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Introduction: Singapore Convention Reference Book

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ARTICLES

INTRODUCTION

Hal Abramson

OVERVIEW

This Reference Book focuses on the new Singapore Mediation Convention for enforcing cross-border mediated settlement agreements. It is designed to deliver on its title—as a reference book. We hope that it will inform discussions as states contemplate ratifying the Singapore Convention and will aid users when interpreting the Convention.

To serve as an accessible reference source, the book is organized into three parts. As explained more fully below, Part I includes three articles that offer three perspectives on the Convention and the process that produced it; Part II presents four articles that supply evidence of the need for a cross-border enforcement instrument and its likely effectiveness; and Part III includes eight articles that examine key provisions in-depth, explaining why particular choices were made and others rejected.

The articles in the book are expanded versions of presentations given at a symposium on the Singapore Convention. The symposium was co-sponsored by Cardozo and Touro Law Schools in New York City on March 18, 2019, three months after the U.N. General Assembly adopted the Convention. Most of the authors were delegates who were in the “room where it happened,” to quote a well-known phrase from Lin-Manuel Miranda’s break-out Broadway hit *Hamilton*.

The Singapore Convention is not perfect. It is the product of a complex negotiation involving diverse parties from around the world. Parties brought to the room varied professional, cultural, and political perspectives and experiences. The result reflects “compromises,” a word with mixed and not always positive meanings, especially for me. Compromise is often understood as an anemic conclusion to a quarrel, where the parties exhaustedly offer to “split the difference.” In this book, I will define the word “compromise” based on what I observed during the UNCITRAL Working Group II deliberations, the U.N. group responsible for drafting the Convention. “Compromise” proposals were usually not the

uncreative “split the difference” variety. Instead, they were frequently quite inventive ones that addressed to some extent the different interests and concerns that were holding up reaching a consensus (the criteria for agreement in a process with no voting). This usage is consistent with best practices in negotiations and left me with a more positive view of a “compromise.”

Realizing that the Convention reflects multiple compromises designed to meet conflicting interests, it is not surprising that the Convention may be viewed as imperfect from the perspective of some delegates and user groups. For this reason, each author that focused on the Convention’s specific provisions in Part III was asked to do more than explain the provisions that the author was covering. Each author was asked to highlight the rationale behind key compromises and any risks when implementing the provisions. By adopting this approach, I hope this book offers a realistic, not idealized, assessment of key provisions.

This reference book offers answers and explanations to many questions that will likely arise in any discussion of the new Convention. Is there a need for an enforcement convention? Given the availability of so many Article 5 defenses, does the Convention improve upon current enforcement mechanisms? Does Article 4 on providing a mediation and Article 5 on defenses against enforcement based on mediator misbehavior offer an easy way for a party to repudiate an agreement? Do Article 8 reservations risk gutting the Convention or offer a pathway for broader buy-in by states? Answers to these questions and many others can be found in these articles.

CONTENT

PART I: OVERVIEW OF THE SINGAPORE CONVENTION

The initial three articles provide an overview of the Convention.

The article by Natalie Morris-Sharma from Singapore who chaired UNCITRAL Working Group II that drafted the Convention provides what she describes as a “whirlwind tour of the Convention.” She explores the multilateral nature of the consensus-building process and how the Convention responds to diverse legal traditions while fashioning a simple, easy-to-use instrument that accommodates flexible mediation processes.

The article by Corinne Montineri, senior legal officer at UNCITRAL and Secretary of Working Group II for the enforcement project, describes how the UNCITRAL drafting process functions within the United Nations and the significance of the Convention in promoting cross-border trade and investment. She provides historical context in explaining how the Convention fits within UNCITRAL's history of mediation-related and enforcement initiatives.

The third article, by me, explains the multiparty negotiation process that produced the Convention and why a number of the key substantive choices were made from the perspective of a person who was present during much of the drafting process.

PART II: NEED FOR AND EFFECTIVENESS OF THE CONVENTION

The first three articles describe empirical studies that can be useful to states that are assessing whether a cross-border enforcement instrument is needed.

In an article designed to open up the black box of the early treaty making stages, Professor S.I. Strong, University of Missouri School of Law and an American Society of International Law Delegate, uses the Singapore Convention as a case study to illustrate how the combination of theoretical work and empirical studies can support the *treaty-proposing* process. Her article includes a summary of her original empirical study that can be useful to countries looking for evidence to support adopting an enforcement instrument. Her full study, published separately, in an article entitled *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973 (2016), identified existing difficulties enforcing mediated settlement agreements, and concluded that “the international legal community strongly supported the adoption” of an international enforcement treaty.

Four other relevant empirical studies are summarized in an article by Deborah Masucci, Co-chair of the International Mediation Institute (IMI) and head of the IMI Delegation. She summarizes studies that were conducted by Queen Mary/White and Case, International Mediation Institute (IMI) (2016 Survey), Institute for Dispute Resolution of the New Jersey City University School of Business, and the Global Pound Conference Series.

Two of these studies, the IMI and the Global Pound Series surveys, are reported in greater detail in an article by Professor

David Weiss, New Jersey City University Institute for Dispute Resolution (NJCU-IDR) and IMI Delegate.

The fourth and final article in Part II offers reassuring evidence that if the U.S. mediation litigation experience reflects the litigation experiences in other countries, the Singapore Convention should be efficacious even with the conditions that must be met in the Convention and the range of defenses that can be asserted in an enforcement proceeding. In an article by Professor James Coben from Mitchell-Hamline Law School and the leading expert on U.S. mediation-related litigation, the author reports on his empirically-based studies and conclusions.

PART III: KEY PROVISIONS—IN-DEPTH CONSIDERATION

Part III scrutinizes Convention provisions central to states' assessment of the treaty's effectiveness in establishing a cross-border enforcement regime that serves their needs. This part also provides guidance to mediation parties seeking to determine the ambit and content of the Convention.

Part A offers two articles that cover the scope of the Convention.

The first article explains why the Convention is limited to commercial disputes and settlement agreements that only result from mediation. It also gives background on the long-overdue change by UNCITRAL to replace the term "conciliation" with "mediation," in an article by Professor Ellen Deason, Ohio State University Law School and American Society of International Law Delegate.

The second article explains why the Convention only applies to mediated settlements and how easy it is to prove a mediation qualifies for enforcement under the Convention, in an article by Allan Stitt, Canadian Delegate and experienced mediator.

Part B offers four articles that delve deeply into the Convention's central features on enforcement and defenses.

The short and convoluted Article 3 that is simply titled "General Principles" is the essential "player" in the enforcement Convention according to Tim Schnabel, former head of the U.S. Delegation. He deciphers the Article while explaining why all the other provisions are "supporting players."

The other three articles cover the defenses.

The first defenses article considers claims of mediator misconduct that can be asserted as a defense against enforcement, a provision that has generated alarm within the mediation community because of how such defenses can be misused. Michel Kallipetis, IAM Delegate and experienced mediator, explains what triggered inclusion of these defenses, parses the language, and suggests why the fears of abuse are unwarranted due to the safeguards in the carefully crafted language.

Two delegates were asked to analyze the same Article 5 defenses because their implementation could be dispositive in determining the Convention's success. Each author also was asked to answer independently whether the new enforcement convention is better than the status quo (existing enforcement options)? The answer is not obvious as the Convention offers a wide range of defenses that could generate the same sort of litigation that can arise without the treaty. In two lengthy articles, one by the Belgium Delegate and lawyer, Jean-Christophe Boulet, and another by Mexican delegate and lawyer, Héctor Flores Sentías, the authors offer their insights on this pivotal provision.

Part C offers two articles that cover Reservations and two other significant provisions.

In a discerning analysis of Article 8 on Reservations, a common provision in treaties that can dilute their effectiveness, Israeli delegate and lawyer, Itai Apter, with a colleague, explains the rationale for these reservations including their benefits for promoting state buy-ins while preserving the Convention's benefits. He suggests that the provision may induce more states to ratify the Convention because states that are hesitant about the Convention's automatic application can file a reservation to reverse it so that the Convention would apply only if a disputing party elects to opt-in.

Finally, in an article that addresses three narrow and significant provisions, Norel Rosner, who represented the European Union at the UNCITRAL negotiations, considers how the Convention coordinates the Convention with other enforcement regimes, illuminates further the opt-in provision, and explains the Convention's involvement of regional economic organizations like the European Union as parties.

ACKNOWLEDGMENTS

I want to thank each of the authors for preparing their valuable and insightful articles. Only because they worked diligently and met a tight timetable with multiple deadlines could this book be published so soon after the Convention was adopted by the U.N.

I also want to thank Corinne Montineri from UNCITRAL's Secretariat for generously reviewing each article in Parts A and C from UNCITRAL's perspective as a safeguard against any major omissions or errors.

I want to join Lela Love in thanking the long list of distinguished sponsors that so generously supported the symposium and this reference book. I want to give special thanks to Touro Dean Harry Ballan who understood early the significance of the Convention's multilateral accomplishment and committed Touro Law School to be a co-sponsor with Cardozo Law School.

Of course, this reference book would not have been possible without the essential and quality work by the student editors of the *Cardozo Journal of Conflict Resolution* and its Editor-in-Chief, Nick Gliagias. I especially want to thank Nick for his professional dedication that went beyond his normal responsibilities, including working diligently and proficiently after graduating and taking the bar examination to format articles and getting the book in shape for the publisher.

And finally, it is my pleasure and privilege to thank Lela Love for suggesting that we put together a symposium on the Singapore Convention, her eagerness to expand the scope of the symposium and the reference book as we progressed, and her devotion and hard work to ensure a successful and worthwhile outcome.

STATUS OF CONVENTION AT TIME OF REFERENCE BOOK
PUBLICATION

On August 7, 2019, the Singapore Convention officially opened for signature at an elegant ceremony hosted by Singapore where 46 countries signed the convention. The official list of signatories that will be updated in perpetuity can be found on the UNCITRAL website by searching for "Singapore Convention on Mediation."

When you check, you will find two columns. The left one lists the countries that have signed the Convention so far. The right column lists the countries that have deposited an instrument of ratification, acceptance, approval, or accession in accordance with Article 14.1 of the Convention. The Convention will become effective six months after a third country shows up in the right column. At the time this book went to the publisher, there were no countries in the right column.

When a third country deposits an instrument and this first international treaty on cross-border commercial mediation becomes effective, mediation will be available for parties on an even playing-field with arbitration and its New York Convention. We hope that this book will help inform the discussions and decisions as countries weigh whether to join the new Singapore Mediation Convention. We also hope the book will be valuable to users when it comes time to implement this new Convention.

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