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# SINGAPORE CONVENTION AS A FLEXIBLE PROTECTIVE UMBRELLA FOR ENFORCEMENT OF SETTLEMENT AGREEMENTS

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**Abstract.** The article analyses the provisions of the Singapore Convention relating first, to the prerequisites for its applicability, second, to the evidence necessary to prove that a settlement agreement has been entered into before a mediator, and third, to the conditions for its effectiveness determined by objections aimed at refusing to enforce the settlement agreement. The purpose of this article is to assess the indicated regulations of the Convention and their potential imperfections and the difficulties they may generate in the course of the proceedings aimed at ensuring the enforceability of the settlement agreement. In the conclusion, it is pointed out that, despite its many imperfections, the Convention may constitute an important "protective umbrella" for international settlement agreements, the potential of which depends on the parties to the settlement and the legal solutions developed in the legal systems of the Parties to the Convention. The Convention will then not become a proverbial Trojan horse in the hands of a party bent on litigation obstruction.

**Keywords:** cross-border mediation; commercial disputes; international commercial mediation.

## INTRODUCTION

Economic globalisation, which is characterised by the increasing interdependence of economies based on trade, calls for an adequate level of security in legal transactions, including simple, rapid and non-costly methods of dispute resolution that enable reaching an agreement and establishing mechanisms to enforce the international agreements reached. Therefore, the ideas of creating an international legal framework that optimises the time, cost and ease of redress in a global economy by providing precise and at the same time effective enforcement tools in the event of unwillingness to voluntarily meet an obligation constitute an essential "umbrella" in fostering international economic cooperation. Within this cooperation, a central position with regard to alternative dispute resolution (ADR) of international disputes is occupied by arbitration and, more specifically, the legal effects produced by arbitral awards under the Convention on the Recognition and Enforcement

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of Foreign Arbitral Awards of 10 June 1958.[1] And although the ADR system has historically also included mediation, based to the greatest extent on the autonomy and self-determination of the parties and at the same time providing a broader opportunity to regulate the principles of cooperation through creative dispute resolution [Clark and Sourdin 2020, 493] rather than limiting itself to such resolution, it did not see a regulation analogous to settlement agreements resulting from mediation for many years after the adoption of the New York Convention. The main disadvantage of international mediated settlements was that, as standard agreements, they were not covered by an international mechanism for their recognition and enforcement, generating the need to initiate court or arbitration proceedings to obtain an arbitral award and then enforce it. Settlements reached in international mediation were therefore based on the mutual trust of the partners to deliver the settlement performance without regulation in the form of a simple, quick and effective procedure to ensure enforceability.

The attempt to fill a gap in the international ADR system by extending settlement agreements resulting from mediation to a mechanism analogous to the New York Convention, which is used by arbitral awards, was reflected in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018), which was initially received with great enthusiasm.[2] The Singapore Convention is a private international law agreement that entered into force on 12 September 2020 and which by July 2024 has been signed by 57 states, of which 14 have ratified it. It creates a harmonised framework, requiring signatories to recognise international settlements reached in commercial mediation to ensure their enforceability before a "competent authority" of a Party to the Singapore Convention. To date, neither the European Union nor its constituent Member States have signed the Singapore Convention, which does not operate on the basis of reciprocity, and settlement agreements resulting from mediation entered into have no state affiliation under the Convention. This therefore warrants the analysis and the attempt to answer the question of whether the provisions of the Singapore Convention are precise enough to "successfully", unobjectionably, and more simply and quickly ensure the enforcement of international mediated settlement agreements than it is possible before its ratification, or whether, due to the nature of its provisions, the Convention may prove to be a "Trojan horse", opening the way to procedural and formal review of the settlement, ultimately leading to its undermining, while nullifying the attributes of efficiency and simplicity of the procedure. In the context of the question posed and due to the limited scope of this article, the aim

[1] Journal of Laws of 1962, No. 9, item 41 [hereinafter: New York Convention].

[2] See https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements [hereinafter: Singapore Convention or Convention].

is not to analyse the provisions of the Singapore Convention in its entirety but to limit the analysis to selected practical aspects and key problems related to the prerequisites for the applicability of Convention provisions, the documentation of the fact of settlement and the defence objections that also determine the effectiveness of a settlement resulting from mediation.

## 1. PREREQUISITES FOR THE APPLICABILITY OF THE CONVENTION

According to a survey conducted by the International Mediation Institute,[3] more than 93 per cent of respondents would be "significantly more likely" or "likely" to mediate a dispute with a party from another country, as long as that country had ratified a convention allowing for the enforcement of international settlements reached through mediation. In turn, 90 per cent of respondents felt that the lack of an international settlement enforcement mechanism was an obstacle to the development of mediation for cross-border dispute resolution. Analysing the content of the Singapore Convention in the context of the cited survey results, one wonders whether its purpose was to strengthen the importance and spread of mediation as an international dispute resolution instrument. Or whether, due to the deformalised and thus flexible nature of mediation and its extremely capacious scope of meaning, it has merely become an accidental tool responding to the international demand for simple, quick and effective tools to ensure the protection of the self-determination process, simplifying the procedure for enforcing settlements by entrusting the mediator with the role of guardian of the mediation stamp, which distinguishes in its effects the settlement reached before it from other agreements, including those reached through ordinary negotiations. There is no doubt that the Singapore Convention achieves both of the stated objectives and represents an important step towards harmonising the international framework for different legal, social and economic systems to facilitate the building of international trade cooperation.

The Singapore Convention establishes four requirements for its provisions to be invoked in a country that has ratified it: a mediated settlement; in a recorded form (not necessarily in writing); in commercial disputes; of an international nature. In accordance with Article 1 of the Singapore Convention, it applies to written settlements reached in mediation to resolve a commercial dispute which are international at the time of their conclusion.

The first requirement, therefore, is the conclusion of a mediated settlement. The concept of mediation contained in Article 2(3) of the Singapore

[3] See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session, New York, February 2-6, 2015, U.N. Doc. A/CN.9/896, p. 6.

Convention has been harmonised with the definition of mediation contained in the 2018 UNCITRAL Model Law on International Commercial Mediation,[4] updated for consistency with the Singapore Convention. Thus, mediation means a process, regardless of the wording used or the basis on which it is initiated, whereby the parties attempt to reach an amicable resolution of their dispute with the assistance of a third party or parties (the mediator) who do not have the power to impose a solution on the parties to the dispute. The cited definition of mediation is constructed in the most universal and capacious way. It refers neither to rules relating to standards for the conduct of mediation nor to types of mediation. It also defines the mediator in a general manner, excluding the possibility of imposing a solution on the parties. However, this does not exclude the possibility for the mediator to make a non-binding proposal for the resolution of the dispute in an evaluative mediation. Furthermore, the definition of mediator also does not exclude the possibility of an AI robot playing the role of mediator, especially since Article 4 of the Convention does not require the mediator to draw up any documents and the signature of the settlement agreement is only optional. This is all the more so as mediation may be conducted using electronic communication and through ODR platforms [Alexander and Chong 2022, 24-25] and the settlement agreement may also be recorded in such a format. Definitions of mediation and mediator formulated in such general terms make the Convention a legal instrument supported by model law [Kożuch 2023, 279] through a tentative reference to UNCITRAL Model Law 2018, especially for Parties to the Convention that do not have developed mediation regulations or to the norms of mediation in force in the state where the party seeks to enforce the settlement. In the latter case, this opens the way to a number of interpretative doubts compounded by the content of Article 5(1)(e) and (f) of the Convention creating a risk of uncertainty in assessing and ensuring the enforceability of the mediated settlement agreement. They are also compounded by the risk that the settlement agreement may be challenged, which may be greater the further the mediation process deviates from the standards applicable in the State where the party seeks enforcement of the settlement agreement. This is especially the case since, on the basis of Article 3(1) of the Convention, each Party to the Convention shall enforce the settlement in accordance with its own rules of conduct.

The second requirement for the admissibility of invoking the provisions of the Convention in a signatory State is that the settlement agreement must

[4] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018), U.N. Vienna 2022 [hereinafter: UNCITRAL Model Law 2018], https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf [accessed: 10.06.2024].

be consolidated. Pursuant to Article 2(2) of the Singapore Convention, a settlement agreement is in writing if its content is recorded in any form. The requirement that the settlement agreement be in writing is also satisfied through the use of electronic communication if the recorded information is available in a manner that allows for subsequent use. The provisions of the Singapore Convention are disorderly in this respect because Article 1(1) and Article 2(2) of the Convention explicitly indicate the requirement of writtenness juxtaposed with the obligation of the parties to sign the settlement agreement under Article 4(1)(a) and the regulation contained in Article 4(2)(a), (b), which treats any reliable method that allows the parties or the mediator to be identified with an indication of intent with regard to the information contained in the electronic communication on an equal footing with the affixing of a signature and the written form. It therefore allows not only for electronic signatures but also for the use of other equivalent means from which it is clear that the parties have reached a settlement.[5] The requirement of writtenness may therefore be replaced by a reliable video and audio recording that identifies the parties, the mediator and the content of their statements.

The third requirement relates to settlements concluded to resolve commercial disputes involving pecuniary and non-pecuniary considerations [Schnabel 2019, 12], which in Article 1(2) of the Singapore Convention is defined negatively by excluding from the scope of the Convention settlements entered into by a consumer for personal, family or household purposes, as well as settlements under family, inheritance or labour law. Furthermore, the scope of the Convention does not include settlements that have been approved by a court or concluded in the course of proceedings before a court, provided that they are enforceable as judgments in the state of that court or have been registered and are enforceable as an arbitral award. In Poland, settlements that have been concluded before a mediator in the course of pending proceedings before a court, as long as they have not been approved by a court and are not enforceable, do not meet this requirement.

Under the Convention, a settlement is international provided that (a) at least two of the parties to the settlement have their places of business in different countries; or (b) the country in which the parties to the settlement have their places of business is different from the country in which a substantial part of the obligations under the settlement is performed; or the country with which the subject matter of the settlement is most closely connected. However, pursuant to Article 2(1) (a) of the Convention, if a party has more than one place of business, the relevant place of business is the one which bears the closest relationship with the dispute to be

[5] See UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session, New York, 27 June – 15 July, 2016, U.N. Doc. A/CN.9/861, p. 11.

settled pursuant to the settlement, having regard to the circumstances known to or contemplated by the parties at the time of settlement; or (b) if a party has no place of business, reference should be made to the party's habitual residence. The construction adopted in the Singapore Convention entails potential complications particularly where a party has more than one place of business and the parties are domiciled in the same country, and it is then necessary to consider the "closest relationship" and to do so having regard to the circumstances known or contemplated by both parties at the time of settlement. The premises determining the prerequisite of the international character of the settlement agreement justified by the flexibility of mediation including, in particular, the possibility to conduct it online, make the country in which the settlement agreement was concluded irrelevant for the assessment of that settlement's international character. What is decisive is the fulfilment of the prerequisites of "internationality" at the time the settlement agreement was concluded. This therefore implies a lack of state affiliation of the settlement, ruling out the possibility of identifying the jurisdiction to which the settlement agreements resulting from mediation is subject, contrary to the provisions of Article 1(1) of the New York Convention. This is because that convention adopts the concept of a place of issuance of the arbitral award other than the place where recognition and enforcement of the award is sought while ensuring under Article 5(1)(e) a procedure for reviewing the award through the possibility of revoking it or suspending its enforcement in the country of its issuance. The statelessness of the settlement agreement resulting from mediation, on the other hand, excludes the possibility of its review in the country of origin[6] [Staute and Wansac 2021, 40-55] since that place is undetermined or extremely difficult to determine. Thus, a settlement agreement resulting from mediation does not have to comply with the law of the country in which it is concluded, including in terms of standards relating to the conduct of mediation and the mediator.

The above prerequisites for the admissibility of the provisions of the Singapore Convention constitute the first stage of the review conducted by the "competent authority of the Party to the Convention"[7] to which

[6] "During the discussion, a view was expressed that a court of the originating state might be better suited to review some of the defences mentioned above for procedural efficiency, and it was suggested that a review mechanism should be incorporated at the originating state. In response, the difficulties in determining the originating state were reiterated", see UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session, New York, 27 June – 15 July, 2016, U.N. Doc. A/CN.9/861, p. 18.

[7] The competent authority shall be a court or other competent authority in accordance with the law of the Signatory State in which the application is lodged analogous to the regulation of Article 6(2) of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, pp. 3-8) [hereinafter: Directive 2008/52/EC].

the enforcement of the settlement agreement has been requested. Contrary to what one may think, the assessment of the said prerequisites may prove to be an immensely time-consuming process, requiring "all the necessary documents", which under Article 4(4) of the Singapore Convention, the "competent authority" may request in order to verify that the requirements of the Convention have been met, in particular omitting Article 4(5) of the Convention, which provides that the application should be examined promptly. It should be noted that among the documents/evidence to be produced to the competent authority to ensure the enforcement of the settlement, as indicated in Article 4 of the Singapore Convention only includes evidence of the fact that a settlement has been reached in mediation and before a mediator. Among them, there is no mention of evidence of meeting the prerequisite of "internationality". Therefore, it can be assumed that they should be apparent from the content of the settlement agreement or from the documents attached to the settlement agreement facilitating and expediting the assessment of this prerequisite by the competent authority of a Party to the Convention, but this should be taken care of by the parties to the settlement agreement.

## 2. PROOF OF A MEDIATED SETTLEMENT AGREEMENT AND CONDITIONS FOR ITS EFFECTIVENESS

Article 4 of the Singapore Convention contains a catalogue of evidence to be submitted to the "competent authority" of a Party to the Convention to ensure its enforcement. The jurisdiction of the authority to which a party to a settlement agreement may apply should be derived from the internal regulations of the Party to the Convention which, in addition to the provisions of the Singapore Convention under Article 3(1) will apply to the procedure for securing enforcement of the settlement agreement. This will require the Parties to the Convention to regulate an internal procedure which in the member states of the European Union could be similar to the procedure for ensuring the enforcement of settlements concluded before a mediator by analogy with the regulations from the transposition of Directive 2008/52/EC.

The essential evidence to be presented to the competent authority is the settlement document signed by the parties (Article 4(1)(a) of the Convention) together with proof that the settlement was concluded before a mediator (Article 4(1)(b) of the Convention). Evidence that the settlement was concluded before the mediator may be the mediator's signature on the settlement agreement (Article 4(1)(b)(i) of the Convention), a document signed by the mediator indicating that the mediation was carried out (Article 4(1)(b)(ii) of the Convention), an attestation by the institution that administered the mediation (Article 4(1)(b)(iii) of the Convention) and only in the absence of the above-mentioned evidence – any other evidence

acceptable to the competent authority of a Party to the Convention (Article 4(1)(b)(iv) of the Convention). The last possibility is the “lifeline” thrown by the Singapore Convention, opening the way to confirm the fact of mediation by any means that corresponds to the internal regulations of a Party to the Convention. Perhaps a better solution, however, would be the wording of Article 4 of the Singapore Convention, starting by indicating that evidence of concluding a settlement before a mediator may be any evidence acceptable to the competent authority of a Party to the Convention including, in particular: the mediator’s signature on the settlement agreement; a document signed by the mediator indicating that mediation was conducted; an attestation from the institution that administered the mediation. This wording would reverse the hierarchy, bringing to the fore the requirements of the relevant legal system of the Parties to the Convention since, in any case, the fact that a settlement agreement was concluded before a mediator will be subject to verification and the competent authority will be able to request under Article 4(4) of the Convention all necessary documents to verify whether the requirements of the Convention have been met. Indeed, at present, the mediator’s signature on a settlement is of dubious validity as evidence that the settlement was reached as a result of mediation and that the person who signed was indeed acting as a mediator. This does not remove concerns about the potential formalisation of agreements reached in ordinary negotiations by obtaining the signature of a random person whose signature will open the door to the possibility of claiming enforcement of the settlement in the legal system of the Parties to the Convention. This is because the level of involvement was not specified for the mediator, nor even the obligation to draw up a protocol of the actual involvement in the process of its conduct giving credence to the formal, rather than substantive, conduct of the mediation. The possibility of affixing the mediator’s signature on the settlement agreement, as a sufficient form of activity, is the simplest imaginable way of giving the agreement the effect of a settlement reached before a mediator, and at the same time the easiest to obtain and devoid of any control. The mediator’s signature can sometimes become more sought after than the mediator’s involvement and the very idea of mediation, allowing ready-made settlements to be submitted to the mediator for signature in order to give them the effect of a “mediation stamp”. Thus, the Singapore Convention does not establish a requirement for a mediation protocol, as it is only optional (Article 4(1)(b)(ii) of the Convention). This can be seen not so much as a manifestation of the desire to ensure the maximum level of deformalisation of mediation, but rather as a defect that shifts the burden of determining all the grounds for the admissibility of the Convention’s provisions to the competent authority, and ultimately to the party, based on the body of evidence provided by the party seeking to secure the enforcement of the settlement agreement while facing potential

opposing objections from the other party. It should therefore be pointed out that evidence of the fact that a settlement agreement was concluded before a mediator should, in the interests of the parties, show beyond doubt that mediation was carried out before specific persons in a specific case and on a specific date, together with a statement that a settlement covering all or part of the dispute was concluded before a mediator and not, for example, in the context of subsequent negotiations. This procedure can, in practice, prevent potential evidentiary problems associated with seeking to enforce a settlement, saving time and costs. In the case of an AI acting as a mediator, corroborating evidence could be an attestation from the institution that managed the mediation or, under Article 4(1)(b)(iv) of the Convention, a record of the course of the mediation, e.g. in the form of electronic correspondence on the ODR platform.

The above evidence of the fact that a mediated settlement agreement has been concluded, in addition to the discussed prerequisites for the application of the Convention is, counter-intuitively, not exhaustive for the conclusion of a valid and effective settlement agreement that would make it enforceable. Indeed, the other conditions are catalogued in the form of negative grounds indicated in Article 5 of the Convention. Although they constitute a catalogue of objections whose consideration by the competent authority may lead to the refusal of enforceability of a settlement agreement, they nevertheless need to be taken into account in advance during the mediation and settlement process to prevent potential objections formulated at the request of a party or taken into account by the competent authority of its own motion in the State of enforcement.

Article 5 of the Singapore Convention regulates a catalogue of grounds for refusal to enforce a settlement agreement, which may be taken into account by the competent authority of the Parties to the Convention upon request and based on evidence presented by the party against whom enforcement is sought (Article 5(1) of the Convention) or of its own motion (Article 5(2) of the Convention). It is both exhastive and general in nature, providing the enforcement authority with the flexibility to further specify the grounds it contains.[8] This is because the competent authority first assesses of its own motion the grounds for the admissibility of the Convention's provisions, arising from Article 1(1), then the formal requirements set out in Article 4 and finally, either of its own motion or at the request of a party, the conditions under Article 5 of the Convention.

The first reason for refusal to enforce a settlement upon application is the lack of legal capacity of a party to the settlement agreement (Article 5(1)

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[8] See UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session, New York, 27 June – 15 July, 2016, U.N. Doc. A/CN.9/861, p. 17.

(a) of the Convention). The second reason is related to the defectiveness of the legal transaction when it is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention (Article 5(1)(b)(i) of the Convention). A further reason is the allegation that the content of the settlement agreement is not binding or final according to its terms (Article 5(1)(b)(ii) of the Convention), e.g. as a result of the non-fulfilment of a condition[9] or deadline. What matters is therefore only the express statements of the parties included in the content of the settlement agreement and not external circumstances relied upon by the parties and not directly apparent from the content of the agreement [Schnabel 2019, 46-47], such as the belief that the negotiation process has not been concluded so far and the settlement agreement is only part of an ongoing mediation. Raising the allegation that the settlement agreement would not be binding and final, even though this is not apparent from its content, would not fall within the aforementioned grounds. The allegation would then be destructive, resembling an action to establish the existence or non-existence of a legal relationship (concluded settlement agreement) in the course of ensuring its enforceability. The only exception relating to extrinsic circumstances not mentioned in the content of the settlement agreement, which is another premise indicated in Article 5(1)(b)(iii) of the Convention, is the invocation of the fact that a subsequent settlement agreement modifying the original content of the document has been concluded. The competent authority should in such a case, in accordance with the aforementioned provision, admit evidence of a final settlement. Further grounds are related to the allegation of the fulfilment of the obligations arising from the content of the settlement agreement (Article 5(1)(c)(i) of the Convention) and the interpretation of its provisions to the extent that they are not clear or comprehensible (Article 5(1)(c)(ii) of the Convention). The interpretation of the provisions of the settlement agreement is objective in nature and should be undertaken from the perspective of the competent authority not only at the request of a party but, above all, of its own motion in order to ensure that the agreement can be implemented precisely and without the possibility of modifying unclear provisions of the content of the agreement before the competent authority, which would deprive the agreement of its initial character – concluded before a mediator and not before the competent authority by way of modification. It should only be mentioned that this condition does not entitle the competent authority to refuse to ensure the enforceability of a settlement agreement which is formulated in a language other than an official

[9] See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session, New York, 5-9 February, 2018, U.N. Doc. A/CN.9/934, p. 9.

language of a Party to the Convention, as Article 4(3) of the Convention allows the competent authority to require a translation into such a language. The next prerequisite indicated in Article 5(1)(d) of the Convention allows a party to raise an objection that enforcement of the settlement agreement would be contrary to its terms. It thus introduces a further ground in addition to non-binding or non-final provisions of the settlement agreement the allegation that it would be contrary to the terms of the settlement agreement to make it enforceable. The reference to the provisions of the settlement agreement makes it clear that what is at issue are circumstances indicated in and arising solely from the content of the settlement agreement and not from extrinsic circumstances raised by a party. Undoubtedly, the indicated premise is of a highly general nature[10] and thus laying the foundations for an unforeseen catalogue of consequences determined by the different legal solutions in force in the legal systems of the various Parties to the Convention. However, it is indicated that it refers to dispute settlement clauses included in the content of the settlement agreement and referring, for example, to arbitration or excluding the application of the provisions of the Singapore Convention[11] [ibid., 49].

The last two grounds listed in Article 5(1)(e) and (f) of the Convention are essentially duplicative. On the one hand, they refer to a "serious breach" by the mediator of an unspecified catalogue of standards relating to the mediator's function or to the mediation conducted, without which a party would not have concluded the settlement agreement (Article 5(1)(e) of the Convention). On the other hand, they concretise two standards relating to the mediator, pointing to a breach of the principle of impartiality and independence as grounds for a party to raise an objection of a failure by the mediator to disclose circumstances raising "justifiable doubts", the non-disclosure of which materially impacted or unduly influenced the party, and without which failure that party would not have reached a settlement (Article 5(1)(f) of the Convention). The principle of impartiality and independence establishes an independent standard relating to the mediator in the event that the mediator is not included in the "standards applicable to the mediator or mediation" referred to in Article 5(1)(e).[12] Both prerequisites are highly vague and thus unpredictable in their

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[10] With regard to the rationale, the enforcement of the settlement agreement would be contrary to its terms and conditions – "it was agreed that that the wording was acceptable but might need further elaboration to provide a clear meaning and scope in accordance with the deliberations, as it should not inadvertently introduce defences not contemplated", see UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session, Vienna, 12-23 September, 2016, U.N. Doc. A/CN.9/896, p. 18.

[11] Ibid., pp. 17-18.

[12] See UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session, New York, 6-10 February, 2017, U.N. Doc. A/CN.9/901, p. 16.

effect, providing an open door to challenge the fact that a settlement has been reached by invoking procedural failures in the correctness of the mediation and the mediator's function. This may raise concerns about the steps taken by the competent authority to establish the validity of the allegations raised, not to mention the time required and the complexity of the issues to be resolved. Their determination calls for a series of evidence-gathering measures to be taken, ranging from the determination of the standards applicable at the time of the mediation and settlement, which is almost impossible unless indicated by the parties, to the fact and degree of their breach, to the determination of the causal link between their breach and the conclusion of the settlement, including the examination of the level of "material impact" of the fact of breach on the party's decision to enter into the settlement agreement. This procedure would require interviewing the parties as well as the mediator breaching the fundamental, especially from the point of view of trade secrets, principle of confidentiality of mediation in order to establish a breach of standards. It should be noted that the two grounds mentioned are extremely capacious and restrictive in their potential effects, potentially leading to a refusal to ensure the enforceability of the settlement agreement, becoming a tool of procedural obstruction with immense potential. No analogous grounds are provided for in the text of Directive 2008/52/EC, which refers to mediation standards such as voluntariness (Article 3(a)) impartiality (Article 3(b)), confidentiality (Article 7) and the rest to the internal regulations in force in the Member States by imposing an obligation on them (Article 4) to ensure apropriate quality of mediation [Dąbrowski 2022, 5-19] without specifying sanctions for violation of such standards. The question is whether or not the autonomy of the will of the parties and the need to protect the process of self-determination, as well as the permissible minimum function of the mediator in the mediation process, are limited by being ranked lower than the standards of the conducted proceedings. The view that "grounds for refusing enforcement should focus on the conduct of the parties and not on the conduct of the conciliators"[13] is justified. It seems that how the grounds expressed in Article 5(1)(e), (f) of the Convention are formulated constitutes an excessive and at the same time unnecessary formalism, which in practice may become a key tool in the event of a desire to undermine an effectively concluded settlement agreement or a tool of procedural obstruction, and which could be replaced by the content of Article 5(1)(b)(i) referring to defects in the declaration of intent. The extensive catalogue of grounds contained in Article 5(1) of the Singapore Convention, despite its exhaustive catalogue, may be a gateway to turning the procedure for ensuring the enforceability of a settlement agreement into a formalised and costly process that will be more

[13] Ibid., p. 14.

time-consuming than ensuring the enforceability of a pre-Convention settlement [Abramason 2019, 11].

The last two grounds for refusing to enforce a mediated settlement are taken into account routinely and are not questionable because of their reference to the law applicable in the state where the party seeks enforcement of the settlement. Pursuant to Article 5(2)(a), the competent authority of a Party to the Convention may refuse to enforce a settlement agreement when enforcing it would be contrary to the public policy of that Party or when the dispute lacks the capacity to be settled and cannot be settled through mediation in accordance with the law of a Party to the Convention. Naturally, this may lead to a discrepancy related to the possibility of enforcing a settlement in one Convention signatory State and refusing to enforce it in another, due to the violation of the different values in force there on which the legal order of the country is based.

Article 6 of the Convention does not establish a stand-alone ground for refusing to enforce a settlement agreement, but it does create the possibility of deferring a decision on its enforcement where an application or claim relating to the settlement agreement that may affect its enforcement has been made to a court, arbitral tribunal or another competent authority. Although it is not implicit in the Singapore Convention, the application or claim may relate to the substance or content of the settlement, its annulment, the enforcement of the same settlement but in another country, or be a parallel enforcement application.[14] This provision is therefore not limited to situations where the application or claim is made in the same State that is Party to the Convention, although it does not regulate the effect of a postponement. It should be borne in mind, however, that a settlement under Article 3(2) of the Convention enjoys the force of res judicata having regard to the regulations applicable in the legal system of a Party to the Convention. Subsequent procedure as a result of the postponement may be determined by the private international law rules on the recognition of foreign judgments [Chong and Steffek 2019, 478] deciding an application or claim related to a settlement or the recognition of arbitral awards under the New York Convention.

## CONCLUSION

Working out a settlement agreement acceptable to the parties in the mediation increases the probability of its implementation. However, the Singapore Convention constitutes a useful "protective umbrella" in the hands of the parties

[14] UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session, Vienna, 12-23 September, 2016, U.N. Doc. A/CN.9/896, p. 21-22.

to the settlement, in the event that cooperation based on mutual trust fails. It is an instrument that might not be used in the States that are Parties to the Convention, but not because its provisions generate legitimate uncertainty, but exactly because it can be a sufficiently effective deterrent mechanism, safeguarding the certainty of international trade in commercial disputes resolved through settlement agreements resulting from mediation. Unlike in the case of Directive 2008/52/EC, it is not aimed to create a legal framework and standards for mediation but an exhaustive yet flexible mechanism that takes into account, as far as possible, the dissimilarities of different legal systems, providing protection for the parties to the settlement agreement. The creation of an international legal instrument and the lack of established practice in its application naturally generates a number of potential uncertainties, which tend to become apparent in the insufficient precision resulting from the flexibility of its provisions. This flexibility is determined by the attempt to take into account different legal traditions, giving rise to the temptation to formulate ever new uncertainties on the basis of its provisions, as if in search of creative solutions in mediation. Whilst this cannot be denied, as this article also confirms, any precise, "rigid" mechanism that does not provide a flexible margin adapted to the specificities of the legal systems concerned would be more likely to come under fire than a common position developed through consultation. Therefore, how the potential of the Singapore Convention is realised depends on two factors. The first is the adequate approach of the parties to the settlement agreement and the mediator with regard to properly preparing, conducting and documenting the mediation process, together with the precise wording of the settlement agreement that does not raise doubts and at the same time does not involve the subsequent waste of time in proving that a party has met the prerequisites for the application of the Convention, closing the door to potential evidentiary difficulties or objections possible under Article 5 of the Convention. This would be regardless of whether this takes the form of institutionalised mediation or of considering the reasonableness of the choice of law to which the settlement will be subject. Obviously, there would be added value in taking into account the regulations contained in the legal system of the Party to the Convention where a party to the settlement could seek enforcement, which, incidentally, is in accordance with Article 5(2) of the Convention, although this may seem additional time-consuming formalism and an argument against the Singapore Convention. The second factor on which its potential depends is the provision of an adequate domestic legal framework to establish the procedure for invoking the settlement agreement and ensuring its enforceability in accordance with the rules of procedure applicable in a state that is a signatory of the Singapore Convention and under the terms of the Convention (Article 3). Given the activity of the parties to the settlement and the Parties

to the Singapore Convention, and leaving aside any shortcomings of the that Convention, the increase in the number of settlement agreements resulting from mediation and the decrease in the number of court cases for non-performance before the competent authorities of the Parties to the Convention will be indicative of its ultimate success. Indeed, the Convention cannot be regarded as the proverbial "Trojan horse" as long as the parties take care of the quality of the mediation themselves, taking into account all the evidence of the settlement before the mediator and the conditions for its effectiveness.

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