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# Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disuputes in American Federal and State Courts

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# Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disuputes in American Federal and State Courts


## Abstract

This article compares a recent five-year dataset (2013-2017) on mediation litigation trends with an earlier dataset (1999-2003) to make some general observations about mediation litigation trends over the last nineteen years, with a specific focus on enforcement of mediated settlements, the topic addressed by the Singapore Convention.

Part II of this article provides a general overview of U.S. mediation litigation trends, including a detailed description of how the databases were created and caveats about their use, a summary of raw numbers, and a review of the common mediation issues litigated in U.S. Courts. Principal conclusions include the fact that litigation about mediation has steadily increased between 1999 and 2017, a time period when new civil filings in state and federal courts have been more or less constant, or in some years declined. Disputes about enforcement of mediated settlements remain the most commonly litigated topic; however, disputing about enforcement has significantly declined overall in proportion to all litigated mediation disputes.

Part III offers a detailed examination of mediated settlement enforcement litigation, including types of enforcement disputes, defenses to enforcement, the enforcement-confidentiality connection, and significance of the subject matter of the underlying dispute. Principal conclusions include the fact that mediated settlements continue to be enforced at a very high rate—68% on average for the 2013–2017 time period. The frequency with which parties raise "traditional" contract defenses such as whether there was a meeting of the minds or mistake, as well as challenges to fundamental fairness of the process through fraud or duress, have declined. In their place are a panoply of procedural and jurisdictional defenses which have increased in number as mediation gets institutionalized in statutes and court rules. As was true in the original 1999–2003 dataset, cases involving mediator malfeasance are exceedingly rare, and with a 95% settlement enforcement rate, virtually always a loser for the challenging party. Surprisingly, cases raising both enforcement defenses and confidentiality issues were far less common in 2013–2017 compared to 1999–2003, and settlement enforcement far more likely in such cases in the recent time period.

Part IV applies lessons gleaned from the litigation data to evaluate the choices made by the drafters of the Singapore Convention. From my perspective as a chronicler of "mediations gone bad," there is much to praise in the drafters' efforts.



## Keywords

Singapore Convention, Mediation, Dispute resolution

## Disciplines

Dispute Resolution and Arbitration

# 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

*James R. Coben**

## I. INTRODUCTION

This chapter assesses the likely efficaciousness of the Singapore Mediation Convention[1] based on nearly two decades experience of systematically tracking and studying mediation litigation in the U.S. federal and state courts.

In the Spring of 2006, my colleague Peter N. Thompson and I authored our first study analyzing our comprehensive five-year dataset documenting mediation litigation trends from 1999–2003. The article, entitled *Disputing Irony: A Systematic Look at Litigation About Mediation*,[2] made a number of findings relevant to the Convention, including among others:

- Litigation involving mediation issues increased 95% from 1999 to 2003.[3]
- Nearly half of all court opinions about mediation addressed enforcement of settlement agreements. Traditional contract defenses, although frequently raised in enforcement cases, were rarely successful.[4]
- Very few opinions raised the issue of mediator misconduct;[5] in fact, only seventeen times in five years did parties assert a contract defense based on mediator conduct.[6]

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1 U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17, annex I (2018) [hereinafter Singapore Convention].

2 James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

3 *Id.* at 47–48.

4 *Id.* at 48–49.

5 *Id.*

6 *Id.*

- Courts are inclined to order mediation on their own initiative and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute, or stipulated in the parties' pre-dispute contract.[7]
- Courts frequently consider evidence of what occurs in mediation; indeed, in over three hundred opinions courts addressed mediation communications without any mention of privilege or mediation confidentiality.[8]

A year later, we published a follow-up article detailing two additional years of data analysis (2004–2005) and speculating about future trends.[9] Although we then stopped systematically coding every mediation case for inclusion in a master database, we continued to monitor gross annual counts and squib the years' most significant cases for continuing legal education presentations and a variety of publications,[10] including most significantly since 2011, for our work as co-authors (together with Sarah Cole, Nancy Rogers, Craig McEwen, and Nadja Alexander) of *Mediation: Law, Policy & Practice*, a Thomsen Reuters Trial Practice Series Treatise.[11]

As Professor Thompson and I wrote back in 2007, "[w]e, of course, found it ironic and unfortunate that mediation, a process designed as an alternative to litigation, can, in some circumstances, encourage rather than eliminate additional litigation."[12] That disputing irony continues to the present day, and I continue to believe that valuable lessons can be learned from mining the data.

The run-up to the December 2018 General Assembly's approval of the Singapore Convention inspired me to put my mining

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7 *Id.* at 105.

8 *Id.* at 58–59.

9 James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARB. & MEDIATION REV. 395 (2007).

10 *See, e.g.*, James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 DISP. RESOL. MAG., Winter 2017, at 6; James R. Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 CARDOZO J. CONFLICT RESOL. 779 (2015); Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, James R. Coben & Peter N. Thompson, *Where Mediation is Concerned, Sometimes 'There Ought Not to Be a Law'!*, 20 DISP. RESOL. MAG., Winter 2014, at 34; James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN. ST. Y.B. ARB. & MEDIATION 162 (2013); Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363 (2011).

11 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE (2018–2019). The treatise, updated annually and available online in Westlaw, contains detailed analysis of case law, as well as statutes and court rules on all of the topics addressed in this article.

12 Coben & Thompson, *supra* note 9, at 395.

gear back on in earnest. With the assistance of my extremely talented research assistant Caleb Gerbitz, I constructed a new dataset analyzing litigation about mediation for cases decided in 2013–2017. This article compares the new five-year dataset with the original 1999–2003 dataset to make some general observations about mediation litigation trends over the last nineteen years, with a specific focus on enforcement of mediated settlements, the topic addressed by the Singapore Convention.

Part II of this article provides a general overview of U.S. mediation litigation trends, including a detailed description of how the databases were created and caveats about their use, a summary of raw numbers, and a review of the common mediation issues litigated in U.S. Courts. Principal conclusions include the fact that litigation about mediation has steadily increased between 1999 and 2017, a time period when new civil filings in state and federal courts have been more or less constant, or in some years declined. Disputes about enforcement of mediated settlements remain the most commonly litigated topic; however, disputing about enforcement has significantly declined overall in proportion to all litigated mediation disputes.

Part III offers a detailed examination of mediated settlement enforcement litigation, including types of enforcement disputes, defenses to enforcement, the enforcement-confidentiality connection, and significance of the subject matter of the underlying dispute. Principal conclusions include the fact that mediated settlements continue to be enforced at a very high rate—68% on average for the 2013–2017 time period. The frequency with which parties raise "traditional" contract defenses such as whether there was a meeting of the minds or mistake, as well as challenges to fundamental fairness of the process through fraud or duress, have declined. In their place are a panoply of procedural and jurisdictional defenses which have increased in number as mediation gets institutionalized in statutes and court rules. As was true in the original 1999–2003 dataset, cases involving mediator malfeasance are exceedingly rare, and with a 95% settlement enforcement rate, virtually always a loser for the challenging party. Surprisingly, cases raising both enforcement defenses and confidentiality issues were far less common in 2013–2017 compared to 1999–2003, and settlement enforcement far more likely in such cases in the more recent time period.

Part IV applies lessons gleaned from the litigation data to evaluate the choices made by the drafters of the Singapore Con-

vention. From my perspective as a chronicler of "mediations gone bad," there is much to praise in the drafters' efforts.

First, the U.S. litigation experience strongly supports the Convention's singular focus on enforcement, as well as having minimal formalities necessary to trigger treaty application. Second, the drafters' choice to permit only an opt-out from treaty coverage and to generally assume that parties will want their agreements to be enforceable, arguably will maximize application of the treaty and in turn meet the drafters' primary goal of promoting the use of mediation. More important, in light of the recent U.S. litigation experience showing that procedural and jurisdictional defenses are becoming more common, the decision not to use an opt-in approach holds promise for significantly reducing post-mediation disputing. Third, limiting treaty coverage to cross-border commercial disputes and explicitly excluding family and consumer matters is certainly understandable, given an oft-cited concern for power imbalances outside the business-to-business context. However, perhaps somewhat surprisingly, there is no evidence in the U.S. datasets to suggest that enforcement defenses are generally more common, or more successful outside the commercial context. Fourth, the grounds for refusal contained in Article 5 of the Convention will most certainly permit the wide range of "traditional" contract enforcement defenses parties typically raise post-mediation, but will wisely limit challenges based on domestic law procedural arguments and filing formalities, which given the recent U.S. experience, are an increasing share of enforcement litigation. That said, there is little in the litigation track record from the United States to suggest that the grounds for refusal based on mediation misconduct will be commonly invoked and even if invoked ever successful. Finally, the drafters made a defensible choice to decline to legislate mediation confidentiality. While I have in the past made a strong argument praising the merits of uniformity in confidentiality regulation,[13] the political reality is that getting agreement on a single approach to this complex topic (which depending on jurisdiction and legal culture might involve statutes, court rules, judicial decisions, ethical codes, ADR institutional provider policies, and/or party contract), would likely take many more years of negotiation than the three the drafters devoted to the Singapore Convention.

[13] *See* Coben, *My Change of Mind on the Uniform Mediation Act*, *supra* note 10.

## II. The Big Picture: Overall U.S. Mediation Litigation Trends

### A. *Building Datasets and Caveats About Their Use*

Both datasets[14] were derived by searching for cases on Westlaw in the "ALLSTATES" and "ALLFEDS" databases that include the term "mediat!". As you might imagine, this search brings up a large number of "hits" on opinions that include some mention of mediation (most commonly, the fact that mediation at some point occurred before or during litigation). The number of total hits per year on the search term has increased from 1,176 in 1999 to 5,137 in 2017 (by itself, a statistic implying considerable increased use of mediation in American courts).

We then read each of the case "hits" to determine which opinions arguably involved a judicial decision on some disputed mediation issue. Only those cases are included in the datasets.[15] Admittedly, we made judgment calls about inclusion. For example, we excluded class action cases where the court merely acknowledged that a settlement resulted from mediation, but included class action cases where the court explicitly cited the fact the case was

14 The datasets are searchable Excel files, which can be viewed at the Mediation Case Law Project website I maintain at Mitchell Hamline School of Law (https://open.mitchellhamline.edu/dri_mcldata/). Cross-tab functions within the Excel program (available as "Filter" options in the Excel "Data" toolbar) allow you to quickly tailor searches and combine variables (e.g., generate a list of state supreme court decisions where a mediated settlement was enforced despite an allegation of mutual mistake; or create a list of federal trial court decisions in a specific year where a judge enforced a contractual obligation to mediate). Both datasets capture case information such as citation, year, jurisdiction, and level of court. Both datasets also identify the subject matter of the mediation disputing (e.g., enforcement, confidentiality, sanctions, duty to mediate, etc.). With respect to enforcement, the primary focus of this article, both datasets capture with specificity the nature of enforcement issues or defenses presented and their resolution (i.e., agreement enforced, not enforced, remanded, or modified or decided on other grounds). Due to time and workload limitations, the newer dataset has slightly fewer case variables. Also, unlike the initial dataset, the 2013–2017 compilation is organized by chapter sub-section of Mediation: Law, Policy & Practice, the mediation treatise I co-author for Thomson Reuters. *See* Cole et al., *supra* note 11. The revised organizational structure, while making it slightly more difficult to compare and contrast results between the datasets, greatly facilitates our work with annual treatise updates. I encourage researchers to use the datasets and ask only in return that you attribute them to me and Professor Thompson in any published work.

15 It is important to keep in mind that some lawsuits involved multiple reported opinions. Because we wanted to study the extent to which mediation issues were being litigated and addressed by the courts, we treated each opinion involving a mediation issue as a separate entry. Consequently, the total number of opinions/entries is greater than the number of lawsuits. Moreover, a significant percentage of the cases involve more than one disputed mediation issue.

mediated as a reason to approve the mediated settlement.[16] We included cases where the court referred to a "mediation" process involving a judge or court personnel unless we could clearly determine from the opinion text that the "neutral" did not act as a mediator. Conversely, we excluded cases the court labeled as judicial settlement conferences.[17]

There are several caveats about the datasets. First, we discovered that Westlaw continuously adds (and in some circumstances deletes) cases to its databases many months after case decisions occur. Our final cut-off date for the 1999–2003 dataset was January 31, 2005. The cut-off date for the 2013–2017 dataset varied slightly from year to year but usually was in May or June of the following year. Westlaw searches after these dates may likely reveal some additional cases and perhaps delete some we originally captured. Given the total number of potential dataset hits in these two five-year periods (23,812),[18] I readily acknowledge our review process may not have succeeded in reporting every single case deciding a disputed mediation topic. Suffice it to say, we tried our best to be consistent in our inclusion/exclusion decisions.

Second, case opinions published on Westlaw by no means capture the full range of disputing in American courts. In many jurisdictions, jurists have discretion regarding which cases to publish. While a steadily increasing number of federal trial court decisions are on Westlaw, far fewer state court trial decisions make it into the online database. Presumably, a huge number of mediation disputes of all types are resolved at the trial court level with unreported decisions that are not appealed by any party to the dispute. Accordingly, it is quite possible that the big picture trends I report here could differ considerably from the reality of work in nation's courthouses.

Third, even for those judicial decisions published on Westlaw, readers know only the facts about the case that a judicial author decided to include in the opinion to support the ultimate ruling on

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16 *See, e.g.*, Gallucci v. Gonzales, 603 Fed. Appx. 533, 534 (9th Cir. 2015) (noting that the court's conclusion that party bargaining occurred without collusion "is bolstered by the fact that the settlement was negotiated with the aid of a retired magistrate judge and experienced mediator, who reported no evidence of collusion"). *See also infra* notes 50–61 and accompanying text.

17 *See, e.g.*, Cornell v. Delco Elecs. Co., 103 F. Supp. 2d 1116, 1117 (S.D. Ind. 2000) (addressing an agreement arrived at in a "settlement conference" where the Magistrate Judge acted as a "go-between during negotiations.").

18 Over the entire seventeen years, "hits" on the search term yielded 63,078 opinions (which might partially explain why I am disinclined to create any future datasets on this particular topic)!

the merits. The legally relevant facts from the court's perspective may vary considerably from the parties' (or mediator's) perspective on what actually transpired during a mediation.

Fourth, the trends reported here, which arguably can be characterized as the maturation of mediation litigation over two decades of institutionalization, might not, in the end, be at all predictive of the experience of other countries and disputing cultures. That, of course, remains to be seen.

### B. *Raw Numbers*

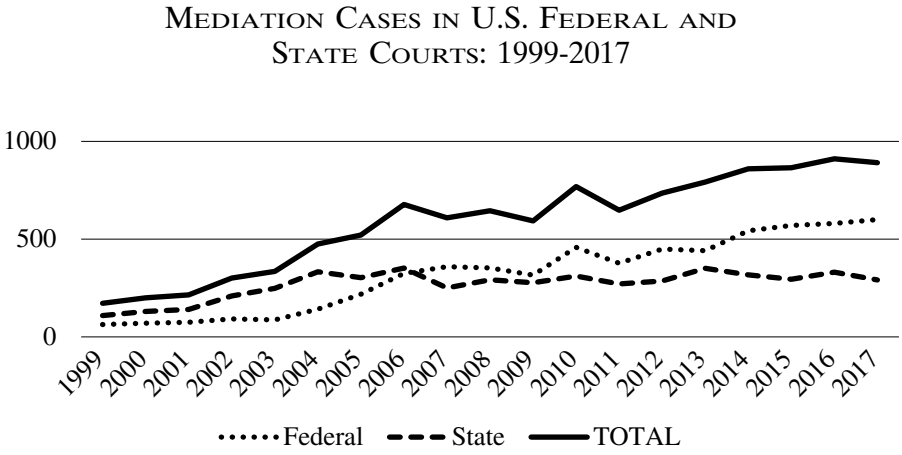
The number of judicial opinions actually deciding a disputed mediation issue has risen from 172 in 1999 to 891 in 2017, as illustrated in Tables 1 and 2. That more than five-fold increase in disputing has occurred over a time period when civil filings in U.S. federal and state courts have been more or less constant,[19] or during the 2008 recession, in decline.[20] The increase in cases was particularly steep in the 1999–2006 timeframe, with growth steady but at a slower rate in more recent years. The total relevant number of opinions, 11,216 over nineteen years, might seem insignificant on a national scale, especially when it seems safe to assume the total number of mediations throughout the country has increased substantially over the same time period. Unfortunately, since many mediations are private matters, it is virtually impossible to determine with any accuracy the total number of mediations conducted in the United States on an annual basis. Even court-annexed mediations are difficult to quantify because court programs vary dra-

[19] For example, according to the Administrative Office of the U.S. Courts, new civil case filings in the federal district courts numbered 260,271 in 1999: *see Judicial Business 1999*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/judicial-business-1999 (last visited Apr. 10, 2019); declined to 252,962 in 2003: *see Judicial Business 2003*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/judicial-business-2003 (last visited Apr. 10, 2019); increased to 267,257 five years later in 2008: *see Judicial Business 2008*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/judicial-business-2008 (last visited Apr. 10, 2019); rose again in 2013 to 284,604: *see Judicial Business 2013*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/judicial-business-2013 (last visited Apr. 10, 2019); and in 2017 declined to 267,769: *see Judicial Business 2017*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/judicial-business-2017 (last visited Apr. 10, 2019).

[20] *See, e.g.*, NAT'L CTR. FOR STATE COURTS, TOTAL INCOMING CIVIL CASES IN STATE COURT TRIALS, 2007–2016, http://www.courtstatistics.org/NCSC-Analysis/Civil/Civil-Caseloads-2016.aspx (last visited Mar. 13, 2019) (documenting 16% decline in civil filings between 2007 and 2016).

matically from state to state, and there is no single source of national data for use of mediation.[21]

TABLE 1: NUMBER OF MEDIATION CASES PER YEAR, 1999–2017




One particularly interesting trend in the data is the shift from a majority of mediation disputes coming from state courts (true from 1999–2006) to a majority coming from federal courts (commencing in 2007 and continuing to the current day). This increase is most likely attributable to the 2005 Congressional enactment of the Class Action Fairness Act,[22] designed to "federalize" class actions.[23] Indeed, according to a 2008 report of the Federal Judicial Center, federal class action diversity filings increased nearly three-

[21] Even in the more unified federal court system, ADR data has been hard to come by. Just by way of example, it was not until 2018 that the Administrative Office of the U.S. Courts specifically referenced the extent of federal courts' use of ADR in its annual report of court business. *See U.S. District Courts—Judicial Business 2018*, USCOURTS.GOV, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018 (last visited Apr. 10, 2019) (noting that "56 districts operated ADR programs of some form, and 53 of these districts provided mediation or judge-hosted settlement conferences. More than 25,500 civil cases were included in ADR programs.").

[22] Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (now codified at 28 U.S.C. § 1332(d)).

[23] *See generally* Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013) (describing CAFA goals and providing a detailed critique of the "mythology" of state class action abuses so routinely cited in support of the Act).

fold in 2006–2007.[24] As described in more detail in Part III, this increase in federal court caseload has in turn significantly increased the number of mediation disputes in the datasets, given the degree to which federal judges now routinely invoke the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.[25]

TABLE 2: NUMBER OF MEDIATION CASES PER YEAR, 1999–2017
DETAILED CASE COUNTS

| Year | Federal Cases | State Cases | Total Cases |
|---|---|---|---|
| **1999** | 63 | 109 | 172 |
| **2000** | 70 | 129 | 200 |
| **2001** | 76 | 139 | 215 |
| **2002** | 96 | 209 | 301 |
| **2003** | 88 | 248 | 335 |
| **2004** | 143 | 332 | 475 |
| **2005** | 218 | 303 | 523 |
| **2006** | 325 | 352 | 677 |
| **2007** | 359 | 250 | 609 |
| **2008** | 353 | 292 | 645 |
| **2009** | 316 | 277 | 593 |
| **2010** | 458 | 311 | 769 |
| **2011** | 377 | 271 | 648 |
| **2012** | 449 | 286 | 735 |
| **2013** | 441 | 351 | 792 |
| **2014** | 543 | 317 | 860 |
| **2015** | 570 | 295 | 865 |
| **2016** | 580 | 331 | 911 |
| **2017** | 600 | 291 | 891 |

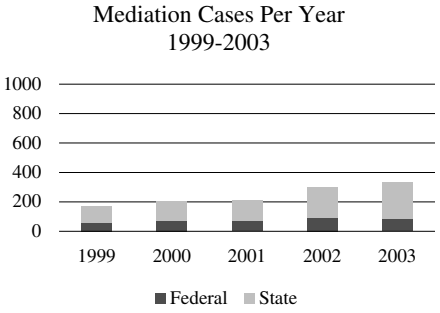
[24] EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6–9 (2008).

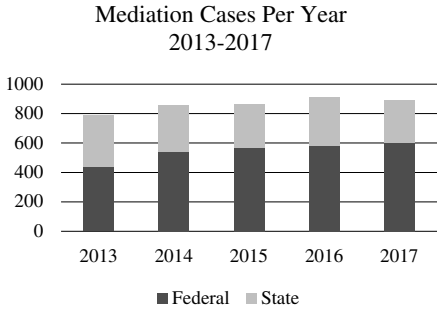
[25] *See infra* notes 50–61 and accompanying text. I have written extensively about this phenomenon elsewhere, believing it to be an unjustifiable form of judicial deference to the opinions of class action mediators. *See* Coben, *Creating a 21st Century Oligarchy*, *supra* note 10; Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 790–95.

For the balance of this article, I will focus on two five-year time periods: 1999–2003 and 2013–2017. Why? First, while I tracked the total number of mediation cases throughout the nineteen-year period, I systematically coded case details only in twelve of those years (including the two five-periods). Second, comparing two five-year periods a decade apart strikes me as an effective way to evaluate big picture trends in disputing.[26]

As illustrated in Table 3, there were 1,223 reported opinions involving significant mediation issues in the 1999–2003 five-year period. The number of opinions increased from 172 in 1999 to 335 in 2003, reflecting a 95% increase. State court opinions constituted 68% of the overall total, and more than doubled in number over five years. Federal court opinions constituted just 32% of the overall total, with the number of opinions issued each year remaining relatively constant over the five-year period.

TABLE 3: NUMBER OF MEDIATION CASES PER YEAR IN EACH 5-YEAR PERIOD




| | Total | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|---|
| **Total** | 1223 | 172 | 200 | 215 | 301 | 335 |
| **Federal** | 387 | 63 | 70 | 75 | 92 | 87 |
| **State** | 836 | 109 | 130 | 140 | 209 | 248 |

| | Total | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|
| **Total** | 4319 | 792 | 860 | 865 | 911 | 891 |
| **Federal** | 2731 | 441 | 543 | 570 | 580 | 600 |
| **State** | 1588 | 351 | 317 | 295 | 331 | 291 |

Quite a different picture emerges a decade later. While the total number of cases significantly increased (from 1,223 in 1999–2003 to 4,319 in 2013–2017), the pace in annual increases over the five-year period slowed substantially. In 2013, courts issued opinions about mediation disputes 792 times; in 2017, there

[26] For detailed reporting on the two years (2004 and 2005) left out of this comparison, see Coben & Thompson, *Mediation Litigation Trends*, *supra* note 9.

were 881 decisions, an overall caseload increase of just 12.5%. State court opinions constituted just 37% of the overall total and declined in number from 351 in 2013 to 291 in 2017. Federal court opinions constituted 63% of the overall total, with the number of federal court opinions increasing each year, from 441 in 2013 to 600 in 2017.

### C. *Disputed Mediation Issues*

As illustrated in Tables 4 and 5, the disputes about mediation are quite diverse. Disputes about enforcement of mediated settlements constituted close to half of all mediation disputing in 1999–2003.[27] That percentage dropped to 39% in 2013–2017. In both five-year periods, disputes about fees and costs of mediation[28] were the second largest category of mediation litigation: 20% of all disputed cases in 1999–2003; 13% of all disputed cases in 2013–2017.

In 1999–2003, the third most frequent dispute was about court power to compel mediation,[29] occurring in 13% of the cases, followed by confidentiality disputes,[30] which occurred in 12% of the cases. Sanctions were a topic of disputing 10% of the time,[31] as was condition precedent, most commonly whether a statutory or contract obligation to mediate before litigation or arbitration was satisfied.[32] Ethics issues, including both alleged failures of mediators and judicial officers adjudicating mediated cases oc-

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[27] For detailed analysis, see Part III *infra*, notes 46–72 and accompanying text.

[28] For a detailed analysis of mediation fee and cost cases, see COLE ET AL., *supra* note 11, §§ 9:17–9:20. *See also* Coben & Thompson, *supra* note 2, at 112–19.

[29] For a detailed analysis of cases addressing court power to compel mediation, see COLE ET AL., *supra* note 11, § 9:2 (noting "[s]uccessful challenges to judicially compelled mediation are rare."). *See also* Coben & Thompson, *supra* note 2, at 105–08.

[30] Confidentiality disputes were wide-ranging, including among many other things: applicability of evidentiary exclusions and privilege law, waiver of privilege, discovery challenges, limitations on mediator reports, public right of access, court sanction for wrongful disclosure, as well as complex choice of law problems. For a detailed analysis of mediation confidentiality law, see COLE ET AL., *supra* note 11, §§ 8:1–8:49. *See also* Coben & Thompson, *supra* note 2, at 57–73.

[31] For a detailed analysis of sanctions cases, see COLE ET AL., *supra* note 11, §§ 9:3–9:16. *See also* Coben & Thompson, *supra* note 2, at 119–23.

[32] For a detailed analysis of condition precedent cases, see COLE ET AL., *supra* note 11, § 6:4. *See also* Coben & Thompson, *supra* note 2, at 105 ("[c]ollectively, the . . . opinions support a simple principle: courts are inclined to order mediation on their own initiative, and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties' pre-dispute contract.").

curred in 6% of the cases.[33] Procedural implications of a mediation request or participation constituted 4% of the disputing,[34] followed by lawyer malpractice at 3%,[35] and other acts and omissions as the basis for independent claims at 2%.[36]

TABLE 4: DISPUTED MEDIATION ISSUE (DETAILED BREAKDOWN)[37]

| **1999–2003 (1223 total cases)** | | **DISPUTED ISSUE** | **2013–2017 (4319 total cases)** | |
|---|---|---|---|---|
| 569 | 47% | **Enforcement** | 1668 | 39% |
| 243 | 20% | **Fees/Costs** | 566 | 13% |
| 157 | 13% | **Court Power to Compel Mediation** | 238 | 6% |
| 152 | 12% | **Confidentiality** | 358 | 8% |
| 123 | 10% | **Condition Precedent** | 404 | 9% |
| 117 | 10% | **Sanctions** | 172 | 4% |
| 68 | 6% | **Ethics (Judicial and Mediator)** | 96 | 2% |
| 50 | 4% | **Procedural Implications of Mediation Request or Participation** | 498 | 12% |
| 31 | 3% | **Lawyer Malpractice** | 65 | 2% |
| 20 | 2% | **Act or Omission as Basis for Independent Claims** | 207 | 5% |
| 6 | 1% | **Arbitration-Mediation Waiver** | 59 | 1% |

By 2013–2017 the relative frequency of disputed issues shifted in some interesting ways. Most relevant to the Singapore Conven-

[33] For a detailed analysis of ethics cases involving judicial officers, see COLE ET AL., *supra* note 11, § 10:16. For detailed analysis of ethical claims against mediators, see COLE ET AL., *supra* note 11, §§ 10:5–10:14. *See also* Coben & Thompson, *supra* note 2, at 95–105.

[34] *See* COLE ET AL., *supra* note 11, §§ 5:12–5:16, where my treatise co-authors and I have grouped this wide array of case disputing into four broad categories: 1) cases raising tolling, laches, and failure to prosecute issues (§ 5:13); 2) cases where parties used mediation participation (or failure to participate) to influence litigation timelines and/or excuse rule violations (§ 5:14); 3) cases where mediation was used to establish waiver of rights, notice of claims, and exhaustion of administrative remedies (§ 5:15); and 4) cases where mediation participation impacted jurisdiction, venue, and transfer issues (§ 5:16).

[35] For a detailed analysis of lawyer malpractice issues, see COLE ET AL., *supra* note 11, § 12:4. *See also* Coben & Thompson, *supra* note 2, at 90–94.

[36] For a detailed analysis of acts and omissions leading to other claims, see COLE ET AL., *supra* note 11, §§ 15:17–15:19. *See also* Coben & Thompson, *supra* note 2, at 90–94.

[37] The total number of issues raised exceeds the number of total cases because opinions often address more than a single disputed mediation issue.

tion, the percentage of cases raising enforcement issues declined 17% (from 47% of all cases in 1999–2003, down to 39% in 2013–2017).[38] Disputes about confidentiality also showed marked decline, down 33%;[39] as did fee/cost disputes, down 35%;[40] disputes about court power to compel mediation, down 54%;[41] disputes about sanctions, down 60%;[42] and disputes raising ethical concerns about mediators or the judges deciding disputed mediation issues, down 66%.[43]

The frequency of disputing about enforcing statutory or contractual obligations to mediate before litigation or arbitration remained more or less constant, with the issue being litigated in 10% of the cases in 1999–2003 and 9% of the cases in 2013–2017.[44] The same pattern held for disputes alleging waiver of arbitration rights by virtue of mediation participation, with the issue addressed in 1% of the cases in both five-year periods.

The growth area in mediation litigation are disputes about procedural implications of mediation request or participation. These disputes have increased three-fold, increasing from 4% of all cases in the 1999–2003 dataset to 12% of the cases in 2013–2017.[45] Cases alleging acts or omissions in mediation as a basis for new

[38] And, as detailed *infra* at notes 62–72 and accompanying text, the percentage of those enforcement cases raising "traditional" enforcement defenses (such as whether there was a meeting of the minds or mutual or unilateral mistake, as well as challenges to fundamental fairness of the process through fraud or duress) declined even more.

[39] Confidentiality disputes were raised in 12% of all cases in 1999–2003 but only 8% of cases in 2013–2017.

[40] Attorney's fees and mediation costs were raised in 20% of all cases in 1999–2003 but only 13% of cases in 2013–2017.

[41] Dispute about court power to compel mediation were raised in 13% of all cases in 1999–2003 but only 6% of cases in 2013–2017.

[42] Sanctions disputes were raised in 10% of all cases in 1999–2003 but only 4% of cases in 2013–2017.

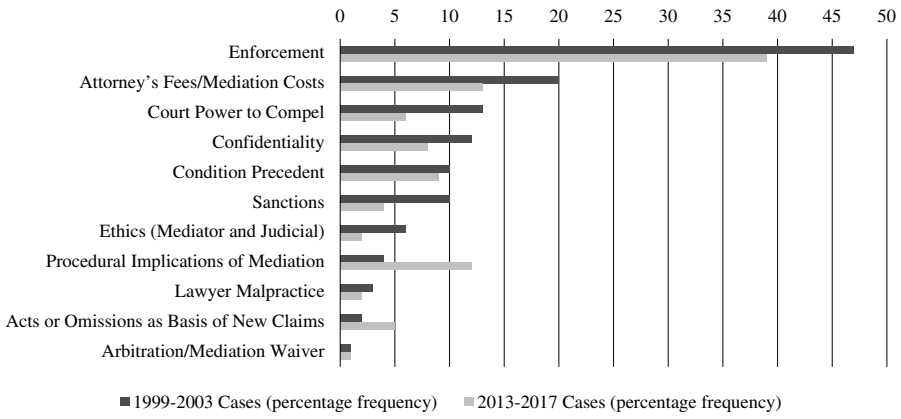
[43] Ethics issues were raised in 6% of all cases in 1999–2003 but only 2% of cases in 2013–2017.

[44] However, it should be noted that in this time period more than a third of the 404 cases (156 or 39%) came from a single state—Nevada, and involved that state's foreclosure mediation statute. Without the disputing attributed to this single statute, the frequency of disputing about statutory obligations to mediate would have been closer to 6% of all cases, rather than 9%.

[45] As I wrote in the *Cardozo Journal of Conflict Resolution* in 2015, "[r]oughly a decade ago, I first began to joke that it might be possible for me to teach my first year civil procedure course using only case law decisions about disputed mediation issues. That is no longer a hypothetical." Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 783 (following up the observation with a long list of case citations and parentheticals detailing disputes about mediation raising issues addressing, among other things, subject matter jurisdiction, venue, transfer, service of process, attachment, choice of law, discovery relevance, work-product, failure to state a claim, waiver of defenses, joinder, summary judgment, dismissals, appeals, and res judicata).

claims also have become more common, rising from just 2% of all cases in 1999–2003 to 5% of all cases in 2013–2017.

TABLE 5: DISPUTED MEDIATION ISSUE




Given that the Singapore Convention focuses exclusively on enforcement of mediated settlements, the next section explores in detail the data relevant to that topic.

## III. DISPUTING MEDIATION SETTLEMENT ENFORCEMENT IN U.S. FEDERAL AND STATE COURTS

### A. *Types of Enforcement Disputes*

As a threshold matter, it is helpful to divide enforcement disputes into three distinct categories. First, a considerable amount of litigation (29% in the 1999–2003 dataset; 23% in the 2013–2017 dataset) are disputes about interpretation and/or alleged breach of mediated settlements.[46] This is distinct from cases where a party

[46] *See, e.g.*, Lester v. Percudani, 511 Fed. Appx. 174 (3d Cir. 2013) (interpreting the scope of a release); Reilly v. Carpenter, No. 14–1260, 2015 WL 6143382, *4 (W. Va. Oct. 16, 2015) (concluding that failure of both parties to timely perform the "contingencies" found in their mediated settlement agreement did not preclude the trial court's conclusion that the agreement was binding and enforceable); Butler v. Caldwell, No. 48931-3-I, 622 WL 554952, at *3–4 (Wash. Ct. App. Apr. 15, 2002) (determining that a delivery of an appraisal by fax started the three day period for rejection set forth in the mediated settlement agreement); Caswell v. Anderson, 527 S.E.2d 582, 584 (Ga. Ct. App. 2000) (interpreting clause in mediated settlement agreement setting forth compensation for withdrawing partner).

raises a defense to settlement enforcement, the topic specifically addressed in Article 5 of the Singapore Convention.[47] Enforcement defenses, discussed in more detail below,[48] were raised in 65% of the cases in the 1999–2003 dataset, but only in 37% of the cases in the 2013–2017 dataset—a 43% reduction in disputing about defenses. Finally, a third category of enforcement cases in the datasets involve class action litigation or other contexts where courts exercise settlement approval authority, such as settlements on behalf of minors or Fair Labor Standards Act disputes, where the relevant statute requires judicial approval. Here, there is a dramatic change in case counts between the datasets, with virtually all the increase attributable to class action litigation. In 1999–2003, just 34 (31 federal and 3 state) or 6% of the enforcement cases involved judicial approval of class actions or other contexts demanding judicial approval of mediated settlements. In the more recent dataset, 2013–2017, there are 601 class action cases (595 federal and 6 state) constituting 36% of all enforcement disputes.[49] That is a rather remarkable six-fold increase in frequency, worth just a bit of explication here, despite the fact that the Singapore Convention excludes from its scope settlements, like court-approved class action settlements, that are enforceable as judgments.[50]

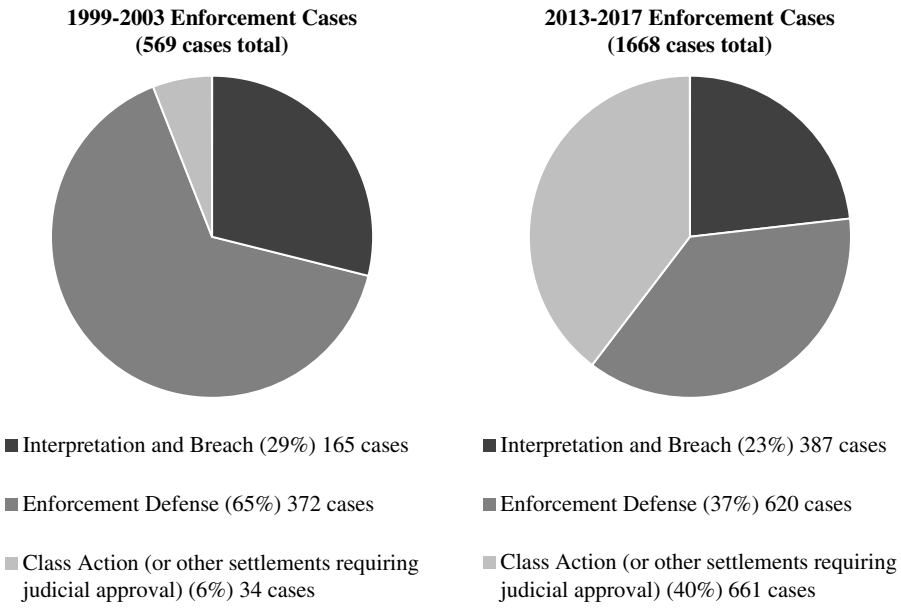
[47] Singapore Convention, *supra* note 1, art. 5 (Grounds for Refusing to Grant Relief).

[48] *See* Part III.B, *infra* notes 62–72 and accompanying text.

[49] The balance of 661 cases in this category are predominantly Fair Labor Standards Act cases, where courts approved mediated settlements and specifically referenced the mediation effort as an indicia of fairness. There were also in this category a handful of minor settlement approval cases.

[50] Singapore Convention, *supra* note 1, art. 1(3)(a). *See generally* Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 25–27 (2019).

TABLE 6: TYPE OF ENFORCEMENT DISPUTE




In the vast majority of civil disputes resolved by mediation in the United States, the parties' settlement ends any ongoing litigation without judicial review or approval of the settlement agreement.[51] Most typically, the underlying lawsuit (assuming there was one) is dismissed with prejudice, and the parties' mediated settlement agreement is a new contract that, if breached, becomes the subject of an entirely new legal proceeding—a contract action for enforcement or breach.[52] Class action settlements, in contrast, follow a different path to finality. Federal Rule of Civil Procedure 23(e) mandates that class actions may be settled "only with court approval."[53] While the precise factors vary from federal circuit to federal circuit, the general objective of court review is to protect class members "whose rights may not have been given due regard by the negotiation parties."[54] As I have documented elsewhere in

[51] *See* Coben, *Creating a 21st Century Oligarchy*, *supra* note 10, at 163. *See generally* COLE ET AL., *supra* note 11, § 7:19 nn.50–51 and accompanying text.

[52] *Id.*

[53] FED R. CIV. P. 23(e) (providing that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.").

[54] Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d 615, 624 (9th Cir. 1982) (noting that "[t]he class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks.").

great detail,[55] judges increasingly discharge this oversight duty by invoking mediation evidence, all the more so in federal courts since the 2005 passage of the Class Action Fairness Act.[56] Specifically, judges cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.[57] Courts not only cite mediator testimony on process fairness, they often go further to recite and credit mediator evidence on substantive merits of the very settlement the mediator brokered,[58] a development that has always

55 Coben, *Barnacles, Aristocracy and Truth Denial*, *supra* note 10, at 790–93; Coben, *Creating a 21st Century Oligarchy*, *supra* note 10, at 167–74. *See also* COLE ET AL., *supra* note 11, § 7:17 nn.24–34 and accompanying text.

56 *See supra* notes 37–39.

57 *See, e.g.*, Jones v. Singing River Health Servs. Found., 865 F.3d 285, 295–96 (5th Cir. 2017), *cert. denied sub nom.* Almond v. Singing River Health Sys., 138 S. Ct. 1000, 200 L. Ed. 2d 252 (2018) (concluding that "objectors failed to show that, even if a conflict of interest existed, the settlement negotiations themselves were unfair or collusive" where "[t]o the contrary, the district court relied heavily on the fact that a well-recognized neutral mediator oversaw settlement negotiations of the federal cases to ensure they were conducted at arms' length"); *In re* Fab Universal Corp. S'holder Derivative Litig., 148 F. Supp. 3d 277, 280 (S.D.N.Y. 2015) (stating that "[t]he Proposed Settlement was the product of extensive formal mediation aided by a neutral JAMS mediator, hallmarks of a non-collusive, arm's-length settlement process"); ABF Freight Systems, Inc. v. U.S., Nos. C 10–05188 SI, 11–04663, 2013 WL 3244804 (N.D. Cal. June 26, 2013) (citing the fact that the agreement was reached in mediation with a neutral mediator as evidence that there was no collusion, fraud, or tortious conduct connected with obtaining the settlement); *In re* Citigroup Inc. Sec. Litig., 965 F.Supp.2d 369, 381 (S.D.N.Y. 2013) (observing that "[f]rom his front row seat, the mediator concluded that "negotiations in this case were hard fought and at arm's-length at all times"); *In re* LivingSocial Mktg. and Sales Practice Litig., 298 F.R.D. 1, 11 (D. D.C. 2013) (reciting mediator testimony that "[t]here was never any type of collusion between the Parties in any of the negotiations," and that the parties' negotiations "were intense at every step of the way, and the Parties vigorously advocated for their respective positions"). For historical documentation of this practice and many more case citations and parentheticals, see *supra* note 55.

58 *See, e.g.*, *In re* MGM Mirage Sec. Litig., 708 F. App'x 894, 897 (9th Cir. 2017) (emphasizing that "the parties reached a settlement after extensive negotiations before a nationally recognized mediator, retired U.S. District Judge Layn R. Phillips" and "the district court properly relied on Judge Phillips's declaration stating that the settlement 'represent[ed] a well-reasoned and sound resolution of highly uncertain litigation' and was 'the product of vigorous and independent advocacy and arm's-length negotiation conducted in good faith.'"); Johansson-Dohrmann v. CBR Sys., Inc., No. 12-cv-1115-MMA (BGS), 2013 WL 3864341, *8 (S.D. Cal. July 24, 2013) (citing mediator testimony that "the settlement reached between the parties was the product of arm's-length and good faith negotiations . . ." [and] "*is non-collusive, fair and reasonable to all parties and provides significant benefits to the Settlement Class.*") (emphasis added); *In re* Visa Check/Mastermoney Antitrust Litig., 297 F.Supp.2d 503, 509–10 (E.D.N.Y. 2003) (citing mediator testimony that "it is my opinion that *the [S]ettlement[s] w[ere] achieved through a fair and reasonable process and [are] in the best interest of the class . . . the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties") (emphasis added).*

struck me as a particularly unwarranted judicial abdication of power, not to mention the posing of a rather obvious conflict of interest.[59]

Only a very small minority of judicial officers have resisted the trend, most notably the Honorable William Alsup, who in *Kakani v. Oracle Corp.*,[60] rejected the parties' joint motion for preliminary approval of a mediated class action settlement, and pointedly opined:

> [i]t is . . . no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table.[61]

## B. *Defenses to Enforcement*

### 1. Overall Enforcement Rates

While the relative frequency of enforcement defense disputes has declined, as shown in Table 7 below, the likelihood that a settlement will be enforced in the face of an alleged contract defense has increased from 57% of the time to 69%.

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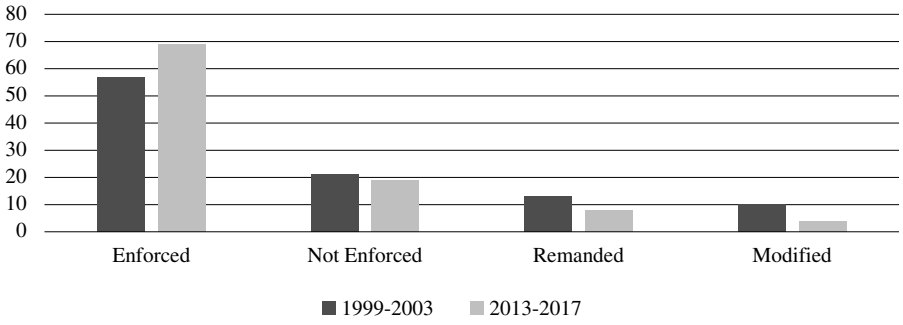
[59] *See* Coben, *Barnacles, Aristocracy, and Truth Denial*, *supra* note 10, at 175–87.

[60] Kakani v. Oracle Corp., No. C 06-06493 WHA, 2007 WL 2221073 (N.D. Cal. June 19, 2007). *See also In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 948 (9th Cir. 2011) (observing that "the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement"); Martin v. Cargill, Inc., 295 F.R.D. 380, 86 Fed. R. Serv. 3d 1593 (D. Minn. 2013) (stating that applying the presumption that a settlement reached through mediation was an arm's length, fair settlement was highly doubtful where no formal discovery had taken place and the nature of any informal exchange of information was not presented to the court); Lusby v. Gamestop, Inc., 297 F.R.D. 400, 413 (N.D. Cal. 2013) (expressing a concern when the mediation was conducted privately and not subject to court oversight).

[61] Kakani v. Oracle Corp., 2007 WL 2221073, *11.

TABLE 7: HOW OFTEN SETTLEMENTS ENFORCED WHEN DEFENSE RAISED (AS PERCENTAGE)




| 1999–2003 (372 cases) | | **DISPOSITION** | 2013–2017 (620 cases) | |
|---|---|---|---|---|
| Number of Cases | Percentage of Cases | | Number of Cases | Percentage of Cases |
| 210 | 57% | Enforced | 426 | 69% |
| 77 | 21% | Not Enforced | 118 | 19% |
| 47 | 13% | Remanded | 50 | 8% |
| 38 | 10% | Modified or decided on other grounds | 26 | 4% |

2. Specific Enforcement Defenses: Frequency and Success Rates

Table 8 shows the frequency of particular defenses in each dataset. In 1999–2003, the six most common defenses raised—those adjudicated in 10% or more of the enforcement cases—were (in declining order of frequency): no meeting of minds; lack of formality;[62] fraud; mistake (mutual or unilateral); agreement to agree; and duress.

62 Lack of formality includes such things as lack of a required writing or signature, or failure to include statutorily required language. *See, e.g.*, Haghighi v. Russian-American Broadcasting Co., 173 F.3d 1086, 1087–88 (8th Cir. 1999); Haghighi v. Russian-American Broadcasting Co., 945 F. Supp. 1233, 1234–35 (D. Minn. 1996), *certified question answered*, 577 N.W.2d 927 (Minn. 1998), *rev'd*, 173 F.3d 1086 (8th Cir. 1999) (refusing to enforce an otherwise fair mediation agreement signed by the parties that stated it was a "Full and Final Mutual Release of All Claims" but did not include the magic words required by relevant state statute that the parties intended the agreement to be binding). *See generally* James R. Coben & Peter N. Thompson, *The Haghighi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota*, 20 HAMLINE J. PUB. L. & POL'Y 299, 324 (1999) (arguing that the insistence on technical terms in mediated settlement agreements con-

TABLE 8: ENFORCEMENT DEFENSE FREQUENCY

| **1999–2003 (372 opinions)** | | | **2013–2017 (620 opinions)** | |
|---|---|---|---|---|
| **Number of Opinions** | **Percentage of Total Enforcement Opinions**[63] | **Enforcement Defense** | **Number of Opinions** | **Percentage of Total Enforcement Opinions**[64] |
| 78 | 21% | **No Meeting of Minds** | 78 | 13% |
| 62 | 17% | **Lack of Formality** | 76 | 12% |
| 54 | 15% | **Fraud** | 63 | 10% |
| 52 | 14% | **Mistake** | 43 | 7% |
| 47 | 12% | **Agreement to Agree** | 38 | 6% |
| 36 | 10% | **Duress** | 65 | 10% |
| 20 | 5% | **Attorney Lack of Authority** | 36 | 6% |
| 17 | 5% | **Mediator Misconduct** | 16 | 3% |
| 15 | 4% | **Procedural/ Jurisdictional Challenges** | 148 | 24% |
| 13 | 3% | **Public Policy** | 26 | 4% |
| 12 | 3% | **Undue Influence** | 6 | 1% |
| 11 | 3% | **Unconscionability** | 15 | 2% |
| 3 | 1% | **Incapacity** | 23 | 4% |
| 61 | 16% | **Miscellaneous** | 69 | 11% |

In the 2013–2017 dataset, the relative frequency of many of these "traditional" defenses declined, with procedural or jurisdictional challenges taking over a larger share of the overall disputing—24% of the cases, compared to only 4% of the cases in the earlier dataset. This most rapidly expanding category of disputing, which we did not even include in the original case coding questionnaire in 1999–2003 because so infrequent in that time frame, involves such things as whether the court had jurisdiction to hear the matter,[65] whether the parties had exhausted administrative reme-

trary to community expectations creates uncertainty in whether mediation settlements are enforceable "casting a pall over the development of ADR in Minnesota").

63 Since opinions often evaluate more than a single enforcement defense, the total exceeds 100%.

64 *Id.*

65 *See, e.g.*, Melchor v. Eisen & Son Inc., No. 15CV00113 (DF), 2016 WL 3443649, at *8 (S.D.N.Y. June 10, 2016) (finding no independent basis for federal jurisdiction for the enforcement of a mediated settlement agreement where the court had not expressly retained jurisdiction to enforce the settlement, but nonetheless granting relief under Fed. R. Civ. P. 60(b)(1) because the court's premature dismissal was a "mistake" removing any incentive for compliance with the agreement); *In re* Paternity of S.A.M., 85 N.E.3d 879, 889 (Ind. Ct. App. 2017) (declaring the trial court's order for the parties to conduct mediation, the resulting mediated agreement grant-

dies,[66] or had taken the necessary steps in the prior proceeding or in this proceeding to raise the issue or preserve the issue for review.[67]

Duress cases constituted 10% of the disputing in both datasets. Disputing about attorney lack of authority and incapacity increased ever so slightly, the former increasing from 5% to 6%, the latter from 1% to 3%. Defenses based on public policy were also slightly more common, rising for 3% of cases in 1999–2003 to 4% of cases in 2013–2017.

The overall frequency of the miscellaneous category of defenses—admittedly a catch-all for a wide variety of attacks on enforcement ranging from allegations of general unfairness,[68] to assertion of "traditional" but rarely invoked contract theories,[69] to use of arguably creative but ultimately failed avenues of attack[70]—fell slightly, with such cases representing 16% of all enforcement disputes in 1999–2003 but only 13% of disputes in 2013–2017.

And what do the datasets show about success of these various defenses? Table 9 shows how often agreements were enforced despite a particular defense being raised. In both datasets, defenses

ing visitation rights, and the trial court's order approving the agreement all void *ab initio* because the father lacked standing to bring the underlying paternity action).

66 *See, e.g.*, Furlough v. Spherion Atl. Workforce, LLC, 397 S.W.3d 114, 126 (Tenn. 2013) (holding that the plaintiff employee did not have to again exhaust administrative remedies before petitioning the trial court to set aside his mediated worker's compensation settlement).

67 *See, e.g.*, Boyd v. Texas Dep't of Criminal Justice, 697 F. App'x 397, 398 (5th Cir. 2017) (concluding that where no stipulation of dismissal had been filed and the trial court had not yet issued a final judgment, a party's challenge to the validity of a mediated settlement agreement was premature); Krechuniak v. Noorzoy, 11 Cal. App. 5th 713, 726–27, 217 Cal. Rptr. 3d 740, 751–52 (Ct. App. 2017) (precluding party from arguing on appeal that a mediated settlement included an invalid penalty provision where the issue was not presented to the trial court).

68 *See, e.g.*, Byrd v. Byrd, No. 2150124, 2016 WL 3568725, at *9 (Ala. Civ. App. July 1, 2016) (rejecting the argument that financial hardship posed by imminent retirement made a mediated alimony agreement inequitable); Peterson v. Peterson, 765 N.E.2d 827 (Mass. App. Ct. 2002), *rev. denied*, 772 N.E.2d 590 (Mass. June 27, 2002) (rejecting theory that mediation process was so devoid of procedural safeguards "as to deprive the husband of due process").

69 *See, e.g.*, Nelson v. Levy Ctr., LLC, No. CV 9:11-1184-SB-BHH, 2016 WL 1276414, at *5 (D.S.C. Mar. 30, 2016) (rejecting applicability of the doctrine of promissory estoppel where defendant failed to establish, among other things, any injury sustained in relying on alleged promises in the agreement); Cook v. Hughston Clinic, P.C, No. 3:14-CV-296-WKW [WO], 2015 WL 6082397, at *3 (M.D. Ala. Oct. 15, 2015) (deeming both parties' words and actions as inconsistent with the continued existence of the settlement agreement and applying the doctrine of rescission to find the otherwise valid and binding agreement no longer enforceable); Gray v. Wells Fargo Home Mortg., Inc., No. 62408, 2014 WL 504605 (Nev. Jan. 21, 2014) (finding adequate consideration to support enforcement of a mediated settlement).

70 *See, e.g.*, Edney v. Edney, No. S.CT.CIV. 2015-0051, 2016 WL 3188938, at *3 (V.I. June 7, 2016) (confirming that a party's misunderstanding of the law is not a valid ground to set aside a contractual obligation).

related to fundamental fairness of the process such as mediator misconduct, duress, undue influence, fraud, unconscionability, and incapacity were all rejected at a higher rate than the average for the respective five-year period. This rejection of fairness defenses is particularly robust in the more recent dataset. In 2013–2017, where the overall average enforcement rate was 69%: alleging mediator misconduct as a defense to enforcement failed 100% of the time; unconscionability claims were rejected 93% of the time; duress defenses were rejected 88% of the time; incapacity claims were rejected 87% of the time; and fraud defenses were only marginally more successful, with an enforcement rate of 86%.

The lowest enforcement rate is where parties raised procedural or jurisdictional arguments. In 1999–2003, such defenses were rejected outright only 33% of the time, with an additional 27% of the cases being remanded for additional proceedings. In 2013–2017, procedural/jurisdictional arguments continued to be the most successful attacks on mediated settlements, with an enforcement rate of just 53%, well below the 69% average rate. And as in 1999–2003, these defenses were also more likely than average to result in remand (11% when compared to the average remand rate of 8%).

TABLE 9: HOW OFTEN AGREEMENTS ENFORCED DESPITE DEFENSE ASSERTED

| **1999–2003 (372 opinions) 57% Overall Enforcement Rate** | | **2013–2017 (620 opinions) 69% Overall Enforcement Rate** |
|---|---|---|
| **How Often Agreement Enforced Despite Defense Raised** | **Enforcement Defense** | **How Often Agreement Enforced Despite Defense Raised** |
| 75% | **Undue Influence** | 83% |
| 71% | **Mediator Misconduct** | 100% |
| 69% | **Fraud** | 86% |
| 69% | **Mistake** | 74% |
| 66% | **Incapacity** | 87% |
| 64% | **Duress** | 88% |
| 64% | **Unconscionability** | 93% |
| 60% | **Attorney Lack of Authority** | 75% |
| 59% | **Miscellaneous** | 74% |
| 57% | **No Meeting of Minds** | 60% |
| 55% | **Agreement to Agree** | 68% |
| 50% | **Lack of Formality** | 67% |
| 46% | **Public Policy** | 69% |
| 33% | **Procedural/Jurisdictional Challenges** | 53% |

### 3. The Enforcement-Confidentiality Connection

The common wisdom is that enforcement and confidentiality are closely linked.[71] The datasets, in contrast, suggest litigation only relatively rarely involves both issues. As shown in Table 10, between 1999 and 2003, courts considered both enforcement defenses and confidentiality challenges in thirty-eight cases (just 10% of all enforcement defense cases in that time period).

[71] *See, e.g.*, Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, DISP. RESOL. MAG., Fall 2015, at 32, 36 (noting that "presenting evidence of contract defenses often spawns tensions with confidentiality protections."); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 515 (2004) (observing that "the penchant for confidentiality and secrecy, resulting in overlapping privilege rules, makes it difficult for parties to litigate claims of unfairness in the mediation process.").

TABLE 10: THE ENFORCEMENT-CONFIDENTIALITY CONNECTION

| **1999–2003 (38 cases where a court considered both enforcement and confidentiality issues) 10% of all enforcement defense cases** | | **DISPOSITION** | **2013–2017 (29 cases where a court considered both enforcement and confidentiality issues) 5% of all enforcement defense cases** | |
|---|---|---|---|---|
| Number of Cases | Percentage of Cases | | Number of Cases | Percentage of Cases |
| 11 | 29% | Enforced | 19 | 66% |
| 13 | 34% | Not Enforced | 8 | 28% |
| 7 | 18% | Remanded | 2 | 7% |
| 7 | 18% | Modified or decided on other grounds | 0 | 0% |

In the more recent 2013–2017 time period, courts grappled with both enforcement defenses and confidentiality issues only twenty-nine times, just 4% of all cases raising an enforcement defense. The sharp decline in this issue-linking is somewhat surprising given that combining these issues together during the 1999–2003 time period significantly increased the likelihood that an agreement would not be enforced. Indeed, while the overall settlement enforcement rate in that time period was 57%, it dropped dramatically to 29% when parties disputed both enforcement and confidentiality. In 2013–2017, not only did the frequency of linking those issues substantially decline, but the dramatic differential in enforcement rates when the issues were linked virtually disappeared altogether (a 66% enforcement rate when linked, compared to a 69% enforcement rate when not). Together with the overall decline in litigation about confidentiality issues,[72] these statistics suggest that confidentiality frameworks for mediation are working relatively efficiently and predictably for parties.

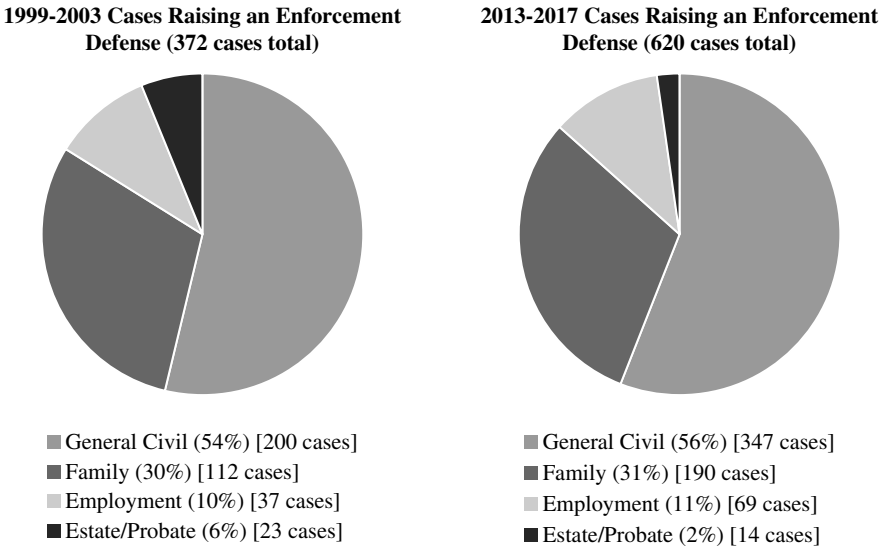
4. Significance of the Subject Matter of the Underlying Dispute

The underlying subject matter of the disputes involving enforcement defenses has been remarkably stable. As shown in Table 11, enforcement-defense disputing in the commercial context increased ever so slightly, from 54% of the cases in 1999–2003 to 56% of the cases in 2013–2017. Very slight increases also occurred

[72] *See* Table 5, *supra* notes 27–45 and accompanying text (noting that confidentiality disputes constituted 12% of all mediation litigation in 1999–2003, but only 8% of all mediation litigation in 2013–2017).

in the family law and employment contexts. Family law cases were 30% of enforcement defense cases in 1999–2003 and 31% of the cases in 2013–2017. Employment law cases were 10% of enforcement defense cases in 1999–2003 and 11% of cases in 2013–2017. In contrast, estate/probate enforcement-defense disputes declined, dropping from 6% of all cases in 1999–2003 to only 2% in 2013–2017.

TABLE 11: SUBJECT MATTER OF CASES WHERE ENFORCEMENT DEFENSES RAISED




Do enforcement rates vary based on subject matter context? Table 12 shows the enforcement rates for the four categories of cases: general civil, family, employment, and estate/probate. In the 1999–2003 dataset, the enforcement rates were virtually identical for all four case types, with the exception that defenses raised in the estate/probate context were slightly less likely to fail (52% enforcement when contrasted with the overall 57% average enforcement rate). In the 2013–2017 dataset, employment disputes were the most likely to be enforced despite defenses (71% enforcement rate), with general civil and family law cases both being enforced at a 69% rate. Once again, enforcement defenses were most successfully adjudicated in the estate/probate context, where agreements were enforced against challenges only 50% of the time.

TABLE 12: ENFORCEMENT RATE BY SUBJECT MATTER OF DISPUTING

| **1999–2003 (372 opinions) 57% Overall Enforcement Rate** | | **2013–2017 (620 opinions) 69% Overall Enforcement Rate** |
|---|---|---|
| **How Often Agreement Enforced Despite Defense Raised** | **Subject Matter of Underlying Dispute** | **How Often Agreement Enforced Despite Defense Raised** |
| 57% | **General Civil** | 69% |
| 56% | **Family** | 69% |
| 57% | **Employment** | 71% |
| 52% | **Estate/Probate** | 50% |

## IV. EVALUATING THE SINGAPORE CONVENTION IN LIGHT OF THE U.S. LITIGATION EXPERIENCE

As noted above, there is certainly no guarantee that the U.S. litigation experience with mediation will be replicated in other jurisdictions. Nonetheless, these litigation trends provide at least some empirical data against which to evaluate decisions, both political and practical, made by the drafters of the Singapore Convention. In particular, I will focus on six things: 1) the choice to focus on enforcement; 2) the wisdom of minimal formalities and an opt-out approach; 3) subject matter treaty exclusions for vulnerable parties; 4) grounds for refusing to grant relief; 5) concerns about mediator malfeasance; and 6) confidentiality.

### A. *A Sensible Focus on Enforcement*

The Singapore Convention creates a legal framework for recognition and enforcement of mediated settlement agreements made in the context of international commercial business disputes. As Timothy Schnabel, former head of the U.S. delegation to the Convention Working Group puts it, mediated settlements qualifying for enforcement under the Convention will "be able to circulate across borders in their own right, without the need to rely on domestic contract law or being transformed into an arbitral award on agreed terms."[73]

[73] Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 25 AM. REV. INT'L ARB. (forthcoming 2019), *available at* https://

Why elect to focus on enforcement? Perhaps most important is the perspective of international commercial mediation users. Recent empirical surveys suggest strong support for a global enforcement framework, akin to what the New York Convention accomplished for arbitration.[74] In a perfect world, since mediation is based on consent and self-determination, one might be excused for thinking that parties using the process would live up to their obligations. But the reality is that they do not always do so, as aptly demonstrated by the U.S. mediation litigation experience documented in Part III *infra*, which shows that disputing about enforcement of mediated settlement agreements has always been the most common issue addressed in mediation litigation.

The Convention drafters initially discussed whether to include enforcement of agreements to mediate in addition to enforcement of mediated settlement agreements.[75] That dual-track approach would have mirrored the New York Convention, which provides for enforcement of agreements to arbitrate,[76] as well as arbitral

ssrn.com/abstract=3320823, at 2. According to the Convention's Preamble, the enforcement framework will "contribute to the development of harmonious international economic relations." Singapore Convention, *supra* note 1, at Preamble.

74 *See, e.g.*, S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation* (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, Nov. 17, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302 (reporting that 74% of survey respondents believe a Convention on enforcement would encourage increased use of mediation and conciliation in their countries, "with only 8% of respondents taking the contrary view."). *See also* Schnabel, *supra* note 50, at 3 (noting that "UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation to resolve disputes" and further noting that "[m]any companies find it hard to convince their business partners in some jurisdictions to engage in mediation based on views that it lacks a stamp of international legitimacy like the New York Convention has given to arbitration since 1958.").

75 *See generally* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 32–34 (2014) (recommending that a Convention address enforcement of agreements to mediate and suggesting that drafters could turn to the UNCITRAL Model Conciliation Law "for inspiration, since that instrument includes some very good language concerning the enforcement of an agreement to mediate as well as provisions relating to the rejection or termination of an offer to mediate").

76 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, art. II(1) (providing that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

awards.[77] The drafters ultimately declined to legislate enforcement of agreements to mediate, primarily out of concern the issue would overcomplicate the drafting effort.[78] The U.S. litigation experience would suggest this choice should be relatively non-controversial. As noted above in Part II(C), disputes about court power to compel mediation were just 6% of all cases in 2013–2017 (down from 13% in 1999–2003), while disputes about contractual or statutory obligations to mediate were 9% of all cases in 2013–2017 (down from 10% in 1999–2003).[79] Regardless of the overall frequency of disputing, successful challenges to court-compelled mediation are rare,[80] and courts "will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties' pre-dispute contract."[81]

### B. *The Wisdom of Minimal Formalities and Opt-out Approach*

The Singapore Convention requires only minimal formalities as a condition of providing enforcement relief[82] and permits opt-out from treaty coverage only by declaration[83]—in other words, a default approach that generally assumes that parties want their agreements to be enforceable. Both were wise drafting choices that will limit the type of litigation about formalities and party in-

77 *Id.* art. I(1) (providing that "[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.").

78 *See generally* Schnabel, *supra* note 50, at 14. *See also* Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, 3 ICC DISP. RESOL. BULL. 42, 49 (2018) (noting that "[w]hether or not agreements to mediate are enforceable and whether they are considered conditions precedent that preclude the progression to employing other dispute resolution modalities varies across jurisdictions."); Deason, *supra* note 71, at 34 (calling it sensible to separate enforcement of settlements from enforcement of agreements to mediate, noting that "as a practical matter, garnering support for a less ambitious legal instrument would probably be easier" and questioning whether enforcement is needed to initiate mediation).

79 *But see supra* note 44 (emphasizing that more than a third of the condition precedent cases in 2013–2017 addressed the foreclosure mediation statute of a single state, Nevada).

80 COLE ET AL., *supra* note 11, § 9:2.

81 Coben & Thompson, *supra* note 2, at 105.

82 Singapore Convention, *supra* note 1, art. 4.

83 *Id.* art. 8(1)(b).

tention to be bound that regularly appears in the U.S. mediation litigation datasets, both old and new.[84]

Under the Convention, a settlement must be signed by the parties,[85] with an authorized option for electronic signature.[86] The party seeking relief under the Convention must offer evidence that mediation has occurred,[87] including among other easy to prove options, the mediator's signature on the agreement.[88] While a number of delegations expressed concerns about the mediator being the source of such evidence,[89] it is a common exception to confidentiality in a number of U.S. statutory frameworks, including the Uniform Mediation Act,[90] which expressly authorizes a mediator to report whether mediation occurred, as well as party attendance and whether a settlement was reached.[91] The 2005 AAA/ABA/ACR Revised Model Standards of Conduct for Mediators, the most widely cited ethical code of conduct for mediators in the United States, also expressly authorizes mediator reports regarding

84 *See* COLE ET AL., *supra* note 11, § 7:19 (observing that "[i]ncreased formality requirements are intended to guard against surprise and uncertainty, to protect confidentiality, and to reduce litigation" but often end up "creat[ing] the surprise, uncertainty, and increased litigation"). *See, e.g.*, Haghighi v. Russian-American Broadcasting Co., 945 F. Supp. 1233, discussed *supra* note 62; *In re* TFT-LCD (Flat Panel) Antitrust Litig., 2013 WL 6326707 (N.D. Cal. 2013) (holding it insufficient that the parties intended, at the time of contract formation, to be bound by the mediated settlement terms, where their agreement did not include a statement to the effect that their settlement was intended to be enforceable or binding).

85 Singapore Convention, *supra* note 1, art. 4(1)(a).

86 *Id.* art. 4(2)(a).

87 *Id.* art. 4(1)(b). *See* Schnabel, *supra* note 50, at 30–31 (noting that "[t]he stated reason for imposing this requirement was to reduce the risk of fraud and to make it easier for competent authorities to ensure that the settlement was indeed mediated").

88 Singapore Convention, *supra* note 1, art. 4(1)(b)(i). Other options for such evidence include the mediators' separate written attestation that mediation occurred, a written statement from the institution administering the mediation, or in the absence of those listed methods, "any other evidence acceptable to the competent authority." *See* Singapore Convention, *supra* note 1, art. 4(1)(b)(ii)–(iv). For a more complete analysis of Article 4 proof, see SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019).

89 *See generally* Schnabel, *supra* note 50, at 31–32 (noting, among other things, the concern that mediators in some jurisdictions are trained not to sign a settlement).

90 For detailed information about the Act, including full text as adopted (with or without reporter's notes), superseded drafts, and legislative fact sheet, see *Mediation Act*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110w (last visited Apr. 10, 2019).

91 *See* Unif. Mediation Act § 7(b)(1) ("A mediator may disclose . . . whether the mediation occurred or has terminated, whether a settlement was reached, and attendance"). For additional statutory and court rules addressing mediator reports, see COLE ET AL., *supra* note 11, § 8:40.

attendance and whether or not a settlement was reached.[92] The European Code of Conduct for Mediators likewise authorizes mediator disclosure when "compelled by law or grounds of public policy."[93] The bottom line: the Convention requirement for minimal formality will do little to chill mediator performance, is consistent with many jurisdictions' existing approach to confidentiality, and will avoid a particularly robust category of litigation—disputing about enforcement of oral agreements[94] and "magic word" requirements like those in my home state of Minnesota[95] or California.[96]

The Convention's "opt-out" approach is also likely to significantly reduce overall litigation. Signing states may exercise a reservation right to declare that the Convention applies only if parties have agreed to its application,[97] but absent that reservation or express contractual agreement of parties to negate Convention application,[98] the Convention applies without the necessity of private party contracting on the topic. This seems best aligned with the common understanding of disputing parties.[99]

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92 *See* 2005 AAA/ABA/ACR REVISED MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V(A)(2) (permitting mediator to report "if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.").

93 *See* EUROPEAN CODE OF CONDUCT FOR MEDIATORS § 4 ("The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it.").

94 COLE ET AL., *supra* note 11, § 7:5 (cataloguing dozens of oral enforcement disputes, including seventeen state supreme court decisions).

95 Under Minnesota's Civil Mediation Act, a mediated settlement agreement must state specifically that the agreement is binding, that the parties were advised in writing that the mediator has no duty to protect the parties' interests or to inform them about their legal rights, that signing the settlement agreement might adversely affect their rights, and that they should consult with an attorney before signing or if the parties are uncertain of their rights. *See* Minn. Stat. § 572.35(1).

96 *See* CAL. EVID. CODE § 1123 (providing that a written mediated settlement agreement can be admissible only if the "agreement provides it is admissible," "enforceable," or contains "words to that effect.").

97 Singapore Convention, *supra* note 1, art. 8(1)(b) ("A Party to the Convention may declare that: . . . (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.").

98 Parties who affirmatively by agreement opt-out of Convention application would satisfy the refusal ground in Convention, art. 5(1)(d) ("granting relief would be contrary to the terms of the settlement agreement.").

99 *See* Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, ASIAN J. INT'L L. 1, 5–6 (2019) (noting that requiring affirmative opt-in could be contrary to the expectations of the parties as they would generally expect the other party to comply with the settlement agreement and thus its possible enforcement, citing Report of Working Group II (Dispute Settlement) on the Work of its Sixty-sixth Session, UNCITRAL, UN Doc. A/CN.9/901 (2017), para. 36.); Deason, *supra* note 71, at 36 (noting that "[a]n opt-out

### C. *Justifiable Exclusions?*

The Convention applies to agreements resulting from mediation to resolve international commercial disputes.[100] Disputes arising from transactions involving consumers, as well as family, inheritance, and employment law are specifically excluded from coverage.[101] A primary motivation for these exclusions is the perception that in these contexts parties are more likely to be victims of unequal bargaining power.[102] As one commentator has opined, "crafting desirable protections for relatively unsophisticated parties subject to adhesion agreements would overly complicate a convention. Furthermore, absent this exclusion, a convention would run afoul of mandatory laws protecting such parties, which frequently are stronger outside the United States."[103]

Does the litigation track record in the United States provide any evidence to support the assumption that parties might be more "at risk" when mediating in certain subject matter categories? Surprisingly, there is very little in the datasets to justify this concern.

framework makes sense from the perspective of maximizing use of the convention's enforcement mechanisms" as "[r]esearch has shown that default rules are 'sticky,' meaning that parties tend not to alter them."). That said, the opt-in, opt-out choice was hotly debated. *See* Schnabel, *supra* note 50, at 57–59. *See also* Sussman, *supra* note 78, at 49 (summarizing the underlying policy conundrum as offering contrasting views of self-determination and party autonomy, with one perspective positing these prime values would be best served by convention application only where the parties have expressly consented to be bound, whereas others emphasize the counter-intuitiveness of requiring parties "to confirm their consent to enforce their obligations under a settlement agreement.").

100 Singapore Convention, *supra* note 1, art. 1(1) ("This Convention 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 . . .").

101 *Id.* art. 1(2) ("This Convention does not apply to settlement agreements: (a) concluded to resolve a dispute 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.").

102 *See generally* Schnabel, *supra* note 50, at 23–24.

103 Deason, *supra* note 71, at 33–34; SING. REF. BK., Ellen E. Deason, *What's in a Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1149 (2019). *See also* Dorkas Quek Anderson, *Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory? in* MAX PLANCK INSTITUTE LUXEMBOURG SUMMER SCHOOL-INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW SUMMER SCHOOL 2018: PRIVATIZING DISPUTE RESOLUTION AND ITS LIMITS para. 43 (Nomos, 3d ed. 2018), *available at* https://ssrn.com/abstract=3304587 (noting it is "common practice in commercial mediations to have legal representation to protect parties against any pressure exerted by the mediator. Hence, the assumption of arms-length negotiations within contract law may not be too far from the reality in cross-border commercial mediations.").

As noted *supra* in Table 12, the percentage at which agreements in a particular subject matter context are enforced despite an enforcement defense tend not to vary from the overall enforcement averages. Estate/probate cases are a clear exception, with enforcement defenses succeeding in that context at a relatively higher rate when compared to the average (52% settlement enforcement rate in 1999–2003 dataset compared to the average rate in that time period of 57%; 50% settlement enforcement rate in 2013–2017 dataset compared to the average rate of 69%). On the one hand, this disparity might well be attributable to the vulnerability of parties in that particular bargaining context, exactly as the Convention drafters feared. It is also possible, however, that the relative paucity of estate/probate cases in the datasets simply skews the numbers.

### D. *Striking the Right Balance on Contract Defenses (for the most part)*

Article 5 of the Convention lays out an exclusive list of grounds on which a court may refuse enforcement or block a party's ability to invoke a mediated settlement agreement in defense of an attempt to relitigate the underlying dispute (what many jurisdictions would refer to as "recognition").[104] A detailed explication of the grounds for refusal is beyond the scope of this short article. Comprehensive summaries are available elsewhere, including essays published in the chapters in this Singapore Reference Book[105] The chart below authored and recently published by Edna Sussman offers a beautifully succinct summary[106]:

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[104] For a detailed explication of the complex negotiations regarding the absence of the word "recognition" from the Convention, see Schnabel, *supra* note 50, at 35–42.

[105] *See* SING. REF. BK., Michel Kallipetis, *Singapore Convention Defences Based on Mediator's Misconduct: Articles 5.1(e) & (f)*, 20 CARDOZO J. CONFLICT RESOL. 1197 (2019); SING. REF. BK., Jean-Christophe Boulet, *The Singapore Convention and the Metamorphosis of Contractual Litigation*, 20 CARDOZO J. CONFLICT RESOL. 1209 (2019); SING. REF. BK., Héctor Flores Sentíes, *Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention*, 20 CARDOZO J. CONFLICT RESOL. 1235 (2019). *See also* Schnabel, *supra* note 50, at 42–56.

[106] Sussman, *supra* note 78, at 52 (noting that "[t]he grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct.").

| | |
|---|---|
| Substantive grounds | Incapacity of a party to the settlement agreement,[107] or Settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it, or failing any indication, under the law applicable by the competent authority where relief is sought.[108] |
| Grounds relating to the terms of the settlement agreement | The settlement agreement is not binding, or is not final, according to its terms,[109] or<br><br>The settlement agreement has been subsequently modified,[110] or<br><br>Obligations in the settlement agreement have been *performed*[111] or are *not clear or comprehensible*,[112] or<br><br>Granting relief would be contrary to the terms of the settlement agreement.[113] |
| Grounds relating to the mediator's conduct and the process | Serious breach by the mediator of standards applicable to the mediator or the mediation without which breach the party would not have entered into the settlement agreement,[114] or<br><br>Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.[115] |
| *Sua moto*/*sua sponte* grounds invokable by the competent authority of the Party to the Convention where relief is sought or a requesting party | Granting relief would be contrary to the public policy of that Party,[116] or<br><br>The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.[117] |

During the March 2019 symposium, more than one speaker emphasized the necessity to interpret these Convention grounds for refusal language with particular policy objectives in mind. Allan Stitt, the Canadian Delegate to the UNCITRAL Working Group, offered two very helpful framing questions: 1) Who are we trying to help? and 2) What are we protecting them from? His answers: "We are trying to help the person who wants to enforce a

107 Singapore Convention, *supra* note 1, art. 5(1)(a).
108 *Id.* art. 5(1)(b)(i).
109 *Id.* art. 5(1)(b)(ii).
110 *Id.* art. 5(1)(b)(iii).
111 *Id.* art. 5(1)(c)(i).
112 *Id.* art. 5(1)(c)(ii).
113 *Id.* art. 5(1)(d).
114 *Id.* art. 5(1)(e).
115 *Id.* art. 5(1)(f).
116 *Id.* art. 5(2)(a).
117 *Id.* art. 5(2)(b).

mediated settlement agreement. We are protecting that person from the other contracting party who wants to renege on the agreement."[118]

Michal Kallipetis, the IAM Delegate to the UNCITRAL Working Group, noted that the entire purpose of drafting the Convention was to avoid litigation, not encourage it.[119] And he urged attendees to remain cognizant of three key words (highlighted in bold in his impressive memorable PowerPoint presentation) which govern all of the defenses outlined in Article 5:

1) the word "may", which refers to the fact that all of the grounds for refusal of relief are permissive, rather than mandatory;[120]
2) the word "only", which mandates that this permissive refusal authority is conditioned on the party challenging enforcement meeting its burden of proof to establish entitlement to a refusal ground;[121] and
3) the word "proof", which is what a party opposing enforcement must offer with respect to any of the grounds.[122]

Eric Tuchman, General Counsel for the American Arbitration Association, reminded symposium participants to remember the treaty's primary promise: to give legitimacy to mediation, an amicable process based on consent and self-determination that in theory should not result in significant amounts of litigation. The assumption that litigation would be the exception rather than the rule came early in the Working Group deliberations, where it was noted that "very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement."[123]

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118 *See* SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019).

119 *See* Kallipetis, *supra* note 105.

120 Singapore Convention, *supra* note 1, art. 5(1) ("The competent authority of the Party to the Convention where relief is sought under article 4 *may* refuse to grant relief at the request of the party against whom the relief is sought *only* if that party furnishes to the competent authority *proof* that . . .) (emphasis added). In other words, a court could exercise discretion to enforce an agreement even if a particular ground for refusal might apply.

121 *Id.*

122 *Id.* Moreover, the party challenging enforcement carries the burden of proof to establish the ground.

123 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015)*, U.N. Doc A/CN.9/861, at 8, para. 33 (Sept. 17, 2015). *See also* Quek Anderson, *supra* note 103, para. 42 (characterizing Article 5 as "a safety valve to deal with instances when autonomy is compromised, but ideally one that is not frequently utilized."); Schnabel, *supra* note 50, at 4 ("Ideally, the Convention will rarely need to be

As the co-author of *Disputing Irony*[124] and compiler of the two massive mediation litigation datasets described in Part II above, please forgive me if I take a somewhat skeptical view of the anticipated minimal use for the "grounds for refusal." That said, all in all, with my U.S. litigation experience in mind, I feel like the drafters mostly got it right.[125] The grounds are certainly broad enough to permit the wide range of "traditional" contract defenses parties typically raise post-mediation. As documented in Part III above, disputing about those defenses has substantially declined over time in the United States. That may well be the pattern under the Convention as well.

More important, the grounds for refusal are intended to foreclose defenses based on unique domestic law requirements, "such as any requirements that mediators be licensed in a particular jurisdiction or that mediations must be conducted under certain rules or by certain institutions, or that mediated settlements must be notarized or meet other (extra-Convention) formal requirements."[126] The U.S. litigation experience shows that these technical formalities and procedural hoops have become the growth sector in the mediation litigation industry. Cutting them off from the very beginning is a very wise choice.

### E. *Much Ado About Nothing: Overblown Concerns About Mediator Malfeasance?*

As noted in the previous section, Article 5 provides for refusal based on mediator malfeasance.[127] Specifically, Article 5(1)(e) authorizes discretionary refusal to grant enforcement relief if there is proof of a serious breach by the mediator "of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement."[128] Article 5(1)(f) authorizes discretionary refusal to grant enforcement relief based on proof the mediator failed "to disclose to the parties cir-

invoked in court, as in most cases, parties will abide by the mediated settlements they conclude.").

124 Coben & Thompson, *supra* note 1.

125 See Part IV.E *infra* for an important caveat.

126 Schnabel, *supra* note 50, at 45.

127 *Id.* at 50 (characterizing these grounds for refusal as relating "less to the agreement reached by the disputing parties than to the conduct of the third party who helped them resolve the dispute, and the consequences of such conduct.").

128 Singapore Convention, *supra* note 1, art. 5(1)(e).

cumstances that raise justifiable doubts as to the mediator's impartiality or independence" but only if "such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement."[129]

Whether to include any defenses premised on third-party conduct was a topic of hot debate, with the compromise solution being inclusion but only in a very narrow set of circumstances.[130] As succinctly summarized at the March 18, 2019 Cardozo Symposium by speaker Michel Kallipetis,[131] the Article 5(1)(e) defense premised on mediator breach of standards is significantly cabined by the requirement that any alleged breach of standards be "serious" and proven to effectively vitiate party consent—a but/for standard that will be extremely difficult to prove in practice.[132] Kallipetis also forcefully argued that the Article 5(1)(f) defense based on failure to make disclosures about conflicts was similarly restricted in scope

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[129] *Id.* art. 5(1)(f).

[130] *See, e.g.*, Sussman, *supra* note 78, at 49:

> There was a particularly vigorous debate as to whether there should be any defenses based on the conduct of the mediator or a mediator's failure to make disclosures related to independence and impartiality, since that would open the door to some of the gamesmanship that has become problematic in the context of enforcement under the New York Convention. Others felt that it was crucial that these grounds be included in order to ensure the fairness of the mediation process. As part of the package of compromises, it was agreed that grounds related to the conduct of mediators would be included as grounds for refusing to grant relief but that they would only apply in narrow circumstances.

*See also* Chua, *supra* note 99, at 8 (describing the provisions as reflecting compromise in three key ways):

> First, it limits the scope of the defences to instances where the mediator's misconduct or failure to disclose had a direct impact on the settlement agreement in that the "party would not have entered into the settlement agreement". Second, it adjusts the language of the defences to highlight the exceptional circumstances that can be raised by using adjectives such as "serious" and "material". Third, by having the text accompanying the instrument, it provides an illustrative list of examples of applicable standards. Although it would take the development of a substantial body of case-law or other pronouncements by enforcing authorities before it can be said with any certainty what types of conduct would cross the line, the words used in the defences are sufficient to establish that the threshold should be high. Whether or not the misconduct of the mediator was such that a party would not have entered into the settlement agreement without it would be a finding of fact that courts and other enforcing authorities are in a position to make based on available evidence.

[131] Mr. Kallipetis was the International Academy of Mediators Delegate to the Convention Working Group.

[132] *See also* Schnabel, *supra* note 50, at 51–52 (highlighting, among other things, that alleged breaches of standards must be serious, "not just questionable conduct or a minor breach," and the authority considering refusal cannot "apply standards on a post hoc basis (e.g., . . . cannot deny relief based on an argument that the mediator should have followed certain best practices or other jurisdictions' requirements.").

because of the necessity that doubts about mediator impartiality/independence be "justifiable," and even if justifiable, would only be actionable if those justifiable doubts had such material impact that without the failure to disclose the party would not have entered the agreement.[133]

In short, this compromised focus on mediator behavior is in large part likely to be entirely symbolic in practice, which is exactly what the track record from U.S. litigation suggests (despite the fact that the defense is not nearly as circumscribed under common law in the United States as it is in the Convention). As Professor Thompson and I wrote in 2006 with respect to the 1999–2003 dataset which, as noted above in Part III(B)(2), included just seventeen cases where parties asserted mediator misconduct as a defense to enforcement:

> [d]espite considerable academic ink devoted to the subject of mediator liability and ongoing debates about quasi-judicial and statutory immunity, there is a surprising dearth of cases alleging mediator misconduct or ethical violations. As other authors have observed, the chance of a mediator being successfully sued is remote. Nor is mediator misconduct commonly used as an enforcement defense.[134]

In the 2013–2017 dataset, the total number of cases alleging a mediator misconduct defense was even smaller (sixteen total), with not a single one being successful. In other words, much ado about nothing in a practical sense.

### F. *A Defensible Choice to Decline Legislating Mediation Confidentiality*

The Singapore Convention does not address confidentiality, instead leaving this topic to be determined by applicable domestic law.[135] In the past, I have praised the merits of uniformity in confi-

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133 *Id.* at 53–54 (highlighting, among other things, that "'[j]ustifiable doubts'" is intended to establish an objective standard, not affected by whether the party in question subjectively doubts the mediator's independence and impartiality.").

134 Coben & Thompson, *supra* note 2, at 95.

135 *See* Schnabel, *supra* note 50, at 18. While the Convention is silent on confidentiality, the newly approved UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting From Mediation (2018) expressly authorizes disclosure of mediation information "for the purposes of implementation or enforcement of a settlement agreement." *See* Article 10 Confidentiality ("Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is

dentiality regulation,[136] and specifically endorsed the Uniform Mediation Act ("UMA") as a statutory framework where reasonable exceptions to confidentiality permit parties to sensibly litigate about enforcement disputes.[137] That said, getting global agreement on a single approach to this complex topic (which depending on jurisdiction and legal culture might involve statutes, court rules, judicial decisions, ethical codes, ADR institutional provider policies, and/or party contract) would likely take many more years of negotiation than the three the Singapore drafters devoted to the Convention. Indeed, the drafting history of the UMA in the United States was a case study in the difficulty of herding cats, which in the end has resulted in adoption of the end product in only twelve U.S. jurisdictions.[138]

Moreover, the U.S. litigation data suggests that confidentiality, an issue that impacts many aspects of mediation litigation beyond just enforcement, may be far less critical in the context of enforcement disputes than one might assume. Indeed, in our 2006 report on the 1999–2003 dataset, Professor Thompson and I highlighted a surprising phenomenon:

> The large volume of opinions in which courts considered detailed evidence of what transpired in mediations without a confi-

required under the law or for the purposes of implementation or enforcement of a settlement agreement."). U.N. Comm'n on Int'l Trade Law, Report of the U.N. Comm'n on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/, annex II (2018) (emphasis added). This confidentiality provision, albeit renumbered and with the word "mediation" replacing the word "conciliation," is identical to Article 9 of the 2002 UNCITRAL Model Law on International Commercial Conciliation. *See* Report of the United Nations Commission on International Trade Law on Its Thirty-Fifth Session, U.N. GAOR, 57th Sess., Supp. No. 17, annex 1, at 54, U.N. Doc. A/57/17 (2002). *See also* Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, U.N. Commission on International Trade Law, 35th Sess., at 1, U.N. Doc. A/CN.9/514 (2002) (noting that "[a]lthough the Working Group that prepared the Model Law initially considered including a list of specific exceptions, it was strongly felt that listing exceptions in the text of the Model Law might raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive.").

136 *See* Coben, *My Change of Mind on the Uniform Mediation Act*, *supra* note 10.

137 *Id. See also* COLE ET AL., *supra* note 11, § 8:15 (detailing the rather limited litigation history for the Uniform Mediation Act, now adopted in twelve U.S. jurisdictions) and § 8:28 (detailing the litigation perils of California's more absolute approach to mediation confidentiality protection).

138 *See generally* COLE ET AL., *supra* note 11, § 8:13 and multiple secondary sources cited therein (noting that negotiating the Act's confidentiality provisions "proved to be the most contentious part of the Act because many interested commentators had strong but conflicting beliefs about the need for confidentiality in mediation and the tension among privacy, fairness and access to the courts" and that "[d]rafting was also difficult because over 250 state mediation privilege statutes existed at the time the UMA was drafted and mediators from those states sometimes advocated for their state's statute.").

> dentiality issue being raised—either by the parties, or *sua sponte* by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediators' statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct—all without objection or comment. In sum, the walls of the mediation room are remarkably transparent.[139]

I did not code the 2013–2017 dataset with equal specificity regarding source of disclosure and whether disclosure occurred without objection or comment. But as detailed above in Table 12, in the more recent 2013–2017 dataset, litigating parties only relatively rarely joined enforcement and confidentiality issues in the same dispute. Indeed, parties joined those two issues in enforcement defense cases only 5% of the time. And even when the issues were joined, the enforcement rate changed only marginally.[140]

## V. Conclusion

If the U.S. mediation litigation experience tells us anything, it is that disputing about mediation is an inevitable part of institutionalization of the mediation process. As statutes, rules, and other regulations are created and applied, lawyers inevitably learn to exploit the rules universe on behalf of their clients. That said, with institutionalization has also come evolution in disputing trends. Perhaps most relevant to the Singapore Convention effort, the U.S. litigation experience suggests that party disputing about enforcement will decline over time, especially challenges to mediation settlement enforcement based on contract formation or fairness concerns. In that respect, the drafters might take comfort in the hope that the primary goal of the Convention—to promote the use of mediation and confidence in its use—will in fact be its primary legacy, as opposed to ramping up the global count of mediation enforcement disputes.

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139 Coben & Thompson, *supra* note 2, at 58–59.

140 In cases where parties disputed both confidentiality and an enforcement defense, the overall enforcement rate dropped from 66%, as opposed to 69% when enforcement defenses were raised without also litigating confidentiality.



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