injustice:
How law firms, arbitrators and financiers are fuelling an investment arbitration boom
November 2012 Published by Corporate Europe Observatory and the Transnational Institute

Thus, often had to seek compromise at all costs, even if it means abandoning their social or environmental goals.

The case of Philip Morris V Australia

In this case, Philip Morris V Australia, it cost the Australian taxpayer a total of A$39 million, for both the High Court and ICSID arbitration. Of which the Australian taxpayers was awarded half of the cost of almost A$24 million in legal fees and arbitration cost.[313] Not to mention it took seven years defending a case that is clearly an abuse of process.

Not too many developing States can afford it, commenters and policymakers are coming to the conclusion that the current ISDS system benefits the richest and whether the outcome is a judgment or an amicable settlement, it allows case law, and the international legal system, to escape all democratic control.

7. Reform Options

Foreign investment is important to a large number of developing economies, aiming to raise employment opportunities and raise the social-economic standard of living for its citizens. Hence, ISDS is an important provision in investment treaties to assure foreign investors.

Some of the key reform options are:

a) Waiver of State Immunity
b) “Levelling the Playing Field”
c) Dispute Settlement Mechanism (DSM)
d) Fork-in-the-road clauses
e) Forum selection options
f) Arbitrator and Panel selection process
g) Right to Regulate and Protection of Foreign Investment.

[313] https://www.iareporter.com/articles/final-costs-details-are-released-in-philip-morris-v-australia-following-request-by-iareporter/

a) Waiver of State immunity; to be sue (arbitrate) and enforcement (Execution) of awards

In waiving State immunity through an explicit arbitration agreement in individual contracts or via BIT or MIT, State party should similarly waive immunity from enforcement, the rationale was best expressed by the late Lord Denning in Thai-Europe Tapioca Service v Government of Pakistan, The Harmattan (1975) 1 WLR 1485 at 1491F: *"a foreign government which enters into an ordinary commercial transaction with a trader must honour his obligations like other traders: and if it fails to do so it [should] be subject to the same laws and amenable to the same tribunals as they are."*

b) "A loaded Dice"? – Cost and Claims

As mentioned in the above paragraphs entitled *"The "Consistent" Winners and Loser",* in most ISDS disputes, the status-quo is that claimants-investors, are the "consistent winners", whereas, the respondent, the State are the "consistent" loser. This has in some measures encouraged abuse of process and inflated claims for compensations.

To counterbalance this "loaded dice", ISDS should implement the principle of "Cost follow Action" and Respondent being readily able to assert counterclaims.

Although nearly all arbitration rules provide for the right to assert counterclaims in investor-state disputes, many tribunals are reluctant to allow such counterclaims.[314] This reluctance may have some valid reasons, but it may be tainted with concerns as will be discussed in the later section entitled "*Arbitrator and panel selection procedure".*

Counter claims are significant for poorer developing nations to attract third party funding, in defending "frivolous" claims. This would mitigate such developing nations from having to accept lopsided settlement terms, settlement payment that burdened its economic and social development, and accepting investor's demand to amend on legislation that maybe against public interests and its international commitment like the Paris Climate Accord, and UN SDGs.

Given the possible quantum of counterclaims, it will be attractive to third party

[314] Minnesota Journal of International Law 2012 Counterclaims in Investor-State Arbitration Yaraslau Kryvo

funders and thus make third party funding more readily available to State party. That is, equal access to third party funding to both parties - investors and State?

c) Dispute Settlement Mechanism (DSM)

International commercial arbitral awards under the NYC are subject to judicial reviews either at *Lex Arbitri* or *Lex Fori*.
Except for ICSID, ISDS cases handled by specialised arbitration courts; the UN Commission on International Trade Law, the Permanent Court of Arbitration in The Hague and some major chambers of commerce, are without right of appeal. [315]

The debate under the aegis of the United Nations Commission on International Trade Law (UNCITRAL) began its work in 2017 on reforming ISDS.

Among the proposals submitted by member States and other stakeholders, two systemic reform proposals call for the particular attention of academics and practitioners, as they may involve the replacement (total or partial) of the ISDS system.

These proposals are for:
(i) the establishment of a multilateral investment court; and
(ii) the creation of an appellate mechanism.

Total Replacement

In the RCEP, in lieu of ISDS, an all-purpose inter-state DSM is provided for in Chapter 19 of the RCEP (the RCEP DSM).[316] If a party to the RCEP breaches any of its obligations under the RCEP, the investor would need to request that its home state escalate its claims. The investor's home state would then be able to bring a claim against the host state under the RCEP.

Partial Replacement

China has established the China International Commercial Court to resolve BRI-

[315] Could an Appellate Review Mechanism "Fix" the ISDS System? Dr. Margie-Lys Jaime/February 11, 2021
[316] RCEP, article 19.3(1).

related investment and commercial disputes. [317] Various Chinese arbitral institutions have begun to offer themselves as fora for the resolution of BRI-related investment disputes – the China International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration and the Beijing International Arbitration Centre have each adopted rules for international investment arbitration.

China's Belt and Road Initiative (BRI) is a development plan that seeks to enhance both land and sea trade links between China and major markets in Europe, Asia and the Middle East. Currently, 146 countries are participating in the initiative.

Taking a step further is the European Union–Singapore investment protection agreement (the EU–Singapore IPA) and the European Union–Vietnam investment protection agreement (the EU–Vietnam IPA). These agreements establish both a permanent investment tribunal and a permanent appeal tribunal.[318] The permanent investment tribunal comprises six members under the EU–Singapore IPA and nine under the EU–Vietnam IPA. These members would be one-third from the European Union, one-third from Singapore or Vietnam, and one-third from third countries. The tribunal would be chaired by the national from the third country. The permanent appeal tribunal would hear appeals from the awards issued by the permanent investment tribunal.

d) Fork-in-the-road clauses

Fork-in-the-road clauses require investors to elect to either pursue their claim via arbitration or in local courts or other venues available. This would prevent investors from commencing a multitude of proceedings against a State.

The CPTPP contains a fork-in-the-road clause in respect of proceedings in Chile, Mexico, Peru and Vietnam.[319] The CPTPP precludes investors from bringing arbitration claims where those claims have already been pursued before

[317] China International Commercial Court, 'A Brief Introduction of China International Commercial Court' (28 June 2018). Available at **http://cicc.court.gov.cn/html/1/219/index.html**.
[318] Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (EU–Singapore IPA), Chapter 3, section A, articles 3.9 and 3.10, 19 October 2018 (not yet in force); EU–Vietnam IPA, Chapter 3, section A, subsection 4, articles 3.38 and 3.39.
[319] TPP/CPTPP, Annex 9-J.

domestic courts or administrative tribunals in those states.

e) Forum selection options

This clause is similar in nature with "Fork-in-the road" clause, in not commencing multiple proceeding against the State but distinct in that the Claimant has to make a choice of the forum where disputes arise concerning similar rights or obligations under multiple trade agreements.

The RCEP provides that where a dispute arises concerning 'substantially equivalent rights and obligations' under the RCEP and another international trade or investment agreement to which the investor's home state and the respondent state are party, the claimants may select the forum in which to settle the dispute, which will then be used to the exclusion of other fora.[320]

f) Arbitrator and panel selection procedure

The selection of the adjudicators of disputes is often a contentious process and plays an essential part in ensuring equality and fairness between the parties. The selection and appointment of arbitrators are often set out in the relevant individual contracts, chosen applicable laws or investment treaties or agreements.

But as ISDS has developed, some of the more serious concerns that have emerged are:

i. "Double-hatting"

Law Firms and arbitrator, acting as arbitrators and legal counsel for the same Parties, during the same period, albeit on different disputes. (Conflict of Interest?) [321]

ii. Repeated re-appointments of arbitrators by law firms or parties

No doubt, good competent arbitrators and lawyers are in high demand; however, some questionable patterns have emerged. [322]

[320] RCEP, article 19.5(1).
[321] https://www.lexology.com/library/detail.aspx?g=c458ef3c-ca44-4f36-a3cc-9416da3d0c22
[322] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966459

Creating situations of actual or perceived *Quid Pro Quid"* and/or conflict of interest, not the least its impact on the sanctity of the arbitral institution, the tribunal and arbitration in general.

iii. Other relationships between counsels and arbitrators [323]

The first concern is as highlighted above under *repeated re-appointment of arbitrators by law firms or parties* and thus the arbitrator's independence and impartiality.

The second concern is the long delays and "generously large" damages awarded in favour of the claimants.

And lastly, the reluctance of tribunal to allow counterclaims by State parties.

iv. The economic incentives said to be associated with the emergence of a class of professional arbitrator

International arbitrations are usually high profile, command high fees attracting highly competent arbitrators that are viewed as "Crème de la crème" of the dispute resolution space.
This augur well for the arbitration, in so far as it is impartial, independent and non-clannish.

g) Protection of Foreign Investment and Right to Regulate [324]

Delineating the balance between protection of foreign investment and the right to regulate in the public interest are on the one hand; most-favoured-nation (MFN) treatment, fair and equitable treatment (FET) and indirect expropriation, and on the other hand; inclusion of exceptions like public policies, national security, amongst others.

i. MFN

MFN clauses aim to prevent less favourable treatment of investors from the

[323] https://academic.oup.com/arbitration/article-abstract/26/4/597/179484?redirectedFrom=fulltext

[324] UNCTAD's Reform Package (2018)

signatory State vis-à-vis comparable investors from any third country (i.e., nationality-based discrimination). The MFN principle thereby aims to ensure a level-playing field between investors of different foreign nationalities.

In actual ISDS practice, investors have most often invoked the MFN clause to access more "investor-friendly" provisions in International Investment Agreement (IIA) concluded by the host State with third countries. Application of MFN clauses in this way can result in investors "cherry-picking" the most advantageous clauses from different treaties concluded by the host State, thereby potentially undermining individual treaty bargains and side-lining the base treaty.

The first option is to specify that MFN treatment does not apply to ISDS provisions found
in other IIAs, existing or future.

A second option is carving out from the MFN obligation certain sectors or industries or certain policy measures through a general carve-out (applicable to both parties) or through country-specific reservations. This option is particularly relevant for IIAs with a pre-establishment dimension.

And the final option, followed by some countries, is to omit the MFN clause altogether. The Free Trade Agreement (FTA) between the EU and Singapore (2014), the FTA between India and Malaysia (2011), the ASEAN–Australia–New Zealand FTA (2009), are examples in point.
Such an approach preserves a maximum of flexibility and can facilitate IIA reform.

ii. FET

FET standard is designed to protect foreign investors from government misconduct not captured by other standards of protection. In actual practice, owing to its open-ended and largely undefined nature, the FET standard, especially as it has been drafted in traditional IIAs, has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem unfair. In fact, almost all ISDS cases to date have included an allegation of a FET breach.

There is a great deal of uncertainty concerning the precise meaning of the concept of FET, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations.

A particularly challenging issue that has arisen through arbitral practice relates to the use of the FET standard to protect investors' "legitimate expectations". Given the potentially far-reaching application of the concept of "legitimate expectations", there is a concern that the FET clause can restrict countries' ability to change investment-related policies or introduce new policies – including those for the public good – if they have a negative impact on individual foreign investors.

An option that some countries have implemented in some of their IIAs is omitting the FET clause altogether (e.g. Bangladesh–Uzbekistan BIT (2000), Australia–Singapore FTA (2003)) or reducing it to a softer commitment; for example, by referring to FET in the preamble but not in the main treaty text (e.g. Turkey–United Arab Emirates BIT (2005) or Azerbaijan–Estonia BIT (2010)). This approach reduces States' exposure to investor claims, but also reduces the protective value of the agreement.

iii. Indirect expropriation

The expropriation provision is a key IIA element that mitigates an important risk faced by investors. Expropriation clauses do not take away States' right to expropriate property but make the exercise of this right subject to certain conditions.

Expropriation provisions usually cover both "direct" and "indirect" forms of expropriation. "Indirect expropriation" covers acts, or series of acts, whose effects are "tantamount to" or "equivalent to" a direct, formal taking. These are acts that generally involve total or near-total deprivation of an investment or destruction of its value but without a formal transfer of title to the State or outright seizure.

Investors have used provisions on indirect expropriation to challenge general non-discriminatory regulations that have had a negative effect on their investments (e.g., a ban or the imposition of restrictions on a certain economic activity on environmental or public health grounds). This raises the question of the proper borderline between expropriation (for which compensation must be paid) and legitimate public policymaking (for which no compensation is due).

A first option is to limit the protection in case of indirect expropriation by establishing criteria that need to be met in order for an indirect expropriation to be found. This can include reference to;
(i) the economic impact of the government action.
(ii) the extent of government interference with distinct, reasonable investment-

backed expectations; or
(iii) the character of the government action (e.g., whether it is discriminatory or disproportionate to the purpose of the measure under challenge).
(iv) Another possible criterion is whether the measure(s) alleged to constitute an expropriation have produced a direct economic benefit for the State.

Another option is to omit a reference to indirect expropriation from the IIA or even explicitly exclude it from the treaty coverage.

From the investors' perspective, such protection is particularly desirable in governance-weak economies where protection from measures of this nature under the domestic laws of the relevant host State may not be seen as reliable.

iv. Public Policy Exceptions

Investors may bring claims against public interest measures that have a negative effect on an investment's profitability. These provisions aim at balancing investment protection with other public policy objectives and at reducing States' exposure to investor challenges of such measures.

Public policy exceptions expressly in an IIA increases legal certainty for host States: public policy exceptions explicitly allow for measures, which might otherwise be challengeable under the agreement, to be taken under specified circumstances. In so doing, they can have an important effect of increasing certainty and predictability about the scope of the IIA's obligations.

Adding exceptions provisions raises questions about their relationship with some traditional investor protections, e.g. the provision on direct expropriation (if a direct expropriation corresponds to one of the objectives included in the exception clause, does this relieve the State of the duty to pay compensation?) or the FET standard (e.g. does the State's creation of protected legitimate expectations foreclose its later reliance on an exceptions clause?).

First option is for countries to specifically list the public policy objectives to which they want the exception to apply

(i) the protection of public health, public order and morals, the preservation of the environment),

(ii) provision of essential social services (e.g., health, education, water supply),

(iii) the prevention of tax evasion,

(iv) the protection of national treasures of artistic, historic or archaeological value (or "cultural heritage"), cultural or media diversity, or allow for

(v) the pursuit of broader objectives, such as the host countries' trade, financial and developmental needs.

v. National Security Exception

A national security exception enables a State to introduce emergency measures when its essential security interests are threatened or for the maintenance of international peace and security, even if these measures contradict substantive IIA obligations. Such measures may include the freezing of assets, other types of sanctions, or discriminatory treatment of investors of certain nationalities (or of foreign investors in general). In the pre-establishment context, such measures may include refusal of access to specific projects or transactions in industries considered as strategically important (such as manufacturing of arms, telecommunications, transportation, energy or water supply). Including a reference to actions taken in pursuance of States' obligations under the UN Charter or by specifying that the exception covers only certain types of measures such as those relating to trafficking in arms or nuclear non-proliferation, applied in times of war or armed conflict, etc.

Although national security exceptions are sometimes seen as reducing or limiting the protective strength of a treaty, clarifying and fine-tuning exceptions can help to increase predictability in the application of the clause and the circumscription of its application. A reference to the UN Charter can also help foster coherence between different bodies of law.

A second set of options relates to the standard of review that ISDS tribunals should apply to measures invoked for national security reasons. A "self-judging" exception gives host States a wide margin of discretion in its application and may trigger the perception that the treaty's protective value is somewhat reduced. However, that depending on the formulation chosen, a tribunal may still be able to review whether the exception is being relied upon in good faith and without manifest abuse.

8. Conclusion

The above brief discussions highlight the evolution of State immunity and the differing applications from jurisdiction to jurisdiction. Failure to adequately consider and address questions of State immunity could have serious consequences, including losing the ability to enforce contractual rights, recover damages or enforcement of judgments or awards.

International commercial arbitration under the NYC seems to be less contentious than ISDS.
The current ISDS law and practices seems to be “a loaded dice” in favour of investors. A balance must be strike between i) the protection of foreign investment and State right to regulate, ii) abuse of process, iii) equal access to third party funding for both parties, iv) “ballooning” arbitral cost and v) “generously large” awards.

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INTERNATIONAL COMMERCIAL ARBITRATION – HARMONIZATION OF INDIAN LEGAL FRAMEWORK WITH INTERNATIONAL PRACTICES IN CONTEXT OF INTERNATIONAL CONSTRUCTION DISPUTES

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Abstract

Even though India was signatory to New York Convention since 1960 and enacted Indian Arbitration and Conciliation Act in 1996 in line with UNCITRAL Model Law, the enforcement of foreign awards in India has a chequered history. Nonetheless, the Indian legal framework has undergone significant changes during last 5 years with a view to make it responsive to international best practices.

The present paper brings out the existing legislative framework on India and examines the grounds for setting aside of an award and grounds for refusal of enforcement of few recent international arbitration awards to bring clarity on state of enforcement of foreign awards with respect to construction disputes under

New York Convention.

The paper sums up that Indian legal framework has evolved significantly since ratification of New Yok Convention and in a series of recent pro-enforcement developments through important amendments and policy directives, which are reflective in Court's judgments as well, Indian legal system is acknowledging foreign awards with less uncertainty.

Keywords: Enforcement of Award, Setting Aside of Award, Grounds for Challenge, Indian Arbitration Act 1996

1. Legislative framework of the enforcement of foreign arbitral awards in India

In India, prior to the enactment of the Arbitration and Conciliation Act, 1996[325] ("Arbitration Act"), the law of enforcement of foreign awards[326] was governed by the Foreign Awards (Recognition and Enforcement) Act, 1961 ("Foreign Awards Act"). The Foreign Awards Act has since been repealed by the Arbitration Act. Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the New Yok Convention[327].

While ratifying the New York Convention ("Convention"), India entered two reservations under Article I(3) being reciprocity and commercial reservations. The reciprocity reservation states that India will apply the Convention only to the recognition and enforcement of an award from the territory of another contracting country[328]. This reservation is reflected in Section 44 of the Arbitration Act. India has further narrowed down the application of the Convention to only those

[325] The Arbitration and Conciliation Act, 1996 (26 of 1996)

[326] Section 44 of Arbitration Act defines the foreign award as *an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—*
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

[327] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as "New York Convention"

[328] https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1728

territories[329] which have been recognized by India as having such reciprocal provisions. This narrowed field of operation has caused difficulties in the past. The Supreme Court recognized Ukraine as a reciprocal territory under the Convention on the basis of it being a successor State to the Soviet Union[330].

The commercial reservation states that India will apply the Convention only to differences arising from legal relationships, whether contractual or not, which are considered commercial[331] under national law. This reservation is also reflected in Section 44 of the Arbitration Act.

The enforcement of foreign awards is covered by Part II of the Arbitration Act, whereas the challenge and enforcement of domestic awards is covered under Part I of the Arbitration Act. Part II, Chapter I relates to Convention Awards and Chapter II relates to Geneva Conventions Awards. This dissertation will focus on the enforcement of New York Convention awards only. The reason for not considering the enforcement of the Geneva Convention[332] awards is because there is no recent instance where the Geneva Convention award has been pressed for enforcement.

The Arbitration Act has been amended in 2015[333], 2019[334] and recently in the March 2021[335]. The 2015 Amendment is more relevant in the present context of foreign award in which Section 48 was amended to delete the ground of an award '*contrary to the interest of India*'[336].

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[329] At present, only 48 countries (out of the 167) that have signed the New York Convention are notified in the official gazette of Government of India, Ministry of Law and Justice. Mauritius was the latest country to be notified, on 13 July 2015 reference available at http://egazette.nic.in

[330] Trans-Ocean Shipping Agency (Private) Ltd. v black Sea Shipping and others, AIR 1998 SC 707 (1998).

[331] A commercial dispute has been defined under section 2(1)(c) of the Commercial Courts Act, 2015

[332] Convention on the Execution of Foreign Arbitral Awards, 1927 known as "Geneva Convention". Section 53 of The Arbitration and Conciliation Act, defines "foreign award" as *an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July,1924*

[333] The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016). This amendment made sweeping changes in the Arbitration Act on the basis of the 246th Law Commission Report. The amendment came into effect on 23 October 2015.

[334] The Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019)

[335] The Arbitration and Conciliation (Amendment) Act, 2021 (3 of 2021)

[336] Prior to this Amendment, it stood as: "*Explanation – Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption*."

2. Setting Aside an Award

One of the distinct advantages of arbitration process is the finality of the award. The major arbitration laws and rules support such finality by limiting the possibility of setting aside the award[337].

2.1 Purpose of Setting Aside an Award

The purpose of setting aside an award before national court of the seat of arbitration is to get the award declared, in whole or in part, null and void. The consequence of such declaration is that the award now would be treated as invalid and accordingly unenforceable not only by the courts of the seat of arbitration but also by national courts elsewhere.[338]

2.2 Requirements for Setting Aside an Award

There are three pre-requisites that are required for successful attempt of setting aside an award:

(a) Legal Basis for Setting Aside an Award

The law that will govern the action will be the *lex arbitri*, or the curial law, which governs the arbitration proceedings at the situs[339]. The procedural law for challenging an award in the majority of the jurisdictions will be based on the Model Law[340], which will provide the grounds on which an award can be challenged[341].

(b) Time Limits

Failure to bring a challenge to an award within prescribed limit without justifiable and reasonable ground may bar a challenge to the award[342].

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[337] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 203 (3rd Edn., Cambridge University Press, 2017)

[338] Nigel Blackaby, J. Martin Hunter et al, Redfern and Hunter on International Arbitration 10.06(6th Edn Kluwer Law International Oxford University Press 2015)

[339] Margaret L. Moses The Principles and Practice of International Commercial Arbitration 203 (3rd Edn., Cambridge University Press, 2017)

[340] UNCITRAL Model Law on International Commercial Arbitration

[341] Margaret L. Moses The Principles and Practice of International Commercial Arbitration 203 (3rd Edn., Cambridge University Press, 2017)

[342] The Model Law under Article 34(3) prescribes the time limit of three (3) months from the notification of the award to the party wishing to challenge it and the same limit is applicable in

(c) National Courts

Before approaching the relevant courts for setting aside, the party should first exhaust all the possibilities of a review or correction of the award by the tribunal. Then the challenge to set aside an award must be filed with a court which has jurisdiction to hear the application. According to the Model Law[343] and the majority of arbitration laws, this jurisdiction is with the competent[344] court at the seat of arbitration[345].

If action to set aside fails, the losing party can oppose to enforce the award in a different jurisdiction, where the losing party's assets are located[346].
In India, the Arbitration Act makes it explicitly clear that in order to set aside, the parties have to file a written[347] application under Section 34 of the Arbitration Act. Merely stating that the award is bad in law and against facts would serve no useful purpose.

3. Grounds for Challenge

The applicable law in the jurisdiction where the challenge is brought defines the grounds that can be used. There are essentially three broad areas on which an arbitral award is likely to be challenged before a national court at the seat of the arbitration[348].

First, an award may be challenged on jurisdictional grounds i.e. the non-existence of a valid and binding arbitration agreement or other grounds.

Secondly, an award may be challenged on 'procedural' grounds such as failure

Indian Act.

[343] Article 34, 1 and 6, The UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended in 2006

[344] The competent court is designated in Article 6 The UNCITRAL Model Law on International Commercial Arbitration.

[345] Unless otherwise agreed by the parties. It has been suggested that it is unnecessary and unhelpful to exercise this freedom to choose another court. *See*, Julian D.M. Lew Loukas A Mistelis & Stefan M. Kroll, Comparative International Commercial Arbitration 664 (Kluwer Law International 2003).

[346] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (3rd Edn., Cambridge University Press, 2017)

[347] In India, a written application is the only recognized mode for challenging an award.

[348] Nigel Blackaby, J. Martin Hunter et al. Redfern and Hunter on International Arbitration 10.36 (6th Edn. Kluwer Law International; Oxford University Press 2015)

to give a party an equal opportunity to be heard.

Thirdly, and most rarely, an award may be challenged on substantive grounds on the basis that the arbitral tribunal made a mistake of law[349].

These grounds often mirror the grounds listed in Article V of the Convention. Interestingly Article 36 of the Model Law[350] also sets out the same grounds on which an award may be set aside.

3.1 Jurisdictional Grounds

Jurisdictional challenges may be made to an award, but they are more typically made at the beginning of the arbitration.

The grounds for challenge based on the jurisdiction could be as follows:

(a) Incapacity or invalid agreement to arbitrate[351]

The international arbitral process is based on consent. An arbitration award made in the absence of an arbitration agreement or submission of parties is invalid and

[349] Ibid

[350] Article 36 of Model Law summarized the grounds for refusing recognition or enforcement as follows:

- Lack of capacity to conclude an arbitration agreement or lack of a valid arbitration agreement;
- The aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or was otherwise unable to present its case;
- The award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, at goes beyond the scope of what was submitted;
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself;
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the state in which the arbitration takes place; and/or
- The award (or any decision within it) is in conflict with the public policy of the state in which the arbitration takes place.

[351] The first ground for challenging an award under Article 34(2)(a)(i) of the Model Law provides that:
"*A party to the arbitration agreement….. was under some incapacity; of the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State.*"

ineffective[352] and liable to be set aside.

(b) Excessive jurisdiction of the tribunal[353]

This ground of challenge contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it[354].

A tribunal may have had jurisdiction under the arbitration agreement, but nonetheless could have rendered an award that it was not entitled to make. The award may also be challenged if the tribunal either fails to consider all the issues before it or if it decides certain issues that were not before it[355].

(c) Arbitrability

The concept of arbitrability constitutes yet another ground to challenge an award in terms of the Model Law, an award can be challenged if '*the subject matter of the dispute is not capable of settlement by arbitration'*[356]. The arbitrability of a dispute is usually linked to the underlying public policy of the state in which the arbitration takes place.

3.2 Procedural Grounds

One of the major and the most common ground for challenging and setting aside

[352] Gary B Born, International Commercial Arbitration (2nd Edn., Kluwer Law International, 2014).
[353] Model Law Article 34(2)(a)(iii) states:

> *The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decoctions on matters beyond the scope of the submission to arbitration. provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.*

[354] Nigel Blackaby, J. Martin Hunter et al, Redfern and Hunter on International Arbitration 10.45 (6th Edn. Kluwer Law International; Oxford University Press 2015)
[355] *In some instances, if a court finds that the tribunal has exceeded its powers, the issues that were improperly decided may be severed leaving the award as to other issues intact.* Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (3rd Edn., Cambridge University Press, 2017)
[356] Article 34(2)(b)(i) of The UNCITRAL Model Law on International Commercial Arbitration

an award relates to the deficiency in the procedure of the arbitration[357]. Certain minimum procedural standards must be observed in the fair and proper conduct of arbitration to ensure that the parties are given equal treatment and a fair hearing with a proper opportunity to present their respective cases [358].

Further procedural issues may include a challenge where the composition of the arbitral tribunal and the procedure adopted in the arbitration are not in consonance with the agreement of the parties or filing such agreement, with the law.

It is imperative to note that a procedural irregularity or defect alone will not invalidate an award unless a significant injustice has been made had the tribunal not made that mistake.

3.3 Substantive Grounds

In addition to jurisdiction and procedural grounds for a challenge, substantive ground is yet another ground that come into play which may relate to the merits of the award and can pose a strong challenge whether there is a mistake of law, mistake of fact or anything contrary to public policy in the award.

If the arbitral award is in conflict with the public policy of its own country, it may be set aside by the national count of the place of arbitration. In most Model Law jurisdictions including India, fraud or corruption would probably be considered a proper ground for challenging an award as a violation of public policy.

3.4 Challenge Based on Merit

There are few exceptions for challenging an award on merit, generally in common law[359] systems. Arbitration Act though specifically proscribe the review on merit

[357] Article 34(2)(c)(ii) of the Model Law mentions that an award can be challenged when '*the party making the application was not given proper nonce of theappointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.*

[358] Nigel Blackaby, J. Martin Hunter et al Redfern and Hunter on International Arbitration 10.53 (6th Edn. Kluwer Law International; Oxford University Press 2015)

[359] It is noted that India is a common law country.

of the case[360].

4. Grounds for Non-Enforcement under the Convention

The permitted grounds of non-enforcement emphasize on the integrity of the procedure with special attention to the fairness to the parties and a reasonable opportunity to present their case.

Neither the Model Law or the Convention allows any scope of challenge on the merits of an award[361]. It must be noted that the Convention presents exhaustive grounds for refusal of recognition and enforcement[362].

The grounds for refusing enforcement are as follows:

4.1 Incapacity and Invalidity

The first ground for refusal enshrined is that there is some incapacity of the party or the agreement is invalid either under the law chosen by the parties, or if the parties did not choose a governing law, then under the law of the country where the award was made.[363]

4.2 Lack of Due Process

Another ground of refusing the recognition and enforcement of the award is if the party resisting enforcement furnishes proof that "*he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*."[364]

4.3 The Arbitrator has Acted Beyond Their Jurisdiction

Another important ground for refusal of recognition and enforcement of award

[360] Section 48(2) of Arbitration Act: *Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*
[361] Nigel Blackaby, J Martin Hunter et al, Redfern and Hunter on International Arbitration 11.53 (6Th Edn. Kluwer Law International, Oxford University Press 2015)
[362] Article of the New York Convention
[363] Article V(1)(a) of the New York Convention
[364] Article V(1)(b) of the New York Convention

under the Convention is enshrined in Article V(1)(c)[365]. It is imperative to note that the arbitrator's power comes from the consent of the parties.

4.4 Procedural Irregularity or Composition of Tribunal

The composition of tribunal or procedure not in accordance with the arbitration agreement or the relevant law is yet another ground for refusal of recognition and enforcement of an award[366]. It establishes the supremacy of party autonomy over the law of the place of arbitration.

4.5 The Award is 'not-Binding' or has been 'Suspended' or 'Set Aside'

The next ground for refusal of enforcement is when the award "*has not yet become binding on the parties or has been set aside or suspended by a competent authority.[367]"* Most courts consider that an award is binding if there is no way of bringing an appeal on the merits.

4.6 Subject Matter not Arbitrable

The Model Law, as well as the Convention, provides that recognition and enforcement of an arbitral award may be refused if "*the subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[368]

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[365] Article V(1)(c) New York Convention states that "*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration provided that, if the decision on matters submitted to arbitration can be separated from those not to submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced"*

[366] Article V(1)(d) of the New York Convention[366] states that enforcement can be refused if *"the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"*

[367] Article V(1)(e) of New York Convention allows for the refusal of enforcement when the award "*has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."*

[368] Article V(2)(a) of New York Convention provides that the *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;*

4.7 Public Policy

Recognition and enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state[369]. This public policy exception is an acknowledgment "*of the right of the State and its courts to exercise ultimate control over the arbitral process."*[370]

5. Indian Case Laws

The enforcement of foreign awards in India has a chequered history[371]. The present dissertation will focus on the important development in last 5 years in the Indian jurisprudence in enforcement of foreign awards. The present discussion is limited to construction disputes and issues involved investment disputes have not been discussed.

5.1 Renusagar v General Electric

In the landmark judgment of *Renusagar*[372], it was held that, firstly, under the guise of public policy, there was to be no review on merits and secondly, that the public policy defence was to be construed narrowly and that contravention of law alone was not enough. Public Policy was sought to be defined judicially and the *Renusagar* test was evolved.

As per this test, the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement is contrary to:

a. Fundamental policy of Indian law, or
b. The interests of India; or
c. Justice or morality

[369] Article V(2)(b) of New York Convention provides that recognition or enforcement of an arbitral award may be refused if a court finds that it would be contrary to the public policy of that country.
[370] Julian DM Lew, Loukas A Mistelis & Stefan M Kroll, Comparative International Commercial Arbitration 721 (The Hague Kluwer Law International, 2003)
[371] Gourab Banerji, Enforcement of Foreign Arbitral Awards in India, Thomson's Commercial Arbitration – International Trends and Practices Edited by Chirag Balyan and Yashraj Samant– 1st Edition 2021.
[372] Renusagar Power Co. Ltd v General Electric Co. (1994) Supp 1 SCC 644 (1994)

This test was reiterated in *Shri Lal Mahal*[373] in which a Trade Agreement award was enforced. In *Phulchand*[374], judgment seeking to give a wide meaning to public policy was overruled by Court.

The two limbs of the *Renusagar* test have been statutorily accepted though explanation to Section 48 of Arbitration Act[375]. The test that it would be contrary to the interests of India was deleted as being 'vague' and 'capable of interpretational misuse'. Instead of 'justice and morality', the scope was further narrowed down, tightening the formulation to the 'most basic notions of morality and justice'.

5.2 Vijay Karia v Prysmian[376]

This is a landmark decision of the Supreme Court of India. A dispute arose out of a joint venture agreement ('JVA') entered into by Vijay Karia and others with an Italian company Prysmian. The JVA had an LCIA arbitration clause, governed by English law and seated in London. Prysmian initiated arbitration alleging loss of control of Ravin. The LCIA appointed a sole arbitrator who made four awards also, a challenge to the impartiality of the arbitrator was dismissed by the LCIA court.

The award was not challenged at the seat but was resisted at the enforcement stage invoking the grounds under Section 48[377]. High Court found no merit in Karia's objections and decided that the award was enforceable. Karia straightaway appealed to the Supreme Court invoking Article 136 of the

[373] Shri Lal Mahal Ltd. v Progetto Grano SPA (2014) 2 SCC 433 (2014)
[374] Phulchand Exports Limited v Ooo Patriot (2011) 10 SCC 30 (2011).
[375] Two 'Explanations' inserted through Act 3 of 2016, sec 22 (wef 23.10.2015) as as under:

> **Explanation 1** - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if –
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
> (ii) it is in contravention with the fundamental policy of Indian law; or
> (iii) it is in conflict with the most basic notions of morality or justice.
>
> **Explanation 2**- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.[29]

[376] Vijay Karia and others V Prysmian Cavi E Sitemi, 2020 SCC Online 177
[377] Equivalent to Article V of the New York Convention

Constitution of India.

Referring to judgment in *Renusagar*, other judgements and the Act, the Supreme Court stated that only an arbitral award that shocks the conscience of the court would be set aside. Most importantly, the Court noted that there is a pro-enforcement bias under the Convention[378].

Noting that the grounds under Section 48 are watertight, the Court observed that the expression used in Section 48 is '*may*'. The Supreme Court examining the scope of the natural justice ground under Section 48(1)(b), and, in particular, the expression '*or was otherwise unable to present his case*', concluded that this expression was not to be given an expansive meaning and that the same would be limited to a case where a fair hearing was not given by the arbitrator.

The Court emphasized that fundamental policy refers to the core values of India's public policy which may find expression not only in statutes but also *time-honoured, hallowed principles which are followed by the Courts*. It observed that a FEMA violation, even if proved, would not breach the fundamental policy of Indian law.

The Court observed that the Appellants were *indulging in a speculative litigation* and the challenge in reality is plainly *a foray into the merits of the matter* which are plainly proscribed by section 48 of the 1996 Act.

5.3 NAFED v Alimenta[379]

Unfortunately, a different note was struck by the Supreme Court in *NAFED* case. The judgment, though subsequently delivered, does not notice the earlier judgment of the court in *Karia*. One of the reasons could be that this judgment had been reserved on an earlier date[380].

NAFED had contracted to supply groundnut to Swiss Company Alimenta on FOSFA terms and conditions. The contract stated that in case of prohibition of export, the contract was to be treated as cancelled. The governing law of the

[378] *Parsons & Whittemore Overseas Co. v Societe Generale De L'Industrie Du Papier,* 508 F.2d 969 (2d Cir.: 1974).
[379] *National Agricultural Cooperative Marketing Federation of India (NAFED) v Alimenta S.A.*, 2020 SCC Online 381 (2020).
[380] This judgement was reserved on 04 September, 2019 and Vijay Karia V Prysmian case was pronounced on 13 February, 2020

contract was English law.

NAFED couldn't supply due to restrictions imposed by the Government. For dispute resolution, NAFED was asked to appoint its nominee arbitrator who refused to appoint an arbitrator. FOSFA proceedings nevertheless continued, despite the stay from High Court. FOSFA appointed NAFED's arbitrator. The Delhi High Court and then the Supreme Court, however, held that an arbitration had been opted for by the contracting parties.[39]

In the FOSFA award, apart from a sum, interest was awarded @10.5%. NAFED appealed to the Board of Appeals which rejected NAFED's appeal. Interestingly, FOSFA's nominee arbitrator appeared as counsel on its behalf before the Board of Appeals. The Board of Appeals also increased the rate of interest.

Alimenta filed a petition seeking enforcement of the FOSFA awards, NAFED's objections were not accepted by the Delhi High Court. In NAFED's appeal, the Supreme Court held that in view of the Clause 14 of Contract and the refusal of the Government, the contract came to an end and NAFED was justified in not making supplies.

The Supreme Court commented on the merits of the addendum and observed that it had been entered into unfairly. This Court also considered the issue of public policy and concluded that the export for which permission of the Government was necessary would be against the fundamental public policy of India.

The Court held that it was not open to the Board of Appeals to increase the rate of interest, the award was ex facie illegal and in contravention of fundamental law and the public policy of India. NAFED's appeal was allowed and the award was held to be unenforceable.

The judgment in *NAFED* has been universally criticized. It purportedly extended the scope of public policy in India and made a dent in India's pro-enforcement regime. The judgment does not notice the settled legal position as per *Renusagar* that the challenge has to be on a narrow well-defined basis and there cannot be a foray into the merits of the award. Yet another problem is that by entertaining an appeal on the merits, the Supreme Court has applied the Indian law of frustration when the underlying contract was governed by English law. The Supreme Court also failed to appreciate the distinction between the breach of law and breach of the fundamental policy of Indian law.

That being said, it is clear from the factual narrative that there were serious infirmities in the arbitral process and on that ground, the award ought to have been refused enforcement. Perhaps it would have been more appropriate to refuse to enforce the award on due process grounds.

5.4 Centrotrade v HCL

In *Centrotrade*[381] case, Centrotrade had entered into a contract for sale of copper concentrate to HCL. A dispute arose between the parties as regards the dry weight of the copper concentrate. Contract contained a two-tier arbitration agreement by which the first tier was to be settled in India, with a right of appeal to a second arbitration in London under ICC rules. Centrotrade invoked arbitration but suffered a nil award by the Indian arbitrator. Centrotrade appealed for second tier arbitration and the ICC appointed arbitrator delivered an award in London, ordering HCL to pay Centrotrade.

Centrotrade sought to enforce the award in India. The High Court dismissed HCL's objections under Section 48, as a result of which the award became executable in India. The Supreme Court noted that the arbitrator had considered even the belated submissions by HCL and taken them fully into account in making the award.

HCL had argued that the word '*otherwise*' in Section 48(1)(b)[382] is to be read widely and cannot be read *ejusdem generis* with the words that preceded it. This submission did not find favour with the Court.

Supreme Court noted that the ICC arbitrator was extremely fair towards HCL and finally held that HCL chose not to appear before the arbitrator and filed submissions outside the timeframe set by arbitrator. The Court noted that the order remanding the matter to the ICC arbitrator was outside the jurisdiction of

[381] Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd, 2020 SCC Online SC 479

[382] Section 48 of the Indian Arbitration and Conciliation Act, 1996:

> ***48. Conditions for enforcement of foreign awards.*** –
>
> *(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-*
>
> *(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was* ***otherwise*** *unable to present his case;* [Emphasis applied]

an enforcing court. Resultantly, the foreign award was held to be executable.

This judgment of the Supreme Court reinforces its pro-enforcement approach and further explains the scope of the natural justice defence to enforcement of the foreign awards. The only criticism that could perhaps be made of the Supreme Court is that it took 16 years to decide the matter.

5.5 Government of India v Vedanta

In *Vedanta*[383] case, the Supreme Court refused to interfere with the enforcement of a foreign award pronounced in Malaysia.

In this case, disputes arose relating to the recovery of base development costs which had been incurred by Respondents. The Government of India ("GOI") contended that all the development costs claimed were incurred in connection with the Ravea Plan, and were subject to the 'cap' on such costs as provided by Production Sharing Contract ("PSC"). Under the PSC, the substantive law of the contract was Indian Law; the venue of the arbitration was Kuala Lumpur, Malaysia, and the law governing the arbitration agreement was English law. The arbitral tribunal held that the Respondents were entitled to recover development costs.

This award was challenged by the GOI before the courts in Malaysia. However, both the Malaysian High Court and the Malaysian Court of Appeal found no reason to set aside the award. Then Respondents filed an enforcement petition before the Delhi High Court along with an application for condonation of delay. The GOI challenged the enforcement of the award on the ground that the enforcement petition was filed beyond the period of limitation, award was contrary to the public policy of India, and it contained decisions on matters beyond the scope of the submission to arbitration. The High Court allowed the application for condonation of delay and directed the enforcement of the award. The GOI impugned the order by questioning its maintainability (*re* limitation), on the grounds of public policy and erroneous application of the Act by the Malaysian Courts.

On limitation, Court observed that Article 137 of the Limitation Act would apply to enforcement/execution petitions for foreign awards since these are not a 'decree of a civil court in India'. The Court further held that a petition under Section 47,

[383] Government of India v Vedanta, 2020 SCC Online SC 749 (Vedanta).

read with Section 49 of the Act, is substantive. Therefore, a party could file an application for condonation of delay along with their petition under Section 47.

As for public policy, the Court held that the amended Section 48 would not apply to the present case as the court proceedings for enforcement had been initiated prior to the 2015 Amendment[384]. In accordance with *Renusagar*, the court held that the GOI had made out no case for a violation of procedural due process and that the award was not in conflict with the basic notions of justice or public policy of India.

Through this judgment the Supreme Court has clarified the law regarding limitation in enforcement of foreign awards in India and has reinforced the previous understanding that even pre-2015, Section 48 generally, and the defence of public policy under section 48(2)(b), in particular, would be interpreted in a narrow manner and emphasized that foreign awards are to be enforced unless they conflict with basic notions of justice, or are in violation of the substantive public policy of India.

6. CONCLUSION

The recent developments in relation to the Convention in India present a mixed bag. Though the judgments in *Vedanta*, *Karia* and *Centrotrade* present a very positive picture, the judgment in *NAFED* does strike a jarring note. However, the general trend in India is that for Convention awards to be enforced. *Alimenta* is, in many ways, an outlier. The reality is that an overwhelming number of foreign awards are ultimately enforced[385].

The view point of the Supreme Court of India in observing that *in cases where the judgment recognizes and enforces a foreign award, the Court would be very slow in interfering with such judgments, and should entertain an appeal with a view to settle the law if some new or unique point is raised*[386] really sets direction for Indian legislature in this regard. The Supreme Court cautioned that only in a

[384] The 2015 Amendment to Indian Arbitration Act come into force wef 23.10.2015

[385] These cases are worth mentioning- *Banyan Tree Growth Capital LLC v Axiom Condages Limited and Ors*., Commercial Arbitration Petition Nos. 476 and 475 of 2019 (Bombay High Court:2020), *POL India Projects Limited v Aurelia Reederei Eugen Friederich GmbH.* (2015) SCC Online Bom 1109 (Bombay High Court: 2015), *Xstrata Coal Marketing AG Dalmia Bharat Cement Limited* (2016) SCC Online Del 5861 (Delhi High Court 2016), *Daiichi Sankyo Company Limited v Malvinder Mohan Singh & Others* (2018) SCC Online Del 6869 (Delhi High Court 2018) which have been ultimately enforced.

[386] Vijay Karia and others V Prysmian Cavi E Sitemi, 2020 SCC Online 177

very exceptional case of a blatant disregard of Section 48 of the Act, it would interfere with a judgment which recognizes and enforces a foreign award.

However, the real concern is not so much as enforcement of an award, but how long it will take. It took 20 years for the *Centrotrade* case to close. The *enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking*[387]. Timely enforcement of award with positive and consistent approach will pay way for harmonization of Indian legal system with other pro-arbitration countries.

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[387] Justice RF Nariman in Kandla Export Corporation and Another v OCI Corporation and Another (2018)

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