The impact of the Singapore Convention on the international business mediation

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In line with the general trend towards the development of a settled justice, the Convention on International Settlement Agreements Resulting from Mediation (hereinafter referred to as the "Singapore Convention") will enter into force on 12 September 2020 with the well-expressed intention to promote mediation as the most privileged tool for the resolution of international commercial disputes.Hightlights from Joséphine Hage Chahine, Ettore M. Lombardi, David Lutran, Catherine Peulvé[1]

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1. Litigation is generally a procedural mechanism to solve the disputes that people seek to avoid. It is expensive, time consuming, emotionally draining and unpredictable. Alternative dispute resolution, such as arbitration first, and mediation afterwards, became therefore very popular.

2. In line with the general trend towards the development of a settled justice, the Convention on International Settlement Agreements Resulting from Mediation (hereinafter referred to as the "Singapore Convention") will enter into force on 12 September 2020 (The Convention was adopted on 20 December 2018 and opened for signature on 7 August 2019. It has been signed by 52 States so far, including some of the world's largest economies, the US, China, India and South Korea.In accordance with Article 14 (1), the Singapore Convention shall effectively enter into force six months after the deposit of the third ratification instrument. The Convention has been ratified by Singapore and the Fiji Islands States on 25 February 2020 and by Qatar on 12 March 2020) with the well-expressed intention to promote mediation as the most privileged tool for the resolution of international commercial disputes (*See Annex I. United Nations Convention on International Settlement Agreement Resulting from Mediation. Preamble*, available at https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf, where we can read that *«[...] Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations »*).

3. It is worth mentioning that the Singapore Convention succeeded in gathering 46 signatures on 7 August 2019 (*i.e.* the date of its signing ceremony), in comparison to the 10 signatures initially gathered for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (referred to as the "New York Convention") (adopted by the United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf).

   The New York Convention provides for: (i) an expedited and simple enforcement procedure (Article IV of the New York Convention); (ii) limited grounds to refuse enforcement (Article V of the New York Convention) and (iii) the "most favourable law" provision (Article VII of the New York Convention).when it was enacted on 10 June 1958.

One might think that it would be at least as successful (if not more) as the New York Convention, while providing the economic players with the needed and long-awaited flexibility and efficiency in the resolution of their international commercial disputes.

4. Considering now its technical features, the Singapore Convention broadly defines mediation (the Convention defines mediation as *"a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute."*(Article 2(3) of the Singapore Convention), and applies to international agreements resulting therefrom, concluded in writing by parties to resolve a commercial dispute (Article 1 (1) of the United Nations Convention on International Settlement Agreements Resulting from Mediation).

5. In spite of its use, the word "commercial" is nowhere to be defined in the Convention, which leaves room for an extensive interpretation that could encompass investor-state disputes too, *i.e.* disputes brought by a foreign investor against the host State, on the grounds that the latter has breached its obligations of safeguarding the rights of the foreign investor (these obligations arise out of a multilateral or bilateral treaty for the promotion and protection of private investments made by nationals of the Signatory States in each other's territories or from the domestic investment laws of the host state. The standards that can be found in most treaties and domestic laws are as follows: fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory treatment, protection against expropriation, national treatment and most-favoured nation treatment).

6. Indeed, if otherwise argued, it would not have been necessary to provide for Article 8.1(a) in the Convention : (article 8.1(a) in the Convention states: "*1. A Party to the Convention may declare that: (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration* [...]"). this provision must be construed as allowing a Signatory State to exclude the application of the Convention to "*settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party*".

Hence, Article 8.1(a) should be considered as an incentive for States to ratify the Convention, by offering them a flexibility to "carve out" a

category of disputes from its scope of application.

7. The Convention establishes an international legal framework for the enforcement of settlements reached through mediation, and set forth a very limited number of requirements thereon. Should the parties be established in a State that has ratified the Singapore Convention, the enforcement of the settlement agreement they have reached through mediation will no longer be conditioned to a legal action for contractual liability before the competent authorities.

8. Consequently, the private contractual settlement agreement is granted a status comparable to the arbitral award status resulting from the application of the New York Convention.

9. Considering that the enforceability of arbitral awards is perceived as the arbitration's most important feature, the cross-border enforceability of the settlement agreements reached through mediation conferred by the Singapore Convention could somehow erode arbitration's edge.

Another element which could lead to the same conclusion is the very nature of mediation as a non-confrontational process which, unlike arbitration helps preserving the parties' on-going relationship and allows them to craft a business-friendly solution rather than an "aseptic" one.

10. However, arbitration and mediation should not be envisaged as competing tools to solve disputes. Instead, combining the best of both worlds would optimize the dispute resolution process. Practically, mediation can be combined with arbitration at three different stages: (i) before arbitration, as the first tier of an escalation clause ; (Suggested Med-Arb Clause *"Any dispute arising out of or in connection with this contract shall first be referred to mediation under the [...] Mediation rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute being resolved, then such dispute shall be definitively settled by arbitration under the [...] Arbitration rules")* ; (ii) during arbitration, when parties reach a settlement notably with the help of a mediator and request the Tribunal to render an award by consent; (iii) after arbitration, as a means to reach a settlement regarding the quantum to be paid and avoid therefore enforcement issues.

11. Furthermore, it must be underlined that the entry into force of the Singapore Convention will encourage the use of mediation in three specific regions. First, in the States comprised within the

Belt and Road Initiative, (it is worth mentioning that China had already expressed its support towards mediation during the Opening Ceremony of the Belt and Road Forum for International Cooperation held on 14 May 2017, where the Chinese President XI JINPING pointed out the need of an "*equitable and transparent system of international trade*" and the global promotion of "*mediation in the spirit of justice*") involving no less than 70 countries, that will inevitably lead to cross-border disputes to be settled in a cost and time efficient manner. Then in Europe, currently coping with the consequences of Brexit, settlement agreements reached through mediation conducted in the UK will no longer benefit from the European Union's instruments (these include mechanisms related to the 2008 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (referred to ask the EU Directive in Civil and Commercial Matters), the Rome I Regulation and the Brussels Regulation). Last but not least, in the Asia-Pacific area, that has a culture for business, where mediation centers (such as the WIPO Arbitration and Mediation Center, the Singapore Mediation Centre and the Singapore International Mediation Centre) and academies (such as the Singapore International Mediation Institute and the Singapore International Dispute Resolution) are flourishing, and which enjoys a favorable legislative environment for the development of mediation (for instance: the 2012 amendment to China's Civil Procedure Law who adopted the principle of "mediation first" in its Article 122; the 2013 Hong Kong Mediation Ordinance and the 2017 Apology legislation; the Malaysian Mediation Act of 2012 and the 2017 Singaporean Mediation Act).

12. In the same vein, several industries will benefit from the entry into force of the Singapore Convention: the construction sector, in which parties usually need a timely solution that preserves the contractual relationship (that usually extends for several years in order to complete the construction works); and the shipping industry, in which mediation has already gained recognition, (see in this respect: BIMCO's Standard dispute resolution clause referring to mediation) insofar as disputes are now expected within the BRI maritime sea route (this route connects China's coastal regions with south east and south Asia, the South Pacific, the Middle East and Eastern Africa, all the way to Europe. The project is expected to involve over USD $1 trillion in investments, notably for infrastructure development for ports and networks).

13. The Singapore Convention can with no doubt be seen as the missing piece of the international dispute resolution framework(the international conventions (outside the European Union framework) in force before the signing of the Singapore Convention related either to litigation - the Hague Convention on the Choice of Court Agreement (adopted by the Hague Conference Private International Law on 30 June 2005 and entered into force on 1 October 2005, available at https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf) and the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted on 2 July 2019) – or to arbitration (the New York Convention)) oriented for the

first time towards mediation which has been granted by the United Nations at a rank comparable to international arbitration (the Singapore Convention is the 4th instrument available in the Chapter XXII "Commercial Arbitration and Mediation" of the United Nations Collection Treaties, the three first instruments inserted in this Chapter being the New York Convention, the European Convention on International Commercial Arbitration (Geneva) of 21 April 1961 and the United Nations Convention on Transparency in Treaty-based Investor state Arbitration (New-York) of 10 December 2014, all related to international arbitration).

14. The States' striking enthusiasm for the Singapore Convention from the day of its enactment and onwards seems to be an encouraging indicator for the increasing use of mediation for the settlement of international commercial disputes in the upcoming years. It will also alter the dispute resolution market by challenging its users and practitioners in their way to foresee the conflict itself and its resolution mechanisms.