MINISTRY OF JUSTICE

PROMOTING A FAIR BUSINESS ENVIRONMENT IN ASEAN

UNITED NATIONS DEVELOPMENT PROGRAMME

REPORT

ON VIET NAM'S POSSIBILITY TO ACCEDE TO THE UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

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FOREWORD

The Report on the assessment of Viet Nam's possibility to accede to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) is the result of one of the activities within the framework of the cooperation between the Ministry of Justice and the Regional Project of UNDP (hereinafter referred to as the Project) funded by the UK's Prosperity Fund to assist Viet Nam in promoting a fair business environment and building a justice system of integrity.

The Report was drafted with the desire to provide more materials for the Ministry of Justice and relevant ministries and branches to refer to in the process of proposing policies to improve the efficiency of international trade dispute settlement. It will be published on the website of the Ministry of Justice.

The Report expresses the views of independent experts and is not affiliated with or intended to express the views of UNDP or any Vietnamese agencies, organizations, or individuals. The Report is based on current research, which is limited by the fact that the Singapore Convention is a very young Convention, adopted in 2019 and entered into force in September 2020, having only seven parties at the time of the drafting of this Report.

The independent experts would like to express their gratitude to UNDP and the Department of International Law of the Ministry of Justice for their active and effective support in completing this Report.

The Report has the following main sections:

Part I. Introduction

This section defines the general background including a brief introduction of the Singapore Convention and the need to study Viet Nam's possibility to accede to the Convention.

Part II. The Singapore Convention

This part provides a basic analysis of the history and content of the Singapore Convention.

Part III. International comparative overview

This part presents the experience of some countries on commercial mediation and the recognition and enforcement of settlement agreements resulting from mediation, especially the views of these countries on the accession to and implementation of the Singapore Convention.

Part IV. Vietnamese law and practice

This part analyses Vietnamese law and practice of commercial mediation and recognition of successful out-of-court mediation.

Part V. Recommendations

This part assesses the necessity, advantages, and challenges in the accession to the Singapore Convention and makes proposals and recommendations.

I. INTRODUCTION

A. Context

1. In international trade relations, disputes are unavoidable. There have long been a number of developed international commercial dispute resolution methods in the world, from litigation in state courts to a wide range of alternative, out-of-court dispute resolution (ADR) methods. Each method has its own advantages and disadvantages that suit the needs of disputing parties to varying degrees. Mediation has many advantages such as cost and time savings, the ease to adopt at any time before or during a dispute, confidential and flexible procedures according to the agreement and the needs of the parties to the dispute. The biggest advantage of mediation consists in the possibility of exploring mutually satisfactory outcomes that serve the parties' interests best, not limited by legal rights and obligations. A settlement resulting from mediation is commonly voluntarily performed, as it is the result of a willing and voluntary agreement of the parties. Nevertheless, if enforcement is necessary, enforcement can remain part of maintaining a good commercial relationship after the dispute has been resolved.

2. In a globalized context, the cross-border recognition of settlement agreements requires cooperation from sovereign countries. On one hand, the countries of the parties concerned need to support the cross-border implementation of individual settlement agreements. On the other hand, regional and global recognition of settlement agreements – and through this of mediation itself – is needed to provide a uniform legal background to a dispute resolution method that is supportive of trade relationships. The international community, therefore, needed to develop a common legal instrument to govern the recognition and enforcement of settlement agreements. International commercial arbitration received a similar support and global recognition as a dispute resolution system from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention exists as a legal tool to ensure the enforcement of commercial dispute settlement through arbitration in the member States. In force since 1959 and with 168 parties at the time of this Report, the New York Convention was the primary tool in supporting international trade through ADR. The past decades witnessed an increase in the complexity of arbitration and a growing preference for less adversarial dispute resolution processes. Nevertheless, it was not until 2018 that the recognition and enforcement of settlement agreements resulting from mediation became subject of an international convention that can support mediation as an attractive dispute resolution method in cross-border business relationships.

3. In order to develop commercial mediation into a globally recognised system similar to arbitration, the United Nations Commission on International Trade Law (UNCITRAL) has adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention). The Singapore Convention creates the previously missing legal basis for the recognition and enforcement of international commercial dispute settlement agreements through mediation and by this, the legal background to an already popular ADR method supportive of long-term business relationships.

B. The need for research

4. Since the opening of the economy, Viet Nam has been aware of the need to promote international legal cooperation by creating a legal framework for attracting and protecting foreign investment and encouraging domestic enterprises to do business internationally. Viet Nam acceded to the New York Convention in 1995,[1] demonstrating the Government's understanding that a uniform legal framework for alternative methods of international dispute resolution is an integral part of supporting cross-border trade.

5. Among ADR methods, mediation is an effective choice to businesses due to its superior advantages such as time and cost-saving, flexibility, and preservation of business relationships. In response to trends of global economic development, the policy of developing ADR methods was recognized in the Politburo's Resolution on developing and enhancing the Vietnamese legal system to 2010 with orientations to 2020,[2] Resolution on Judicial reform strategy to 2020,[3] and specifically Article 5 of Decree No. 22/2017/ND-CP on commercial mediation.[4] In 2020, the Politburo reviewed 15 years of implementation of the Resolutions No. 48-NQ/TW and No. 49-NQ/TW and decided to continue with the tasks and solutions which were set in these Resolutions.

6. The policy of developing ADR methods has been institutionalized by legal normative documents of the State such as the Law on Grassroots mediation 2013, the Civil Procedure Code 2015 (CPC 2015),[5] and the Decree 22/2017/ND-CP. At an international level, from

[1] Viet Nam acceded to the New York Convention under the President's Decision No. 458/QD-CTN of July 28, 1995.

[2] Resolution no. 48-NQ/TW of May 24, 2005. Section II.6 requires the enhancement of laws on economic dispute settlement (arbitration and mediation) conforms with international commerce.

[3] Resolution No. 49-NQ/TW of June 2, 2005. Section II.2.1 stipulates that one of the judicial reform tasks is "to encourage the resolution of a number of disputes through negotiation, mediation, and arbitration".

[4] Decree No. 22/2017/ND-CP of February 24, 2017, stating that "The State encourages disputing parties to use commercial mediation to settle commercial disputes and other disputes prescribed by law to be resolved by commercial mediation."

[5] Chapter XXXIII – Recognition of out-of-court successful mediation results.

the early days when the initiative of an international text on the recognition and enforcement of settlement agreements resulting from mediation was included in the mandate of the UNCITRAL Working Group II (WG II),[6] a Vietnamese delegation attended the Working Group meetings on the drafting and negotiation of these texts as an observer.[7] Official representatives of Viet Nam were also sent to attend the Signing ceremony of the resulting Convention on 7 August 2019 in Singapore, [8] showing support to the Convention.

7. Under the Singapore Convention, the validity of an international commercial mediated settlement agreement is not only a contract but is recognized and guaranteed to be performed by a system of competent state agencies in all Convention member states. If Viet Nam accedes to the Singapore Convention, both foreign and Vietnamese businesses will benefit from this legal instrument for ensuring the enforcement of settlement agreements resulting from mediation, but also for supporting the use of mediation over more adversarial dispute resolution methods. The pressure on Vietnamese courts will be reduced and businesses will be able to focus on doing business and maintain their reputation and relationships even in the presence of disputes. In addition, as a member of UNCITRAL elected for six years in 2019,[9] Viet Nam's accession to a UNCITRAL Convention will show an active engagement in the 'promotion of the progressive harmonisation and unification of the law of international trade.'[10]

8. Viet Nam has legal provisions regulating commercial mediation[11]and the recognition and enforcement of mediated settlement agreements resulting from domestic mediation[12] or

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[6] A/70/17 para. 142

[7]UNCITRAL, Reports of WG II from its 63rd to 68th sessions, available at https://uncitral.un.org/working_groups/2/arbitration (last visited 20/5/2021)

[8] More than 50 countries in Singapore on Aug 7 to support new mediation treaty (29/7/2019) available at https://www.singaporeconvention.org/media/media-release/suport-mediation-treaty#Annex_A) (last visited 20/5/2021) – According to the Ministry of Justice of Viet Nam, Ms. Pham Ho Huong – Deputy Director, Department of International Law, Ministry of Justice attended the Ceremony.

[9] United Nations General Assembly Decision 73/412

[10] United Nations General Assembly Resolution 2205(XXI) of 17 December 1966, defining the objective of the UNCITRAL.

[11] Viet Nam, Decree 22/2017/ND-CP of the Government dated 24/2/2017 on Commercial Mediation.
Unofficial English version is available at:
https://moit.gov.vn/web/web-portal-ministry-of-industry-and-trade/legal-documents?p_p_id=ELegalDocumentView_WAR_ELegalDocumentportlet_INSTANCE_lx4mesYsm2me&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_ELegalDocumentView_WAR_ELegalDocumentportlet_INSTANCE_lx4mesYsm2me_backURL=%2Fweb%2Fweb-portal-ministry-of-industry-and-trade%2Flegal-documents&_ELegalDocumentView_WAR_ELegalDocumentportlet_INSTANCE_lx4mesYsm2me_docId=15476&_ELegalDocumentView_WAR_ELegalDocumentportlet_INSTANCE_lx4mesYsm2me_action=viewDetail

[12] Viet Nam, Civil Procedure Code, Law number 92/2015/QH13, dated 25/11/2015, Chapter XXXIII.
Unofficial English version is available at:

arbitration.[13] There is, however, no legislative framework for the recognition or enforcement of international settlement agreements, leaving a gap in the Vietnamese legislation that renders the amicable settlement of cross-border commercial disputes at a disadvantage. As with any international instrument, the accession to the Singapore Convention requires a comprehensive assessment of the Convention's compatibility with Vietnamese law. Therefore, in Decision No. 1268/QD-TTg dated October 2, 2019, approving the project of completing the law on contracts and resolving contractual disputes by commercial arbitration and commercial mediation, the Prime Minister has assigned the Ministry of Justice to assume the prime responsibility for studying and assessing the possibility of Viet Nam's accession to and implementation of the Singapore Convention.

9. In that context, the cooperation project with the Ministry of Justice is carried out by experts with extensive experience in the field of international law and resolving international disputes to make an objective assessment of Viet Nam's possibility of acceding to the Singapore Convention and to make recommendations and offer support for the Ministry of Justice to carry out the tasks assigned by the Government in a timely and practical manner.

C. Research objectives

10. The specific objective of the Report is to provide theoretical and practical information on international commercial mediation and the Singapore Convention to provide references to the Ministry of Justice to draft reports to competent authorities on the accession to the Singapore Convention.[14] In addition, research helps to improve the capacity and awareness of organizations and individuals involved in commercial mediation in general and international commercial mediation in particular. The overall goal is to contribute to

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https://www.economica.vn/Content/files/LAW%20%26%20REG/92_2015_QH13%20Civil%20Procedure%20Code.pdf

[13] Viet Nam, Law on Commercial Arbitration, Law number 54/2010/QH12 dated 17/6/2010.
Unofficial English version is available at:
https://mplaw.vn/en/law-no-542010qh12-of-june-17-2010-on-commercial-arbitration/

[14] The mandate for research the Singapore Convention was assigned to the Ministry of Justice in Official Document No.6067/ VPCP- QHQT dated 09/7/2019 of the Government Office "the Ministry of Justice takes the responsibility and cooperates with other Ministries and agencies to continue the research and conduct impact assessment and the possibility of accession to the [Singapore] Convention, and report to the Prime Minister when Viet Nam has full conditions to accede to the Convention…" Decision No. 1268/QD-TTg dated October 2, 2019 approving the project of completing the law on contracts and resolving contractual disputes by commercial arbitration and commercial mediation, the Prime Minister has assigned the Ministry of Justice to assume the prime responsibility for studying and assessing the possibility of Viet Nam's accession to and implementation of the Singapore Convention

improving the business investment environment in Viet Nam and promoting international trade exchanges.

D. The scope of research

11. The Report clarifies the content of the Singapore Convention regulating the recognition and enforcement of international settlement agreements resulting from mediation. The Report identifies current Vietnamese legal provisions that are relevant for, related to, or potentially conflicting with the content of the Convention. For this purpose, the Report focuses on analysing the content of the Singapore Convention and comparing it with the corresponding provisions of Vietnamese law.

12. The Report introduces a comparative overview of several jurisdictions on their legislation and practice of commercial mediation and their relationship with the Singapore Convention. As the Convention has just come into force recently, this part relies in part on countries' views on their accession to the Convention as expressed by unofficial sources, rather than analysing specific data on the implementation of the Convention, which is not always available at this stage.

13. The Report makes recommendations on Viet Nam possibly acceding to the Singapore Convention. The Report will only analyse the general benefits and challenges in acceding to the Convention. Drafting a comprehensive impact assessment report on Viet Nam's accession exceeds the time and resources allocated to this project. Finally, the Report will make a number of proposals to contribute to improving the Vietnamese legal institutions to enhance the effectiveness of the settlement of commercial disputes with foreign elements by mediation.

E. Research methodology

14. In order to achieve the above objectives, the Report is a piece of conceptual, critical legal research aimed at proposing legal reform in Viet Nam. It is based primarily on descriptive legal doctrinal research identifying and analysing legislation. To a more limited extent, the Report also relies on qualitative, empirical data collected from relevant participants in the development of the Convention and its adoption in other jurisdictions.

15. Analytical methods are used for a critical evaluation of the Convention, of Vietnamese legislation, and mediation practice. Comparative methods are used to identify the compatibility of the Convention with the existing Vietnamese legislative framework. Both

deductive and inductive reasoning approaches are used to explain the relevance and benefit of adopting the Convention by Viet Nam.

II. THE SINGAPORE CONVENTION

A. History of the Convention

16. Mediation is one of the most efficient amicable methods to solve international commercial disputes. It has been traditionally used in many cultures and formally recognised as an effective way of solving disputes outside of state courts in many countries. It was proven effective in practice thanks to its unique advantages such as the simple procedure, time and cost-saving, confidentiality, the possibility of interest-based solutions and maintaining business relationships beyond the dispute, and less stress for the disputing parties. However, mediation has not really been attractive to parties looking for a dispute resolution method that results in an enforceable outcome, especially across borders. In other methods of international commercial dispute resolution, international treaties on the recognition and enforcement of foreign arbitral awards[15] and to a less extent that of foreign court judgments[16] rendered litigation and arbitration to serve that purpose better in the past.

17. The international recognition of settlement agreements resulting from mediation is only governed by an instrument of international legal harmonisation since 2002. According to Article 14 of the 2002 UNCITRAL Model Law on International Commercial Conciliation (Conciliation Model Law),[17] "[i]f the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable." A Model Law, however, does not create international obligations on states. In May 2014, the United States of America submitted a proposal to the UNCITRAL Secretariat for future work in relation to enforcement of international settlement agreements.[18] At its 47th session, the UNCITRAL Commission assigned Working Group II to study the implementation of international

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (The New York Convention) with 168 parties.
The New York Convention status can be checked at:
https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

[16] The 1971 and 2019 Hague Conventions on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, with only five, and respectively three contracting parties. Recognition of foreign judgments is commonly regulated by reciprocity agreements between states. Viet Nam has signed 17 bilateral agreements on mutual legal assistance in civil matters which contain provisions on recognition and enforcement of foreign judgments.
List of the MLAs in civil matters that Viet Nam has signed is available at: http://vbpl.vn/Pages/danh-sach-dieu-uoc.aspx?DULinhVuc=9 (last visited on 30/6/2021)

[17] Replaced by the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the 'Mediation Model Law'), which retains the same provision in Art. 15.

[18] A/CN.9/822

settlement agreements resulting from mediation at the 62nd WG II session and report back to the Commission at the 48th session in 2015.[19]

18. Working Group II found that the value of settlement agreements resulting from mediation, especially their enforceability, varied in different countries and were even not recognized in some, which reduced their effectiveness and had adverse effects on this advantageous method of dispute resolution. Consequently, in many cases, the disputing parties may have to resort to courts or arbitration to make use of the mechanism to recognize and enforce the court's judgments or arbitral awards guaranteed by foreign laws, reciprocity agreements, and international treaties such as the New York Convention. On that basis, the Working Group found that it was necessary to establish a common international legal basis for the recognition of settlement agreements, similarly to court judgments or arbitral awards. Consequently, the UNCITRAL Commission at its 48th session mandated WG II to "commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts."[20]

19. Over the coming six sessions, Working Group II developed a draft Convention on international settlement agreements resulting from mediation[21] and amendments to the Conciliation Model Law to align with the new Convention.[22] The proposed texts were aimed to promote mediation as a method of international commercial dispute settlement in the same way as the 1958 New York Convention promoted arbitration. For this reason, the negotiation process attracted the active participation of all UNCITRAL member states and many non-governmental organizations.[23] Many countries that are major trading partners of Viet Nam have actively supported the drafting of the Convention such as the United States, the United Kingdom, China, and Singapore. After 4 years of drafting, the resulting texts were submitted to the Commission's 51st session. The Convention and the

[19] A/CN.9/WG.II/WP.187 - Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation - Summary of the content of Working Group 2's session No. 62 from 2 to 6 February, 2015 on Commercial Dispute Settlement: the possibility of enforcing a settlement agreement resulting from mediation.

[20] A/70/17 para.142

[21] A/CN.9/942

[22] A/CN.9/943

[23] Nadja Alexander & Shouyu Chong, "An introduction to the Singapore Convention on Mediation - Perspectives from Singapore", Research Collection School Of Law, *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement*. 4, 2019 , pp.37-56.

Available at https://ink.library.smu.edu.sg/sol_research/2775/ (Last visited on 20/5/2021)

A/CN.9/934 - paras. 5 and 8

renamed Mediation Model Law were adopted by the United Nations General Assembly on 20 December 2018 through Resolution 73/198[24] and 73/199,[25] respectively.

20. On August 7, 2019, a signing ceremony of the Convention was held in Singapore, therefore providing the name of 'Singapore Convention'. A record number of 46 countries signed the Convention on the day it opened for signature, including the United States and China, representing the world's two largest economies. An additional 24 countries attended the signing ceremony, showing support for the Convention. The Singapore Convention entered into force on September 12, 2020. As of the day of this Report, a total of 55 countries are signatories to the Convention, seven of which ratified or approved the Convention, respectively.[26]

B. Objective of the Convention

21. The main objective of the Convention is identified through its Preamble. It consists of the aim to promote mediation as an effective means of resolving international trade disputes, and to facilitate harmonious development of international trade, "thereby contributing to the Sustainable Development Goals (SDG), mainly SDG 16"[27] to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[28]

C. Content of the Convention

22. The Singapore Convention has 16 Articles governing scope of application, the general principles and definitions, requirements for reliance on settlement agreements, grounds for refusing to grant relief, etc. Besides, the Convention also has a provision on parallel applications and claims to eliminate overlaps with other international treaties. It also creates a clear mechanism on accession, reservation, and denunciation.

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[24] A/RES/73/198

[25] A/RES/73/199

[26] See status at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

[27] UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Purpose, Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited on 20/5/2021)

[28] See https://sdgs.un.org/goals/goal16

1. Scope of application

23. As per Art. 1.1 of the Convention, it "applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international…." To fall within this scope, there are four main conditions that must be satisfied.

a. <u>The settlement agreement must result from mediation.</u>

24. As per to Art. 2.3 of the Convention,

> *Mediation means 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.*

25. Mediation is the term used instead of "conciliation" which was used in previous UNCITRAL texts. According to the explanation provided by the UNCITRAL Secretariat at the 68th session of WG II,[29] these terms are used interchangeably in the English language but the more widely-used term "mediation" was chosen in order to improve the applicability of the Convention as well as of the Model Law. Mediation can be conducted on different grounds: the parties' agreement, law requirements, or a court or arbitrators' recommendation.[30] Mediation differs from litigation, arbitration, and other determinative processes in the mediator being a third-party neutral that cannot decide on the dispute or impose his/her view about what the solution should be. The outcome of a mediation depends exclusively on the disputing parties and the mediator's role is only to assist the parties to find an amicable settlement; this gives valuable control to the parties over the way their dispute is resolved. If the parties reach a settlement, this settlement is different from a simple contractual agreement under the Convention, for being achieved with the assistance of a third party and aimed to solve a dispute.

b. <u>The settlement agreement must be in writing.</u>

26. As per Art. 2.2. of the Convention,

[29] A/CN.9/WG.II/WP.205
[30] A/CN.9/896 – para. 42

A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

27. The Convention has given a broad definition to the term "in writing", allowing it to adjust to technological developments. The current pandemic-defined environment rendered online dispute resolution (ODR), including e-mediation, to gain preference around the world. The broad concept of "in writing" in Art. 2.2. of the Convention allows for a wide range of electronic communication characterising the latest developments in the field. This will open up opportunities for mediation to become a suitable option to parties in commercial activities regardless of the need to rely on technology for it.

c. <u>The dispute must be commercial.</u>

28. The Singapore Convention is limited to settlement agreements of commercial disputes only. There is no definition of "commercial" in the Convention, the text instead using the exclusion method to define the requirement. In this sense, Art. 1.2. lists the disputes the Convention does not apply to, namely:

(a)… arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

29. The term "commercial" is, however, defined in the Mediation Model Law, which was amended together with and for the purpose of aligning with the Singapore Convention. According to the Model Law definition, "[t]he term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."[31] The same definition is present in the UNCITRAL Model Law on International Commercial Arbitration ('Arbitration Model Law'),[32] creating consistency across definitions in UNCITRAL instruments harmonising international commercial dispute resolution. When drafting the Convention, it was argued that cases involving consumer, family, inheritance, or labour disputes are not commercial disputes by nature. Art. 1.2. was

[31] Mediation Model Law fn. 1.
[32] Arbitration Model Law fn. 1.

included to ensure clarity and consistency with wording similar to other UNCITRAL documents.[33]

d. <u>The settlement agreement must be international.</u>

30. The international character is defined in Art. 1.1. of the Convention through the place of business of the parties to the dispute and is assessed at the time of the conclusion of the settlement agreement. This may allow for a mediation to not be considered international initially but be international by the time the parties sign a settlement agreement, due to a change in the parties' place of business. Art. 1.1. of the Convention demonstrates an inheritance of Art. 1.4. of the 2002 UNCITRAL Conciliation Model Law and the UNCITRAL Arbitration Model Law, rather than the New York Convention on which it was largely modelled. Thus, the mediated settlement agreement must be "international" rather than "foreign" and it is not attached to a specific legal place like an arbitral award is under the New York Convention.

31. The requirement of internationality can be satisfied through three different options connected to the place of business but the Convention does not provide for the determination of a place of business. It does, however, provide a solution if a party has more than one place of business or does not have a place of business (Art. 2.1. of the Convention). The three scenarios that render a settlement agreement international are:

- "at least two parties to the settlement agreement have their places of business in different States"[34] or

- the State of the parties is different from either "the State in which a substantial part of the obligations under the settlement agreement is performed"[35] or "the State with which the subject matter of the settlement agreement is most closely connected."[36]

[33] A/CN.9/896 - paras. 55- 60
[34] Singapore Convention Art. 1.1(a).
[35] Singapore Convention Art. 1.1(b)(i).
[36] Singapore Convention Art. 1.1(b)(ii).

2. Exclusions

32. To clarify the scope of application of the Convention, Arts. 1.2. and 1.3. provide for the non-application of the Convention to certain cases. Art. 1.2. mentioned above refers to the subject matter of the case, implicitly defining the commercial requirement of the dispute. Art. 1.3. further excludes settlement agreements

    (i) That have been approved by a court or concluded in the course of proceedings before a court; and

    (ii) That are enforceable as a judgment in the State of that court; [and]

    (b) … that have been recorded and are enforceable as an arbitral award.

33. The explicit exclusion of court judgments and arbitral awards serves the purpose of avoiding any overlap with other instruments regulating court or arbitration jurisdiction and enforcement based on the New York Convention or the Hague Convention.

3. General principles

34. The Singapore Convention provides for two principles incorporated in Member States' obligation to "grant relief" [37] under the Convention, namely: Members of the Convention must enforce a mediated settlement agreement and must allow reliance on such settlement agreement as defence against claims that have been settled through mediation.

35. First, Art. 3.1. provides that "each party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in [the] Convention." This basic principle creates a solid 'platform' reinforcing the power of mediation in accordance with the purposes of the Convention 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."[38] The principle binds a Member State to enforce the settlement agreement upon receipt of a request for granting relief that meets all requirements of the Convention. On acceding to this Convention, the

[37] A/73/17 - para 24

[38] Singapore Convention – para. 5 of the Preamble

enforceability of mediated settlement agreements is ensured by the system of state agencies under the Convention, not as a mere contract.

36. Second, Art. 3.2. provides for the use of the settlement agreement as evidence for a dispute that "has already been resolved." The Convention does not use the term "recognition" because "recognition" applies to a public act - like a court decision - rather than an agreement between the parties.[39] Similarly, "res judicata"[40] could not be applied to a settlement agreement because this principle is applied to a decision by a competent authority, not a settlement agreement between the parties. While avoiding the use of the term "recognition", Art. 3.2. still provides that a dispute already resolved through mediation shall not be adjudicated anew. The defence available may be closer to the common law concept of 'estoppel'[41] but the Convention does not mention this term either.

37. Regarding the procedures of enforcing and invoking the settlement agreement, the Convention leaves that matter to the domestic regime of Member States, similarly to the New York Convention. The current Vietnamese law has no regulations on the enforcement or invocation of international settlement agreements similar to the Singapore Convention (detailed analysis in Part III of this Report). Therefore, Viet Nam needs to establish a complete legal framework to implement the Singapore Convention. In this regard, institutional frameworks and lessons learned from Viet Nam's membership to the New York Convention can serve as valuable guidance.

4. Requirements for reliance on settlement agreements

38. Art. 4 of the Convention provides for the requirements for reliance on settlement agreement by a party seeking relief. During the drafting of the Convention, a proposal was made to have a separate paragraph in Art. 2 to define "relief" as "any of the actions set out in article 3".[42] However, the word "actions" was considered unclear and it was suggested that this definition should be omitted; instead, Art. 4 should refer to Art. 3 to clarify that "relief" include the enforcement of the settlement agreements (Art. 3.1.) and the right of a party to invoke the settlement agreement to protect itself from a claim (Art. 3.2).

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[39] UNCITRAL - A/CN.9/896 Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session – para 78

[40] "A thing adjudicated - an issue that has been definitively settled by judicial decision"
Bryan A. Garner (ed), Black's Law dictionary, Thomson Reuters, 10th edition, 2014 – p. 1504

[41] "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true"
Bryan A. Garner (ed), Black's Law dictionary, Thomson Reuters, 10thedition, 2014- p. 667

[42] A/73/17, para. 24

39. As per Art. 4.1, the requesting party must provide all of the following documents in the application to the competent authority when seeking relief:

(a) The settlement agreement signed by the parties; and

(b) Evidence that the settlement agreement resulted from mediation.

40. Both requirements can be satisfied by several means. Art. 4.1.(b) lists examples for demonstrating the mediation origin of the settlement:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

41. The list of acceptable evidence reflects the importance of the role of the mediator or the mediation institution in confirming that the settlement resulted from mediation. Nevertheless, in acknowledging that mediation may take different forms in different jurisdictions, and to ensure that evidence may be accepted in other scenarios not included in the exemplificatory list, the Convention allows that a Member State's competent authority accepts any other evidence considered valid in that case.

42. The written form of evidence, as well as the signature of the parties, is subject to the same broad definition as discussed above. As per Art. 4.2, in case of electronic communication, the conditions are satisfied if there is a reliable measure used to identify the parties or the mediator and to confirm their intentions with the information in that electronic information exchange. Reliability is determined on a case-by-case basis, considering all the circumstances and factual evidence available. While online dispute resolution is recognized and frequently used in many jurisdictions, there are still concerns about the effectiveness of the process in the absence of direct contact, the verification of the originality of documents submitted, and confidentiality. Art. 4.2 of the Singapore Convention provides support to online mediation by explicitly recognising reasonable means to rely on electronic communication in signing a settlement agreement, and by this recognising that mediation may be conducted and settled electronically. The competent authority of the Member State where relief is sought may request any additional

necessary documents to prove that the requirements of the Convention have been met.[43] Similarly, the competent authority may request for the settlement agreement to be translated into the official language of the country where relief is sought.[44]

5. Grounds for refusing to grant relief

43. The grounds for refusing to grant relief listed in Art. 5 of the Singapore Convention were inspired and modelled on the grounds for refusing recognition and enforcement of a foreign arbitral award under Art. V of the New York Convention. While the language used may be characteristic to arbitration and its suitability for mediated settlement agreements is yet to be tested in courts, the drafting process of the Convention made such compromise necessary, given the differences of opinion between the delegates negotiating the text.

44. Similarly to the New York Convention, the grounds are grouped in two categories: those that can be raised by the party against which the relief is sought (Art. 5.1) and those verified by the competent authority at its own initiative (Art. 5.2). The first category includes the incapacity of the party (Art. 5.1(a)), the settlement agreement being "null and void, inoperable or incapable of being performed" (Art. 5.1(b)(i)) or not being final or binding "according to its terms" (Art. 5.1(b)(ii)) or having been "subsequently modified" (Art. 5.1(b)(iii)). Relief may also be refused if granting it "would be contrary to the terms of the settlement agreement" (Art. 5.1(d)) or if the settlement agreement is "not clear or comprehensible" (Art. 5.1(c)(ii)) or has already been performed (Art. 5.1(c)(i)). Similar to the due process and independence and impartiality grounds present in the New York Convention, relief under the Singapore Convention may be refused if there was a breach of the mediator's or the mediation standards (Art. 5.1(e)) or if the mediator failed to disclose "circumstances that raise justifiable doubts as to the mediator's impartiality or independence" (Art. 5.1(f)). The last two factors must be of such seriousness as to affect whether the party would have entered into the settlement agreement.

45. The notable difference from the New York Convention relate to procedure and the validity of the outcome. Mediation being a facilitative or advisory method, allows for a more flexible procedure that can be adapted to the needs of the parties at any time, while arbitration procedures are commonly locked in early on. Arbitration procedure must be respected to serve the need for evidentiary processes necessary for a rights-based

[43] Singapore Convention Art. 4.4.
[44] Singapore Convention Art. 4.3.

determinative process, while mediation is more open, as it also allows for a party to walk away from it at any time. For this reason, issues related to notification and other procedures are not grounds for refusing to grant relief under the Singapore Convention. Instead, it is a mediator's professional standards, independent and ethical behaviour during mediation, are important, as they impact on the parties' trust and voluntary signing of the settlement agreement resulting from that process. Therefore, these grounds are relevant for the Singapore Convention, as important characteristics to mediation, ensuring that a settlement agreement was not the result of manipulative influence or coercion. However, there are no international general guidelines or standards applicable to mediators, the Convention leaving that aspect to domestic regulation. [45] It is likely that soft law will develop to provide cross-cultural guidance on these aspects as it did for international arbitration[46] but until then it depends on each state's internal regulatory power or leading professional organisations to set such standards.

46. The second notable difference from the New York Convention relates to the contractual nature of the outcome of the dispute resolution, as a settlement agreement and its content, accordingly, originate from the parties. A settlement agreement is considered to have a special nature for being the result of a successful dispute resolution process. Regardless, it is still only an agreement by the parties, as mediation is not a quasi-judicial determinative process like arbitration. In facilitative mediation, the mediator has no input in the settlement, although it may assist the parties in the drafting process. In advisory or evaluative mediation, the mediator may suggest solutions for settlement, but the content of the settlement is still left to the parties to agree on. As a voluntary agreement drafted by disputing parties, a settlement agreement may be badly drafted or subsequently amended by the parties, all of these scenarios providing grounds for refusing the relief sought. No such scenario is, in principle, possible in arbitration where the award is either drafted or – in case of a settlement award - at least confirmed by the arbitrators.

47. The Singapore Convention also scarcely mentions applicable law, while the applicable law is of utmost importance in the New York Convention and in arbitration. The only relevant applicable law in the Singapore Convention is the one under which a settlement agreement may be null and void, inoperative or incapable of being performed. The determination of this applicable law is similar to the New York Convention, giving prevalence to the parties' choice, followed by "the law deemed applicable by the competent authority" of the Convention member state where relief is sought.[47] The

[45] A/CN.9/901- paras 79-80

[46] See, for example, the many guidelines and evidence rules developed by the International Bar Association and other similar organizations.

[47] Singapore Convention Art. 5.1(b)(i).

finality of the settlement agreement is made subject to the agreement's terms, as the contractual nature of the agreement would otherwise allow it to be modified at any later time and as such never become final.

48. The remaining two grounds to be considered by the competent authority of the Convention member state where relief is sought are the same as the grounds in Art. V.2 of the New York Convention, namely: "granting relief would be contrary to the public policy" of the member state where relief is sought (Art. 5.2(a)) or "the subject matter of the dispute is not capable of settlement by mediation under the law of that [state]" (Art. 5.2(b)). Similarly to the New York Convention, these two grounds are verified by the enforcing authority *ex oficio* to ensure that no such authority would give legal recognition to agreements that are otherwise not recognised by the legal system within which that authority operates.

6. Parallel applications or claims

49. Art. 6 of the Convention provides that

> *if an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought […], the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision (on the relief) and may also, on the request of a party, order the other party to give suitable security.*

50. This provision is identical in scope with Art.VI of the New York Convention, allowing the authority faced with a claim for relief to suspend the decision of such claim until a pre-existing or parallel claim has been decided by another competent authority. The provision allows for a compromise between the requirement to provide relief based on a mediated settlement agreement and allowing competent authorities to decide whether such relief should be granted while parallel proceedings may be in place. In deciding this, the competent authority can consider varying factors that may be relevant on a case-by-case basis.

7. Public international law provisions

a. <u>More favourable rights</u>

51. Art. 7 of the Singapore Convention, similarly to Art. VII of the New York Convention, deals with the Convention's relationship with other international or national laws, establishing a more-favourable-right principle. Accordingly, the Singapore Convention cannot be used to impede an interested party "to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of [a Convention member state] where such settlement agreement is sought to be relied upon."[48] This provision allows for the Convention to be adopted without its provisions potentially depriving parties of more favourable rights that a member state's domestic legislation may have established. This principle is of particular relevance for countries with developed mediation legislation that allow for more relaxed enforcement or broader rights than the Convention would. It also serves as basis for the Convention remaining a valid legal framework while also allowing for future legal developments to create more beneficial provisions in a Member State's domestic regulations.

b. Reservations

52. Art. 8.1 allows Parties to the Convention to reserve certain rights that may otherwise be affected by the Convention. In particular, a party to the Convention can declare that the Convention does not apply to settlement agreements to which the Member State itself or any agency acting on behalf of that authority is a party.[49] This reservation can ensure that no settlement agreement resulting from mediation can be enforced against the sovereign entity of the reserving state, even if that entity engages in commercial relationships and in mediation of commercial disputes. Combined with any reservations or declarations a party may have to other instruments regulating the recognition and enforcement of court judgments or arbitral awards, this safeguard mechanism has the potential of protecting state entities from enforcing rights established against them. To ensure that the reservation does not weaken the trust and recognition vested in mediation, the declaration of reservation can specify the extent to which the reservation applies – for example, by establishing authorisation or approval processes internal to the state entity as a precondition to acceptance of a settlement agreement for the purposes of the Convention.

53. The other reservation parties to the Convention may make is to make the applicability of the Convention subject to the express agreement of the parties to that settlement.[50] This

[48] Singapore Convention Art.7
[49] Id. Art. 8.1(a).
[50] Id. Art.8.1.(b)

opt-in reservation leaves the decision on whether the outcome of a mediation should become subject to the Convention to the parties in dispute. The Convention remains an open possibility but can only be relied on if the parties to the settlement agreement also agree on the applicability of the Convention to their settlement. Paired with the indirect opt-out mechanism recognised in Art. 5(1)(b)(ii) that allows parties to make a settlement agreement not final or not binding, this reservation provides maximum flexibility to disputing parties. It may also lead to reduced application of the Convention if parties fail to expressly 'opt in' to the Convention.

54. No other reservation than these two can be made by parties to the Convention.[51] Notably, the Singapore Convention does not provide for a reciprocity reservation, as the New York Convention does. Reservations can be made at any time, following the same procedure and entry into force timelines as those established for accession of the Convention (see below). Reservations can also be withdrawn without that withdrawal affecting the accession to the Convention overall.[52]

c. Regional integration and sovereign authority

55. Another relationship between the Convention and its members' sovereign authority is reflected in Arts. 12.-13. With the desire to expand participation, the Convention recognises that regional economic integration organizations (Art. 12) can also become members to the Convention. The more favourable right principle also applies to law of states that are members of a regional economic integration organisation which is a party to the Convention.[53] This allows for organisations like the European Union to adopt the Convention – although the EU has not yet settled whether the Convention should be adopted by itself or its member states individually. Of more direct relevance to Viet Nam, the ASEAN may also become a member to the Singapore Convention, by this binding all its ten member states[54], including Viet Nam. As of the day of this Report, there is no indication that the ASEAN itself would become such a member, but five if its member states are already signatories to the Convention.

[51] Id. Art.8.2.

[52] Id. Art.8.5.

[53] Id. Art.12.4.

[54] However, the treaty-making practice of ASEAN is complicated while its legal instruments seem to be unclear in many aspects. See Zhida Chen - ASEAN and Its Problematic Treaty-Making Practice: Can International Organizations Conclude Treaties "on Behalf of" Their Member States? - Asian Journal of International Law - Vol. 4 (02)- 2014, pp 391 - 419
Yogi Bratajaya - ASEAN Reform :Towards a More Cohesive Regional Intergovernmental Organization - Padjadjaran Journal of International Law, Vol 3 (1), 2019 - pp71-83

56. The Convention also recognises that it may become applicable differently in territorial units belonging to a non-unified legal system (Art. 13). This provision enables sovereign states like China, where mainland China, the Macau SAR, and Hong Kong SAR, all have slightly different legal systems, to integrate the Convention differently across these territories.

d. Adopting the Convention

57. The Convention was opened for signature on 7 August 2019 (Art. 11.1), with a signing ceremony held in Singapore. For non-signatories, the Convention was open for accession from the same date. Art. 11 recognises the different modes of adopting the Convention, as determined by the legal system of each potential party. It also states that signing the Convention is not sufficient to be bound by it, Art. 11.2 stating that "[t]his Convention is subject to ratification, acceptance or approval by the signatories." Signing the Convention only creates an obligation to refrain from taking measures that would defeat the purpose of the Convention.[55]

58. While signing a Convention qualifies the signatory to ratify, accept, or approve the Convention, Art. 11.3 stipulates that "[the Singapore] Convention is open for accession by all States that are not signatories as from the date it is open for signature." Accordingly, a state or regional economic integration organisation can become party to the Convention in two ways:

- by signing the Convention at the United Nations Headquarters in New York[56] then carry out ratification/approval/acceptance procedures[57] and submit that instrument to the Secretary-General of the United Nations designated as the depositary of the Convention;[58] or

- by just submitting an accession instrument to the Secretary-General of the United Nations.[59]

e. Entry into force and effect

[55] Vienna Convention on the Law of Treaties (1969) Arts. 10, 18.
[56] Singapore Convention Art.11.1.
[57] Id. Art.11.2.
[58] Id. Art.11.4, Art.10.
[59] Id. Art.11.3-4.

59. The Convention entered into force on 12 September 2020 pursuant to Art. 14.1, following ratification by Singapore, Fiji, and Qatar. By the time of its entry into force, Saudi Arabia and Ecuador have also ratified, and Belarus approved the Convention. Shortly before the finalisation of this Report, Honduras also ratified the Convention, becoming the seventh party. For any new party, the Convention will enter into force in respect to that party six months after depositing the accession instrument.

60. Subject to any agreement required under Art. 8.1.(b), the Convention only applies to settlement agreements that are entered into after the date when the Convention entered into force with regard to the relevant Party to the Convention.[60]

61. The Convention remains in force in a state, territory, or regional entity that became party to it, until that party denounces the Convention. Denunciation may be made through "a formal notification in writing addressed to the depositary"[61] which will take effect 12 months after the notification is received by the depositary - unless the notification itself indicates a longer period. [62]

f. Amending the Convention

62. As per Art. 15.1, any Party to the Convention may propose an amendment to the Convention by submitting such proposal to the Secretary-General of the United Nations. Subject to support from at least one third of the Parties to the Convention, the amendment proposal is considered at a conference, where the amendment can be adopted by a two-third majority of the voting participants.[63] Any approved amendment must be deposited and enters into force following the same procedure and timelines as the ones established for the Convention itself.

[60] Id. Art. 9.
[61] Id. Art.16.1.
[62] Id. Art.16.2.
[63] Id. Art. 15.2.

III. INTERNATIONAL COMPARATIVE OVERVIEW

63. The Singapore Convention is expected to do for mediation what the New York Convention did for arbitration: provide a global boost and recognition as a valid dispute resolution mechanism. For this reason, the Singapore Convention is expected to be as successful as the New York Convention. A reasonable comparison so soon after the creation of the Singapore Convention is technically impossible, considering that the New York Convention was created 63 years ago. Nevertheless, a comparison of the initial success of the two Conventions can indicate that the Singapore Convention is at a better start than the New York Convention was.

64. The New York Convention had 24 signatories in its first year of existence, with only ten obtained the day the Convention was opened for signing. The Singapore Convention obtained 46 signatories at the signing ceremony and a total of 51 during its first year, demonstrating a much stronger start. The bigger support is likely the result of alternative dispute resolution being internationally much better recognised (partly due to the New York Convention) but also because many countries have long established mediation practice integrated in their cultural traditions or their legal system. The so far low number of accessions to the Singapore Convention is comparable to the level of accession to the New York Convention in its first year. As of the date of this Report, the Singapore Convention has seven parties; the New York Convention had eight members within the same amount of time.

65. The Singapore Convention was developed together with the amendment of the UNCITRAL Mediation Model Law, to provide consistency in legislation. By adopting the Model Law as domestic legislation regulating mediation, parties to the Singapore Convention avoid any conflict between their domestic laws and the international obligations undertaken through the Convention. The Mediation Model Law has reasonable success, although 45 jurisdictions of the 33 states that adopted it did so before the 2018 amendments made to accommodate the Convention.[64] The most recent adopting jurisdiction, also the 46th jurisdiction, Georgia in the United States, is the only one that based its new law on the 2018 amendments of the UNCITRAL Mediation Model Law.

66. To assist Viet Nam in deciding whether to adopt the Singapore Convention, this Report examines the five countries that are Viet Nam's main business partners, namely: Singapore, the Republic of Korea, China, the United States of America, and Germany –

[64] Status of UNCITRAL Model Law is available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status (last visited on 20/5/2021)

with reference to its status as a member of the European Union. The comparison will also include Australia as the latest signatory, given its active involvement in the drafting process at the UNCITRAL WG II and its position on the Asia-Pacific Region. The research focuses on two main issues: the domestic mediation legislation of that country, and the adoption of the Singapore Convention. Of the six jurisdictions used for this comparative analysis, five have signed the Singapore Convention, one of these five (Singapore) ratified the Convention, and one of the signatories (the US) has enacted the former Conciliation Model Law in 12 of its states, and the new Mediation Model Law in one of its states.

A. Singapore

1. Domestic mediation law and practice

67. Mediation and ADR methods for Western-style courts which entered Singapore in the 1990s have created a rich system of three main branches: (1) court-based mediation; (2) private mediation conducted mainly by the Singapore Mediation Centre and the Singapore International Mediation Centre; and (3) other mediation conducted by government agencies and industry representative organizations such as the Community Mediation Centre, the Parental Support Council, the Consumers Association of Singapore, and the Tripartite Alliance for Dispute Management.[65] As Asian commercial business was growing, the demand for legal services, particularly in the area of dispute resolution, has also increased. Seeing potential in this area, Singapore offers a full set of dispute resolution services ranging from court proceedings to arbitration and mediation, to meet these different needs.[66] Singapore has made outstanding achievements in the field of arbitration and is ranked among the top places in the world for international arbitration.

68. In the field of commercial mediation, Singapore has also made great progress. Singapore has enacted the Mediation Act 2017 as recommended[67] by the Working Group on

[65] Dorcas Quek Anderson - Mediation- Overview about Singapore Law - Updated 30/12/2018
Available at
https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation (last visited 20/5/2021)
Honorable Justice Belinda Ang Saw Ean - "Opening remarks" at SMU forum – expanding the scope of dispute resolution and access to justice: the use of mediation within the courts- 12-13/3/2018
Available at
https://www.supremecourt.gov.sg/Data/Editor/Documents/Use%20of%20Mediation-Within%20the%20Courts.pdf

[66] Gloria Lim - "International Commercial Mediation- the Singapore Model" - Singapore Academy Law Journal- 2019
https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1465/Citation/JournalsOnlinePDF

[67] Singaporean Ministry of Law, Final ICM WG Press Release - Annex A- 2013

International Trade Mediation (including domestic and international experts) established in 2013 by the Supreme Chief Justice and the Ministry of Law to develop international commercial mediation in Singapore[68]. On January 10, 2017, the Mediation Act was officially adopted by the Singapore Parliament. The Mediation Act and its guiding documents such as the Mediation Rules passed by the Ministry of Law (Mediation Rules[69] - that only identify the required information to be included in a mediated settlement agreement) took effect on November 1, 2017. The Act codified issues previously resolved by common law and with the most recent amendment from 2021 which aligned the Act with the Singapore Convention, it likely one of the most modern mediation laws in the world.

69. According to Art. 3 of the Mediation Act,

> *"mediation" means a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:*
>
> *(a) identify the issues in dispute;*
>
> *(b) explore and generate options;*
>
> *(c) communicate with one another;*
>
> *(d) voluntarily reach an agreement.*

70. As per Art. 6 of the Mediation Act, the Act applies to any mediation conducted wholly or partly in Singapore and to mediations where the mediation agreement provides for this Act or the law of Singapore to govern a mediation. The Act does not apply to statutory compulsory mediation, court-ordered or conducted mediation (except when being extended by a decision of the Minister of Law), and other forms of mediation excluded under decisions of the Minister of Law.[70] The Act does not preclude an international

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Available at https://app.mlaw.gov.sg/files/news/press-releases/2013/12/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf

[68] Ministry of Law of Singapore "Mediation Act to commence from 1 November 2017" https://www.mlaw.gov.sg/news/press-releases/mediation-act-to-commence-from-1-november-2017

[69] Singapore, Mediation Rules https://sso.agc.gov.sg/SL/MA2017-S624-2017?DocDate=20171031

[70] The Act does not apply to mediation conducted by the court or under the direction of the court (by a judge, court officer or volunteers of the Family Justice Courts and the State Courts), and the mediation procedures comply with other written laws such as the Community Mediation Center (under Community Mediation Centres Act Cap 49A Act, 1998 Rev Ed), trilateral dispute settlement under the management of the Ministry of Manpower (under the Labor Claims Act 2016, Employment Claims

settlement agreement from being considered a mediated settlement agreement to which the Act applies, or from being recorded as an order of court if it has not been recorded under section 5 of the Singapore Convention on Mediation Act 2020.[71]

71. Article 8 of the Mediation Act[72] is similar to Article 6 of the Arbitration Act[73] and the International Arbitration Act,[74] giving the court the right to stay the proceedings while the mediation is in progress. It was stipulated in the Recommendation of the Working Group on International Trade Mediation as a necessary feature of the Mediation Act.[75] When parties focus on mediation without the fear of ongoing court proceedings, they will invest their time and effort to reach an agreement, or at least, they have to try mediation before continuing further litigation proceedings.

72. One of the salient features of the Act is that Article 12 provides for a swift enforcement mechanism that allows the parties to file an application to court to record their successful mediated settlement agreement as a court order. As such, the agreement can be enforced immediately and directly as a court order if all conditions are met – i.e. an application is sent to the competent court within 8 weeks after settlement; the mediation was administered by a designated mediation service provider or conducted by a certified mediator; the settlement agreement is in writing and signed by or on behalf of all parties; the settlement agreement contains such information as may be prescribed; and does not fall within the scope of Art. 12(4) of the Act.[76]

Act and the Industrial Relations Act Cap 136, 2004 Rev Ed) and Council Small claims lawsuits (Small Claims Tribunals Act) (CAP 308, 1998 Rev Ed)

Dorcas Quek Anderson - "Comment A coming of age for mediation in Singapore? Mediation Act 2016" - Singapore Academy of Law Journal. 29, 2017, pp 275-293

Available at

https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4297&context=sol_research (last visited 20/5/2021)

[71] Mediation Act (2017) Art.6(2A)

[72] Singapore Mediation Act, No.1 of 2017, available at https://sso.agc.gov.sg/Act/MA2017#pr8-

[73] Singapore Arbitration Act, No.37 of 2001, available at https://sso.agc.gov.sg/Act/AA2001#pr6-

[74] Singapore International Arbitration Act, No. 23 of 1994, available at https://sso.agc.gov.sg/Act/IAA1994#pr6-

[75] Singaporean Ministry of Law, Final ICM WG Press Release - Annex A- 2013

Available at

https://app.mlaw.gov.sg/files/news/press-releases/2013/12/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf

[76] Singapore Mediation Act (2017) Art. 12(4):

> The court may refuse to record a mediated settlement agreement as an order of court if —
> (a) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;
> (b) the subject matter of the agreement is not capable of settlement;
> (c) any term of the agreement is not capable of enforcement as an order of court;
> (d) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or
> (e) the recording of the agreement as an order of court is contrary to public policy.

73. On the other hand, Art. 12(4) emphasizes that the court may refuse to record a mediated settlement agreement as an order of court if: (1) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground invalidating a contract; (2) the subject matter of the agreement is not capable of settlement; (3) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; (4) the recording of the agreement as an order of court is contrary to public policy. These grounds are considered adequate but not so different from the traditional approach of common law. However, Article 12 offers a quick procedure so that settlement agreements could be enforceable as court orders without undergoing lengthy proceedings.

74. Exceptions in the Legal Profession Act that currently apply to arbitration extend to mediation (Art. 17). Under these exceptions, certain categories of dispute resolution professionals can practice mediation in Singapore without having to comply with local requirements for obtaining a license. These categories are: certified mediators; appointed mediators of mediation service providers; foreign attorneys to represent the parties in the mediation proceedings conducted by the above mediator or mediation service provider; or the mediation "relates to a dispute involving a cross-border agreement where Singapore is the venue for the mediation"[77] or the mediation "relates to a dispute in respect of which an action has commenced in the Singapore International Commercial Court."[78]

2. The Singapore Convention in Singapore

75. After signing the Singapore Convention, Singapore has passed the Singapore Convention on Mediation Act 2020[79] ('Singapore Act') to implement the Convention into its domestic legislation and amended the Mediation Act to make reference to the Convention.[80] The Singapore Act has 13 articles and the full text of the Convention included in a Schedule. Despite the Convention being reproduced in full in the Schedule, the Act still reiterates the definition of mediation and some important provisions, especially the grounds for refusing to grant relief. The Act does not introduce a concept of foreign mediation but uses the concept of international settlement agreement resulting from mediation.

[77] Singapore Legal Profession Act Section 35B.c.ii - as supplemented by Article 17 of the Mediation Act
[78] Singapore Legal Profession Act Section 35B.d
[79] Singapore Convention on Mediation Act, No.4 of 2020. Available at https://sso.agc.gov.sg/Act/SCMA2020
[80] Sec. 6(2A) Singapore Mediation Act

76. Under the Singapore Act, an international mediation agreement will be recognized in two ways: (i) the requesting party may submit an application to the High Court for the agreement to be recorded as a court order for enforcement or to prove that the matter has already been resolved or (ii) the requesting party may request a review by the court (superior or appellate court) while handling the case which involves a party to the agreement and a matter already resolved by the agreement to confirm that the matter has already been resolved.

77. The Act does not specify the time limit or the court procedure to implement international settlement agreements resulting from mediation. The Act empowers the Rules Committee under the Supreme Court of Judicature Act to make Rules of Court with respect to applications and other proceedings, as well as fees and costs of those applications and other proceedings. The Act assigns the Ministry of Law to regulate other matters related to the implementation of this Act.

78. According to information provided by the Singapore Ministry of Law to the Viet Nam Ministry of Justice, as of May 2021 there have been no cases registered in Singapore under the Singapore Convention. Available statistics indicate that since its establishment in 1997, the Singapore Mediation Center has handled over 4,800 cases with 70% of success, of which 90% were resolved on the same day.[81] The number of successful mediated settlement agreements is increasing but there is no official statistical data on the number of settlement agreements registered at courts of Singapore.

B. The Republic of Korea

1. Domestic mediation law and practice

79. Unlike in Singapore, there is no separate law governing private mediation in Korea. Mediation is mainly required by law and conducted by state agencies or is a court-based process. It is not understood as the process defined by the Singapore Convention or the UNCITRAL Mediation Model Law but is a statutory process, imposed by law. Disputing parties are required to mediate even when there is no agreement to resolve the dispute by this method between the parties.[82] This kind of mediation is provided as a free administrative process to encourage the parties to settle disputes.

[81] Singapore Mediation Center website- https://www.mediation.com.sg/

[82] Kyung-Han Sohn - "Alternative Dispute Resolution System in Korea" https://www.softic.or.jp/symposium/open_materials/11th/en/Sohn.pdf (last visited 20/5/2021)

80. Mediation required by law is conducted by state agencies and the settlement agreement as the same effect as court order. For example: the Consumer Dispute Settlement Committeeof the Korea Consumers Agency has the authority to mediate consumer disputes in accordance with the Framework Act on Consumer.[83] The Copyright Deliberation and Conciliation Committee is established under the Copyright Act to review and mediate disputes concerning rights protected under this Act.[84] The Financial Dispute Mediation Committee operates under the supervision of the Financial Supervisory Commission under the Law on the establishment of financial supervision organizations arising under the Bank of Korea Act, Insurance Act and Security and Exchange Act.[85]

81. Mediation at the E-commerce Mediation Commission (ECMC) is established under the Framework Act on Electronic Documents and Transactions[86] to mediate disputes in the e-commerce sector. One outstanding feature is that the mediation can be done in a specific location or completely online via a computer in a virtual session. The filing of a request for mediation can be done entirely electronically; only evidence needs to be submitted physically. There are currently 49 mediators at the Centre, including attorneys, patent attorneys, experts, professors, and people working in consumer protection.

82. Court-based mediation is another kind of popular mediation in Korea. It is conducted upon the request of one party or referred by the judge presiding the case. Historically, court-based mediation has been used for family and rental disputes. With the enactment of the 1990 Civil ConcilliationAct,[87] court-based mediation has been extended to all civil

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[83] Korea, Framework Act on Consumers (2006 -latest amendment in 2018) - Article 60
English version available at https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=25571&type=part&key=19
https://elaw.klri.re.kr/eng_service/lawView.do?hseq=49238&lang=ENG (last visited 4/7/2021)

[84] Korea, Copyright Act (2006 - latest amendment in 2018), Articles 114- 117
English version available at https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=49128&type=lawname&key=copyright (last visited 4/7/2021)

[85] Korea, Act on the establishment, etc. of financial services commission (2008- latest amendment in 2018) - Art.51
English version available at https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=47931&type=part&key=23 (last visited 4/7/2021)
See further Kyung-Han Sohn "Alternative Dispute Resolution System in Korea"
https://www.softic.or.jp/symposium/open_materials/11th/en/Sohn.pdf (last visited 20/5/2021)

[86] Korea, Framework Act on electronic documents and transactions (2002- latest amendment 2016), Chapter VI Mediation Committee of disputes on electronic documents and electronic transactions, Articles 32 to 37-2
English version available at
https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=179518&viewCls=engLsInfoR&urlMode=engLsInfoR&lsId=002000&chrClsCd=010202#0000 (last visited 4/7/2021)

[87] Korea, Judicial conciliation of civil disputes Act (1990- latest amendment in 2020)
English version available at
https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=52915&type=lawname&key=conciliation (last visited 4/7/2020)

cases. The outcome of court-based mediation has the same effect as a court judgment.[88] Thus, there is limited space for private mediation.

2. The Singapore Convention in Korea

83. There is no specific mechanism for enforcement of international settlement agreement resulting from mediation in Korea. The Republic of Korea signed the Singapore Convention at the signing ceremony in Singapore, but it has not yet ratified the Convention. In the 3rd Asia-Pacific Conference hosted in Korea, Korean experts expressed views that the Singapore Convention can lay foundation for a Commercial Mediation Act. This could ensure that the views and goals of the parties are understood and respected in the mediation, and active exchange is promoted between the parties which will shift mediation from a cure to a care.[89.]

84. Mediation is less commonly used in Korea than in other countries for a number of reasons. Korean people lack understanding of ADR and mediation; therefore, they want to win the case rather than seek concessions. Lawyers also do not have much experience in mediation, despite mediation being imposed for a range of disputes. According to a Korean Judge, a mediator cannot live by his career because there is no market for private mediation in Korea. The courts supervise mediation and determine which case is suitable for mediation, thus parties do not need to pay for private mediation.[90] As mediation is usually referred to in the second half of court proceeding, it is not perceived as an empowering, genuine attempt by the parties to achieve a mutually satisfactory solution.

85. To change current mediation practice, the Korean judiciary introduced the motto of settling disputes through mediation instead of proceedings and adopted a system that allows earlier mediation conducted by a mediator instead of a judge, to limit the tension between the parties.[91] However, the application of mediation in international commercial disputes is limited, and its future is unclear.[92]

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[88] Judicial conciliation of civil disputes Act (1990- latest amendment in 2020 Article 29)

[89] Olivia Sommerville - "Singapore Convention Series – Strategies of China, Japan, Korea and Russia", 16/9/2019 http://mediationblog.kluwerarbitration.com/2019/09/16/singapore-convention-series-strategies-of-china-japan-korea-and-russia/(last visited 20/5/2021)

[90] Peter Robinson, J. Youngjin Lee, J. Kwang Ho, Lim Ryul Kim - "The Emergence of Mediation in Korean Communities"- Pepperdine Dispute Resolution Law Journal - Vol 15- Issue 3
Available at https://core.ac.uk/download/pdf/71935567.pdf (last visited 20/5/2021)

[91] "The Emergence of Mediation in Korean Communities"- Pepperdine Dispute Resolution Law Journal - Vol 15- Issue 3 https://core.ac.uk/download/pdf/71935567.pdf

C. China

1. Domestic mediation law and practice

86. Like Korea, China does not have separate legislation to govern commercial mediation. Mediation can be used during arbitration proceedings, during court proceedings, or as independent mediation conducted by private mediators at a mediation institution. The Chinese Arbitration Law[93] and Civil Procedure Law[94] allow arbitral tribunals and the court to conduct mediation and the outcome of such mediation will be recorded by the arbitral tribunal or the judge with the same value as an arbitral award or court judgment.

87. Mediation is deeply rooted in Chinese culture and tradition and has evolved gradually but out-of-court mediation only attracted attention after 2010 to solve the boom of cases in Chinese courts and to serve the Belt and Road Initiative. In this Initiative, China has proposed a diverse Dispute Resolution Scheme in which mediation, arbitration and court litigation connect to and supplement each other.[95] Out-of-court mediation is a system combining people's mediation (to solve disputes within people residing in the same areas), administrative mediation (conducted by administrative agencies - e.g. police mediating cases relating to public security and traffic accidents), industry mediation (conducted by a

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Supreme Court of Korea – Civil Conciliation Proceedings
Available at https://eng.scourt.go.kr/eng/judiciary/proceedings/civil.jsp (last visited 20/5/2021)

[92] Clifford Chance, International Mediation Guide, 2nd edition, 2016
Availeble at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/06/international-mediation-guide-second-edition.pdf (last visited 20/5/2021)

[93] China, Arbitration Law (1994)
English version available at:
http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml

Art.49 After the parties have applied for arbitration, they may reach reconciliation on their own initiative. Whereas a reconciliation agreement has been reached, a request may be made to the arbitration tribunal for an award based on the reconciliation agreement or the application for arbitration may be withdrawn.

[94] China, Civil Procedure Law (1991- latest amendment in 2017)
English version available at:
https://www.chinajusticeobserver.com/law/x/civil-procedure-law-of-china-20170627

Art 97 Where a conciliation agreement is reached, the people's court shall prepare a written mediation statement, stating the claims, the facts of the case and the result of the conciliation.

The written conciliation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties.

A written conciliation statement shall come into force immediately upon signatures by both parties.

[95] Alyssa V. M. Wall - "Designing a new normal: dispute resolution developments along the Belt and Road" -
Availble at:
https://nyujilp.org/wp-content/uploads/2020/01/NYI105.pdf

member of industry associations), commercial mediation, and court-based mediation (conducted by a judge).[96]

88. Although China has no legislation on commercial mediation, it is believed that modern commercial mediation has its foundations in the Civil Procedure Law amendment of 2012.[97] The 2012 amendment itself did not mention commercial mediation but included court-based mediation. When resolving a dispute, the court will refer cases it deems appropriate to the mediators to be handled in a timely manner.[98] After the adoption of the 2012 amendment to decrease courts' workload, a series of pilot programs to establish independent mediation providers were deployed, especially in industry associations. Commercial mediation is now performed by a specialized commercial mediation institution on a market-based fee basis. This is the most professional form of mediation, but currently there are only a limited number of mediation centres in China: China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Centre (established in 1987), Beijing Arbitration Commission Mediation Centre (established in 2011), Shanghai Commercial Mediation Centre (established in 2011), and Guangdong, Hong Kong & Macau Commercial Mediation Alliance (established in 2013). The Supreme Court also established an International Commercial Expert Committee for disputes concerning the Belt and Road Initiative between Chinese and foreign companies through mediation.

89. One of the main disadvantages of out-of-court mediation is that a successfully mediated settlement agreement cannot be enforced by the court because it is just a regular contract by nature. To resolve this issue, the CPL's 2012 amendment stipulates that the court can make a decision on the validity of the settlement agreement at the request of the parties to allow it to be enforced.[99] In particular, in compliance with the Law on People's Mediation and other applicable laws, the parties must, within 30 days from the effective date of the successful mediated settlement agreement, file their request to the first

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[96] Guodong Du, Meng Yu - "Mediation in China: Past and Present" - 11/8/2019
Available at https://www.chinajusticeobserver.com/a/mediation-in-china-past-and-present (last visited 20/5/2021)
Jiang Heping, Andrew Wei-Min Lee - "From the Traditional to the Modern: Mediation in China"
Available at
https://weinsteininternational.org/mediation-in-china/#:~:text=Today%2C%20China%20uses%20five%20broad,Mediation%20is%20conducted%20by%20judges.

[97] Id.

[98] Clause 2, Article 133 of the CPL, available at https://www.chinajusticeobserver.com/law/x/civil-procedure-law-of-china-20170627
Ashley M. Howlett, Sonny Payne- "Adding more strings to the bow: the 2012 amendments to China's Civil Procedure Law"- 10/1/2013
https://www.lexology.com/library/detail.aspx?g=33677440-0dff-4172-9a43-4212048afcf6

[99] China, Civil Procedure Law (1991 latest amendment in 2017) Articles 194, 195- Section 6 Chapter XV Special Procedures

instance People's Court for recognition of this agreement.[100] If the petition does not comply with the law, the court must refuse the petition, and the parties can change the original settlement agreement through a new mediation or by initiating a lawsuit. If the petition is accepted by the court and either party refuses to perform or does not fully comply with the agreement, the other party may request enforcement by the court.

90. If the mediation is a part of foreign arbitration, the settlement agreement can be recognized as an arbitral award. Foreign arbitral awards recording a settlement agreement can be enforced under the New York Convention and reciprocity agreements, if the applicant applies to the Intermediate People's Court where the award debtor has his domicile or assets.

2. The Singapore Convention in China

91. China has a policy promoting mediation and other ADR methods to resolve international disputes. On August 29, 2019, China was among the first 46 countries to sign the Singapore Convention, but it has not ratified the Convention since. The signing of the Convention is considered "particularly timely"[101] for China. Several reforms that have resulted in a more modern mediation system have been introduced by the Chinese government in recent years. Along with improving the legal system based on the rule of law, China also has a strategy to consolidate its position as one of Asia's leading dispute settlement centres. Therefore, the effect of the Singapore Convention on domestic law will be indirect and less pronounced but will have a more lasting effect.

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[100] China, Law on People's Mediation (2010)

Article 33. After mediation agreement has been concluded upon mediation by the people's mediation committee, where both parties deem necessary, they may apply to the People's Court jointly for judicial confirmation within thirty days from the day the mediation agreement takes effect. The People's Court shall conduct a review of the mediation agreement promptly and confirm the validity of the mediation agreement according to law. Where the People's Court confirms that the mediation agreement is valid, one party refuses to fulfill or has not completely fulfill, the other party may apply to the People's Court for mandatory execution. Where the People's Court confirms that the mediation agreement is invalid, the parties may alter the original mediation agreement or conclude a few mediation agreement through the people's mediation approach. It may also file a lawsuit with the People's Court.

English version available at
http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/%5Ben%5Dguojifalvwenjian/PeoplesMediationLawofthePeoplesRepublicofChina.pdf

[101] Ashley M. Howlett, Sonny Payne- "Adding more strings to the bow: the 2012 amendments to China's Civil Procedure Law"- 10/1/2013
https://www.lexology.com/library/detail.aspx?g=33677440-0dff-4172-9a43-4212048afcf6

92. Although mediated settlement agreements are not enforceable by themselves in China, the agreements resulting from the work of mediation institution may allow parties to ask the courts to enforce such agreements in compliance with their rules. This procedure may be the pathway for implementing obligations under the Convention because it can be extended to international settlement agreements. However, since the Singapore Convention has certain requirements for implementation, it is necessary to amend the CPL to define the terms, forms, and grounds for refusal to grant relief.

93. China also needs to address at least two issues in order to implement the Singapore Convention.[102] First, it needs to develop specific standards to enforce an international settlement agreement under the framework of the Convention, namely deciding which court has competence and whether a group of specialized judges should be assigned to deal with this type of case.[103] Second, problems stem from the Convention itself. The Convention uses the place of business approach to define the internationality of the mediation agreement but it does not define the concept of place of business, which can be interpreted very differently in member states. Chinese law has only one similar term "the main place of business" to indicate that a party may have multiple business locations. Hence, inconsistency when applying the Convention can occur in Member States. Supporters believe that these two issues can be overcome but they may still prolong the time that China decides to ratify the Convention. Furthermore, in the Singapore Convention Week 2021, Mr. Liu Xiaochun, President of Shenzhen Court of International Arbitration gave an insight that the Singapore Convention required a complete mechanism for the Chinese court to grant reliefs. However, the current legal system and the Convention led Chinese courts to concern about: how to make sure that the underlying transaction and dispute is real, how to avoid false settlement agreements and whether the mediated settlement agreement would harm the third party's or public interests[104] .

D. The United States of America

1. Domestic mediation law and practice

94. The United States of America (USA) is a federal country. There is no regulation of private commercial mediation at federal level but the Alternative Dispute Resolution Act of

[102] Carrie Shu Shang, Ziyi Huang - "The Singapore convention in light of China's changing mediation scene" - Asian Pacific Mediation Journal Vol. 2, No. 1 ,2020
Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539739 (last visited on 20/5/2021)
[103] Id.
[104] Further information on Singapore Convention Week can be found at https://www.singaporeconventionweek.sg/index.html

1998[105] requires states and state courts to facilitate the resolution of civil disputes through alternative means, including mediation. State laws on mediation have expanded and increasingly diversified in recent years. Mediation has been a part of the US legal system for the past 30 years, mainly originating from court-annexed mediation. State laws require private parties to mediate certain types of disputes. There are two types of law regulating mediation. The first one forces the parties to mediate before initiating a lawsuit when the case involves certain rights (for example medical malpractice).[106] The second one not only forces the parties to mediate but also controls mediation in cases such as credit disputes between creditors and homeowners or insurance policy disputes.[107] State laws have created a new development stage for mediation institutions, while federal and state lawmakers have granted the courts and administrative agencies the right to design mediation schemes and to guide parties and mediators.[108] State law has different provisions to support mediation (including a provision that does not allow the winning party to claim attorney fees if the money received is less than the amount the other party offered to pay in mediation). A State even allows the mediator to rule like an arbitrator if the parties cannot reach an agreement.[109]

95. In an effort to unify the laws of the states on mediation, the Uniform Mediation Act 2001 (UMA) was adopted. Recommended by the National Conference of the Commissioners on Uniform State Laws, the UMA is based on the 2002 UNCITRAL Conciliation Model Law. It has so far been enacted in 12 states and most recently introduced in Georgia.[110] The UMA acknowledges a strong national policy of supporting mediation, recognising its value to the parties. It encourages the establishment of offices and institutions to facilitate wider use of mediation and defines mediation with emphasis on the mediator assisting the parties to negotiate a resolution suitable with their needs and interest. The UMA provides for confidentiality in mediation, and the fairness and integrity of the process. Agreements

[105] Available at https://www.congress.gov/congressional-report/105th-congress/house-report/487/1

[106] See South Carolina Code of Laws SECTION 15-79-125. Also see Lydia Nussbaum, "Mediation as Regulation: Expanding State Governance over Private Disputes," Utah Law Review Vol. 2016 No. 2, available at https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1017&context=ulr (last visited 4/7/2021)

[107] See California Insurance Code Sections 10089.70 - 10089.83

[108] Lydia Nussbaum, "Mediation as Regulation: Expanding State Governance over Private Disputes," Utah Law Review Vol. 2016 No. 2, available at https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1017&context=ulr (last visited 4/7/2021)

[109] See California Health and Safety Code Section 8016

[110] See status at https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110

However, Georgia noted that their legislation is based on the 2018 Mediation Model Law. See fn.61 on the status of the UNCITRAL Mediation Model Law

reached through mediation must be in writing, but the settlement agreement can only be enforced like any other contractual agreement.[111]

96. The regulations on enforcing a settlement agreement vary from state to state, but this agreement is generally enforced by initiating a lawsuit.[112] Some states allow a simplified procedure of enforcement by "treating the agreements as arbitral awards in summary proceedings".[113] Other states, like Minnesota, restrict enforcement by procedural regulations. A written mediated settlement agreement must state that the agreement is binding, that the mediator has no obligation to protect the parties' interests or to give the parties legal advice, that signing a settlement agreement could negatively affect their rights, and that they need to consult an attorney if they do not understand their rights properly.[114] Colorado law states that a settlement agreement cannot be enforced unless documented in writing, approved by the parties and their attorneys, and approved by the court.[115]

97. Changing state laws created a new phase of development of mediation institutions, with federal and state lawmakers giving the courts and administrative bodies the authority to design mediation programs and providing guidance to the parties and the mediators. Institutionalization of mediation reflects the wide-scale adoption of mediation by public and private organizations as a common process for dispute resolution, with roots in the judicial reform. Mediation has become an integral and growing part of dispute resolution proceedings in courts, public authorities, community dispute resolution, and both commercial and business disputes. Nevertheless, statistics show that, contrary to common expectation that no disputes on enforcement of mediated settlement agreement occur,

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[111] Linklaters - "Commercial mediation in the U.S."- 1/4/2020
Available at https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/us (last visited on 20/5/2021)

[112] Edna Sussman - A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony - IBA Legal Practice Division - Mediation committee newsletter - April 2006
Available at https://sussmanadr.com/docs/IBA_mediation_enforcement_0406.pdf (last visited on 20/5/2021)

[113] Polsineli PC, "Mediation in USA", 9/9/2019
Available at https://www.lexology.com/library/detail.aspx?g=1afc5951-1db6-4f91-8e3b-500022484dbd (last visited on 20/5/2021)
See further Edna Sussman, Final Step: Issues in Enforcing the Mediation Settlement Agreement, in Arthur W. Rovine (ed), Contemporary Issues in International Arbitration and Mediation, Fordham Law school, 2009, pages 343-359
Available at
https://epdf.pub/contemporary-issues-in-international-arbitration-and-mediation-the-fordham-paper7885489d4d7163ad548b755d0e0cfea215894.html
Also see California Code of Civil Procedure, Section 1297.401.

[114] See Minnesota Civil Mediation Act (Minnesota Statutes 2020) Section 572.35

[115] See Colorado Revised Statutes 2016, Session 13-22-308.

the number of disputes on enforcement remains relatively high - likely due to a litigious, adversarial culture. Over the 2013-2017 period, total 1668 cases on enforcement of settlement agreements were recorded, ofwhich 37% were related to enforcement denfenses (620 cases), the remains concerned interpretation and breach of settlement agreements or class action..[116] In more recent years, mediation became extremely common and generally working well, with some concerns only regarding the enforcement of settlement agreements originating from international mediation.[117]

2. The Singapore Convention in the US

98. The US is the initiator of the development of the Singapore Convention,[118] actively participating in the negotiations of the text in Working Group II. The US was among the first 46 signatories to the Convention, but it has not ratified it yet, despite apparently strong internal support. Several trade groups, including the Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and the United States Council for International Business, sent a letter to then Secretary of State Michael Pompeo as early as November 2018, expressing their "strong support for the United States signing and ratifying the Singapore Convention on Mediation."[119] The groups argued that "by encouraging the use of mediation as a viable path to resolving commercial disputes, the Convention reduces cost and eliminates the needs for duplicative litigation."[120] The American Bar Association, in its 2020 Report also "urges all nations, including the United State, to become party to and implement the […] Singapore Convention." [121] The Report also recommends that the US law enforcement agencies and the Senate consider the Convention to be self-executing in the US or if

[116] James R. Coben - "Evaluating the Singapore convention through a U.S.-centric litigation lens: lessons learned from nearly two decades of mediation disputes in American federal and state courts"Singapore Mediation Convention Reference Book -Cardozo Journal of Conflict Resolution volume 20–number 4–2019 - page 1078
Available at https://cardozojcr.com/wp-content/uploads/2020/01/Singapore-Mediation-Convention-Reference-Book.pdf (last visited on 20/5/2021)
[117] See S.I. Strong, Realizing Rationality: An Empirical Assessment ofInternational Commercial Mediation, 73 WASH. & LEE L. REV. 1973, 2019, 2054 (2016)
[118] A/CN.9/822
[119] Letter to The Hon. Michael R. Pompeo (November 6, 2018)
Available at https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SignaporeConventiononMediation_11.6.18.pdf (last visited on 20/5/2021)
[120] Idem
[121] American Bar Association, Resolution No. 104A, 17/2/2020
Available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2020/2020-midyear-104a.pdf

implementing legislation is needed, that legislation to be at federal level, similar to the Federal Arbitration Act implementing the New York Convention.[122]

99. There is currently no official position regarding the ratification of the Convention in the US. The U.S. Department of State Advisory Committee on Private International Law scheduled a discussion on the "finalisation" of the Singapore Convention to be included in its annual meeting in 2020[123] held online due to the pandemic, but minutes of that meeting have not yet been released at the time of this Report. Given the strong support to the Convention and the steady growth in adopting the UNCITRAL Model Law-based Uniform Mediation Act, it is likely that ratification by the US is only a matter of time. The topic is presumed to be temporarily side-lined by the pandemic, and the recent change in presidency requiring the prioritisation of other legislative matters and changes in international policy.

100. Before the President can transmit the Convention to the Senate, the executive must go through a complex internal process assessing how the US would comply with the international obligations created by the Convention.[124] Processes preliminary to ratification include identifying changes that need to be made to existing domestic legislation and deciding whether the Convention will be directly applicable in courts as self-executory, without the need for implementing legislation – a proposal supported by scholarly analysis[125] - or whether implementing legislation has to be created at federal or state level. For the latter case, a cooperative federalism approach is recommended, with a federal statute to apply in states that have not enacted a uniform state law regulating the same issue. If the US follows its long-standing tradition of labelling private law treaties as self-executory, the Convention will become judicially enforceable immediately upon ratification. Amendments to some domestic legislation may then be necessary to avoid conflicting provisions, but "self-executing treaties have a status equal to federal statute, superior to U.S. state law."[126]

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[122] Idem p.3

[123] U.S. Department of State Advisory Committee on Private International Law: Notice of Annual Meeting, 06.19.2020
Available at https://www.federalregister.gov/documents/2020/06/19/2020-13193/us-department-of-state-advisory-committee-on-private-international-law-notice-of-annual-meeting (last visited 20/5/2021)

[124] The Circular 175 procedure https://2009-2017.state.gov/s/l/treaty/c175/index.htm

[125] Timothy Schnabel -Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties- 30 Am. Rev. Int'l Arb., 265, (2020)
Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3320823 (last visited 20/5/2021)

[126] Stephen P. Mulligan, International law and Agreements: Their Effect upon U.S. Law, Congressional Research service 7-5700 (September 19, 2018)
Available at https://fas.org/sgp/crs/misc/RL32528.pdf (last visited 20/5/2021)

E. Australia

1. Domestic mediation law and practice

101. In Australia (also a federal state, like the US), there are mainly two types of mediation: private and court-annexed. Australia has seen a significant cultural shift embracing mediation over the past years, mainly as a result of government incentives, yet there is no mediation law, as such. The National Alternative Dispute Resolution Advisory Council (NADRAC), an advisory body to the Attorney-General of the Commonwealth of Australia between 1995-2011, developed a total of 155 reports, issue and consultation papers, and guidelines, to assist the government and the general public in understanding and using alternative dispute resolution mechanisms, including mediation. The work of NADRAC is since continued by its private successor, the Australian Dispute Resolution Advisory Council (ADRAC), gathering mediation practitioners, researchers, and academics. Private mediation is only regulated by professional organisations, mainly through the accreditation of mediators. All mediators are expected to be accredited to practice under the National Mediator Accreditation System (NMAS), a voluntary industry system.'[127] Regardless of the absence of a statutory framework, private – and especially commercial – mediation is a service frequently used from specialised dispute resolution institutions.[128]

102. Court-referred mediation is regulated through civil procedure laws and court regulations. Australia courts in all jurisdictions can refer parties to mediation regardless of the parties' consent, or at the least require parties to make use of dispute management processes before litigation either to settle the dispute or to identify the issues to be decided by the court. The Civil Dispute Resolution Act 2011 at Commonwealth level requires parties to take "genuine steps" to resolve their dispute prior to resorting to litigation[129] - steps that commonly translate in mediation. Similar provisions exist in all state and territory civil procedure acts. Courts often also conduct pre- and post-mediation conferences, joint mediations, and may include mediation-like processes in their case management processes designed to enhance efficiency of civil proceedings. Delay or failure to mediate or mediate in good faith, may result in an adverse costs order. According to some authors, "the justifications for such legislation were almost entirely about the perceived capacity of mediation to save time and costs and to take pressure off crowded court dockets than they were about any intrinsic qualities of mediation and other DR processes that might

[127] Mediator Standards Board, National Mediator Accreditation System (NMAS) – Available at https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf

[128] The Australian Centre for International Commercial Arbitration (ACICA), the Australian Disputes Centre (ADC), the Australian Mediation association (AMA), are only the largest mediation providers, with a large number of smaller organisations and private businesses and mediators also operating successfully in the field.

[129] Civil Dispute Resolution Act (Cth) 2011 s6.

make them preferable to litigation."[130] Statistical data collected from a range of organisations indicates both a high level of success and a high level of user satisfaction with mediation,[131] despite Australia being labelled as a litigious culture with an adversarial legal system. The Federal Court of Australia also reports a high number of mediation referrals as a way of solving disputes before a matter proceeds to trial

103. There is also statutory mediation is some fields, like farm debt disputes, or native title claims. Under a more-or-less uniform state and territory level legislation, banks and other creditors must try to solve farm debt claims through mediation before attempting debt recovery on farm mortgages. Mediation is also included in the processes prescribed by the Native Title Act 1993 (Cth). Under this act, the National Native Title Tribunal conducts mediation (among other processes) to solve claims to recognise Indigenous rights and interests in land as preceding the arrival of the British colonists. Another medication-like, mainly statutory dispute resolution mechanism widely characteristic to Australia, is conciliation. Similar to the statutory mediation described in Korea and industry mediation in China, conciliation in Australia, however, is not synonym to mediation - although defining the term has posed significant challenge to the specialist literature.[132] Its process is based on mediation and most organisations require their conciliators to be trained in mediation, but conciliation is either statute-based and prescribed as a compulsory method in a wide range of disputes, or is conducted under the private rules of private organisations. Either way, conciliation seems to be closer to a rights-based than an interest-based approach to dispute resolution and conciliators are commonly required to ensure that the laws or rules governing the field of the dispute are respected. There are currently 96 laws that refer to conciliation in Australia, many of which entrust a conciliation function to an identified entity[133] but none of these laws define or describe conciliation,[134] which can be the source of uncertainty – especially considering that internationally, conciliation and mediation are often term used interchangeably.

104. With some minor exceptions, mediation in Australia is generally conducted on a "without prejudice" basis, meaning that information disclosed during mediation cannot be used as evidence in subsequent court proceedings. Mediations are also typically confidential, with all mediation institutions providing rules in this regard.

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[130] Andrew Hemming and Tania Penovic, Civil Procedure in Australia (Lexis Nexis Butterworths, 2015).
[131] See NADRAC, ADR statistics at https://apo.org.au/sites/default/files/resource-files/2003-08/apo-nid67080.pdf; Justice Connect, Using mediation to resolve conflicts and disputes at https://www.nfplaw.org.au/sites/default/files/media/Using_mediation_to_resolve_conflicts_and_disputes_Cth_0.pdf; Australian Bureau of Statistics, Industrial Disputes Australia at https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/industrial-disputes-australia/latest-release
[132] Pauline Collins, Dalma Demeter, Susan Douglas, Dispute Management (Cambridge University Press, 2021) 255-258.
[133] Ibid 15. and Appendix 7
[134] Ibid 24.

105. Settlement agreements resulting from mediation are enforceable under contract law. Some jurisdictions impose the formalisation of certain types of settlement agreements.[135] Settlement agreements may be incorporated in consent orders by courts, or in consent awards by arbitral tribunals – case in which they become enforceable as a court order or an arbitral award, accordingly.

2. The Singapore Convention in Australia

106. Australia signed the Singapore Convention on 10 September 2021, being the latest signatory at the time of this Report. Australia was actively engaged in the drafting of the Convention, with its expert delegate sent by the Government to represent Australia at every WG II session contributing to the wording and often conducting negotiations with other delegates when differences in opinions required compromises in drafting. The UNCITRAL National Coordination Committee for Australia (UNCCA), a private organisation established to promote and support the development and implementation of UNCITRAL instruments in Australia, also sent delegates as observers on behalf of Law Asia, who actively contributed to the development of the Convention. This active involvement from Australia in the development of the Convention was, however, followed by a relatively slow adoption of the Convention.

107. Australia has an internal policy according to which it only signs conventions that it is committed and confident that it can ratify and implement. Consequently, the Commonwealth Attorney-General's Department conducted a large-scale consultation before deciding to even sign the Convention. A total of 17 submissions were made in support of the adoption of the Convention, among others by the Law Council of Australia, the Australian Disputes Centre, the Council for Australian Dispute Resolution, the Australian Chamber of Commerce and Industry, the Mediator Standards Board, and the Resolution Institute.[136] The range of respondents to the consultation indicate that both the mediation industry but also the legal profession and businesses, are equally supportive of this legislative development. As a result of this public consultation, Australia recently signed the Convention.

108. As Australia is a dualist country, the Singapore Convention will have to be enacted into domestic legislation before it can take effect. The Convention will be tabled in both Houses

[135] For example, mediated settlement agreements in civil matters must be formalised under the Legal Profession Act 2004 s 4.3.12(1) in Victoria.

[136] All submissions are available at https://www.ag.gov.au/international-relations/publications/submissions-received-singapore-convention-mediation

of Parliament for scrutiny by the Joint Standing Committee on Treaties. Any legislative changes which are required to implement the Convention into domestic law must pass through both Houses of Parliament before the Convention will enter into force. Due to the well-developed national accreditation system, Australia has, exceptionally, no concerns regarding the professional standards referred to in the Convention. As the Convention regulates international settlement agreements, it is expected that the enacting legislation will be at federal, not at state level – similar to the legislative framework regulating international arbitration and the recognition and enforcement of foreign arbitral awards at the federal,[137] and domestic arbitration and awards at state and territory level.[138]

F. Germany and the European Union

1. Domestic mediation law and practice

109. Germany is part of the European Union (EU) regional political and economic union since its establishment; one of the current 27 member states. Due to the interaction between the EU level and national level legal systems, mediation is regulated both by the EU and by Germany; hence, Germany cannot be discussed without looking at EU legislation as well. At EU level, mediation is regulated through the European Mediation Directive 2008/52/EC, which requires Member States to achieve the results from the Directive without specifying how to do that internally in the Member States. The Directive applies to cross-border civil and commercial disputes and reflects the EU's overarching support and promotion of alternative dispute resolution methods. Its "principal objective […] is to encourage the recourse to mediation in the Member States"[139] and it defines mediation as a process designed to allow two or more disputing parties to voluntarily reach an agreement to resolve their dispute with the assistance of a mediator.[140] This process may be conducted at the request of the parties, recommendation or decision of a court or under the law of the member country, including mediation conducted by the non-presiding judge (court-annexed mediation). Article 6 of the Directive provides for the enforceability of the agreements resulting from mediation, giving the parties the option to record the

[137] International Arbitration Act 1974(Cth), based on the UNCITRAL Arbitration Model Law and incorporating the New York Convention.
[138] Commercial Arbitration Acts in each state and territory, harmonised based on the UNCITRAL Arbitration Model Law.
[139] EU Overview on mediation
Available at https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do
[140] European Mediation Directive 2008/52/EC, Article 3 (a)
Available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32008L0052

settlement as an enforceable title.[141] However, due to the broad scope of the Directive, the laws of European countries on the validity or enforcement of settlement agreements differ.[142] If recognized as a court ruling or an authentic instrument, enforcement of a settlement may be available for that instrument, based on the Brussels I Regulation.[143]

110. To implement the Mediation Directive, Germany enacted the Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution (2012) ('Mediation Act'). While the Directive applies exclusively to cross-border disputes, the German Mediation Act regulates ADR more broadly and does not differentiate between domestic and cross-border mediation. The Mediation Act defines mediation as a confidential and structured process through which the parties, voluntarily and autonomously, seek an amicable settlement of their dispute with the assistance of one or more mediators.[144] The Act provides only for general guidelines, leaving the parties and mediators a large degree of flexibility in how to conduct mediation. Following debate on whether to include in-trial mediation in the Act, that method is, instead, now recognised as a form of judicial conciliatory process. With only nine clauses (definition, process and tasks of the mediator, disclosure obligations, limitations on practice, duty of confidentiality, initial and further training of the mediator, certified mediator, authorization to issue statutory instruments, academic research projects and financial support of mediation, evaluation, and transition provisions), the Act does not provide for the enforcement of settlement agreements.[145] Depending on the content of the settlement, the Act requires the agreement to be in writing or notarized (for example, the transfer of ownership of land or shares must be notarized to take effect).

111. As a result of the Mediation Directive, the German Code of Civil Procedure and other statutes were also amended to align with the pro-mediation principle. For example, Sec. 253(3) of the Code of Civil Procedure, the plaintiff must provide the court with information on attempts made to settle the conflict before accessing litigation and what were the

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[141] Mediaton Directive Art.6.1

[142] Nadja Alexander - "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform" - Klaus J. Hopt; Felix Steffek (eds), Mediation: Principles and regulation in comparative perspective - OUP, 2012
Available at http://mediation-moves.eu/wp-content/uploads/2018/06/Alexander_Harmonisation-and-Diversity-in-the-Private-International-Law-of-Mediation-The-Rhythms-of-Regulatory-Reform.pdf

[143] European Parliament and Council Rules 1215/2012 dated 12/12/2012 on jurisdiction and recognition and enforcement of judgments in the civil and commercial matters available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF

[144] Germany, Mediation Act of 21 July 2012, sec. 1 par. 1
English version available at
https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html#:~:text=Mediation%20Act%20(MediationsG)&text=(1)%20Mediation%20is%20a%20confidential,of%20one%20or%20more%20mediators.&text=(3)%20The%20mediator's%20obligations%20shall,%2D%C3%A0%2Dvis%20all%20parties.

[145] Id.

reasons for not pursuing any such alternative dispute resolution methods. The court may also suggest that the parties attempt out-of-court dispute resolution during which the court may stay the proceedings.[146] Settlement agreements are recognised as contracts under German law.[147] Accordingly, the enforcement of mediated settlement agreements is regulated by the Code of Civil Procedure[148] and can be obtained through a range of different methods: with the assistance of a notary[149] or an attorney[150] and record it in a district court of competent jurisdiction or with court approval if the mediation is conducted in parallel with court proceedings,[151] or by converting the agreement into an arbitral award.[152]

112. Although many European Countries committed themselves to the European Code of Conduct for Mediators,[153] the German Mediation Act does not provide for such a code of conduct but leaves this aspect to be regulated by the private sphere. Combined with the more recent European Code of Conduct for Mediation Providers,[154] these codes provide a consistent framework across Europe securing the recognition of mediation as a valid dispute resolution mechanism. Both European Codes are used in Germany as an optional source of norms. According to a 2016 European Parliament Report on The Implementation of the Mediation Directive,[155] Germany is one of the few European countries to have more than 10,000 mediation cases per year. With a growing mediation practice and strong incentives created by the pandemic to regulate online and consumer dispute resolution, the German Mediation Act is planned to be amended to make room for the EU Regulation No. 524/2013 on online dispute resolution for consumer disputes.[156]

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[146] Germany, Code of Civil Procedure Sec. 278a

[147] Germany, Civil Code Sec. 779

[148] Germany, Code of Civil Procedure Sec. 796a - 796c and Sec. 794(1)5

[149] Id., Sec. 794(1)5

[150] Id, Sec. 796a(1)

[151] Id. Sec. 794(1)1

[152] Id. Sec. 794(1)

[153] European Code of conduct for mediators
Available at https://www.euromed-justice.eu/en/system/files/20090128130552_adr_ec_code_conduct_en.pdf (last visited 4/7/2021)

[154] European Code of conduct for mediation providers
Available at https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6 (last visited 4/7/2021)

[155] European Parliament - The implementation of the implementation of the Mediation Directive - Compilation of In-depth Analyses - 29 November 2016
Available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf (last visited 4/7/2021)

[156] Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)
Avaliable at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF (last visited 4/7/2021)

2. The Singapore Convention in the EU

113. Neither the EU nor Germany (or any other European country) has signed the Singapore Convention so far. Despite the strong support to mediation overall, the EU expressed concerns about the Convention during the WG II negotiations – in which the EU engaged on behalf of its member states. The Mediation Directive is the basis for German legal development but it has otherwise not been well used within other member states, which adds to some scepticism towards the Singapore Convention as well.[157] Regardless, the EU concern consisted primarily in the potential overlap between the Singapore Convention and EU instruments governing mediation like the Mediation Directive, or other instruments regulating choice of forum,[158] or the enforcement of other dispute resolution outcomes.[159] Based on the final text of the Convention, none of the concerns regarding conflict with other conventions remains justified. There is a partial overlap, however, with Art. 6 of the Mediation Directive. Since the Directive does not have legal status and is not directly applicable within member states, this partial overlap is not a source of legal concern. In any case, the Singapore Convention is not applicable to settlement agreements recorded as a judicial document, therefore even if a member state adopted the Directive *ad verbatim*, the wording of the Singapore Convention would ensure that no conflict exists between the two provisions.

114. The delay in signing the Convention appears to originate from both legislative and non-legislative factors. On one hand, Europe as a whole has been overwhelmed by the implications of Brexit and is still battling with a pandemic of such extent that pushes everything else out of focus. Therefore, the Singapore Convention has not received the necessary level of attention from policy makers. On the other hand, it yet appears to be undecided whether the convention should be signed by the EU itself or its member states individually. The level at which the Convention would be signed would ultimately determine its position in the hierarchy and potential conflicts between the convention, EU law, and the national laws of member states. So far neither the European Parliament nor the European Council has taken position on this matter. Legal researchers are debating the

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[157] Sage Mediation - "What's Next for International Mediation in Europe?"- 29/1/2021 https://sagemediation.sg/blog/whats-next-for-international-mediation-in-europe/#_ftn1 (last visited on 20/5/2021)
See further
https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

[158] Hague Convention on Choice of Court Agreements (2005)

[159] Hague Convention on the Enforcement of Foreign Judgments, New York Convention

legal implications[160] and there are views from the profession[161] that the EU prefers to prioritise the further development of the Mediation Directive over introducing a new instrument by adopting the Convention. Finally, according to the EU representative at the WG II negotiations, whether to accede to the Convention will ultimately be a political decision.[162] Some member states appear to be eager to sign the Convention, especially those with significant market connections to Asia.[163]

115. The accession of European countries and preferably of the EU as a block, would be a significant support to the global recognition of mediation as a valid dispute resolution mechanism supplementing arbitration and litigation. In 2016 the European Parliament recommended that "there should be not only a minimum set of common private international law rules on key aspects of cross-border mediation, but also quick, affordable and simple ways to achieve the enforcement of cross-border settlements throughout the Union."[164]Adopting the Singapore Convention would be in line with that recommendation, which makes it to be a likely outcome as soon as the legal technicalities of doing so are clarified internally.

G. Lessons for Viet Nam

116. The Singapore Convention was passed on December 20, 2018 and has just come into effect on September 12, 2020.[165] With the exception of Singapore, countries that have a great influence on global trade such as the US, China, India, Australia, and the Republic of Korea, have signed the Convention but have not yet ratified it. European countries and Japan have not signed the Convention so far. There is a common tendency to compare the Singapore Convention with the New York Convention, given their similar scope in

[160] See Conflictyoflaws, Roundtable on the position of the European Union on the Singapore Convention on Mediation, https://conflictoflaws.net/2021/webinar-roundtable-on-the-position-of-the-european-union-on-the-singapore-convention-on-mediation/

[161] Henneke Brink, The Singapore Convention on Mediation - Where's Europe?, referring to statement made by Deborah Masucci, then Co-Chair of the International Mediation Institute - https://www.mediate.com/articles/brink-singapore-europe.cfm

[162] Consumer Protection BC, Henneke Brink - "The Singapore Convention on Mediation - Where's Europe?", 3/2021 Available at https://www.mediate.com/articles/brink-singapore-europe.cfm (last visited 4/7/2021)

[163] Sage Mediation - "What's Next for International Mediation in Europe?"- 29/1/2021 https://sagemediation.sg/blog/whats-next-for-international-mediation-in-europe/#_ftn1(last visited 20/5/2021)

[164] European Parliament - The the implementation of the Mediation Directive - Compilation of In-depth Analyses - 29 November 2016 - p. 70 https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf (last visited 4/7/2021)

[165] Singapore Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (last visited 4/7/2021)

promoting and giving global recognition to alternative methods to solve international commercial disputes and through this to support trade development. The New York Convention's success of having 168 member states took over 60 years to achieve. Its early performance is comparable with the status of the Singapore Convention. The historical adoption rate for the New York Convention is of approx. 2.7 ratifications or accessions per year. International commercial treaties typically do not enjoy high visibility on the political agenda and do not get priority by legislators, unless there is very strong industry interest and support or some institutional mechanism capable of effective promotion.[166] Based on the current level of international trade, of the level of acceptance and practice of ADR in general, and of the current level of harmonisation of international trade law, it is unlikely that the Singapore Convention would take as long as the New York Convention to achieve similar popularity. It is more likely that lessons learned from the New York Convention will contribute to the success of the Singapore Convention and that dispute resolution industry – where developed – will successfully determine legislators to adopt and implement the Convention. At the same time, the very modest performance of instruments like the Hague Judgments Convention, indicate that successful legal harmonisation is far from guaranteed.

117. The experience of the selected countries presented above shows that there is no dominant trend in the development of domestic mediation legislation in general or the recognition and enforcement of settlement agreements in particular. The adoption of the former Conciliation Model Law in 33 states comprising of 46 jurisdictions over a period of 15 years is indicative of a steady level of harmonisation, corresponding with the steady increase in the popularity of mediation even where mediation was not an integral part of culture and legal tradition. The initiative to develop an instrument like the Singapore Convention supported unanimously by the 60 UNCITRAL member states, is also indicative of a growing need and relevance of international commercial mediation benefiting of harmonised regulation.

118. The speed at which the Singapore Convention will become widely adopted depends on a variety of factors ranging from legal and practical pragmatism to political. The monist or dualist nature of a legal system determines whether the Convention becomes directly applicable once ratified or needs to be implemented through domestic legislation. In either scenario, potential conflicts between existing domestic laws and the provisions of the Convention are preferred to be eliminated before adopting the Convention, rather than leave them to be solved in court through a hierarchy of norms principle. Many countries have a strong policy of only signing a convention once it can be implemented but

[166] Luca Castellani, Uniform law and the production and circulation of legal models (to be published)

mapping out such potential conflicts; eliminating them is a time-consuming internal process that is not always obvious to the outside world. Lack of political will or policy prioritisation over more pressing matters, as well as political strategy in waiting for ally jurisdictions' lead to adopt the Convention first, are all additional factors determining how the global map of a convention's coverage is developed.

119. Singapore has blazed the trail by rapidly amending its laws and enacting an Act to implement the Convention. Agreements covered by the Convention may be enforceable under the Convention Act or the domestic law of Singapore if certain conditions are met. This Act is expected to be detailed by guiding documents, especially on specific court proceedings. This model shows that adopting the Convention is possible through prompt internal legislative development in order to serve the purpose of trade development. The same is not as easy to achieve by countries whose legal system is unable to be easily amended due to its federal nature like the US, or due to the unique legal complexity of the European Union. Nevertheless, both the US and Germany show strong support to commercial mediation. The US just introduced harmonised mediation legislation in the 13th state and was the initiator of the negotiations that led to the development of the Singapore Convention. The European Union has an EU-wide Directive urging its member states to develop uniform domestic laws regulating commercial mediation and Germany is leading within the EU with its mediation practice. In this context, it is reasonable to expect both the US and the EU to adopt the Convention as soon as their internal processes for doing so are clarified.

120. The countries that will adopt the Convention will have both a commercial and a strategic regional advantage. Even though mediated settlement agreements reflect the disputing parties' voluntary agreement in solving a commercial conflict and as such is expected to be voluntarily performed, the certainty of a legal framework securing relief based on such a settlement agreement makes trading with partners from those jurisdictions more attractive. The other advantage that adopting countries can exploit consists in a pro-ADR reputation. By adopting domestic laws that are supportive of alternative methods of solving international commercial disputes, some countries attract disputing parties to solve their disputes in that jurisdiction. Singapore is an example of successfully adopting this policy and becoming a leading dispute resolution hub in the Asia-Pacific region. Hosting the signing ceremony and being the first to ratify the Singapore Convention[167] were also part of this strategy.

[167] Ratification by Singapore and Fiji are from the same date of February 25, 2020.

IV. VIETNAMESE LEGISLATION AND PRACTICE ON COMMERCIAL MEDIATION

121. In order to assist the decision on whether Viet Nam should accede to the Singapore Convention, this Report will assess the compatibility between the existing mediation legislation and practice. For this purpose, the Report will look at the current Vietnamese legislation regulating mediation to see whether and if so where there might be provisions that are overlapping, conflicting, or aligning with the Convention in scope, substance, and operation. The Report also looks at the practice of mediation in Viet Nam to assess whether the Convention would serve and support that practice.

A. Vietnamese law on mediation and its compatibility with the Singapore Convention

122. For the purposes of this Report, the compatibility between the Singapore Convention and the laws of Viet Nam will be assessed with focus on Arts. 1-6 of the Convention, not including the public international law provisions from Arts. 7-16 regarding accession, reservation, and entry into force. The related provisions from Viet Nam to be considered are primarily located in Decree No. 22/2017/ND-CP dated 24/02/2017 of the Government on commercial mediation (Decree No. 22/2017/ND-CP), the Commercial Law 2005, and the Civil Procedure Code 2015. Based on this compatibility assessment, the Report will make recommendations on any amendments necessary for the Vietnamese domestic law to align with the provisions of the Convention, should Viet Nam decide to accede to the Convention.

1. Scope of application

123. Art. 1(1) of the Convention states that "the Convention applies to an agreement resulting from mediation […] to resolve a commercial dispute which, at the time of its conclusion, is international." Therefore, the scope of the Convention has five elements to consider. First, (a) the Convention only regulates directly the enforcement and reliance on the resulting settlement agreement, not the mediation process leading to it. Second, for a settlement agreement to fall within the scope of the Convention it also needs to satisfy three conditions: (b) mediation to be the process used for solving a dispute (c) that is of commercial nature, and (d) the internationality of the resulting settlement agreement. Finally, (e) this settlement agreement must be in writing.

a. Settlement agreement

124. Mediation in Viet Nam is regulated by Decree No. 22/2017/ND-CP, the scope of which is to "[prescribe] the scope, principles, order and procedures for dispute resolution by commercial mediation, commercial mediators, commercial mediation institutions, Vietnam-based foreign commercial mediation institutions, and state management of commercial mediation activities."[168] The scope of the Vietnamese law is, accordingly, to regulate mediation process and service providers, the first of which is similar in scope with the UNCITRAL Mediation Model Law. The effect of the Convention on a mediation process is only indirect, through the grounds on which relief based on the settlement may be refused (to be discussed further below). With regard to the resulting settlement agreement, Decree No. 22/2017/ND-CP provides that the written record of the agreement "is binding on the parties in accordance with the civil law"[169] and "shall be recognised in accordance with the civil procedure law."[170]

b. Mediation

125. Art. 2.3 of the Convention provides that, no matter what the parties call it,

> *"Mediation" means a process […] 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.*

126. Decree 22/2017/ND-CP does not define mediation, only commercial mediation, as "a method of resolving commercial disputes agreed upon by involved parties with the assistance of a commercial mediator acting as an intermediary in accordance with this Decree."[171] Further provisions of the Decree include the mediators' obligation "to refrain from acting as a representative of or an advisor for any of involved parties or concurrently acting as an arbitrator for the same dispute of which he/she is mediating or has mediated the resolution, unless otherwise agreed upon by the parties."[172] While none of the Vietnamese provisions explicitly states that mediators do not have the authority to impose a solution on the parties as the Convention does, Art. 14.3 of Decree 22/2017/ND-CP

[168] Decree No. 22/2017/ND-CP Art. 1.1.
[169] Decree No. 22/2017/ND-CP Art. 15.1
[170] Decree No. 22/2017/ND-CP Art. 16
[171] Decree No. 22/2017/ND-CP Art. 3.1
[172] Decree No. 22/2017/ND-CP Art.9.2.dd/

states that "at any time in the mediation process, a commercial mediator may put forth proposals for dispute resolution." The "proposal" nature of a possible resolution, the "intermediary" role of the mediator, and the "assistance" the mediator provides, reflect an overall concept of mediation that is identical with the definition from the Singapore Convention.

c. Commercial nature

127. The Convention links the commercial characteristic to the dispute in its Art. 1 and refers to "commercial disputes," "commercial relationship," and "commercial parties" in its Preamble. As opposed to this, Decree No. 22/2017/ND-CP talks about commercial mediation, its scope in this regard being closer to that of the Mediation Model Law. The Model Law defines "commercial" for this purpose to have "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."[173] Decree No. 22/2017/ND-CP of Viet Nam lists three categories of disputes to be resolved through commercial mediation, as follows:

1. Disputes arising from commercial activities.

2. Disputes between parties at least one of them is engaged in commercial activities.

3. Other disputes which are prescribed by law to be resolved through commercial mediation.[174]

128. As per Clause 1, Article 3 of the Commercial Law 2005, "commercial activities mean activities for the purpose of generating profits, including sale and purchase of goods, provision of services, investment, commercial promotion and other activities for profit." Based on this, there appears to be no conflict between the commercial scope of the UNCITRAL and Viet Nam texts, but Art. 2.2-2.3 of the existing domestic legislation is broader. The consequence of this may be that settlement agreements resulting from a mediation conducted under the current Vietnamese legislation may encounter difficulties in being recognised under the Singapore Convention if falling under Art. 2.2. or Art. 2.3 of Decree No. 22/2017/ND-CP, if the dispute itself does not qualify as commercial.

[173] UNCITRAL Mediation Model Law fn.1
[174] Decree No. 22/2017/ND-CP Art. 2

d. International character

129. Vietnamese law defines civil relationships (including business and commercial relationships) with foreign elements (3 cases)[175] but these foreign elements are different from the internationality of the settlement agreement in the Convention. The Convention determines the internationality of the settlement agreement based on the disputing parties' places of business. In Viet Nam, the territorial jurisdiction of courts for commercial disputes is usually determined by the location of the head offices of the defendants (if the defendants are organizations or legal entities) or their residence or workplace.[176] Art. 2(1) of the Convention provides the basis for determining the place of business for the purposes of the Convention when a party has more than one or no place of business – in the latter case providing for "the party's habitual residence" to be considered as its place of business.[177] Vietnamese law does not have specific provisions on this issue. The closest provision to this matter is in Point d, Clause 2, Article 35 of Commercial Law 2005, which provides for delivery of goods at the buyer's "place of residence identified at the time the purchase and sale contract is entered into in cases he/she has no place of business."

130. The absence of an international element in the existing Vietnamese mediation law means that there would be no overlap in scope between Decree No. 22/2017/ND-CP and the Singapore Convention. Decree No. 22/2017/ND-CP gives recognition to mediated settlement agreements conducted under domestic law, while the Convention would give effect to international settlement agreements. Domestic law may need to be supplemented with clarifications on the relevance of place of business in order for Vietnamese parties to be able to make use of the Singapore Convention's recognition of their mediated settlement agreements.

e. Written form

131. The Convention defines a settlement agreement as "an agreement resulting from mediation and concluded in writing by the parties to resolve a commercial dispute"[178] further clarifying that the written form requirement is satisfied "if its content is recorded in any form," recognizing electronic form, provided that "the information contained therein is accessible so as to be useable for subsequent reference."[179] According to Art. 3.4 of

[175] Viet Nam, Civil Code, Art 663.2
[176] Viet Nam, Civil Procedure Code, Art 39.1(a)
[177] Singapore Convention Art. 2.1(b)
[178] Singapore Convention Art. 1.1
[179] Singapore Convention Art. 2.2

Decree No. 22/2017/ND-CP, "the successful mediation result is an agreement between disputing parties on the resolution in part or in whole of an arising dispute". Art. 15.1 of the Decree. No. 22/2017/ND-CP stipulates that "the successful mediation result shall be made in writing by the parties".

132. In this regard, Vietnamese law is consistent with the Convention concerning the written form of the settlement agreement. Although the electronic form of a settlement agreement is not governed by Vietnamese law on mediation, a settlement agreement recorded in electronic format would be valid pursuant to Art. 12 of the Law on Electronic Transactions 2005.[180] For the ease of convenience and to avoid the need to rely on the Law on E-transactions, the domestic mediation law could be amended to have specific provisions on the settlement agreements in electronic forms, regardless of whether Viet Nam accedes to the Convention or not. Such amendment, however, is not necessary for the Convention to be implemented in Viet Nam or for Vietnamese mediation settlements to be recognised under the Convention.

2. Exclusions

133. To further clarify the scope of application, Art. 1.2 and 1.3 of the Convention specifies cases of non-application of the Convention, including mediation of disputes arising from consumer transactions, family, inheritance or employment law, court proceedings, or arbitration. Vietnamese law also separates commercial mediation and consumer dispute mediation. Decree 99/2011/ND-CP dated October 27, 2011 of the Government guiding the Law on the Protection of Consumers' Rights 2010 has provided a separate mechanism for mediation for disputes between businesses and consumers, in which the standards of mediators and mediation institutions are different from the Decree on commercial mediation. Vietnamese law also stipulates that family and inheritance cases are civil ones, not in commercial matters. Mediation in labour cases is carried out by labour mediators stipulated in the Labour Code 2019 and Decree 145/2020/ND-CP dated December 14, 2020 detailing a number of articles of the Labour Code regarding working conditions and labour relations.

134. Art. 416 of the Civil Procedure Code 2015 (CPC 2015) stipulates the extent to which mediation results will be recognized by the court. Settlement agreements recognised

[180] Law on Electronic transaction – Article 12 - Data messages being as valid as documents: "Where the law requires information to be in writing, a data message shall be considered having met this condition if the information contained therein is accessible and usable for reference when necessary."

under this provision must originate from mediation performed by agencies, organizations or persons in charge of mediation in accordance with the law on mediation. As opposed to this category, settlements reached during litigation that become part of a judgment are subject to recognition as such under Art. 212 of the CPC 2015. Similarly, settlement agreements that are included in an award of the arbitral tribunal recognizing the agreement of the parties are recognised as an award under Art. 58 of the Law on Commercial Arbitration 2010. Neither of them being recognised as a mediated settlement agreement, the Vietnamese legislation is consistent in this sense with the exclusions of the Singapore Convention.

3. Procedures for recognition of a settlement agreement

135. According to Art. 3 of the Convention, the procedures for recognition a settlement agreement shall be carried out in accordance with the domestic laws of the Member States. Therefore, if acceding to the Convention, the law on recognition of commercial mediation results of Viet Nam will apply, consisting in provisions of Chapter XXXIII of the CPC 2015 on procedures for recognition of successful out-of-court mediation results. Art. 416 of the CPC 2015 stipulates that:

> *The Court shall consider issuing the decision to recognize the result of an out-of-Court mediation in a dispute between agencies, organizations and individuals that is conducted by a competent agency, organization or individual according to law regulations on mediation to be a successful mediation result.*

136. However, with the provisions of Decree 22/2017/ND-CP, the order and procedures in Chapter XXXIII of the CPC 2015 only apply to results of commercial mediation conducted by commercial mediators, mediation institutions and foreign mediation institutions in Viet Nam. It does not cover commercial mediation results of foreign mediators and mediation institutions established and operated overseas.

137. Due to the internationality (foreign elements) of the settlement agreement under the scope of the Convention that is based on the places of business of the parties, not on the nationality of the mediator or the mediation institution, there are two scenarios. Under the first scenario, when a settlement agreement is implemented by a commercial mediator, a mediation institution, or a foreign mediation institution based in Viet Nam (commercial mediators and mediation institutions are governed by Decree 22/2017/ND-CP), Chapter XXXIII of the CPC 2015 is applied to recognize the mediation results. In this case, the provisions of Vietnamese law are consistent with the requirements of the

Convention. Under the second scenario, for the settlement agreement implemented by a foreign commercial mediator or a foreign mediation institution to be enforced in Viet Nam, it should be recognized and enforced in accordance with related legal provisions. In that case, Chapter XXXIII of the CPC 2015 shall not apply. However, a settlement agreement is not considered to be recognized and enforced in Viet Nam under Clause 2, Article 423 of the CPC 2015[181] because a decision of a foreign competent authority (besides the court) is only recognized and enforced in Viet Nam if it is on personal identities, marriage and family. Vietnamese law has not had provisions on the recognition and enforcement of the settlement agreement within the scope of the Convention.

138. Therefore, in the event that Viet Nam decides to accede to the Convention, it is necessary to supplement Article 416 of the CPC 2015 to allow the recognition of settlement agreements by agencies, organizations or persons with the authority to carry out mediation in accordance with the international treaty to which Viet Nam is a member.

4. Requirements for reliance on settlement agreements

a. Requirements on documents

139. Art. 4.1 of the Convention requires that a party seeking relief must provide to the competent authority of a Party to the Convention the signed settlement agreement, and evidence that the settlement agreement resulted from mediation. The Convention then provides a list of examples on what can be accepted as evidence demonstrating that the settlement resulted from mediation. As per Art. 4.3, the competent authority may (but is not obliged to) request for a translation of these documents if the original is not in the official language of the party to the Convention where the relief is sought.

140. Article 418 of the CPC 2015 stipulates that a party requesting recognition of successful mediation results from outside of court must have a petition and a document on the settlement achieved in accordance with relevant laws. For a request to recognize the settlement resulting from a commercial mediation conducted under Vietnamese law, the settlement agreement must be signed by the parties and the mediator in accordance with Art. 15.3 of Decree 22/2017/ND-CP. The Convention does not require that the mediator must sign a settlement agreement. Instead, the Convention allows for a range of options through which the mediation can be proven, not all of them requiring the mediator's

[181] Viet Nam, Civil Procedure Code, Article 423.2: "Decisions on personal identities, marriage and family of other foreign competent agencies shall be considered being recognized and enforced in Vietnam like civil judgments and decisions of foreign Court provided for in clause 1 of this Article."

signature.[182] Therefore, if Viet Nam accedes to the Convention, Article 416 of the CPC 2015 must be supplemented to allow for a settlement agreement that is not signed by the mediator to be recognised when relying on the Convention in Viet Nam.

b. Other conditions

141. Akin to the New York Convention, the Singapore Convention provides an exhaustive list of grounds on which a competent authority may refuse to grant relief, rather than a set of conditions for granting such relief. This puts the burden of proof on the party resisting the relief sought, not on the party seeking relief based on a mediated settlement agreement.

142. On the contrary, Article 417 of the CPC 2015 stipulates the conditions for a successful mediation result to be recognized by the court. In particular, the parties must have full civil act capacity; must have rights and obligations related to the content of the settlement agreement; must have sent a petition requesting the court to recognize the mediation; and the content of the settlement agreement must be based on voluntary agreement, not be against the law, morality, or aim at avoiding obligations towards the State or others. The CPC 2015 is silent on the burden of proof, hence, the general rules for burden of proof are applied. The applicant has the obligation to prove that the settlement agreement fulfils the conditions, while the person "against whom the relief is sought" has the right to prove that the settlement agreement does not fulfil those conditions as a defence.

143. In comparison with the respective provisions in Article 5 of the Convention, the conditions specified in Article 417 of the CPC 2015 correspond to the conditions of non-recognition of the Convention; it is only the burden of proof that is reversed. However, the Convention also lists additional grounds on which relief may be refused, that do not have a corresponding provision ion the CPC. Such grounds relate to the content and validity of the agreement (Art. 5.1(b)); the implementation of the agreement (Art. 5.1(c)), the mediator (Art. 5.1(e)-(f)) and the applicable law (Art. 5.1(b)). Thus, in terms of conditions and mechanisms for recognition of settlement agreements, while the Convention only provides general provisions on requirements for reliance on settlement agreements or grounds for refusing to grant relief, Vietnamese law specifies conditions for recognition of successful mediation results. Two different approaches lead to some differences such as the form of the settlement agreement; the burden of proof of the person who must implement the successful mediated settlement agreement; the reference to the settlement agreement by mediation; the law applicable to a settlement agreement and

[182] Singapore Convention Art. 4.1(b)(iii)-(iv).

the law applicable to mediator or mediation in general, especially in the case of mediation with internationality or foreign elements. These are provisions that need to be supplemented when Viet Nam decides to accede to the Convention so that Article 417 of the CPC is applicable to the recognition of the settlement agreement under the Convention.

5. Parallel applications or claims

144. Article 6 of the Convention provides that if an application or claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under Article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision. Upon request by a party, it may also order the other party to give suitable security. This content has not yet governed by Vietnamese law.

145. In summary, the settlement of commercial disputes through out-of-court mediation began to be recognized in Article 317 of the 2005 Commercial Law where mediation is recognized as a means for the parties to choose in case of disputes. The Investment Law 2014 then recognized mediation as a measure to resolve disputes in business investment activities (Article 14). In 2017, for the first time, the scope, principles, order and procedures for settlement, of commercial mediator, organization of commercial mediation, and expansion of regulations for organizations of foreign commercial mediation in Viet Nam were governed in the Government's Decree No. 22/2017/ND-CP dated February 24, 2017 on commercial mediation. The Decree has created a legal corridor for commercial mediation in Viet Nam, demonstrating the Government of Viet Nam’s policy to encourage disputing parties to use commercial mediation to settle disputes in commercial matters and other disputes required by law to be resolved through commercial mediation.

146. For the recognition and enforcement of the domestic commercial mediation agreement, the legal system is relatively complete. The provisions of Chapter XXXIII of the Civil Procedure Code 2015 stipulate that a competent court of Viet Nam shall recognize such agreement by a judgment with immediate legal effect, without appeal according to appellate procedures. At the same time, this judgement is guaranteed for enforcement by civil judgment enforcement. In addition, the law also stipulates that the non-recognition of a commercial mediated settlement agreement does not affect the content and legal validity of the settlement. There is no provision on the recognition and enforcement of international commercial mediated settlement agreements.

B. Commercial mediation practice and settlement agreements

1. Commercial mediation practice

147. Since Decree No. 22/2007/ND-CP took effect on April 15, 2017, 15 Mediation centres have been established, seven Arbitration centres which also provide mediation services have been operating, and more than 100 *ad hoc* mediators have registered to practice. Statistics on commercial disputes received by centres by the end of December 2020 is presented in the table below.[183]

Number of cases	Successful mediation	Invalid cases[184]	Value of successful mediation
27	11	16	Approximately 964 billion dongs

148. Although the above data is still incomplete (the number of cases received by mediators has not been recorded), it can be said that commercial mediation is recognized as an alternative dispute settlement method in Viet Nam. However, the very modest number of mediations requested and completed since implementing Decree 22/2017/ND-CP, also shows that businesses have not developed a strong interested in this method of dispute resolution. This can be for several reasons. Firstly, businesses have not yet understood mediation and its benefits such as cost and time savings, flexibility, good maintenance of business relationship, etc. Secondly, the settlement agreement's binding effect on the parties is no more than that of a contract; in order to force a party to implement the agreement when they do not voluntarily perform it, a court decision for recognition is still required. In addition, under the current statute of limitations laws (Article 156, 157 Civil Code 2015), when the parties fail to reach a settlement agreement resulting from mediation, the time spent on this procedure is not counted to suspend or restart a limitation period for initiating a lawsuit. This may also make the parties hesitate to choose this method when the statute of limitations for litigation is running short.

[183] The Ministry of Justice as the agency assisting the Government in performing the state management of commercial mediation has not yet assessed the implementation of Decree 22/2017/ND-CP, so there are currently no complete data. The figures shown in the Report were compiled from the currently active mediation centers.

[184] Cases where one of the parties withdraws the request for mediation or one party does not accept the settlement agreement.

149. As not many commercial disputes are resolved by mediation, Vietnamese mediators do not have the opportunity to practice their mediation skills and to accumulate experience. *C*ommercial mediation principles are not developed and the lack of clear regulations on the registration of mediators can lead to poor quality of mediation service. Finally, in order to create comfort and openness for the parties to the mediation, thereby improving the possibility to reach an agreement, it is necessary to study the regulations on the documents, information or opinions of the parties which shall not be used as evidence against them in court proceedings.

2. Settlement agreements in practice

150. Up to now, out of 11 cases of successful mediation at the Mediation Centres, there has been no case requiring the court to recognize the mediated settlement agreement pursuant to Chapter XXXIII of the CPC 2015. This shows that the results of commercial mediation in Viet Nam are respected and voluntarily performed by the parties without the intervention of state agencies. Therefore, there have not yet been any issues on the recognition of mediation results with regards to legal regulations or implementation.

151. However, aggregating data on the recognition of successful out-of-court mediation is challenging, as it has not been included in court statistics. Data on successful mediation is collected either from the mediation centres and mediators, or from the district people's court where a party is located. For the first method, there are cases where the mediation centre itself or the mediator cannot know whether the settlement agreement is requested to be enforced by a court. For the second method, it is necessary to know the parties' business places to be able to request the court which has jurisdiction to provide information. Therefore, in order to facilitate the monitoring, synthesis and evaluation of the recognition of successful out-of-court meditation results, the Supreme People's Court should prescribe statistical criteria in this field to facilitate timely intervention when the inconsistency in the application of law by local courts affects the implementation of the Convention, in case Viet Nam decides to accede to.

V. RECOMMENDATIONS

A. Assessment of Viet Nam's possibility to accede to the Singapore Convention.

1. The necessity of acceding to the Singapore Convention

152. The Party and State's policies on legal reform, judicial reform, and international integration all extend to the method of dispute settlement outside the court, including mediation. The aim is to reduce pressure on the judicial system, to increase efficiency of dispute settlement, to ensure the right to access justice, to protect legitimate interests for people and businesses, to develop business investment environment, and to expand commercial relations with other countries.

153. There is also demand for the Convention in practice. Although the statistical results available are modest, the potential for the development of mediation in Viet Nam is significant. The Asian tradition of dispute resolution forms the foundation for a flourishing commercial mediation. Since 2013, Singapore has targeted Viet Nam as a potential market to promote its dispute resolution services in general and mediation in particular.[185] Along with Vietnamese enterprises becoming more and more familiar with international trade relations, international dispute resolution and mediation have also become a remarkable option in the current context. As such, the need to enforce mediated settlement agreements also gradually arises. Early accession to the Convention will be an effective first step, meeting the needs of Vietnamese businesses choosing mediation, as well as Vietnamese mediation centres who want to reach out into the international market.

154. Accession to the Convention does not diminish the competitiveness of mediation centres in Viet Nam, but instead brings a balanced position with the mediation centres in the world where their successful mediation results are implemented in other countries, thanks to the Singapore Convention. When supporting the Ministry of Justice to participate in the activities of UNCITRAL Working Group II, mediation centres such as VMC, OPIC, VIMC, etc. all have written requests to Viet Nam to soon accede to the Singapore Convention. Many conferences and seminars such as the Singapore Convention Workshop and the Future of Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) in Asia by the

[185] Singaporean Ministry of Law, Final ICM WG Press Release - Annex A- 2013
Avaliable at
https://app.mlaw.gov.sg/files/news/press-releases/2013/12/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf
(last visited on 20/5/2021)

Viet Nam Business Lawyers Club (VBLC) held in Ho Chi Minh City on July 23, 2018[186] and the participation of Vietnamese representatives in the signing ceremony of the Convention in Singapore showed the great attention of both state management agencies and practitioners of this Convention.

155. Gaps in the legal system of commercial mediation require an effective mechanism to fix. The Singapore Convention is not a "panacea" but is a cure or remedy for the biggest weakness of mediation, contributing to complementing Viet Nam's domestic laws that only allow for the recognition of successful out-of-court mediated settlement agreements established or registered in Viet Nam by mediators or mediation centres.

2. Impact of the accession to the Singapore Convention

156. Stemming from the practical need and the requirements for institutional reform, the impact and benefits of Viet Nam's accession to the Singapore Convention should also be assessed. On studying the content of the Singapore Convention, assessing the current practice of commercial mediation and overall policies on international economic integration and improving the business investment environment in Viet Nam, the experts would like to analyse two impacts of acceding to the Convention.

a. Impact on commercial mediation in Viet Nam

157. The Singapore Convention itself helps ensure the implementation of international mediation agreements, thereby affirming the outstanding benefits of mediation such as cost and time saving, flexible and friendly procedures compared to other methods of dispute resolution. When acceding to the Singapore Convention, commercial mediation agreements made by mediators and Vietnamese mediation centres will be recognized and enforced in the Member States. Therefore, Vietnamese and foreign enterprises are assured when choosing this dispute settlement method. In addition, acceding to the

[186] ADR Viet Nam Chambers LLC - "Công ước Singapore về hòa giải và tác động của công ước lên hoạt động hòa giải từ góc nhìn của Trung tâm Hòa giải Việt Nam" tại hội thảo về Công ước Singapore và tương lai của ADR và ODR tại Châu Á" [Singapore Convention on Mediation and its impact on mediation from the perspective of Viet Nam Mediation Centre] - 2018
Available at
https://www.adr.com.vn/vi/tin-tuc/cong-uoc-singapore-ve-hoa-giai-va-tac-dong-cua-cong-uoc-len-hoat-dong-hoa-giai-tu-goc-nhin-cua-trung-tam-hoa-giai-viet-nam-tai-hoi-thao-ve-cong-uoc-singapore-va-tuong-lai-cua-adr-va-odr-tai-chau-a (last visited on 20/5/2021)

Singapore Convention brings an equal competitive advantage between Vietnamese mediation centres and international mediation centres, therefore promoting commercial mediation in Viet Nam.

b. Impact on the business investment environment in Viet Nam

158. Improving the business investment environment has long been a strategy of the Government of Viet Nam in the economic development process in the context of globalization and international integration. One of the solutions to improve business investment environment is to carry out institutional reform to create favourable conditions for businesses. Assession to the Convention is meant to create an international legal basis for the recognition and enforcement of settlement agreements resulting from mediation. Therefore, Viet Nam's accession to the Convention will add one more reason for foreign businesses and investors to consider doing business with Vietnamese enterprises as well as making investment in Viet Nam as they will have many options for dispute settlement, especially when mediation results are guaranteed to be enforced in Viet Nam.

3. Advantages and challenges to Viet Nam when acceding to the Singapore Convention

a. Advantages:

159. The policies of the Party and State show the political direction and determination of Viet Nam which is the prerequisite for the success. Many countries have signed the Convention even though their legal system does not yet have uniform regulations on commercial mediation. Viet Nam, on the other hand, already has a legal framework governing this field and has a mechanism to enforce successful mediated settlement agreements. The existing legislation provides for a solid foundation for the implementation of the Convention and facilitates the completion of the domestic legal framework, instead of having to build a completely new one.

160. The gradual growth of commercial mediation centres in Viet Nam is also a favourable condition for acceding to and implementing the Convention. Although the number of cases is still modest, the value of the disputes is impressive (11 cases of approximately 964 billion VND). The operation of mediation centres has also gradually improved. Many

centres have their own websites in foreign languages and a diverse team of mediators promising to offer services that can satisfy domestic and international customers.

161. The improvement of the judicial system also constitutes an advantage. After the Law on Organization of the People's Courts 2014 and the CPC 2015 were promulgated, the organizational structure and operation of the courts at all levels in Viet Nam has improved significantly. The judicial sector also runs programs to develop a team of judges and officers with knowledge and skills to meet integration requirements. The judges are also experienced in enforcing the New York Convention and in recent years, the rate of recognition of foreign arbitral awards also improved.[187]

b. Challenges

162. The Convention is still too new, with the concessions made by the parties negotiating the treaty not yet clarified through interpretation. In addition, States often prefer a multilateral mechanism whose effectiveness is measured in terms of the number of Parties. Because the Singapore Convention is still very new, the number of countries implementing the Convention is not high and international experience applying the Convention is still scarce. Early accession will require Viet Nam to study and assess the socio-economic impacts carefully to develop a detailed roadmap to ensure feasibility.

163. Although compatible, Vietnamese law still has differences with the Convention. The revision of the legal system also requires time and careful assessment to ensure consistency and synchronization. Commercial mediation in Viet Nam has not yet developed to its full potential. The review of the Decree on Commercial mediation has not been implemented. As statistics on the enforcement of mediated settlement agreements are not included in the court system's database, it is not possible to have an overall and comprehensive assessment of commercial mediation and the implementation of successful mediation results in Viet Nam. Having a bigger picture and a more complete strategy like Singapore has done to develop their dispute resolution industry, would be necessary.

164. The court system has been improved, but court specialization is not high. It is difficult to focus on developing a team of experienced judges specializing in handling cases with foreign elements in general and enforcing settlement agreements resulting from international mediation, in particular. The proposal to assign the courts in the three major

[187] Evaluation in the Report on the applicability of the Model Law on international commercial arbitration in Viet Nam conducted by the UNDP team of experts.

cities of Hanoi, Ho Chi Minh and Da Nang to resolve requests for recognition and enforcement of foreign arbitral awards was rejected in the process of amending the CPC 2004. This can serve as an early warning for similar efforts in mediation.

165. The number of mediation centres and mediators is high, but the number of experienced mediators is low. The modest numbers of mediation requests over the past years provided insufficient opportunity for mediators to practise. People, enterprises, and relevant entities also suffer from the lack of awareness of commercial mediation and of mediation's benefits. Even though this is not a direct hindrance, Viet Nam should still consider this as an issue to address when deciding to accede to an international instrument. These challenges can be relatively easily eliminated with information dissemination and education.

B. Proposals and recommendations

166. Based on the above assessment, the expert group proposes that Viet Nam should accede to the Singapore Convention. Signing and ratification/approval of the Convention may lengthen the procedure[188] without bringing any further benefits in this situation. Viet Nam missed the chance to advertise itself as a mediation friendly State by signing the Convention in Singapore. At present, signing and waiting for ratification/approval is not a good strategy. However, with the difficulties and challenges analysed above, the time of accession should be carefully considered. In the short term, Viet Nam needs to have a master plan with a detailed roadmap to ensure a suitable legal system and sufficient physical and human conditions to fully and effectively implement the Singapore Convention. The expert group would like to make the following proposals for Viet Nam’s preparation to accede to the Singapore Convention.

1. Legislative development

167. In Part IV of the Report, the expert group has pointed out the compatibility and the gaps between Vietnamese legal documents and the Singapore Convention. Therefore, when acceding to the Singapore Convention, the Vietnamese legal system on commercial mediation needs to be completed to avoid legal loopholes that negatively affect the

[188] The procedure is provided in Law on treaties, No. 108/2016/QH13, dated 9/4/2016

implementation of the Convention. In order to solve the institutional problems, there are two possible solutions:

a. Option 1

168. Amending and supplementing the existing legal documents. In Decree 22/2017/ND-CP, supplementing regulations on commercial mediation involving foreign elements, and including regulations on determining foreign elements according to where the business is conducted. In CPC 2015, regulations on recognition and implementation of successful mediation results involving foreign elements in accordance with the amendments of Decree 22/2017/ND-CP, and prescribing the court's jurisdiction over the enforcement of mediated settlement agreements involving foreign elements.

b. Option 2

169. Promulgating the Law on Commercial mediation, upgrading the Decree 22/2017/ND-CP into a law, and supplementing regulations on commercial mediation with foreign elements and recognizing the results of commercial mediation.

2. Institutional development

170. The Singapore Convention does not provide for a cooperation mechanism between Parties but specifies the responsibility of Parties to consider granting relief. Therefore, the Convention does not require the designation of a central body to implement it. However, to ensure the uniform implementation of the Convention, to manage and monitor the recognition of international commercial mediation agreements and to respect international commitments, it is essential to assign a focal point on the basis of analysing and evaluating the suitability and convenience of management to ensure efficiency. Based on the functions and tasks of the concerned agencies, the task can be assigned to the Supreme People's Court or the Ministry of Justice.

171. Second, the consideration of a request for enforcement of a mediated settlement agreement must be assigned to a number of courts. The court will be the body to deal with requests for enforcement of commercial mediated settlement agreements under the Convention. According to the expert group, in the future, the number of requests for such

enforcement in Viet Nam is likely to remain modest. However, the enforcement should be assigned to only a few courts to be specialized and professionalized, which would also facilitate the monitoring, management and evaluation of the implementation of the Convention.

172. Third, it is necessary to form a coordination mechanism among relevant agencies and organizations to promptly handle and resolve any issues arising in the implementation of the Convention. The relevant agencies are the Ministry of Jutice (especially the state management agency for commercial mediation), the Supreme People's Court, and the courts assigned to deal with requests for enforcement.

173. Forth, the establishment of a Viet Nam Mediator Association is encouraged and recommended, to gather qualified mediators having high competence, reputation and skills. A professional organisation gathering experienced mediators could contribute significantly to the further development of commercial mediation and of mediator training programs. The Association can also serve as a bridge connecting mediation centres, mediators and government entities to review practice and propose policies.

3. Education and capacity building

174. Capacity building through education is essential to develop a culture of mediation, a strong professional basis for mediation practice, and a well-equipped judiciary applying the Singapore Convention. Promoting communication and raising awareness of enterprises about the benefits of mediation would encourage businesses to choose this method of dispute resolution to promote commercial mediation in Viet Nam. Capacity building for mediators would also create confidence for the disputing parties to choose mediation, especially when one of the grounds for refusing to grant relief is related to the standards of mediators (Art. 5.1(e) of the Singapore Convention). In the long term, ADR (including mediation) should be implemented in law and business university curricula, as well as professional institutes' training programs, to ensure that future generations of practitioners graduate with the requisite knowledge and skills to apply alternative dispute resolution methods on a regular basis.

175. Campaigning and dissemination of knowledge about the Singapore Convention is also needed. The Convention is a new international instrument, so it is necessary to campaign about the Convention to promote clear understanding of its benefits as one of the first steps to prepare for the accession to the Convention. The accession to the Convention also requires Vietnamese courts to prepare resources for the handling of enforcement requests for mediated settlement agreements. Therefore, in order to avoid the allegedly improper enforcement of the New York Convention of some provincial people's courts, it

is important to raise awareness of judges and court officials about international commercial mediation and enforcement of international commercial mediated settlement agreements.