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# Critical Appraisal of the Singapore Convention on Mediation

Prerita Bhardwaj[a]

[a]Symbiosis International University, Pune, India

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*Numerous nations, including India, have a significant history of ADR. Before the British period and the advent of the western litigation system, disputing parties used to approach panchayats, which would primarily use the method of conciliation. The panchayat's decisions were considered binding and equivalent to a court's decision today. Mediation, which is similar to arbitration, has been around for a long time as a simpler, more informal alternative way to settle a dispute. It involves a third party, like a person or a panel, helping the disputing parties work out their differences fairly and impartially. The purpose of the original "UNCITRAL Model Law on International Commercial Conciliation" from 2002 was to be useful when two parties couldn't agree on a set of guidelines for mediation or failed to include them in their contract. Recently, the "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018" was adopted as a revised version of the original law. This article aims to critically examine the Convention's provisions and their applicability. Additionally, its implications for India as a signatory will be analyzed.*

**Keywords:** *convention, mediation, united nations, settlement, agreement.*

## INTRODUCTION

The United Nations General Assembly approved the "United Nations Convention on International Settlement Agreements Resulting from Mediation" on 20th December 2018 during

its 73rd session. It urged UN Member States and regional cooperation organizations who desire to enhance the legislative approach governing international dispute settlement to pursue becoming Parties to the Convention.[1] At the same session, the General Assembly of the United Nations also proposed that all the member States give regard to the "*Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation 2018*", amending the "*UNCITRAL Model Law on International Commercial Conciliation 2002,"* When changing or making new laws about mediation, it's important to take into consideration that the laws need for consistency. UNCITRAL Working Group II (Dispute Resolution) drafted both conventions.[2] The Singapore Convention on Mediation was signed on 7 August 2019 in Singapore. 46 States, inclusive of the world's two biggest economies—the US and China—and three of Asia's four major economies—"*China, India, and South Korea—signed the Singapore Convention"* on Mediation, a landmark for a UNCITRAL treaty.[3]

**THE OBJECTIVE OF THE CONVENTION**

The Convention is a multilateral pact that provides a legal provision to enable the international recognition of "***international mediated settlement agreements"*** (referred to as iMSAs hereafter). The Convention accomplishes this by enhancing settlement agreements to the status of a special kind of legal document that international law recognises.[4] iMSAs that fall under the purview of the Convention and fulfill its prerequisites have a special status.[5] The new Convention creates a structure for the acceptance and implementation of commercial iMSAs.

The Preamble starts by recognizing the need for mediation for international commerce. Regarding mediation's advantages, the passage mentions the preservation of corporate ties, the facilitation of international commerce, and the reduction of expenses for state legal systems, all

[1] UN GA Res, 73/198 (20 December 2018), A/RES/73/198
[2] Herman Verbist, 'United Nations Convention on International Settlement Agreements Resulting from Mediation' [2019] b-Arbitra 53
[3] Nadja Alexander & Shouyu Chong, 'UN Treaty on Mediation Signed in Singapore' (2019) 23 Nederlands-Vlaamstijdschrisft voor Mediation en conflict management 71
[4] Nadja Alexander & Ors, *The Singapore Convention On Mediation: A Commentary* (2nd edn, Kluwer Law International 2022)
[5] *Ibid*

of which are noted characteristics of mediation.[6] The Preamble also mentions the growing use of mediation in international and local conflict resolution contexts. However, Because of the lack of a multilateral treaty, people said they often had difficulty persuading other parties to settle international business conflicts.[7] As envisioned in the Preamble's last paragraph, it was believed that this kind of convention would promote the establishment of amicable international economic ties.[8]

## ANALYSIS OF THE KEY PROVISIONS

**Scope of Application:** The scope of the Convention includes

**1. Agreements that are a consequence of mediation.**

**2. Agreements that have been formalized in writing.**

**3. They must arise from a commercial dispute**: It has been defined in the Model Law on International Commercial Mediation. The word 'commercial' should be interpreted broadly to include issues emerging from any business connections, whether contractual or not.[9] While ***R v Wah Kee***,[10] the Supreme Court of Alberta, in determining whether a laundromat constituted a commercial enterprise, remarked: The term "commercial" communicates to the mind the notion of dealing or selling in any commodity. In a sense, of course, any enterprise with a profit motive is a commercial enterprise.

**4. The agreement must be international in nature:** The international criterion emphasizes both the transnational scope of UNCITRAL's mission and its wish not to meddle with the domestic law of adopting states. International is defined as

[6] Klaus J Hopt & And Felix Steffe, *Mediation: Principles and Regulation in Comparative Perspective* (OUP Oxford 2013)
[7] *Ibid*
[8] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, Preamble
[9] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (12 December 2018) A/73/17
[10] *R v Wah Kee* [1920] 3 WWR 656

- At least two of the people involved in the settlement have their businesses in different states, or
- State in which most of the settlement contract's responsibilities are carried out or the state to which the settlement agreement's essential object has the closest connection is distinct from the State where parties do their business.[11]

In "***Fung Sang Trading Limited v Kai Sun Sea Products and Food Company Limited,"***[12] the Hong Kong High Court ruled, however, regarding international commercial arbitration, that even though the conflict involved entities based in the same State the dispute was international in character because a considerable portion of the contractual duties (i.e., the shipment of products to China) had occurred outside of Hong Kong.

- Disputes stemming from consumer transactions made "for personal, family, or household purposes."[13] as well as those about "family, inheritance, or employment law."[14] Have been excluded from the scope.
- It does not extend to MSAs that are -

a. court-authorized or finalized in judicial proceedings or;
b. recorded and consequently binding as arbitral awards.[15]

**Enforcement**

Article 3(1)[16] allows parties to use MSAs as a weapon against another party that violates its conditions by initiating actions in the jurisdiction of the appropriate authority of a Contracting

[11] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 1(1)
[12] *Fung Sang Trading Limited v Kai Sun Sea Products & Food Company Ltd* [1992] HKLR 40
[13] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 1(2)(a)
[14] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 1(2)(b)
[15] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 1(3)
[16] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 3(1)

State or other Party to the Singapore Convention. If the Convention's scope[17], form, and evidence requirements are met and the parties cannot show one or more reasons for rejection,[18] the competent authority will usually enforce.

**Grounds for refusal to grant relief**

Article 5[19] of the Convention specifies extensively the conceivable exclusions to the execution and acceptance of internationally mediated settlement agreements that otherwise meet the Singapore Convention's standards and circumstances. The reasons are:

- Either or both the parties involved in the agreement are incompetent.
- If the requested remedy is contrary to "*public policy*";
- If the "*settlement agreement is null, void, inoperative, or incapable of being performed under the law to which it is bound*";
- If the conciliator committed a serious breach of the relevant norm, such that, had the parties been aware of it, they would not have entered a contract.

In addition, Article 5(1)(d)[20] offers the parties the opportunity to choose not to avail of any benefit or relief being provided by this framework by declaring so explicitly in the agreement.

**Reservation**

Article 8[21] of the Convention allows signatory governments to express reservations that the Convention would apply only to the degree to which parties involved in the MSA have agreed on implementing it. This is a unique feature of the Convention.

[17] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 1
[18] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 5
[19] *Ibid*
[20] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 5(1)(d)
[21] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 8

## LACUNAE OF THE CONVENTION

After delving into what the Convention encompasses, it is contended that it is a progressive framework and a necessary step to promote the international framework for incorporating mediation as a method of resolving disputes. Also, as a growing number of states ratify the Convention, it will make global trade and business easier and decrease risk, and it will make it easier and more standard to enforce the agreements that have been mediated. However, it has the following shortcomings:

***Significant discretion to municipal laws of the member states:*** The greatest concern is how the Convention will operate and how dependent it would be on local legislation. Due to this, it is unclear how the Singapore Convention will be properly implemented. The Convention grants governments significant discretion in enforcing MSAs. For instance, it would be difficult to implement the MSA in jurisdictions where mediation is not often used to resolve conflicts or where people do not understand how mediation works. Parties to an agreement are sometimes constrained by the norms and practise of their country's laws, and may thus be unable to fully execute the settlement agreement's terms. Consequently, the disparity between domestic laws may be a cause of why the MSA is not implemented. Lack of legislation in such countries could lead to dependence on litigation or arbitral proceedings.

***Exclusion of Negotiated agreements from the scope:*** Given the similarity in advantages of mediation and negotiation and the fact that it is more cost-effective, negotiation is more prevalent. Therefore, it is suggested that it must be included in the scope of the legislative framework.

***Lack of guidelines on the Skills of a mediator:*** There is a lack of detailed instructions on what mediation abilities are required. Because of the inherent incompatibility between national and international law, such conduct cannot be laid down under domestic statutes. The utmost clarity might be attained by developing a set of rules specific to the Singapore Convention.

***Lack of mechanism to comply with MSAs:*** The Convention makes no mention of how the MSA shall be adhered to. It does not specify whether MSAs will be enforced by awarding damages

or any other solution as required and requested under the laws of the nation where enforcement is attempted.

***Article 5:*** The untested wording of Article 5 looks to give sufficient opportunity to hinder the implementation of a mediated resolution. There are a lot of similarities between the reasons listed for not enforcing a contract and contract law defences, such as incapacity[22] and incapability to perform[23]. Article 5(1)(d) of the Singapore Convention could make it much harder for this Convention to be followed. Article 5(1)(d) gives protection of not giving relief if it would be inconsistent with the settlement agreement. From this perspective, parties would be able to contract out of having the Convention enforce their settlement agreement if they explicitly stated so in their MSA.

## IMPLICATIONS FOR INDIA

### Mediation in India

Despite domestic encouragement for mediation from the legislature and court, India likely possesses the poorest established environment for international commercial mediation among Asian jurisdictions like Hong Kong and Singapore. ***"Vikram Bakshi v Ms. Sonia Khosla,"***[24] a Supreme Court ruling, underlined the necessity for early conflict settlement and the advantages of mediation, particularly it's capacity to "*provide a win-win solution that cannot be reached by judicial adjudication."* In "***M.R. Krishna Murthi v New India Assurance Co. Ltd.,***"[25] the Apex Court declared that mediation had several benefits. This position is acknowledged by legislators and policymakers and requires no clarification. A rising number of court-affiliated mediation institutions have emerged. These developments are indicative of an emerging mediation culture in our country.

[22] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 5(1)(a)
[23] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 12 December 2018) GA Res A/73/198, art 5(1)(b)(i)
[24] *Vikram Bakshi v Ms Sonia Khosla* 2014 (2) ILR (Ker) 658
[25] *MR Krishna Murthi v New India Assurance Co Ltd* 2019 SCC OnLine SC 315

**The Convention Vis-À-Vis Indian Laws**

India has no legislative framework for mediation yet. Mediation is gaining legal status and has been included in a few legislations. The Companies Act of 2013,[26] the Civil Procedure Code,[27] and the Commercial Courts Act of 2015[28] are a few examples. These laws are not handling iMSAs made outside the territory of India or allow defences to enforcement; hence they are inadequate for the Singapore Convention on Mediation and Amended Model Law.[29]

The Arbitration and Conciliation Act governs conciliation in India. The "Arbitration and Conciliation Act's" idea of conciliation seems to have the conciliator play an interventionist role, even if the procedure is non-adjudicatory. In ***Salem Advocate Bar Assn. (II) v Union of India,***[30] the Supreme Court of India highlighted the difference between conciliation and mediation. However, the method of "conciliation" under the "Arbitration and Conciliation Act" remains recognizable as "*mediation*" as expounded by the Singapore Convention on Mediation and 2018 Model Law since it entails that an unbiased third party will assist in disputing parties resolve their conflict. To minimize misunderstanding with domestic mediation and conciliation, international commercial mediated settlement agreements should have different laws.

**WHY SHOULD INDIA RATIFY?**

Although major attempts have been made to increase the use of mediation in India via a variety of legislation, international mediation continues to be sluggish and negligible in India. As indicated before, the grounds for this include the non-binding element of the process and its unenforceability. India must expeditiously adopt the Convention otherwise, it would risk impeding and terminating investor and foreign ties. If the Convention has existed at the time and India had ratified it, the likelihood of ***Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India*** [31] proceeding to arbitration might have been considerably decreased. In

[26] Companies Act 2013, s 442(1)
[27] Code of Criminal Procedure 1973, s 89
[28] Commercial Courts Act 2015, s 12A
[29] Eunice Chua, 'Enforcement of International Mediated Settlement Agreements in Asia: A Path Towards Convergence' (2019) 15 AIAJ 1
[30] *Salem Advocate Bar Assn (II) v Union of India* (2005) 6 SCC 344
[31] *Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India* PCA Case No 2016-2017

such a case, the parties would probably have sincerely contemplated "investor-State mediation" as a means to settle the conflict in a more economical and time-efficient manner.[32] Additionally, ratifying the agreement would aid in the promotion, growth, and maintenance of the country's international commercial connections.

## CONCLUSION

The Singapore Convention has tremendous potential to promote the process of mediation, which will aid the international commercial community. In addition, despite the aforementioned disadvantages, the Singapore Convention offers mediators a tool that can establish a standard framework for the enforcement of international settlement agreements. India's ratification of this Convention would be highly beneficial as it would help foster its international business relations as well as increase the prevalence of mediation. Therefore, India must promulgate legislation to ratify the same.

[32] Iram Majid, 'The Singapore Mediation Convention: A Long Pending Catharsis for Mediation and an Urgent Need for India to Ratify' *(SCC Online Blog,* 13 September 2021) <https://www.scconline.com/blog/post/2021/09/13/the-singapore-mediation-convention/#:~:text=%5B1%5D%20To%20date%2C%20the,States%20have%20ratified%20the%20same> accessed 15 January 2023