MEDIATION AND ARBITRATION: THE PROCESS OF ENFORCEMENT

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Mediation and arbitration: the process of enforcement

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Abstract

Mediation is an important means of resolving international commercial disputes. The mediators whom the parties appoint can help to avoid contentious, dilatory and costly conflicts, including by resort to arbitration and/or litigation. The problem is the recognition and enforcement of mediated agreements often diverges from one state to the next. This makes it difficult to predict whether a mediated agreement will be enforced in a particular jurisdiction. The draft 2018 Singapore Mediation Convention [SMC] seeks to address this problem by providing uniform rules to govern the recognition and enforcement of mediated agreements. The obstacle faced by the SMC is that leading commercial states, notably in the EU, have resisted signing onto the SMC. They argue that mediation is, and ought to be, regulated domestically; and that the SMC is likely to marginalize domestic conceptions of mediation.

This article evaluates the significance of mediation in resolving international commercial disputes. It stresses the growing importance of mediation in international commercial dealings, how the SMC can assist to fill a void in regulating such mediation, and how it can prevent commercial disputes from regressing into protracted arbitration with ensuing enforcement complications. Focusing on the SMC's rules governing the enforcement of mediation agreements, it examines how those rules are likely to operate in law, and their perceived strengths and limitations in practice.

I. Introduction

Mediation and arbitration are both part of alternative dispute resolution (ADR) and, hence, arguably cousins. The end product of a successful mediation is the drafting of a contract including the terms agreed to by the parties. If that contract is not voluntarily adhered to, it is subject to enforcement through the courts. This has created a special problem in international mediation in which the contract must be enforced in a jurisdiction and subject to a choice of law that might not be law at the place where the mediation was conducted. Hence, it is important that a

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mediation-generated contract includes a conflict rule that determines the law that is applicable in a court deciding whether to enforce the contract. Simply put, the issue of enforcing an international mediation arguably can cause problems depending on the law of the place of enforcement. This issue—with a view to clarifying and resolving it—was visited in 2002 when the United National Commission for International Trade Law (UNCITRAL) released the Model Law on Conciliation.[1] Article 14 states:

> If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . .[the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

It should also be noted that the word 'conciliation' was chosen, which encompasses ADR mechanisms including mediation but excludes arbitration. However, the enforcement process is only applicable in States that have, in one way or another, adopted the Model Law. In all other States, the enforcement process requires judicial endorsement.[2] The European Union (EU) attempted to resolve the lack of a consistent legal framework governing the enforcement of mediation agreements by releasing the Directive on Certain Aspects of Mediation in Civil and Commercial Matters in 2008.[3] Interestingly, this Directive also includes a limitation on the enforceability of mediation in the preamble to Article 6(1). Sentence 2 notes:

> [I]t should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement.[4]

This limitation on the enforcement of mediation agreements is consistent with jurisprudence maintaining that arbitration awards are also not enforceable if the applicable choice-of-law clause so stipulates in a contract providing for arbitration.

However, mediation is distinguishable from arbitration, both as a process and in light of the purposes that are attributed to it. Even though both arbitration and mediation are directed at resolving a dispute, mediation is perceived to be more time and cost efficient than arbitration, including in the enforcement of an arbitration agreement. As Mark Hilgard and Jan Wendler correctly note, the essential element in mediation is that:

[1] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002.

[2] Mark C Hilgard and Jan Wendler, *Enforcement*, at 193, in P. Barclay (ed), *IBA e book Mediation Techniques*, https://www.mayerbrown.com/files/Publication/c07ed352 f3d8 418f a24a 8ade6d85 a708/Presentation/PublicationAttachment/2a8a3da5 d13a 4d9a 99a6 e60fb6282824/9904.PDF (accessed 19 May 2019).

[3] Directive 2008/52/EC.

[4] Preamble of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, (19).

> the enforcement procedures do not consume too much time and costs. Otherwise, the consensus between the mediating parties which is reflected by the mediation settle ment agreement might be at stake.[5]

This issue of avoiding protracted enforcement proceedings directed at enforcing mediation agreements has now been taken up by UNCITRAL through the proposed Singapore Mediation Convention (SMC), which deals with the enforcement of international mediation agreements.[6] This is perceived by some as a positive step in supplementing the narrowing gap between the expeditious enforcement of arbitration awards and less expeditious judicial enforcement proceedings.[7] On the one hand, 'the gap may be narrowed between the enforceability of arbitral awards and the enforceability of judgments in which arbitral awards enjoy an advantage'.[8] On the other hand, there is the need for mediation contracts to be enforced expeditiously, not unlike the enforcement of arbitration awards.

The question must be asked whether the enforcement process of a mediation contract follows a comparable procedure and logic as is established in enforcing arbitration awards. The reason is that there is a real difference in the process of reaching a settlement in the two cases; the issue is whether that difference justifies changing the relevant process of judicial enforcement.[9]

The key distinction is that the parties to an arbitration agree to appoint an arbitration tribunal, and the tribunal then renders an award. The award is a product of the agreement between the parties only insofar as they agree upon an arbitration process, including to abide by the result (final and binding). The parties to a mediation enter into an agreement to mediate. In that agreement, they ordinarily appoint a mediator and, possibly, determine the mediation process. However, they do not ordinarily agree to reach a final agreement through mediation. The mediation agreement they conclude at the end of the mediation may entail an agreement on all, or only some, issues in dispute. It may also include an agreement to forego the benefits that one party, or both parties, sought through mediation. If they are able to do so, they conclude a mediation agreement in the form of a contract.

A consequentialist argument is that courts should enforce both an arbitration award and an agreement between the parties following mediation and for comparable reasons. In both cases, the parties agree to a particular process, namely

[5] Hildegard at 197.

[6] On the development of the Singapore Mediation Convention (SMC), see *The Singapore Mediation Convention: An Overview*, https://www.globalpound.org/2018/07/12/the singapore mediation convention an overview/ (accessed 19 May 2019).

[7] See e.g. *A Tribute to Mediation's Grassroots, The Australian Dispute Resolution Research Network*, available at https://adrresearch.net/ (accessed 19 May 2019).

[8] 'Arbitration and Public Policy', 2016 Goff Lecture Chief Justice Robert French AC, 18 April 2016, Hong Kong, p 5, http://www.hcourt.gov.au/assets/publications/speeches/current justices/frenchcj/frenchcj18Apr2016.pdf (accessed 19 May 2019).

[9] On questions relating to the potential significance of the SMC compared to conventions governing international commercial arbitration, see *The Singapore Mediation Convention: A Game Changer?*, https://perthlegalinternational.com/2018/09/10/the singapore mediation convention a game ch anger/ (accessed 19 May 2019).

enforcement proceedings, whether it be mediation or arbitration. In both cases, the intended result is for a court to make a determination that is binding upon the parties. In effect, both the arbitration award and the mediation agreement are intended to be binding and enforceable. Both are—at first glance—enforceable by virtue of an act of the parties. In the case of arbitration, that act is in the parties agreeing to arbitrate at the outset. In the case of mediation, that agreement derives from the agreement of the parties to mediate and, if successful, to be bound by the agreement they have reached. In respect of enforceability, therefore, a comparison between mediation and arbitration is appropriate.[10]

However, there are substantive differences. In the case of a mediated agreement, enforcement is directly related to the mediated contract (and the legal observation that contracts in general are binding and enforceable on the parties). In the case of an arbitration award, the binding and enforceable award also originates with the agreement of the parties—which is to arbitrate (not unlike the agreement of parties to mediate). However, the agreement to arbitrate is distinct from an agreement resulting from a mediation. While it is arguable that an arbitration award is the result of the act of the parties in agreeing to arbitrate, the enforcement of the award depends on factors beyond them, particularly whether the arbitrator has complied with due process in reaching a decision independently of them. It is arguable that due process requirements are not imposed in a comparable manner on mediators, primarily because they do not decide the dispute. The parties do so themselves. While this is conceived as a key distinction between the enforceability of an arbitrator award and a mediation agreement, it begs the question whether mediators are subject to due process requirements that are comparable to arbitrators, such as in not disclosing a conflict of interest before appointment and in using mediation arbitrarily in favour of one party over the other. [11]

The proposed SMC has impliedly recognized conceivable differences in the due process requirements attributed to arbitration and mediation. Nevertheless, the SMC has replicated several reasons for a court to refuse to enforce an arbitration award as provided for in the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (NYC).

Hence, the question this article will examine is whether there are substantive and procedural differences in a court determining whether to enforce a mediation agreement under the SMC comparable to decisions whether to enforce arbitration

[10] On the process, perceived advantages, and limitations of commercial mediation over international commercial arbitration and vice versa, from a practitioner's perspective see e.g. Michael Mills, *Dispute Resolution: A Practitioner's Guide to Successful Alternative Dispute Resolution* (Thomson Reuters, 2018).

[11] See Singapore Legal Advice, *Arbitration and Mediation: When They Can Be Useful for Business Disputes*, 19 July 2018, https://singaporelegaladvice.com/law articles/arbitration and mediation when it can be useful for business disputes/ (accessed 19 May 2019). See too FINRA, *Comparison between Arbitration and Mediation*, http://www.finra.org/arbitration and mediation/comparison between arbitration mediation (accessed 19 May 2019).

awards. It will also consider whether there are, or ought to be, material differences in the reasoning courts use, or ought to use, in reaching such decisions.

In addressing this issue, Part II explains the enforceable requirements specified in the SMC. Part III critically examines the effect of the SMC, including by taking account of its working papers. Part IV examines how the enforcement of mediation agreements is different from the enforcement of arbitration awards. Part V concludes with the findings of this article.

II. The main features of the SMC

At the 51st session on 26 June 2018, the final draft of the SMC was approved, including by reference to the 2002 Model Law on International Commercial Conciliation. The essential difference between the Convention and the 2002 Model Law is that the word 'conciliation' in the former was replaced by the word 'mediation' in the latter.[12]

The working papers of the International Trade Law Working Group II responsible for the draft SMC are very instructive in understanding the philosophy underlying the Convention. In its sixty-sixth session in New York in February 2017, the Secretariat of UNCITRAL presented the draft instrument on the enforcement of international commercial settlement agreements resulting from conciliation.[13] This was further discussed and then adopted at the sixty-eighth session in New York in February 2018.[14] The important feature of the SMC, as noted above, is that it facilitates the enforcement of mediation agreements.

The application of the draft Convention pursuant to Article 1(1) reads:

> This Convention applies to agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements') if, at the time of the conclusion of that agreement: (a) at least two parties to the settlement agreement have their places of business in different States; or (b) the State in which the parties to the settlement agreement have their places of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State with which the subject matter of the settle ment agreement is most closely connected.[15]

However, a debate arose over whether to simply refer to the 'settlement agreement' of the parties or to add the word 'international'. The working party concluded that reference to a 'settlement agreement' could be misleading and decided to add the word 'international' to settlement agreements to clarify the issue.[16]

[12] Nadja Alexander (ed), 'Singapore Convention on Mediation', *KluwerMediationBlog*, 24 July 2018, http://mediationblog.kluwerarbitration.com/2018/07/24/singapore convention mediation/ (accessed 19 May 2019).

[13] http://undocs.org/A/CN.9/WG.II/WP.200 (accessed 19 May 2019).

[14] https://documents dds ny.un.org/doc/UNDOC/GEN/V18/008/77/PDF/V1800877.pdf?OpenEle ment (accessed 19 May 2019).

[15] https://documents dds ny.un.org/doc/UNDOC/GEN/V18/008/77/PDF/V1800877.pdf?OpenEle ment (accessed 19 May 2019), p 4.

[16] Ibid.

Arguably, the working party intended to clarify the issue—namely, that the Convention is only applicable to non-domestic settlement agreements.

Article 1(2) of the SMC excludes 'settlement agreements', which (i) have been approved by a court or have been concluded in the course of court proceedings; (ii) are enforceable as a judgment in the State of that court; or (iii) have been recorded and are enforceable as an arbitral award.[17] The reason for placing this limitation on enforcement proceedings follows the principle established in the case of arbitration—namely, that the arbitration award must comply with the NYC or the Model Law and, in other cases, with the Hague Convention on the Choice of Court Agreements. The enforcement mechanism in the SMC therefore takes its lead from the NYC, including by providing for flexibility in determining how a court enforces an arbitration agreement, without losing sight of the enforcing State's rules and procedures.

As with arbitration, the mediating party seeking enforcement is obliged to furnish proof that there is a settlement obtained under mediation embodied in a signed agreement. The evidence that is acceptable is left to be determined by the rules of the enforcing State.[18] Articles 5(1) and 5(2), following the lead of the NYC, list the grounds under which a State might refuse enforcement. The working group appears to have settled in the main on the following wording:

> Article 5. Grounds for refusing to grant relief
> The competent authority of the Contracting State where relief is sought under Article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that:
>
> A party to the settlement agreement was under some incapacity;
>
> The settlement agreement sought to be relied upon:
>
> - Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where relief is sought under Article 4;
> - Is not binding, or is not final, according to its terms;
> - Has been subsequently modified;
> - The obligations in the settlement agreement have been performed, or are not clear or comprehensible;
> - Granting relief would be contrary to the terms of the settlement agreement;
> - There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or
> - There was a failure by the mediator to disclose to the party's circumstances that raise justifiable doubts as to the mediator's impartiality or

[17] Alexander.
[18] Alexander.

> independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

According to the draft SMC, the due process requirements imposed on mediators are comparable in significant respects to the requirements imposed on arbitrators. These relate to standards of procedural justice that inhere in the NYC. However, there is a subtle difference between the due process requirements associated with international commercial arbitration and international mediation. Whereas arbitrators are subject to due process requirements throughout the arbitration process, due process in relation to mediation focuses significantly on the mediator's conduct in relation to the mediation agreement. This is evident in Article 5(a)–(d). However, the due process requirements under Article 5(f) relating to the impartiality and independence of a mediator are directly comparable to a violation of due process under the NYC.

Nor are the grounds for declining to enforce a mediation agreement unique to the SMC. As Nadja Alexander notes, '[t]he penultimate and last grounds' relating to mediator conduct under Article 5(e) and to impartiality and independence under Article 5(f) 'aligns with Articles 5(4), 5(5) and 6(3) of the 2002 Model Law on International Commercial Conciliation'.[19]

However, the scope of the 2002 Conciliation Model Law is limited, given that common law countries and leading trading nations have not incorporated it into their domestic legislation and despite the fact that the Model Law has influenced the design of domestic legislation.

There are also two overriding impediments to the successful application of the SMC. The first is hostility of the EU to the SMC. Timothy Schnabel observes:

> The only strong opposition to authorizing work on the topic came from the European Union and some of its member States. The European Union stated that it saw no evident need for harmonization on the topic and opined that finding agreement on a harmonized approach beyond the model law's decision to leave the issue of enforcement to domestic law was unrealistic.[20]

This attitude of the EU to a harmonized approach to mediation agreements is unsurprising. Indeed, Directive 2/EC of the European Parliament and the European Council of 21 May 2008 expressly disapproves of applying enforcement

[19] Alexander.

[20] Schnabel, Timothy, *The Singapore Convention on Mediation: A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements* (27 August 2018), https://ssrn.com/abstract=3239527 (accessed 19 May 2019). Schnabel also refers to the intervention of the European Union, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), 2 July 2015, 9:30 12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (accessed 19 May 2019). By contrast, the proponents argued that by taking an approach modelled on the New York Convention i.e., not seeking to harmonize procedural law, just the substantive result that would need to be provided the work could be made feasible. *See, e.g.*, intervention of the United States, in Audio Recording: U.N. Comm'n on Int'l Trade L., 48th Session (United Nations 2015), 2 July 2015, 9:30 12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (accessed 19 May 2019).

mechanisms to mediation, other than as provided for under the domestic law of the enforcing State.[21]

The second issue is whether the draft Convention will be ratified by a significant number of leading trading States. Only time will provide an answer to these questions, although the EU's objections to the SMC are a negative indication of wide adoption. It is also questionable whether States following the civil law tradition, not limited to Europe, might hesitate to recognize a multilateral treaty on 'mediation', as distinct from 'conciliation', that is more imbedded in civil law jurisprudence.

III. The effect of the draft SMC

There is no doubt that international mediation contracts are enforceable in accordance with the prevailing rules of laws in the enforcing country. However, the question must be asked whether the SMC adds to the overall utility of ADR processes. A preliminary answer is that the Convention does add to the value of ADR, given the nature and scope of its rules governing enforcement and the prospects of the courts of signatory States further clarifying them.

However, as with all conventions, the long-term reach of its enforcement mechanism will depend on the rate of its ratification. If few developed States with significant global trade ratify it, the Convention is unlikely to have far-reaching effect on mediation. This concern is accentuated by the fact that the 2002 Model Law was not ratified even by major trading nations that subscribe to the common law tradition in which mediation is well understood. The SMC is further limited in not addressing the recognition and enforcement of Mediation-Arbitration (Med-Arb)—namely, when the parties opt for mediation and, failing a mediated settlement, revert to arbitration. The reason for the SMC not addressing Med-Arb is due to the fact that the parties negotiating it viewed Med-Arb as being arbitration driven and, hence, are appropriately subject to the Model Law or the NYC, as noted in Article 1(2) of the SMC.

In defence of the SMC is Singapore's domestic response to the draft Convention. In particular, Singapore has already positioned itself to take advantage of this unfolding development in mediation by enacting a 'Mediation Act', with its own rules,[22] to provide a domestic framework for the enforceability of mediated settlement agreements.[23] With this Act, it has provided for mediated agreements to be recorded as orders of Singapore's courts, allowing parties greater

[21] But see contra, on the virtue of harmonizing mediation internationally, *Towards a Harmonised Approach to Mediation Legislation in Asia*, available at http://www.sidra.academy/blog/towards harmonised approach mediation legislation asia/ (accessed 19 May 2019).

[22] On these SCMA rules, see http://www.scma.org.sg/pdf/rules 201510 eng.pdf (accessed 19 May 2019).

[23] See further 'The International Reach of the Singapore Mediation Act', *Kluwer Mediation Blog*, http://mediationblog.kluwerarbitration.com/2017/12/17/international reach singapore mediation act/ (accessed 19 May 2019).

certainty in enforcing the terms of those agreements.[24] Singapore's strategy in passing this Act is also not unexpected, given the potential to extend international mediation in light of criticism that international commercial arbitration is slow and costly and is suffering from over-judicialization.[25] Singapore's legislation also extends an open invitation to astute contract drafters to include the law of Singapore as the governing law. Singapore also has an established international standing in regard to mediation, including the Singapore International Mediation Centre[26] and the Singapore International Mediation Institute.[27] It also has a protocol for conducting mediation as a pre-condition to arbitration, including through Med-Arb.[28] The SMC is also led by a leading arbitration and mediation practitioner, Lawrence Boo.[29]

There is, however, one issue that needs to be watched carefully—namely, the implied inclusion of provisions in the draft SMC that permit parties to opt out of its enforcement requirements. In essence, the working group acknowledged such an opt-out in Article 5(1)(d), stating that an enforcement can be refused if '[g]ranting relief would be contrary to the terms of the settlement agreement'. The scope of this opt-out provision is not yet tested. However, it is also not unique. Article 6 of the Convention on the International Sale of Goods (CISG) also includes an opt-out provision. The CISG is often excluded from international sales agreements because many contract drafters are not familiar with the CISG and prefer to apply domestic law. Hence, it would not be surprising that the opt-out provision of enforcement requirements would be routinely included in mediation contracts governed by the SMC, unless contract drafters can see a strategic advantage not to do so. Whether the availability of the opt-out provision in the draft Convention will diminish its utility, once adopted, remains to be seen. If mediation agreements routinely, or even incrementally, opt out of the SMC's enforcement mechanisms, its central significance will dissipate.

However, the scope of the draft Convention is limited in another important respect. Article 11(4) provides:

> This Convention shall not prevail over conflicting rules of a regional economic inte gration organization, whether adopted or entered into force before or after this Convention: (a) if, under Article 4, relief is sought to a competent authority of a State that is member of such an organization and all the States relevant under Article 1(1) are members of any such organization; or (b) as concerns the recognition

[24] https://www.straitstimes.com/singapore/un treaty on mediation to be named after singapore (accessed 19 May 2019).

[25] See for example Zeller, B., & Andersen, C., 'Discerning the Seat of Arbitration: An Example of Judicialisation of Arbitration', *Vindobona Journal of International Commercial Law and Arbitration*, Vol 19:2 (2015), 195.

[26] Available at http://simc.com.sg/ (accessed 19 May 2019).

[27] Available at http://www.simi.org.sg/ (accessed 19 May 2019).

[28] On this protocol, available at http://simc.com.sg/siac simc arb med arb protocol/ (accessed 19 May 2019).

[29] On Lawrence Boo's background and experience, available at http://www.arbiter.com.sg/members/residents/lawrence boo.html (accessed 19 May 2019).

> or enforcement of judgments as between member States of the regional economic integration organization.[30]

This proposed Article, in essence, submits the application of the SMC to a regional economic integration organization, even if a State of enforcement has ratified the SMC. Considering that organizations, such as the EU and the Association of Southeast Asian Nations (ASEAN) are considered economically integrated, this proposed Article could substantially diminish the application of the Convention. The scope of the Convention is likely to remain uncertain until the courts of signatory States decide cases based on this issue. However, the courts of the signature States under the NYC of 1958 still continue to resolve comparable uncertainties in regard to the application of this Convention.

There are, nevertheless, three salient distinctions between the enforcement of arbitration awards and mediation agreements that will shape the enforcement process.

First, a mediated agreement is no more than a contract between the parties. The fact that a mediation agreement is concluded between the parties, and not with the mediator, confirms that it is no more nor less than a contract in the ordinary course. This article disagrees with those who argue that it is a special kind of contract, particularly in light of the working draft of the Convention encompassing virtually any kind of agreement between the parties, including a temporary agreement, or one that addresses a single aspect of a dispute.

The second reason for distinguishing a mediation agreement from an arbitration order relates to the distinctive nature and scope of an arbitration award. The fact that an arbitration award is rendered by a third party who has both powers provided for by international convention, such as the NYC and Model Law, and duties to adhere to specified procedures, renders arbitration both more authoritative and substantively different from mediation. The mediated agreement, according to the working draft of the SMC does not even require the involvement of a mediator in the mediated agreement. Again, therefore, the legal authority for the mediated agreement is no more than that agreement. According it a higher legal status than other commercial contracts, and attributing to it a public character, beyond its private attributes of inter-party agreement, is doubtful at best.

Third, the draft SMC significantly limits the attributes it accords to a mediated agreement. Beyond requiring that it be international and commercial, it implicitly recognizes a smorgasbord of party-resolved agreements, loosely referred to as mediated agreements.

In assessing the significance of these differences between the NYC and the proposed SMC, it is important to evaluate the manner and extent to which the latter diverges from the former in relation to the enforcement of mediation agreements as distinct from arbitration awards.

[30] https://documents dds ny.un.org/doc/UNDOC/GEN/V18/008/77/PDF/V1800877.pdf?OpenElement (accessed 19 May 2019).

IV. NYC and SMC

A preliminary comment needs to be made before comparing the enforcement mechanisms contained in each Convention. In arbitration, both the NYC and the Model Law distinguish between setting aside an award and enforcing it. This distinction is not necessary in mediation since there is no mediation award to set aside. The mediation agreement only becomes binding when the parties sign a contract agreeing to the mediated outcome. In particular, an arbitrator's award is final and binding and enforceable on the parties. In contrast, a mediator does not reach a decision that binds the parties. The parties reach an agreement that is binding and enforceable upon them. However, as Robert French, former chief justice of the Australian High Court, noted, 'the making of the award [is] more than the contractual outcome of private contractual arrangements'.[31] Indeed 'the award by the arbitral tribunal [is] not an exercise of judicial power. Its authority was founded on the agreement of the parties'.[32] In effect, the source of an arbitrator's authority to issue a binding and enforceable award resides in the parties who agree to appoint that arbitrator and to the terms of reference governing that appointment, including the arbitrator rendering a binding award.

It is true that the arbitrators make an award that is, by itself, enforceable upon the parties, whereas parties to mediation reach an enforceable agreement. However, the distinction between the legal effect at the seat of the arbitration and at the place where the award is enforced is also applicable to the enforcement of mediation agreements. In this respect, the process of enforcing arbitration awards and mediation agreement are comparable.

As far as the enforcing sections in both conventions are concerned, Article V of the NYC, like Article 5 of the SMC, are not mandatory since both use the word 'may'. However, both conventions also specify that the listed exemptions to enforcement are the 'only' ones that a court may consider. In essence, both consider the same issues in determining whether a mediation agreement or an arbitral award is unenforceable.

However, the additional rules in the NYC are specific to an arbitration, not to a mediation, and were not included in the SMC. As an example, Article V(b) of the NYC mandates that proper notice of an arbitration must be given. In mediation, if a party is not given proper notification or is unable to present his case, that party ordinarily would not sign any mediation contract, as they are not present. The same logic applies to Article V(1)(d) of the NYC in which a procedural error or erroneous composition of the tribunal gives rise to unenforceability. As noted previously, in these cases, a party to a mediation simply would not sign the contract.

[31] 'Arbitration and Public Policy', 2016 Goff Lecture Chief Justice Robert French AC, 18 April 2016, Hong Kong, p 2, http://www.hcourt.gov.au/assets/publications/speeches/current justices/frenchcj/frenchcj18Apr2016.pdf (accessed 19 May 2019).

[32] Ibid at p 13.

The question is whether a court, in determining whether to enforce a mediation outcome, will revisit the correctness of a mediation contract. In arbitration, the law states that the contract is final and binding, and jurisprudence arising from the NYC has shown that a court will usually not revise the arbitration award. This judicial practice has been made abundantly clear in many decisions, such as in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*.[33] In this case, the Court stated that '[it is not] against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award'.[34]

However, a mediated result is both formally and functionally distinguishable from an arbitration award. In essence, a mediation outcome—contrary to an arbitration award—is no different to the outcome attributed to contracts in general. This view, as stated previously, is reinforced by the fact that there is no requirement in the draft SMC that the mediation agreement take any particular form or that it be reached with the participation of a mediator. As a result, a court is not estopped by the SMC or by any domestic laws from taking notice of the contract and can arguably revisit the correctness of the contract and its content. The legal rationale is that courts generally apply the principle of freedom of contract to mediation, as to other agreements. They provide that the parties are free to decide whether the contractual agreement concluded between them is satisfactory on the assumption that they would not have so agreed in the absence of such freedom. Hence, if any disagreement as to the meaning of terms is an issue, a court will revisit the contract including on evidence of the underlying intention of the parties in so contracting.

Of importance is also the fact that the SMC have included public policy as a factor for refusing to enforce a mediated outcome in Article 5(2) of the SMC.

1. The public policy consideration

Article 5(2) provides that:

> The competent authority of the Contracting State where relief is sought under Article 4 may also refuse to grant relief if it finds that:
> 'Granting relief would be contrary to the public policy of that State'; or
> 'The subject matter of the dispute is not capable of settlement by mediation under the law of that State'.[35]

The question of denying enforcement to an international mediation contract on public policy grounds raises comparable problems to not enforcing international arbitration award on public policy grounds. French CJ made the observation in relation to arbitration that '[p]ublic policy criteria internal to the operation of arbitration regimes are embedded in important conventions and domestic

[33] [2011] FCA 131.

[34] Ibid at para 126.

[35] https://documents dds ny.un.org/doc/UNDOC/GEN/V18/008/77/PDF/V1800877.pdf?OpenElement (accessed 19 May 2019), para 59.

statutes giving effect to them'.[36] Hence, it is not surprising that public policy as a basis for a court declining to enforce a mediation agreement has also been included in the SMC, and domestic statutes might treat mediation contracts similarly.

However, the nature and application of public policy may diverge from arbitration to mediation. That difference, as noted above, is grounded in the principle of freedom of contract by which the parties to a mediation decide the outcome in their mediation agreement, whereas, in an arbitration, the arbitral tribunal determines that outcome. It can therefore be argued that the public policy threshold for a court to declare mediation contracts unenforceable is lower than in relation to arbitration insofar as a court might be more willing to revisit the enforcement of a mediated agreement on public policy grounds than in respect of an arbitration award. This does not preclude a court from revisiting arbitration proceedings, such as to determine whether the tribunal has complied with the due process of law, such as whether it has given the parties a reasonable opportunity to present their case and be heard. However, the threshold in reaching such a due process determination is likely to be higher than in determining whether a contract is unenforceable due to the uncertainty of the terms of the contract, a mistake, or undue influence exerted on one party to the mediation agreement.

In relation to public policy, a threshold question needs to be answered—namely, in determining what is understood to be a public policy issue. The fact is that public policy, whether it is applied to arbitration or mediation, is defined in very few jurisdictions, with Australia and the United Arab Emirates being the exceptions.[37] The International Bar Association's Sub-Committee report in 2015 concluded that, in order to annul an arbitration award on public policy grounds, it would be necessary for the tribunal to have breached or violated a fundamental or basic principle of justice.[38] However, it is difficult for courts to agree upon that which is fundamental or basic to a legal system, both across jurisdictions and legal systems. As French CJ observed in general on the distinction between the common and civil law conception of the basic principles of justice:

> [c]ivil law jurisdictions refer to the basic principles or values upon which the foun dations of society rest. Common law jurisdictions are said to invoke broad values such as justice, fairness or morality.[39]

[36] 'Arbitration and Public Policy', 2016 Goff Lecture Chief Justice Robert French AC, 18 April 2016, Hong Kong, p 15, http://www.hcourt.gov.au/assets/publications/speeches/current justices/frenchcj/frenchcj18Apr2016.pdf (accessed 19 May 2019).

[37] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report of the Public Policy Exception in the NYC* (October 2015), http://www.ibanet.org/LPD/Dispute Resolution Section/Arbitration/Recogntn Enfrcemnt Arbitl Awr d/publicpolicy15.aspz (accessed 19 May 2019).

[38] Ibid.

[39] 'Arbitration and Public Policy', 2016 Goff Lecture Chief Justice Robert French AC, 18 April 2016, Hong Kong, p 16, http://www.hcourt.gov.au/assets/publications/speeches/current justices/frenchcj/frenchcj18Apr2016.pdf (accessed 19 May 2019).

In arbitration, the public policy consideration focuses on the action of the tribunal. In mediation, the court needs to focus on the content of the contract, which is the action of the parties. Hence, a determination must be drawn over whether a court, in enforcing a mediation contract, ought to follow the same line of reasoning as in enforcing an arbitration award. If the enforcement of both are treated comparably, courts in most jurisdictions that consider enforcing mediation agreements are likely to apply the public policy mandate with restraint, consistent with the approach taken by courts in enforcing arbitral awards.

Furthermore, a public policy issue is only enlivened when the law of the enforcing State considers the dispute as incapable of being settled by mediation or arbitration. Both conventions contain an identical clause governing enforcement on public policy grounds. However, suggesting that the public policy constraints on enforcement are common to both mediation and arbitration is valid in name only. Mediation and arbitration follow different rules in regard to this requirement.

A further public policy issue turns on whether the requirement that a dispute be arbitrable applies equally to whether there are matters about which the parties cannot reach a mediation agreement. There is also a distinction between arbitrable subject matter and non-arbitrable remedies, as explained by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.[40] The problem in comparing when an arbitration award is not enforceable is distinguishing when the subject matter and/or the remedy is not arbitrable and when the subject matter of a mediation agreement, or the remedy contained in that agreement, is deemed unsuited to mediation. While there is limited common ground as to what 'arbitrability' actually means, 'there seems to be a significant degree of overlap or common ground'[41] over its meaning across primary legal jurisdictions. Several Australian court decisions have also taken a narrow approach to the arbitrability based on the subject matter of a dispute,[42] which could arise in relation to whether the subject matter is suitable for mediation. For example, Hammerschlag J in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*[43] identified a group of non-arbitral disputes, such as:

> criminal prosecutions, determinations of status such as bankruptcy or divorce, the winding up of incorporations in insolvency and disputes about intellectual property such as whether or not a patent or trade mark should be granted '[t]hese matters are plainly for the public authorities of the State. Patents and trademarks are monopoly rights that only the State can grant'.[44]

[40] (2006) 157 FCR 45.

[41] French at 17.

[42] *Government Insurance Office of New South Wales v Atkinson Leighton Joint Venture* (1981) 146 CLR 206, 246 47 (Mason J); *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39, NSWLR 160, 167 (Gleeson CJ).

[43] (2011) 279 ALR 772.

[44] Ibid 783 [64] (citation omitted).

Arguably, those subject matters that are not arbitrable should also apply to mediation. In both cases, the basis for denying the suitability of the subject matter being subject to arbitration and mediation is that both mediation agreements and arbitration awards relate to private, not public, parties. In effect, public policy considerations, such as inhere in criminal law, should transcend both an arbitration award and a mediated agreement on the grounds that such matters of public policy should be resolved by the State, not private parties. This issue relates not only to public policy governing subject matter but also to public policy relating to remedies. As French CJ observed, 'there [are]…public policy limits on the remedies which an arbitrator appointed by private parties could award'.[45] The same arguments, in essence, could be applied to mediation. It is not only whether the subject matter is suitable to be subject to mediation, but it is also whether the remedies agreed to by the parties of a mediation agreement accord with public policy.

As noted above, Singapore has positioned itself to support the SMC by enacting a 'Mediation Act' that facilitates reliance on pre-existing laws in Singapore governing arbitrability and that its courts might also apply by analogy in determining when to enforce mediation agreements and mediated remedies. A good example can be found in *Tomolugn Holdings Ltd v Silicor Investors Ltd*,[46] where the Singapore Court indicated the extent of the willingness to uphold arbitration agreements:

> This decision demonstrates the willingness of Singapore courts to give full effect to the parties' agreement to arbitrate. It also provides insight into how the Singapore courts will exercise their jurisdiction to stay court proceedings in favour of arbitration when faced with remedial inadequacy and procedural complexity. Notably, the fact that the relief being sought is beyond the power of the tribunal is unlikely to justify refusing a stay of court proceedings.[47]

Singapore has also provided a legal framework by which to reconcile the scope of arbitration legislation with other statutory schemes. This is reflected in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*,[48] in which V.K. Rajah JA held:

> [W]e accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dis pute in question (as evidenced by the statute's text or the legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.[49]

Considering the position that Singapore has taken in enforcing arbitration awards, it has positioned itself well to facilitate enforcing mediation agreements. However, it remains uncertain as to how it will enforce mediation agreements,

[45] French at 18.

[46] [2015] SGCA 57.

[47] https://www.google.com.au/search?q=Tomolugn+Holdings+Ltd+v+Silicor+Investors+Ltd+%5B2015%5D+SGCA+57&oq=Tomolugn+Holdings+Ltd+v+Silicor+Investors+Ltd+%5B2015%5D+SGCA+57&aqs=chrome..69i57.1773j0j7&sourceid=chrome&ie=UTF 8 (accessed 19 May 2019).

[48] (2011) 3 SLR 414.

[49] [2012] Ch 333, 354 [75], citing *Larson Oil and Gas Pte Ltd v Petroprod Ltd* (2011) 3 SLR 414, [44].

including the enforcement rules it is likely to adhere to and the circumstances in which it is likely to apply those rules.

In Australia, public policy has been defined as including, under the relevant Australian acts, unfairness, fraud, and corruption. Arguably, the concept of unfairness amounts to no more than a rewrite of Article 18 of the Model Law, which demands that each party be treated equally. In full, Article 18 notes that '[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. Article 18 maintains further that both parties must be heard before the tribunal can decide the issue and that the arbitrators must decide the issue impartially. In essence, it describes the 'hearing and bias' rule as being fundamental.

A Hong Kong decision illustrates this point well. In *Gao Haya v Keeneye Holdings Ltd*, the issue was 'whether the Arbitral Award was tainted by bias, such that its enforcement would be contrary to public policy under s. 40E(3) of the Arbitration Ordinance (Laws of Hong Kong, Cap.341)'.[50]

The Court observed that:

> Keeneye were actually aware of possible bias on the part of the tribunal and that while they wished for a satisfactory resolution of the issue, they feared unfavourable results if they made complaints to the tribunal. Their choice instead to attack GH's credibility by reference to the 'mediation' process was no substitute for a proper complaint to be made about bias. As noted by the Hong Kong Court of Final Appeal in the Hebei case, prompt complaint might enable remedial action to be taken where necessary.[51]

Arguably, the *Goa Haya* case would also be relevant in a court determining whether to enforce a mediation agreement, given that a claim under the 'hearing and bias' rule would not be accepted since the aggrieved party would have had time to complain about the alleged bias or other unfairness of the mediator while the mediation was taking place. However, if the mediator chose to use caucusing—in effect, holding a confidential meeting with one disputing party—the issue of impartiality would simply be taken on trust. In effect, each party would not know what took place in the mediator's caucus with the other party. The result of such caucusing is likely to become apparent only at a later stage in negotiating the mediation contract; at which time, the complaining party would have the opportunity not to sign the contract. However, if the complaining party signed the contract and then sought to have it set aside, that party would need to produce evidence to the court to justify why it declined to enforce the mediation agreement, including on public policy grounds.

V. Conclusion

The SMC is the result of the realization of two issues. First, arbitration is not always perceived as fulfilling the expectations of the parties. Second, cross-border

[50] http://www.onlinedmc.co.uk/index.php/Gao Haiyan v Keeneye Holdings Court of Appeal (accessed 19 May 2019).

[51] Ibid.

enforcement of arbitration agreements is, or can be, difficult to accomplish. Already in 2008, Chief Justice Spigelman stated in a speech:

> Arbitration is no longer fulfilling the basic need of business customers for early and effective resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR.[52]

Whether mediation is a better or superior vehicle to resolve disputes is not the issue addressed by this article. Rather, it has sought to demonstrate that the 'starting point' of a mediation and an arbitration are different and, hence, that the enforcement process must also be different. A successful mediation culminates in the signing of a contract drafted by the parties, whereas an arbitration culminates in the issuing of an award that is the result of the opinion of the arbitrator(s). The basis for the enforcement of a mediation agreement is also less compelling than the basis for enforcing an arbitration award. Whereas an arbitration is conducted by a third party arbitrator who is required to be independent of the disputing parties, the disputing parties decide the terms of their mediation agreement. Indeed, there is no need for a mediator to participate in a mediation agreement, which, in and of itself, is a contractual determination of the parties, not of a mediator.

In addition, while both an arbitration award and a mediation agreement are binding, the mediation agreement is no more binding than any other commercial contract entered into by contracting parties. Similarly, while both arbitration awards and mediation agreements are subject to judicial enforcement, the legal basis for their enforcement is different. The basis for setting aside an arbitration award is ordinarily associated with irregularities in arbitral proceedings and the resulting arbitration award. The basis for setting aside an arbitration agreement is primarily attributable to such interparty factors as contractual uncertainty or a mistake in the terms of a contract, including a mediation agreement. Setting aside an arbitration award may well encompass such interparty factors, but the primary rationale for a court declining to enforce an arbitration award relates to violations of procedural due process rather than to an ambiguity or mistake in the formation of a mediation agreement or a breach by a party to that agreement. Certainly, a court can decline to enforce a mediation agreement on the grounds that the mediator is biased in favouring one party over the other, not wholly unlike a court annulling an arbitration award on the grounds of an arbitrator's bias.

In summary, the basis for annulling an arbitral award is ordinarily, albeit not exclusively, attributed to arbitration proceedings over which the arbitrator presides. The basis for declining to enforce a mediation agreement is primarily ascribed not to a decision of the mediator but, rather, to the terms of a contract that the parties conclude and sign. The central rationale for declining to enforce

[52] Najar JC (2008) 'User's View on International Arbitration', (Speech delivered at Clayton Utz and the University of Sydney International Commercial Arbitration Lecture, Sydney, 6 November 2008). Quoted by Doug Jones in 'The Arbitrator and Mediator', Institute of Arbitrators & Mediators Australia (IAMA), Vol 28:1 (October 2009), 43.

an arbitration award arises from a procedural irregularity ascribed to arbitration proceedings presided over by an arbitrator. The central rationale for declining to enforce a mediation agreement arises from a defect in the contract concluded between the parties. It is in these respects that attempts by the SMC to transpose the public policy grounds for courts to annul arbitration awards, comparable to courts declining the enforcement of mediation agreements, are most subject to question. Whether these concerns will dissipate over time is likely to remain open to question.