MEDIATION IN THE MENA REGION: CHALLENGES AND OPPORTUNITIES OF THE UN’S INTERNATIONAL REGIME ON MEDIATION

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ABSTRACT
This article analyzes the new UN’s international regime on mediation as a tool achieving sustainable development goals, promoting better integration of Arab states in the global trading system, as well as ensuring a more effective trade governance in the MENA region. Such a harmonized legal framework is designed to assist States in modernizing their laws on mediation procedure, and to facilitate the enforcement of mediated settlement agreements in cross-border commercial dispute resolution. But its effectiveness in our region will depend on the degree of commitment and enforcement by Arab states, the scope of reservations expressed by signatories, how judicial apparatus will construe exceptions and vague concepts disseminated in various provisions, as well as on the adoption of domestic tools and policies promoting commercial dispute resolution through mediation.

INTRODUCTION
After nearly four years of negotiations involving representatives from over 85 States and 35 NGOs, the United Nations Commission on International Trade Law (UNCITRAL) has recently approved a new international regime on mediation composed of two aligned and complementary legal instruments: the “Convention on International Settlement Agreements Resulting from Mediation”, Known as the Singapore Convention, accompanied by a corresponding “Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation” (UNCITRAL Model Law), which replaces the existing Model Law on Conciliation of 2002.

Such a framework fills a “missing piece” (WONG, 2019) in the international dispute resolution framework, which currently includes the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as the Hague Convention on Choice of Court Agreements.

The UNCITRAL Model Law is designed to assist States in reforming and modernizing their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use. This Model Law can be used as a basis for enactment of legislation on mediation, included, where needed, for implementing the Singapore Convention.

The Singapore Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. It applies to international settlement agreements resulting from mediation (“settlement agreement”). It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. The Convention will oblige contracting States (except in specified limited circumstances) to recognize international resulting from mediation in commercial disputes, either to enforce the agreement or allow it to be invoked as a defence to a claim (that is, either as a sword or a shield). This will avoid the need for a party to commence proceedings for breach of contract in the appropriate national court and then try to enforce the resulting judgment internationally where required (or to have the agreement recorded as an arbitral award and enforce it as
such). Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDGs), mainly the SDG 16.

The Singapore Convention is consistent with the UNCITRAL Model Law. This approach is intended to provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation.

The Singapore Convention is open for signature from 7 August 2019 and will come into force upon ratification by at least three States or regional economic integration organizations (referred to as “Parties”). A total of 46 Parties have signed the Singapore Convention, including the world’s two largest economies, the U.S. and China, and several of the largest economies in Asia. Only three Arab states, namely Saudi Arabia, Jordan and Qatar, have joined this convention to date.

By contrast, various Arab countries are engaged in an active process of upgrading their arbitration laws to be in line with international best practices. This is evidenced by the increasing use of the UNCITRAL Model Law on International Commercial Arbitration. This Model Law, as amended in 2006, is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. Nowadays the vast majority of Arab states have adopted Arbitration laws broadly based on the UNCITRAL Model Law on International Commercial Arbitration and in consistency with its provisions.

In parallel, the New York Convention is hugely successful. Historically, the rate of adoption of the New York Arbitration Convention in the Arab world has been good. Based on the World Bank’s definition of the MENA region, 16 states out of 19 have ratified the New York Convention, with only Iraq, Libya and Yemen still beating this trend.

If one also considers that Arab arbitration centers are growing in significance, as more parties resort to the use of their services, it appears that these important developments can only serve to facilitate the infrastructure supporting international commercial contracts in the Arab world and, in turn, this will have very positive effects on investment and business growth in our region.

While enforceability is not actually a substantial problem in jurisdictions where mediation is well-established, the Arab world still shows much variability in understanding, experience and willingness to use mediation. There is no specific legislative framework regulating the usage of mediation and other ADR techniques in several Arab states. Even though such legal basis exists, the mediation process as adopted in Arab states is often associated with the arbitration process: if the mediation process does not result in a solution within a fixed period, the parties may resort to arbitration.

Unlike Middle Eastern developments in the field of arbitration, which are for the most part uniform with international practices, mediation in the MENA region remains unique in a number of ways that could possibly serve as the justification for the use of mediation remaining stagnant in the region. Despite the positive historical and cultural background, Arab states have not experienced a surge in the use of mediation institutions and processes. This is most likely because there are very few active and trained mediators in the region and there is a lack of confidence in the mediator’s ability to render impartial decisions. That issue is often exasperated by the absence of ethics rules for mediators and standards for their selection and supervision (TIHI and FACH GOMEZ, 2019).

This situation may come as something of a surprise to those experiencing in commercial dispute resolution since recent Global Pound Conference Series (GPC, 2018) revealed that companies from Asia-Pacific and MENA regions are the most supportive of legislation facilitating the enforcement of mediated settlements.

While supporters suggest the international regime has the potential fundamentally to change cross-border commercial dispute resolution, others are skeptical. In particular, some practitioners and scholars of international commercial mediation question whether the Singapore Convention is necessary (LOVE, 2019). Aspects of this Convention also seem inconsistent with the way commercial mediation is practiced in major jurisdictions such as the UK, the US and various Arab countries. While mediation results from consensus between parties who will not be made to do something they didn’t already agree to, the way the Singapore Convention handles enforceability of mediated outcomes may be antithetical to the process of mediation.

To better understand what is at stake, the remaining article is organized as follows. Section I highlights key provisions of the UN’s international regime on mediation. Section II discusses the benefits for Arab States of the UN’s Legal framework. While Section III stresses obstacles impeding the recourse to such a framework, Section IV analyses obstacles relating to exceptions of enforcement. Section V examines domestic measures supporting the enforcement of the UN’s Legal framework on mediation. Finally, Section VI concludes.

**Key provisions of the UN’s legal framework on mediation**

To avoid uncertainty resulting from an absence of statutory provisions, the UNCITRAL Model Law addresses procedural aspects of mediation, including appointment of mediators, commencement and termination of mediation, conduct of the mediation, communication between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation issues, such as the mediator acting as arbitrator and enforceability of settlement agreements. The Model Law provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure. It provides an exhaustive list of grounds that a party can invoke in a procedure covered by the UNCITRAL Model Law.

For its part, the Singapore Convention applies to settlement agreements resulting from mediated resolutions cross-border commercial disputes. It provides a standardized framework for enforcement within signatory states, much like the New York Convention for arbitral awards. The Singapore Convention
seeks to give mediated settlement agreements bite by recognizing the enforceability of the agreements, if they meet the following criteria:

The settlement agreement is “international” – meaning either: (i) at least two or more parties to the agreement have their place in business in different countries or (ii) the country with close connection to the performance of the settlement agreement is different to the place of business of the parties (Article 1);

The agreement is signed by the parties and “resulted from mediation”. Mediation is defined broadly as “a process, irrespective of the expression used or the basis upon which the process was carried out, whereby the parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the “mediator”) lacking the authority to impose a solution upon the parties to the dispute”; The agreement does not fall within the excluded category of settlement agreements. The excluded category includes settlement agreements relating to family, inheritance or employment law and consumer disputes. A settlement agreement that is enforceable as a judgment or as an arbitral award is also excluded from the scope of the Convention in order to avoid possible overlap with existing and future conventions, namely the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on Choice of Court Agreements (2005) and the convention on judgments, under preparation by The Hague Conference on Private International Law (article 5).

None of the listed grounds to refuse enforcement applies (article 5).

If a settlement agreement meets these criteria, each signatory state to the Convention (and its courts) should recognize and enforce the agreement in accordance with its own rules, without substantive review or fresh litigation. This should aid enforcement against assets located in the signatory state and the discharge of other remedies like specific performance or injunctions. Also, if a dispute arises in a signatory state and a party claims it was already resolved by the agreement, the party can invoke the settlement agreement to prove that the matter has already been resolved on those terms.

Further, Article 3 addresses the key obligations of the Parties to the Convention with respect to both enforcement of settlement agreements and the right of a disputing party to invoke a settlement agreement covered by the Convention. Each Party to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement. Article 4 covers the formalities for relying on a settlement agreement, namely, the disputing party shall supply to the competent authority the settlement agreement signed by them and evidence that the settlement agreement results from mediation. The competent authority may require any necessary document in order to verify that the requirements of the Convention are complied with.

The Convention therefore provides greater certainty to parties in international transactions who have reached a settlement of their dispute through mediation. With the aim to provide for the application of the most favorable framework for settlement agreements, Article 7 foresees the application of the more favorable law or treaty.

The Convention defines in Article 5 the grounds upon which a court may refuse to grant relief at the request of the disputing party against whom it is invoked. These grounds can be grouped into three main categories, namely in relation to the disputing parties, the settlement agreement and the mediation procedure. Article 5 includes two additional grounds upon which the court may, on its own motion, refuse to grant relief. Those grounds relate to public policy and the fact that the subject matter of the dispute cannot be settled by mediation.

Article 8 includes reservations. A first reservation permits a Party to the Convention to exclude from the application of the Convention settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration. A second reservation permits a Party to the Convention to declare that it will apply the Convention only to the extent that the disputing parties have agreed to its application.

The Convention and any reservations thereto apply prospectively, to settlement agreements which have been concluded after the entry into force of the Convention for the Party concerned, as provided in Article 9.

Benefits for Arab states of the UN’s legal framework on mediation

The UN’s legal framework is a need for both States and companies engaged in cross-border transactions. Offering a refined combination between the Singapore Convention, a binding international instrument, and the Model Law as a flexible instrument, such a framework is expected to bring certainty and stability to the international framework on mediation, thereby boosting regional trade and contributing to the achievement of Sustainable Development Goals (SDG), mainly the SDG 16.

Promoting business climate and regional trade

Mediation is widely defined as an informal and confidential process, where a neutral mediator helps the conflicting parties bridge their differences and repair working relationships. An internationally-ratified framework will give businesses greater confidence to mediate cross-border disagreements rather than take them to courts. A priority is to keep commercial disputes out of local courts, where litigation can be costly and there may be bias in favor of local operators. At the same time, mediation preserves business relationships, because ultimately quarreling parties come to agreement through consensus. In arbitration, decisions are imposed by an arbiter, but in mediation the parties involved voluntary agree (LOVE, 2019).

At the end of the mediation process, the parties should record any settlement in a binding settlement agreement. When a party refuses to comply with the terms of the settlement agreement, the counterparty may sue on the settlement agreement as a contract for breach of contract. In practice, enforcement is not normally an issue as the parties reach a negotiated settlement voluntarily. However, if problems do arise, enforcement can become a procedural headache, particularly in cross-border situations, where a party may have to go to court in the counterparty’s jurisdiction and start.
proceedings to enforce the settlement. The mediated settlement agreement can become another step on an ultimately longer dispute resolution journey (LOVE, 2019).

Where litigation or arbitration is already on foot, mediated settlements may be recorded as part of those proceedings and potentially be enforced as a judgment or arbitral award. Arb-med-arb clauses have even evolved (for example, Singapore’s SIMC/SIAC Protocol), to aid enforcement of mediated settlements. These require arbitration to be started before the parties go to mediation and, if the parties settle by mediation, the settlement is enforceable under the New York Convention 1958 as a consent award.

Looking at the overall dispute resolution framework, the Hague Convention on Choice of Court Agreements and the new Hague Judgments Convention are designed to assist enforcement of court judgments internationally (though with limited uptake to date). The New York Convention has hugely benefited international arbitration, with enforcement regarded as arbitration’s trump card.

In many ways, the Singapore Convention is the missing piece in the enforcement. The promotion of mediation as an “alternative and effective method of resolving trade disputes” has a critical impact on trade matters (TITI and FACH GOMEZ, 2019). Mediation can be a powerful tool for investors, lawyers, and government officials to bridge the understanding gap and identify underlying interests. It is also a necessary option in light of the realities and limitations of burdensome judicial procedures before domestic courts. It gives the parties in dispute the opportunity to pursue and achieve the goals they originally intended to reach. Mediation simply helps the parties in dispute recognize either that this relation was intended to work, or it was not. The presence of mediation facilities and mediators in the MENA region will ultimately promote comfort among local and foreign investors, and will provide more reliable expectations with regard to results that may be achieved and the timeframe involved in the dispute resolution process.

Recent international surveys indicate that corporate users “would feel more confident” (GPC, 2018) turning to mediation for cross-border commercial disputes if there was more harmonization between domestic legal frameworks, as well as an internationally-recognized expedited enforcement mechanism for international mediated settlement agreements, something like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) but for mediation.

The Singapore Convention on mediation addresses this concern and, in many aspects, was inspired by the New York Convention on Arbitration. The new convention elevates the effect of international mediated settlement agreements into a novel type of legal instrument, representing final and conclusive dispute resolution outcomes, which may be recognized and enforced in accordance with international law along with foreign judgments and arbitral awards.

The Singapore Convention thus lends mediation the regulatory legitimacy needed to become a major player in international dispute resolution practice (ALAGOS, 2019). From a users’ perspective, the convention promises a risk management mechanism accessible in terms of its flexibility and affordability to cross-border business players from traditional large multi-national corporations, to sole traders, and also to start-ups. Clearly, the Singapore Convention will make it easier for businesses to enforce mediated settlement agreements with their cross-border counterparts. This is particularly so for high-value, cross-border transactions, such as mega infrastructure projects. The latter are inherently complex with long-term commitments involving multiple parties, jurisdictions, and contracts. It is important to have good dispute resolution mechanisms that can resolve issues when they arise across the lifetime of the project. Litigation or arbitration proceedings, once initiated, are often protracted. In the meantime, the project stalls. The earlier and more swiftly problems can be resolved, the better. Mediation is therefore a good option for such disputes because it focuses on solving the problem rather than on deciding who is right. It seeks to resolve the problem in a way that will preserve relationships and allow the project to go on.

In sum, the rise of mediation should ultimately work to Arab States’ interests by creating a more stable and predictable market environment featuring smooth and sustainable business relations, as well as liberalizing and facilitating foreign investment, especially in areas of infrastructure projects, high-tech and innovation.

Achieving Sustainable Development Goals (SDG), mainly the SDG 16 “Peace, Justice and Strong Institutions”

Adopted by all United Nations Member States in 2015, the 2030 Agenda for Sustainable Development provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries, developed and developing, in a global partnership. The UN Sustainable Development Goal (SDG) 16 promotes peaceful and inclusive societies for sustainable development by providing access to justice for all and building effective, accountable and inclusive institutions at all levels.

As with the rest of the 2030 Agenda, while governments have a leading role to play, the achievement of SDG 16 depends on a whole-of-society approach. The private sector can thus make an important contribution to efforts toward peace building, inclusion and advancing the rule of law as fundamental to creating an environment conducive to development where business can thrive. As a result, in an increasing number of jurisdictions, the private sector incorporates SDG 16, which focuses on building peaceful, just and inclusive societies, into business planning. An effective legal framework can help the private sector build trust with the public and civil society, and support the role of business in creating conditions that would improve areas such as corporate social responsibility, transparency, accountability and pacific dispute resolution.

Throughout the world, advances in promoting the rule of law, strengthening institutions, and increasing access to justice are uneven. The development of mediation provides a means of influencing the three dimensions of SDG 16:

1. “justice” by ensuring Rule of law and equal access to justice;
2. “Strong institutions” by promoting effective, inclusive, participatory and representative decision-making;
3. “Peace” by enforcing peaceful dispute resolution mechanisms.

At the same time, the development of mediation and other ADR promotes a new kind of trade governance in the region. While the traditional concept of governance is based on the central role of the state and its regulatory and judiciary apparatus, as well as inter governmental cooperation mechanisms, the increasing use of mediation puts private sector and businesses at the heart of this process. As a result, adecentralized or a “bottom-up” system of governance is gradually emerging as a matter of fact with a primary emphasis on easing business environment and reducing cost of litigations.

The UN’s international regime shows, at a larger scale, signatories’ support for a rules-based international order (Al JAFFALI, 2019). Such a framework, particularly the Singapore Convention on Mediation, is more than just a strengthening of international dispute resolution. It also bears testament to countries’ continued commitment to a rules-based international order, which is particularly crucial now as the system that has underpinned global peace and stability is coming under pressure. A rules-based international world order benefits all countries. It allows for predictability and the management of relations and issues based on agreed principles. This, in turn, assures countries, big and small, that their interests will be taken into account. In this context, the weak adherence of Arab states to the UN’s legal framework is regrettable and harmful. These States are not at the forefront of this challenge. The current situation reflects their lack of keenness to support the international system in all that would uphold the rule of law and provide appropriate environment for security, peace and social justice.

Challenges relating to enforcement

An in-depth analysis of the UN’s international regime reveals that many provisions seem inconsistent with fundamental attributes of commercial mediation as practiced not only in Western jurisdictions, including the United States and the United Kingdom, but also in the MENA region. Moreover, the Singapore Convention’s clear reliance on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) exposes fundamental confusion in the distinction between enforcing a contract and enforcing an award.

Concerns of mediator attestation to the settlement agreement

The Singapore Convention grants “the enforcement” only to “agreement[s] resulting from mediation.” The question then arises how to verify that an agreement resulted from mediation. Article 4.1(b) sets forth four possible ways that the party seeking enforcement may prove that it is such an agreement. Two of them contemplate that the mediator attests to that fact by signing either the settlement agreement or another document “indicating that the mediation was carried out.”

Both contractual and statutory provisions in various Arab states require a mediator to decline any comment on whether a mediation was carried out, and among what parties, in the exercise of their obligation of confidentiality. It is common that mediation agreements, by which parties engage the services of a professional mediator, provide in part: “The mediator will maintain in strict confidence all information arising out of or in connection with this mediation regardless of the form that information might take.”

In practice, many Arab mediators conscientiously refuse to sign a settlement agreement. They often incorporate into their mediation agreements that they cannot be compelled to give evidence about anything said or done during and for the purposes of the mediation, including evidence as to whether or not the parties have reached an agreement resolving the matters in dispute in the exercise of their obligation of confidentiality and general practice as mediators.

Holistic concerns regarding “enforcement” of mediated settlement agreements

Holistic concerns are about the entire idea that an agreement arising from mediation is “enforceable” (PHILLIPS, 2018). Arbitrations result in awards, drafted by tribunals with authority, imposing obligations on the “losing” party that can certainly be enforced by their terms. By contrast, settlements (whether mediated or not) result in agreements, with mutual obligations whose authority derives from the parties’ consent, and often they are incapable on their face of being merely “enforced.”

As a way of illustration, a cross-border mediated settlement in which one party agrees to supply the counterparty with such quantity of material as the counterparty “may reasonably require,” and to do so in a “commercially reasonable” period of time after notice. The counterparty now complains that it did not receive the material when it was needed, and seeks to “enforce” the agreement. What notice was given, by whom and to whom? Was the amount required reasonable? And was the time period “commercially reasonable”? Successful mediations are often the product of ‘unusual’ settlements, which require ongoing actions and dealings (DAVIDSON and LO, 2019). For example, upon the conclusion of a successful mediation process, while the parties may have agreed to resolve the primary or core dispute, sometimes it is the case that a range of ancillary matters may only have an ‘agreement in principle’ or alternatively, may be resolved on the basis of an agreement to agree on how a particular future issue will be treated in the future.

In sum, it is not always possible to finalize a settlement agreement immediately or shortly after the conclusion of mediation, particularly if the dispute is extremely complex. Enforcing a non-standard or ‘unusual’ mediation outcome may be problematic.

Concerns about Arab States’ cultural and legal specificities

An effective enforcement of the Singapore Convention will require overcoming Arab States’ cultures and legal specificities. The major distinguishing factor of mediation in the Middle East is the role of the mediator. In the Arab/Islamic approach to mediation, the status and reputation of the mediator in addition to the parties’ respect for the mediator are crucial to reaching amicable compromise settlements. In the Arab world, the mediator is perceived as someone having all the answers and solutions. Consequently, the mediator plays
an active role (i.e., as a fact finder) and takes an evaluative stance as opposed to the Western mediator who is neutral and plays a facilitating role by allowing the disputants to reach a resolution by themselves. Additionally, while the Western mediator is more concerned with having knowledge about the legal procedures and structures, the mediator in the MENA region is required to know more about the history and facts of the conflict.

Apart from the role and approach of the mediator, the goal of the mediator is different in the two contexts. Because it is important to continue the relationship between the parties and preserve social harmony in the group, unlike the Western mediator who is focused on the maximization of personal and group interests, the goal of the Middle Eastern mediator is to restore the broken relationship between the parties and within the community. The Western mediator views mediation as having a win/lose or win/win outcome, while the Middle Eastern mediator recognizes the preservation of social harmony as a superordinate goal.

Another major difference between the two approaches is that while in the West mediation takes place instead of formal legal proceedings, in the MENA region mediation often takes place alongside a related formal legal proceeding. Therefore, although both approaches consider discretion essential to mediation, in our region mediators may be summoned to a formal state court to testify about an agreement they have obtained.

It is important to also note that in some countries in the Middle East the subject matter of the mediation as well as the mediated agreement must conform to Shari’ah. This can often be problematic since Shari’ah prohibits riba (usury), which generally occurs in any commercial transaction in which one or both parties receive interest, and gharar (gambling), which has been extended by analogy to ban any commercial transaction in which a party’s consideration is uncertain since one party could unexpectedly receive something of greater value than what they gave in exchange. These restrictions can be hard to navigate and serve as a hindrance on the use of mediation as a method for dispute resolution.

Confusion between mediation and conciliation

The UNCITRAL Model Law was initially adopted in 2002. It was known as the “Model Law on International Commercial Conciliation”, and it covered the conciliation procedure. The Model Law has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed “Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation”. In its previously adopted texts and relevant documents, UNCITRAL used the term “conciliation” with the understanding that the terms “conciliation” and “mediation” were interchangeable. In amending the Model Law, UNCITRAL decided to use the term “mediation” instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

For the purposes of the UNCITRAL Model Law, article 1 qualifies “mediation” as a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

Similarly, Article 2 of the Singapore Convention adopts a large definition of the concept of “mediation” with the risk of confusion with other concepts such as negotiation or conciliation. It provides that “Mediation means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute”.

This approach holds a number of advantages. It helps bridge differences existing between the Anglo-Saxon model in which both concepts smoothly merge, and the civil law model making a basic distinction in both content and scope of these concepts (ITTI and FACH GOMEZ, 2019).

It is also worth noting that mediation and conciliation are widespread among businesses, and offer common genuine advantages compared to litigation: 1) attendance and involvement of stakeholders in the dispute resolution, 2) the speed of dispute resolution, 3) lower costs and known in advance, 4) effective enforcement of final agreements, and 5) confidentiality of the process. Legally speaking, the effects of mediation and conciliation are similar. At the end of the process the parties reach an agreement. If the conciliator shall draw up a record of the settlement, the mediator shall submit a mediation report to the parties, which may lead to a mediated agreement. The record and the mediated agreement have the same legal validity. The conciliation or mediation agreement is a contract having force of law between the parties. To make the agreement effective against third parties, the stakeholders may seek a certification or approval by the relevant jurisdictions making it an enforceable instrument.

Mediation and Conciliation are two methods of conflicts resolutions in which a third-party is involved. However, his role varies from one method to another. Unlike the conciliator who has an active role in the conciliation process (eg he can propose a solution to end the conflict), the mediator assists the parties throughout the mediation process to help them find a solution to their dispute by themselves.

It is true that both have a similar objective: to encourage the parties to come together for an amicable solution to their differences. But the methods and the posture of the third party are not the same (CARBONE, 2019). The mediator tends to establish or restore the dialogue, the relational quality, whereas the conciliator has a more prescriptive and directive role. The mediator is neutral while the conciliator is not. The mediator helps the parties find their own solution while the conciliator proposes the solution. This difference is due to the fact that the mediator thinks that if we impose or suggest a solution to the parties, the solution may not be sustainable because it has been imposed or strongly suggested and not
chosen, because it may trigger a need for rebellion or a search for revenge.

Challenges relating to exceptions of enforcement

While the UN’s legal framework makes a positive step toward improving the rule of law and trade governance with promising results in the MENA region, some analysts stress that this framework, in particular the Singapore Convention, clearly raises concerns for businesses and investors as a whole.

Concerns of refusal to enforce grounded on mediator conduct

Article 5 of Singapore convention sets forth grounds upon which a court in a subscribing State may refuse to enforce a settlement agreement arising from mediation. Article 5.1(e) provides that an authority may refuse to grant the relief sought against a party to an agreement if that party furnishes proof that “[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement.”

In Arab states where judicial institutions have little experience in mediation, this provision can be interpreted as a map for counsel to relieve its client of its obligations under a settlement agreement, by focusing on the conduct of the mediator (LOWE, 2019). Many questions and requests for clarification on its exact scope are raised: What standards are applicable to this mediator and this mediation? What conduct of the mediator constituted violation of those standards? What witness to the alleged conduct is competent to testify as to the alleged violation? Shall the mediator be called to explain why the contested conduct does not constitute a violation of the applicable standards?

The latest question refers to another essential challenge relating to the deeply entrenched principles, subsisting in statute, court rule and private contract through many Arab states, that no party will subpoena the mediator to testify in any proceeding; that mediation communications are confidential; and that such communications are also privileged and may not be introduced in any proceeding (DAVIDSON and LO, 2019).

Risk resulting from the interaction between the Singapore Convention and other relevant conventions

Interestingly, the Singapore Convention excludes settlement agreements which:

1. have been concluded or approved in the course of a court proceeding;
2. are enforceable as a judgement; or
3. are enforceable as an arbitral award.

It is evident that the rationale for excluding such settlement agreements is that there are other widely accepted international mechanisms to cover such circumstances and preclude parties from having two bites at the apple, for example, the Hague Choice of Court Convention (Hague Convention) and the New York Convention.

It is not immediately apparent why an overlap between such regimes would necessarily be problematic given that instruments such as the Singapore Mediation Convention and the Hague Convention operate as floors as opposed to ceilings (DAVIDSON and LO, 2019). However, there is a risk for an international settlement agreement to fall between the cracks and not be captured by any international regime. For example, consider the following circumstances:

1. A settlement agreement that is enforceable as an order of a court, but does not derive from an exclusive jurisdiction clause (such an agreement would not engage either the Singapore or the Hague Convention); and
2. A settlement agreement that is enforceable as a judgment in the country of origin, but not in the country of the counter party.

Further, in consideration of the limited number of countries which have ratified the Hague Convention to date, it really calls into question whether it is appropriate or necessary to impose such limitations on the scope of the Singapore Convention.

Although the Singapore Convention is yet to come into force, given the possibility that a settlement agreement may fall between the cracks of the different treaties, it may be prudent to incorporate into the dispute resolution clauses of contracts provisions which provide for mediation and the enforcement of mediated settlements through the Singapore Convention regime as a matter of contingency.

Vague concepts

Like the New York Convention, the Singapore Convention sets out a limited number of grounds for the competent authority to refuse granting relief. Interestingly, these refusals are permissive rather than mandatory, and a competent authority may choose to grant relief despite a particular exception applying. These grounds for refusing to grant relief are set out in Article 5 to the Singapore Convention and can be considered in two distinct categories of exceptions.

Firstly, two grounds for refusing to grant relief are set out in Article 5(2) and are concerned with public policy considerations and may be raised suaponte by a competent authority.

Secondly, the grounds set forth in Article 5(1) are specifically concerned with the mediation process itself and permits parties to challenge the enforcement of settlement agreements if it can be demonstrated that:

1. a party to the settlement agreement was under some form of ‘incapacity’;
2. the settlement agreement relied upon:
   - is null and void, inoperative or incapable of being performed under the law to which the agreement is subjected; or failing any indication thereof, under the law deemed applicable by the competent authority of the Contracting State where the agreement is sought to be applied;
   - is not binding or final, is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen;
   - has been subsequently modified; or
   - is otherwise incapable of being enforced because it is not clear and comprehensible;
the obligations in the settlement agreement have been performed;

there was a ‘serious breach’ by the mediator of the standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or

there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence, and such failure had a material impact or ‘undue influence’ on a party, without which failure that party would not have entered into the settlement agreement.

The Singapore Convention does not go on to qualify what may constitute a “public policy” consideration, an “incapacity” by one party, a “serious breach” by the mediator or the meaning of “undue influence”. Scholars and Stakeholders, in particular foreign businesses, are already raising deep concerns about the use of broad concepts whose interpretation varies according to the particularities of each legal system and the degree of maturity of domestic legal frameworks for mediation.

Once the Singapore Convention has been ratified and adopted into a country’s domestic law, the meaning of these concepts will likely be informed by the relevant case law applicable in that jurisdiction or be given their natural ordinary meaning. However, for a party resisting relief, these concepts will be fertile grounds for argument during the enforcement process which would be problematic for parties wanting a fast and efficient process.

This implication is exacerbated by the critical fact that a competent authority will only have before it a signed settlement document of the parties and some evidence that mediation had taken place (DAVIDSON and LO, 2019). Distinct from the process for enforcing arbitral awards, there will be no reasoning/judgement attached to the settlement documentation. As such, it calls into question as to how a competent authority will make its determination in the absence of an opportunity to forensically analyze the circumstances surrounding the mediation process, the settlement agreement and the evidence adduced by the parties.

In respect of Article 5(f), there is a noteworthy distinction between the Singapore Convention and the New York Convention. Unlike the New York Convention, Article 5(f) of the Singapore Convention requires not only the mediator’s lack of impartiality or independence in the process, but also that this mediator’s lack of impartiality or independence had a material effect on the outcome. In contrast, under the New York Convention, a party does not need to demonstrate that the circumstances had a material effect on the award. It is sufficient under Article V(1)(b) of the New York Convention to establish that a party has not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

In addition, Article 5(1)(b)(ii) of the Singapore Convention permits a competent authority to refuse relief if the mediated settlement agreement is “not binding, or is not final, according to its terms”. As mentioned above, parties may conclude mediations with an ‘agreement in principle’. Therefore, notwithstanding that a party in this situation is unlikely to have a signed mediated settlement agreement, a party seeking enforcement will also be faced with an additional hurdle of having to establish that the ‘agreement in principle’ was binding. In such circumstances, parties should ensure that the ‘agreement in principle’ falls within one of the categories recognized by local courts as being legally binding.

It is also worth noting that the words “according to its terms” imply a restriction on the competent authority that it may only look at what is explicitly stated within the four corners of the mediated settlement agreement, and is precluded from considering extrinsic evidence to determine whether the mediated settlement agreement is final or binding.

Similarly to Article V(2) of the New York Convention, Article 5(1)(b)(i) permits a competent authority to deny granting relief if the mediated settlement agreement is “null and void, inoperative or incapable of being performed”. This language is broad enough to encompass various contract law concepts, including fraud, misrepresentation, duress and undue influence. Again, this represents potential for a party to resist the enforcement of any mediated settlement agreement.

In sum, the challenge is to ensure that the exceptions that would allow a member country to refuse the enforcement of an arbitral award are applied in a strict and narrow manner. The parameters of what a country regards as exceptions can be wide. In some legal systems such as Saudi Arabia, a settlement agreement, like an arbitration agreement or award, is respected provided that it is not contrary to the principles of Shari’a law. Such a limitation falls within the “public policy” exception, but the key lies in the way such an exception is applied. In this respect, it is worth noting that, in the recent past, various Arab countries have upgraded their arbitration laws to be in line with international best practices. This is evidenced by the increasing use of the UNCITRAL Model Law on International Commercial Arbitration. While in the past “public policy” exceptions have been defined in a wide manner that allowed courts to reject a number of foreign arbitration awards in various Arab countries, there is a discernible trend towards limiting the use of this exception, and applying it only in clear cases of contravention of the country’s moral or public policies.

**Party discretion whether to apply the Singapore Convention**

Perhaps the feature of the Singapore Convention that presents the greatest challenge to it achieving a wide application globally is a reservation provision, allowing States that ratify the Convention to elect to apply it only on an ‘opt-in’ basis, i.e. only insofar as the parties to a settlement agreement have specifically agreed that the Convention will apply. This reservation was apparently a compromise between working party members who wanted the opt-in approach to apply in all cases and those who objected to it applying at all.

On a practical level, it is not clear at what stage the opt-in from the parties would need to be exercised. Presumably this would need to be at least within the settlement agreement itself (or preferably earlier, such as in the mediation agreement) if it was to provide certainty to the parties as to their likely enforcement options before they commit themselves.
The fact that the Singapore Convention may operate on an opt-in basis in some States but not others has the potential to result in an imbalance between parties if an agreement was enforceable against one party because its home jurisdiction (or wherever its relevant assets were) did not apply the opt-in, but unenforceable against the other because its home jurisdiction did. In cases where there is an imbalance of power between the parties, the stronger party could potentially exercise its bargaining power to compel its opponent to agree to opt-in or the contrary, depending on which scenario would be most beneficial to it in terms of pursuing or resisting enforcement in specific jurisdictions. Neither of those outcomes is conducive to encouraging wider usage of international mediation.

However, the more fundamental objection to the opt-in is its potential to limit the overall extent to which the Singapore Convention will apply globally. Giving parties (in some States) the discretion whether to apply it seems to risk it being applied in a patchy fashion, contrary to the basic objective of establishing a comprehensive regime under which mediated settlements are widely enforceable. There must be some doubt whether the New York Convention would have achieved what it has for the status of international arbitration if it only applied where parties had specifically opted in to the regime.

The arguments put forward in the working group in support of the opt-in reservation were less than convincing. It was suggested that such an option was necessary in the interests of party autonomy and to avoid undermining the amicable and voluntary nature of mediation. That arguably conflates the mediation process (which is of course voluntary, both as to whether to participate and whether to agree any particular settlement) with the resulting settlement agreement. Once parties agree and sign formal settlement terms, it is difficult to see how holding them to their agreement could in any way undermine the voluntary nature of mediation (any more than holding parties to, say, their construction contract undermines the voluntary nature of their negotiations to enter into such a contract).

However, while the opt-in reservation has the potential to restrict the new regime’s scope in practical terms, it remains to be seen whether this will in fact limit its success in promoting the status of mediation. Much will depend on how many States ratify this Convention and what proportion of those exercise the reservation. Indeed, if the existence of the opt-in option results in a greater number of States ratifying the Convention than would have been the case without it that may well outweigh any downsides in terms of patchiness in its practical operation. Ultimately, if the key to increasing the global usage of international mediation is changing perceptions and creating greater confidence in the process, then simply the existence of an international enforcement regime that is widely ratified (even if not comprehensively applicable) may be sufficient to achieve this. In brief, where enforcement of a mediation outcome may be via the Singapore Convention, it is important that any resolution should be as comprehensively and well documented as is possible.

Domestic measures supporting the enforcement of the UN’s legal framework on mediation

The effectiveness of the UN’s legal framework will not only require addressing the obstacles related to its provisions, but will also require support and concrete actions of Arab governments. While the use of arbitration is fairly extensive in the MENA region, although mainly in the international arena, the use of mediation is not. Arab culture does not appear to be an obstacle to the use of mediation. The role of the mediator may be compared to that played historically by the Amin, and therefore, theoretically, the notion of a third party helping to resolve a dispute should not be an alien notion to the people of the MENA region.

But the lack of trust and expertise in mediation remains a major feature in Arab states and a real obstacle to its development. Arab citizens do not trust this ‘private’ mode of settling disputes, and there is lack of trust in the independent third-party mediator, as opposed to a judge appointed by the State. People are wary of this ‘liberal justice,’ which might employ different language and which might not be confined to closed procedures that mean ‘security’ for some citizens. Generally, this behavior and these perceptions arise from lack of knowledge about what mediation is. In particular, there is a widespread lack of knowledge in such areas as:

- How the mediation process works;
- What a mediator is;
- The advantages and disadvantages of mediation;
- The moment, place, and grounds for recourse to this remedy;
- The rights, obligations, qualities, and competences of the mediator;
- The legal value of the final agreement of mediation; and
- The extent of the parties’ roles in settling the dispute.

To achieve a shift in this field, a number of urgent measures and policies should be adopted. Proposals for promoting commercial mediation should revolve around three pillars:

Building domestic legal frameworks for conventional mediation more conducive to the development of mediation.

Any reform should be inspired from the UNCITRAL Model Law and consistent with the Singapore Convention. Acceptance and support of the UN’s International regime will lead to the consolidation and harmonization of legal frameworks on mediation throughout the region. The long-term impact will inevitably be the spread of a common culture and a shift in mentality concerning the use of mediation.

Promoting the professionalization of mediators by improving professional skills and ethics.

All Arab states should now adopt a “Code of Ethics and Professional Conduct” applicable to mediators, conflicting parties, and public authorities. This Code would reflect the rights and obligations of all concerned, and specify the conditions for the accreditation of mediators and their liability. The professionalization policy will also require that Arab public authorities develop a national roster of practicing mediators, namely lists of qualified mediators must be available and updated regularly. In particular, specialized mediators with skill sets tailored to particular industries must be available and constantly attuned to their corresponding industries.

Awareness-raising policy focused on the usefulness of mediation and other ADR mechanisms as privileged tools offered to businesses.
CONCLUSION

The above discussion suggests, at least, three observations. First, with the rise of cross-border commercial transactions in the region, more cross-border differences may arise, and parties need fair and efficient ways to resolve disputes in a timely manner. While litigation and arbitration appeal to businesses, with certainty that judgments and arbitral awards can be enforced internationally, mediation has risen in prominence. Mediation is cheaper and faster. Parties keep control over the outcome and preserve harmony and business relationships. Such features are in line with many cultures in the MENA region.

Second, while mediation has real advantages, its utility is limited by divergences in Arab states’ approaches, and by the fact that parties are not assured of enforcement. The UNCITRAL Model Law and the Singapore Convention bring certainty to the international framework on mediation and facilitate the promotion of mediation as an alternative and effective method of resolving international trade disputes. The real value of this legal framework therefore lies in its potential to provide reassurance and confidence in the mediation process as a reliable option for commercial parties in international disputes.

Third, the UN’s international regime on mediation is not only crucial for the adoption of international commercial mediation as a dispute resolution option, but it also constitutes a driving force for sustainable development and effective trade governance in the MENA region. Given the obstacles encountered by Arab governments, an international framework supportive of mediation allows companies to play a key role in achieving these goals. A greater number of Arab states should therefore support this major breakthrough towards good governance and the rule of law. At the same time, the effectiveness of such a regime will require taking into account inherent obstacles impeding the recourse to such a framework, as well as the meaningful engagement by Arab states through the adoption of adequate tools and policies promoting mediation.

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