A Critical Analysis of the Practices and Approaches to ICA, in light of the introduction of the Singapore Convention on Mediation

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Abstract

This paper critically examines the evolving landscape of International Commercial Arbitration (ICA) following the introduction of the Singapore Convention on Mediation (SMC). ICA has historically been the preferred method of resolving international disputes due to its enforceability and neutrality. However, the SMC, adopted in 2019, provides a framework for the enforcement of International Mediation Settlement Agreements (IMSAs), altering the balance between arbitration and mediation. The study employs a comparative legal analysis, assessing the SMC against established arbitral instruments such as the New York Convention (NYC) and the UNCITRAL Model Law. It explores how the introduction of the SMC has impacted ICA, focusing on its implications for arbitral institutions, dispute resolution strategies, and the global enforcement of mediated settlements. By examining legal texts, case law, and academic discourse, this research evaluates the compatibility between ICA and the SMC and whether the latter enhances or disrupts existing arbitration frameworks. The findings suggest that the SMC has significantly influenced international dispute resolution by legitimizing mediation as a viable alternative to arbitration, thereby increasing competition between the two mechanisms. Additionally, the convention has encouraged the development of hybrid dispute resolution methods, such as med-arb, which blend elements of both processes. While the SMC does not replace ICA, it fills a critical gap by providing enforceability to mediated settlements, fostering a more dynamic and flexible global dispute resolution system.

Key Words

Alternative Dispute Resolution, International Commercial Arbitration, Singapore Convention on Mediation, New York Convention on Arbitration, Mediation v Arbitration

1. Introduction

International Commercial Arbitration (ICA) is a private system of adjudication that has been hailed as a key mechanism in international dispute resolution, offering parties a flexible and efficient alternative to traditional litigation[1]. In the current climate, where global trade seems to expand exponentially, there is a growing need for the development of the practices used for international dispute resolution. The two most common forms of dispute resolution are arbitration and mediation. Arbitration is a process in which an

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[1] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 1

impartial arbitrator makes a final decision to settle a dispute between parties[2], whereas mediation is a process in which a neutral third party facilitates negotiation between parties to help them reach a mutually acceptable settlement[3]. The United Nations Convention on International Settlement Agreements Resulting from Mediation, otherwise known as the Singapore Convention on Mediation (SMC)[4], could be viewed as being developed to fulfil that need, as it has been called 'a shot in the arm' for international commercial mediation[5]. One of the reasons why it has been viewed as such is due to the rapid development of the 'Tiger Economies'[6] in south-east Asia where there was no formal instrument for the enforcement of settlement agreements rendered in international commercial mediations (IMSAs). This is propelled by the competitive nature of international dispute resolution, as each jurisdiction and set of rules is trying to offer the most well-rounded process to achieve an efficient and enforceable result.

Zukauskaite's observation that "within the EU every country has a mechanism how to transform a MSA into a directly enforceable title however outside the EU the situation varies significantly"[7] highlights, how the need for such an instrument may have only become apparent with the emergence of the 'Tiger Economies', and why the SMC has quickly garnered attention as a method of enforcement[8]. The Creation of the SMC was heavily influenced by other pre-existing instruments of international dispute resolution such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention (NYC) [9], and the UNCITRAL Arbitration Rules[10]. While these conventions served their purpose well, the need for an effective method of enforcing IMSAs was still necessary. This further evidences the competitive nature of ICA as in order to establish themselves within the market they had to identify what was currently missing and wanted.

The primary objective of this dissertation is to evaluate the compatibility between ICA and the SMC, and to highlight how the SMC has impacted the world of international dispute resolution, by critically assessing and comparing the instruments, practices and challenges associated with each mechanism. In doing this I will first examine and review the history of ICA, including a general overview of the major arbitral instruments and rules. I will then discuss the history of the SMC and what events occurred that caused the creation of this

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[2] Alternative Dispute Resolution: Mediation v Arbitration, What is Arbitration? <https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/ > Accessed 03/01/25

[3] Alternative Dispute Resolution: Mediation v Arbitration, What is Mediation? <https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/ > Accessed 03/01/25

[4] United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (Adopted 20 December 2018, entered into force 12 September 2020) UN Doc A/RES/73/198

[5] Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

[6] Andrew Bloomenthal, 'Four Asian Tigers: What They Are, Economic Strengths Explained ' (Investopedia, 05/10/2023) < https://www.investopedia.com/terms/f/four-asian-tigers.asp > accessed 23/11/2024

[7] Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

[8] Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (Adopted 10 June 1958, Entered into force 7 June 1959) 330 UNTS 38

[10] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17

instrument before beginning the critical analysis of both the SMC and other instruments. As well as the conventions I will introduce other important concepts in the process of ICA such as, the choosing of the seat, and Ad-Hoc vs Off the Shelf approaches. After this I will show what the outcome of my research is and provide a judgment as to whether I believe that SMC has greatly impacted ICA or not.

2. History and Background of ICA

International Commercial Arbitration (ICA) has been evolving for centuries, moulded by the need for a neutral and efficient mechanism for dispute resolution in inter-state trade[11]. The early roots of arbitration can be traced back to ancient times and is viewed as one of the 'oldest methods for the peaceful settlement for international disputes'[12]. In Medieval times, the presence of 'lex mercatoria'[13] shows the existence of some form of arbitration as it was viewed as 'a method of adjudication in dispute-resolution situations where different sets of rules may coexist'[14]. However, arbitration in early periods would have been more informal, being heavily reliant on mutual trust between any trading parties in addition to the reputation of the arbitrators.

The industrial revolution was a turning point in the development of ICA, as with the introduction of globalisation that brought growth of competitive international trading and significant commercial developments, inter-state disputes became much more frequent. This was first presented in the Civil Procedure Act, which stated that an arbitration agreement which was made a rule of court could not be revoked[15]. This indicates that arbitration was beginning to show its merits for commercial disputes as it was solidifying the common law practices that were set out in Vynior[16] 200 years earlier. This allowed for the formation of Arbitral institutions such as the London Court of International Arbitration (LCIA) in 1892[17] as with the foundational rules they were able to provide some formality. Another institution that was later introduced was the International Chamber of Commerce (ICC) in 1919[18] which later became a leading authority in ICA through its provision of an International Court of Arbitration which was introduced in 1923[19]. Initially, the ICC was reliant on the Geneva Protocol on arbitration clauses[20] and the Geneva Convention on the Execution of Foreign Arbitral Awards[21] to oversee any enforcement, until the introduction of the NYC which became the dominant framework. These institutions were founded with the intention of provide a fair and routine administration of ICA under codified rules, and a solid foundation for the use of ICA in international dispute resolution.

After the Second World War there were significant legal milestones which standardised ICA on a global scale. The first major instrument that was introduced to facilitate ICA was the New York Convention (NYC). It was seen as the successor to the Geneva Protocol and Geneva

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[11] Gary B. Born, International Arbitration: Cases and Materials (Kluwer Law International 2011) 2
[12] A. Stuyt, Survey of International Arbitrations 1794-1989 (3rd ed. 1990)
[13] Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' [1985] International and Comparative Law Quarterly 34(4) pp. 747-768. Doi:10.1093/iclqaj/34.4.747
[14] Ulla Liukkunen, Normative Pluralism and International Law: Exploring Global Governance (Cambridge University Press, 2013) 201
[15] English Civil Procedure Act 1833, 3 & 4 Will. IV, Ch. 42
[16] Vynior v Wilde [1609] 77 Eng. Rep. 595 (K.B.)
[17] History of the LCIA < https://www.lcia.org/lcia/history.aspx > Accessed 15/12/22
[18] About the ICC < https://iccwbo.uk/about. > Access 15/12/22
[19] ICC International Court of Arbitration < https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/ > 19/12/24
[20] Protocol on Arbitration Clauses (Adopted 24 September 1923, entered into force 28 July 1924) 27 LNTS 158
[21] Convention on the Execution of Foreign Arbitral Awards (Adopted 26 September 1927, entered into force 25 July 1929) 92 LNTS 302

convention which were seen as 'inadequate' by some spectators including Van Den Berg who stated that 'despite being an improvement in comparison to the previous situation, they were still considered inadequate'[22]. The NYC provides a universal framework for the process of ICA[23] and there are currently 172 state parties including 169 of the 193 United nations member states[24] making it a cornerstone in the world of ICA. In addition to the NYC, the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL)[25] was another influential development as it sought to harmonise arbitration procedures across jurisdictions by providing a consistent and predictable framework. The wide adoption of UNCITRAL[26] has aided in further embedding ICA as the preferred dispute resolution method in global commerce.

ICA is often preferred to litigation by international businesses due to the flexibility, confidentiality, and neutrality that it provides where litigation cannot. Moses suggested that the two main deciding factors are there is a higher likelihood of obtaining an enforceable award, due to the NYC, and the neutrality of the forum[27]. Parties are able to choose their arbitrators and the seat at which the arbitration will occur which highlights the flexibility that is ingrained within ICA. The seat of arbitration is the legal venue or place of the arbitration and is not always the same as the physical location, but they are usually the same as it operates under the assumption of mutual agreement[28]. Most jurisdictions have their own legislature on the seat and venue selection in ICA such as the Arbitration Act[29] in the United Kingdom where case law such as Sulamerica[30] is also an influencing factor, and the Federal Arbitration Act for the US where case law such as Bremen[31] is used to a similar effect.

With the increasing reliance from international organisations on ICA, there has been an increase in the number of arbitral institutions that are available. One of these is the Singapore International Arbitration Centre (SIAC) which was established in 1991[32]. It is seen to be one of the top five most preferred arbitration centres in the world and from 2005 to 2015 its caseload increased by roughly 400 percent[33] demonstrating an increased demand for dispute resolution in Singapore and the surrounding Asia-Pacific area.

3. The Introduction of the Singapore Convention on Mediation

Developing an international convention with the aim of encouraging mediation as a form of international dispute resolution, was first proposed in July 2014 at the 47th meeting of UNCITRAL[34]. Its aim was to introduce a uniform mechanism for the international

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[22] A. Van Den Berg, The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation 7 (1981)
[23] Gary B. Born, International Arbitration Cases and Materials (Kluwer Law International 2011) 32
[24] New York Convention, Contracting States < https://www.newyorkconvention.org/contracting-states > Accessed 15/12/24
[25] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17
[26] Who Participates in the drafting of UNCITRAL Texts? < https://uncitral.un.org/en/about. > Accessed 15/12/24
[27] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 3
[28] Nnaemeka Nweze, 'Ascertaining the Effect of the Seat of Arbitration on the Arbitral Award' (2024) 15 Nnamdi Azikiwe U J Int'l L & Juris 117
[29] Arbitration Act 1996
[30] Sulamerica Cia Nacional de Seguros S.A v Enesa Engelharia S.A [2012] EWCA Civ 638
[31] Bremen v Zapta Off-Shore Co. [1972] 407 U.S. 1
[32] Singapore International Arbitration Centre, About Us < https://siac.org.sg/about-us > Accessed 18/12/24
[33] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 13
[34] Shahla Ali, Comparative and Transnational Dispute Resolution (Routledge 2020) 171

enforcement and recognition of settlement agreements[35]. It was adopted under resolution 73/198 of the United Nations General Assembly on 20 December 2018 and was opened for signature on the 7 August 2019[36]. This marked as significant a milestone for international dispute resolution as the NYC, as it provided a routine framework for the enforcement of IMSAs, similarly to what is provided by the NYC[37], and increased the use of mediation as a form of international dispute resolution. This mirrored the growing trend in mediation as it came shortly after the ICC announced its revised mediation rules[38] .

The primary goal of the SMC was to encourage the use of mediation as a form of dispute resolution in international commercial disputes[39]. Upon its introduction in 2019, it saw large acceptance in the Asia-pacific region with 16 jurisdictions signing[40] including 3 of Asias biggest economies in China, South Korea and India[41]. After only a short time it had already garnered great success and recognition[42] which suggests that it was something that had been missing from the international scope for quite some time. Additionally, just a year after implementation, the world was shut down by the global response to the COVID-19 Pandemic, this had an impact on the growth of the SMC. However, despite this interruption there has been continued use and acceptance of the practice and procedures of the SMC.

Between the first proposal of such an instrument and its opening for signature, there were many considerations to finalise the specificities of the convention, such as the scope and application. This task was given by UNCITRAL to Working Group II who first discussed it at a session in February 2015[43] where it was generally agreed that they should promote conciliation as a form of commercial dispute resolution and that a convention modelled on the NYC could be considered for this aim[44]. However, they also shared daunting views concerning the time it would take to develop the convention effectively and the prospect of the convention being successful. Later in the summer of 2015 at it was beginning to gather more support with most states believing it was a promising endeavour[45]. The working group would focus on the mediation project for the next 6 sessions and were all chaired by Natalie Morris-Sharma from Singapore. In a February 2017 session they made what was seen as the significant breakthrough by addressing four key issues[46].

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35 Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

36 <Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Negotiation and signing of the Convention > Accessed 18/12/24

37 Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

38 ICC Launches 2014 Mediation Rules in North America < https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/ > Accessed 03/01/25

39 Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 2

40 United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, Participants < https://treaties.un.org/pages/ViewDetails >

41 Trading Economics, GDP, Asia < https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/ >

42 Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

43 United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), U.N. Doc. A/CN.9/832

44 Ibid 13-15

45 United Nations Commission on International Trade law, Report on the Work of its Forty-Eighth Session, U.N. Doc. A/70/17 (2016)

46 United Nations Commission on International Trade Law, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017), U.N. Doc. A/CN.9/901

The first was concerned with the legal effect of settlement agreements and how they could 'express that settlements could or should be given legal effect without using the expression, recognition'[47]. This was to avoid breaching the intended scope of the convention, which was purely an enforcement mechanism and not to address the legal effect of a settlement agreement between the parties. Second, they addressed settlement agreements that could be enforced as arbitral awards would be excluded from the SMC, mainly due to the pre-existing NYC that could be implemented in cases such as these[48]. The next issue considered was the opt-out or opt-in for the parties to the settlement agreements. This meant that it was deciding whether the application of the instrument would be dependent on the parties consenting to the settlement agreement. This was divided as some had the view that the 'parties' choice should not have any impact on the application of the instrument' in order to provide an enforcement regime comparable to that of the NYC[49]. Whereas other viewed that the parties should be able to decide whether the instrument is applicable to maintain the value of party autonomy. The final addressed the inclusion of two situations which a court could refuse to grant relief based on 'misbehaviour by the mediator[50]'. This was with the view to provide assurance on the proper procedures being followed and allowing for some form of relief where the situation calls for it. After these significant strides were taken the working group only required two more sessions to complete its efforts, and the convention was finalised by the commission on June 25, 2018, including the recommendation that it should be opened for signature in August of 2019[51].

A key reason why the SMC was necessary in the first place was due to the unenforceability of IMSAs. Previous to the SMC, a business could have taken the time and energy needed to reach an agreement and if the other party do not uphold the agreement, their only option would be to restart in arbitration or litigation[52]. This demonstrates why mediation was seen as an inferior approach in international disputes prior to the SMC, as any outcomes reached lacked the legitimacy that often came with a domestic mediated settlement, or an international arbitral award enforced by the NYC. Article 3 of the SMC says that 'each party to the convention shall enforce a settlement agreement in accordance with its rules of procedure' demonstrating how one of the primary provisions is concerned with resolving the enforceability issues[53]. However, it is equally important to note, that the convention was not intended to provide enforceability for settlement agreements that would not have been otherwise enforceable but only to provide a method of enforcement that is more efficient than litigation[54]. Aside from its large-scale commercial application, another result of the SMC could be an increased level of competition and representation afforded to smaller businesses. This is because arbitration can be expensive and time-consuming meaning it wasn't a viable option for smaller firms with less expendable resources[55].

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47 Ibid 16-24
48 Ibid 25-32
49 Ibid 32-49
50 Ibid 41-50
51 U.N. Comm'n on Int'l Trade Law, Report on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, ¶ 44 (2018).
52 Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 3
53 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (Adopted 20 December 2018, entered into force 12 September 2020) UN Doc A/RES/73/198, Art 3
54 Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 4
55 Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

4. Critical Analysis of the instruments and approaches to ICA

ICA has developed into a sophisticated mechanism for the resolution of international disputes, supported by various robust legal frameworks such as the NYC and the UNCITRAL Model Law. However, the introduction of the SMC presents a change in international dispute resolution, as it provides enforceability to mediated settlements which in turn creates competition between arbitration and mediation as the preferred mechanisms.

The NYC has been instrumental in cementing the role of ICA as the dominant method of international dispute resolution. The near universal adoption of 172 state parties[56] provides the predictable and efficient framework for the recognition and enforcement of arbitral awards and by ensuring that awards are enforceable internationally, the convention provides the parties with the security they need to engage in both arbitration and international trade as a whole, as without it there would be less incentive to engage with international trade in case it ends with a conflict and they have to then pursue litigation, which is often timely and costly. For parties engaging in arbitration, the speed, cost, and enforceability are the primary concerns, and arbitration has always been considered as more cost-effective and more time-effective compared to traditional litigation. However, this is dependent on the parties collaborating to resolve the dispute, as the common reason why arbitration can become expensive is where the parties don't attempt to collaborate, and the arbitration becomes more similar to litigation[57]. This may be because with the growth of arbitration and the increasing amounts of money at stake[58] as the average amount in dispute in 2023 was $65 Million compared to $54 million in 2020[59]. The higher stakes that are involved with these disputes could suggest that parties are becoming less concerned with collaboration and innovation, and the focus is shifting towards individual profit which would lead to the parties wishing to spend as little time as possible in the proceedings of these disputes which have both time and monetary cost involved.

However, the advantage offered by the NYC is that the scope for appealing an arbitral award is very limited[60] which means that there are seldom any appeals to the arbitral award and once the award has been decided that is the end of the dispute. The grounds are limited to procedural irregularities, lack of notice and the scope of the award which are all equally easy to prove or disprove when the situation calls for it. However, this could be seen as a double-edged sword as the interpretation of these provisions can be different in different jurisdictions as they are often dependent on the 'law of the country where the arbitration took place'[61]. This presents how if a state were to adopt an approach that would be unfavourable to one party, then they would be dissuaded from attempting arbitration, or maybe even international trade as a whole, with parties from that state. This highlights the importance of the selection of the seat in the process of arbitration and how it can have an effect on the award.

The decision of the arbitral seat is an equally important aspect of the arbitral process as the choice of approach or institution, as it is what determines the applicable law, and which court has supervisory jurisdiction over the arbitral process[62]. It has evolved into a crucial aspect in

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[56] New York Convention, Contracting States <https://www.newyorkconvention.org/contracting-states> Accessed 15/12/24

[57] Steven Seidenberg, International Arbitration loses Its grip, 96 A.B.A. J. 50, 51 (2010)

[58] ICC Releases preliminary 2023 arbitration and ADR statistics, Amounts in dispute <https://iccwbo.org/news-publications/news/icc-releases-preliminary-2023-arbitration-and-adr-statistics/>

[59] ICC Dispute Resolution 2020 Statistics, Amounts in Dispute <https://jusmundi.com/en/document/publication/en-2020-icc-dispute-resolution-statistics>

[60] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (Adopted 10 June 1958, Entered into force 7 June 1959) 330 UNTS 38, Art 3-5

[61] Ibid

[62] Nnaemeka Nweze, 'Ascertaining the Effect of the Seat of Arbitration on the Arbitral Award' (2024) 15 Nnamdi Azikiwe U J Int'l L & Juris 117

ensuring efficiency, fairness and enforceability within the arbitration process[63]. One of the key factors that determines the choice of seat is how well equipped is the venue as different locations will be able to provide different levels of institutional support, expertise from the local practitioners and integrity during its operations[64]. This provides different questions as to whether arbitration will be the most effective method of dispute resolution as it takes the concerns away from the legal aspects and points more towards social or economic factors as this is concerned less with the efficiency of the convention or statute being used and more with the people who are using it and how they are using it. Some evidence of this is shown in the respective case law as the UK and US have been shown to place more emphasis on party autonomy and minimal intervention[65] than Singapore or Switzerland who prioritise neutrality, efficiency and institutional support[66].

The UNCITRAL Model law provides a harmonised set of rules to be applied across jurisdictions ensuring consistency and predictability for those wishing to engage in ICA. It not only involves provisions on tribunal jurisdiction, interim measures and the recognition of awards but also provided a foundation for other rules to be created off, such as the SMC which was said to 'have origins in the UNCITRAL'[67] and even domestic law such as the Singapore International Arbitration Act[68] and the English Arbitration Act[69] which are both seen to adhere to the model law in many ways[70]. The wide adoption of the Model law is one of the reasons it is so prevalent in the international scope, as the more acceptance it gains the more efficient it becomes due to a wider range of applicability. However, one criticism of the model law is that it is limited by its non-binding nature. Article 1 of the UNCITRAL model law provides that the rules are only applicable to the extent that the parties decide[71]. This can remove the certainty aspect of the rules as there is never a certainty as to how the rules will be applied for any given scenario, however it can also provide more control for the disputing parties as they do not have to be subject to the entire scope of the rules, only those which are desired. Furthermore, similarly to the NYC the scope of UNCITRAL is limited to arbitration and overlooks the growing importance of mediation in the context of international dispute resolution.

Another decision that parties will face when deciding to resolve disputes through arbitration is whether to use an arbitral institution or whether they want the arbitration to be Ad-Hoc. Ad-Hoc arbitration is where there is no administering institution[72] and it can offer different advantages to that of institutional arbitration. An arbitral institution is an institution which administers arbitral proceedings under its arbitration rules. One advantage is the removal of any fees or expenses of the arbitral institution which can reduce what can already be quite a high cost, which makes Ad-Hoc more attractive to smaller, or less-equipped parties. This is

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[63] Makam Ganesh Kumar, 'Seat and Venue Debate in International Arbitration: A Comparative Analysis of Jurisdiction' (2023) 3 Indian J Integrated Rsch L 1

[64] Ibid

[65] Sulamerica Cia Nacional de Seguros S.A v Enesa Engelharia S.A [2012] EWCA Civ 638, Bremen v Zapta Off-Shore Co. [1972] 407 U.S. 1

[66] Dow Chemical Pacific Ltd v Isover Saint Gobain AG, ICC Case No.4131, BCY v BCZ [2016] SGHC 249

[67] Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

[68] International Arbitration Act 1994

[69] Arbitration Act 1996

[70] Lingard N, Tan S, Seow V, <'How Singapore's international arbitration laws will compare with the position post-reform of the English Arbitration Act' > (2023)

[71] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17, Art 1

[72] Ad-Hoc Arbitration – An introduction to the key features of Ad-Hoc Arbitration < https://www.lexisnexis.co.uk/legal/guidance/ad-hoc-arbitration-an-introduction-to-the-key-features-of-ad-hoc-arbitration > Accessed 29/12/24

coupled with the ability to tailor the process to fit within the particular dispute as with the absence of an administering institution there are no set of rules that they must use. Often the UNCITRAL rules or some form of them are what is adopted[73] however the parties can draft their own rules if they feel it is necessary. This can mean that the arbitration proceeds more quickly and efficiently, but it can equally have the opposite effect as with the absence of an administering body the proceedings can come to a halt, if the parties are not attempting to collaborate or are intentionally obstructing the process.

Institutional arbitration is the involvement of an arbitral institution to administer the arbitration[74]. The institution that is used is often indicated within the contract in the form of an arbitration clause that designates a specific institution as the arbitration administrator. Institutional arbitration offers different advantages to Ad-Hoc arbitration that can be just as influential depending on the needs of the parties, such as the reliable performance of the administrative functions, and the timely appointment of arbitrators and movement of proceedings[75]. The reliable performance of these functions assures the parties that the arbitration can proceed efficiently and reduces the time and resources that the parties would need to expend if they used an Ad-Hoc approach. Furthermore, the award itself is often seen with more credibility within the international community and courts due to the established reputation of the various institutions, which provides a higher level of enforceability and recognition of an award.

5. The Impact of the Introduction of the SMC

The introduction of the SMC was followed by a swift adoption by the international community, particularly in the Asia-Pacific region[76]. The significance of the SMC in more emerging economies arose from the absence of an instrument that addresses the enforcement of IMSAs which is a gap that the NYC hasn't filled. This coupled with the adoption by some of the largest global economies in the likes of USA, China and India, further evidences the initial success of the SMC indicating that the recognition of IMSAs was seen as a valuable asset to the international community. The adoption from Singapore underscored its compatibility with ICA as Singapore already promoted both arbitration and mediation through the Singapore International Arbitration Centre (SIAC)[77] and the Singapore mediation centre[78] which were both established prior to the introduction of the SMC. Singapore's dual approach to international dispute resolution demonstrated how both mechanisms can co-exist within a single jurisdiction. It also shows how it can potentially boost the efficiency of dispute resolution as between 2005 and 2015 alone the caseload for the SIAC was increased by 400 percent[79] which would suggest that Singapore was becoming more attractive as a centre for arbitration.

Before the introduction of the SMC, the issue of enforceability for IMSAs created a critical barrier to the use of mediation in international dispute resolution, as there was no guarantee that the outcome of the mediation would be complied with by the other parties. The SMCs

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[73] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 10

[74] Glossary, Institutional Arbitration, < https://uk.practicallaw.thomsonreuters.com/. > Accessed 29/12/24

[75] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 10

[76] Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

[77] Singapore International Arbitration Centre, About Us < https://siac.org.sg/about-us > Accessed 01/01/25

[78] Singapore Mediation Centre, About Us < https://mediation.com.sg/about-us/about-smc/ > Accessed 01/01/25

[79] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press) 13

primary aim was to eliminate this issue by providing a standardised enforcement framework, aligning mediation with arbitration in the scope of its international legal reliability. Its similarities with the NYC may have reassured the other parties due to the large-scale acceptance and success of the NYC which is proven and tested[80]. The result of this introduction is a shift in attitudes toward mediation as it is viewed by businesses as not only a tool for preserving relationships but also as a strategic means of reducing time and financial expenditures. This shift was valuable in the international scope as preserving relationships is critical for the success of international trade as it helps collaboration to improve the various technology, production or construction methods used in different jurisdictions. However, the reliance on mutual agreement in mediation remains a barrier that has the potential to limit its use in certain situations. Unlike arbitration where a tribunal is used to make a decision and impose that decision on the parties[81], mediation only uses a third party to facilitate an agreement using their specific expertise[82], so unless one party voluntarily cooperates then the mediation will be at a standstill and arbitration, or litigation, will have to be implemented.

The introduction of the SMC has also had an influence on the development of arbitral institutions. Institutions such as the ICC had already begun to recognise the importance of mediation in dispute resolution as in 2014 the Secretary General Andrea Carlevaris stated that '90% of cases are mediation cases', and they had changed the name of the former ICC ADR Rules to the ICC Mediation Rules to reflect that majority[83]. Shortly after this shift was when the initial meetings concerning the SMC were being held which suggests that while they had recognised the growing need for more structured frameworks concerning mediation, they had overlooked some key aspects in which the SMC was required to fill. The ICC mediation rules were focused on supporting parties to overcome the obstacles that opposed mediation such as how to start and where to hold the mediation process[84], but they didn't address any enforceability issues which meant that even if the parties could follow the rules provided there was no enforceable end result. This shows how the SMC could be viewed as the missing piece of the ICCs shift toward mediation and how its introduction impacted the efficiency and effectiveness of those rules, as without the SMC the ICC mediation rules provide a process that has no enforceable end product, and without the ICC mediation rules the SMC provides an enforceable end product for an inoperative process. This demonstrates the positive impact of the SMC on the efficiency of existing institutions.

It is also right to say that the SMC has encouraged growth in the use of alternatives such as med-arb or arb-med-arb which are combinations of the respective mediation and arbitration processes that aim to harmonise the two in order to gain the most efficient combination. Med-arb usually involves a situation where the parties seek to resolve the dispute through mediation but have agreed that if the mediation ends unresolved then the parties can move onto arbitration[85]. This often means that the process will end with a successfully negotiated agreement as the potential for a third party to render a binding arbitral award often motivates

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[80] United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), U.N. Doc. A/CN.9/832

[81] Alternative Dispute Resolution: Mediation v Arbitration, What is Arbitration? <https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/> Accessed 03/01/25

[82] Alternative Dispute Resolution: Mediation v Arbitration, What is Mediation? <https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/ > Accessed 03/01/25

[83] ICC Launches 2014 Mediation Rules in North America <https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/> Accessed 03/01/25

[84] Ibid

[85] Joshua M. Javits, Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes, ABA Journal of Labour & Employment Law, Vol. 32, No. 2, 2017

the parties to reach an agreement[86]. These processes only gained traction with the introduction of the SMC as it facilitated the enforcement of the original mediated award creating more incentive to resolve the dispute in the mediation process. This further shows how the introduction of the SMC has influenced international dispute resolution even further towards resolving disputes through mediation or some form of it.

This increased use of mediation in international dispute resolution also reduces the caseload of arbitral institutions and their arbitrators. This is because the edge that arbitration had over mediation was the enforceability of settlement agreements, without this edge the fear is that they will begin to lose more and more cases to mediation[87]. However, this does not mean that Arbitration and Mediation are necessarily being pitted against one another, the dynamic between the two should be viewed as them competing against each other to reach their goal quicker than the other party, rather than competing in order to better themselves at the expense of the other party[88]. This is because they are both trying to achieve the most efficient method of dispute resolution rather than remove the other completely, meaning that by reducing the caseload for arbitral institutions and arbitrators, the SMC seeks to help promote more efficient forms of dispute resolution by offering a more suitable alternative for those who had been forced to use arbitration due to the unenforceability of IMSAs.

6. Conclusion

The introduction of the SMC in 2019[89] has been shown to have had profound implications on the field of international dispute resolution, in particular in relation to ICA. After the issue was raised at the 47th meeting of UNCITRAL in July 2014[90] the attendants recognised the need to fill the gap left in the market by providing a framework for the enforcement of IMSAs addressing the long-standing challenge of enforceability for mediated outcomes for international disputes[91]. This has brought about a revision of the roles of arbitration and mediation in international dispute resolution, causing leading businesses, legal professionals, and institutions to rethink their approach to ICA and international dispute resolution.

The swift adoption of the SMC on its introduction underpins its importance to the international community as within a short period they had already garnered significant support in the Asia-Pacific region with three of the largest economies in the area[92] becoming early signatories[93]. The SMC was not only implemented within the Asia-Pacific region as it became clear to other jurisdictions that there was significant value in facilitating the enforcement of IMSAs as a supplement to international dispute resolution. It became clear that by filling this gap they were able to elevate mediation as an equally effective method of dispute resolution for international disputes. Despite the disruptions caused by the COVID-19 pandemic the SMC has continued to experience growth and continued recognition which only further

[86] Katie Shonk, What is Med-Arb? The pros and cons of Med-Arb a little-known Alternative dispute resolution process, 2024 <https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ >
[87] Iris Ng, The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution? <https://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/ > Accessed 03/01/25
[88] Ibid
[89] <Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Negotiation and signing of the Convention > Accessed 18/12/24
[90] United Nations Commission on International Trade law, Report on the Work of its Forty-Seventh Session, U.N. Doc. A/69/17 (2014)
[91] Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481
[92] Trading Economics, GDP, Asia <https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/>
[93]United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, Participants <https://treaties.un.org/pages/ >

demonstrates the resilience of the SMC, providing more evidence that supports its relevance and necessity in supporting the evolution of mechanisms in an evolving market.

An important implication of the introduction of the SMC was the potential to create a more competitive and accessible market for smaller businesses who may not have had the resources available to engage in arbitration. By providing an alternative to arbitration the SMC will encourage smaller businesses to engage in international trade without the worry of being bullied by larger businesses if a dispute arises. By fostering a more competitive environment the international economies that engage with this practice will surely grow due to the higher levels of innovation and efficiency that often pair with higher levels of competition. This means the impact of the SMC could have further reaching implications that just having a direct effect on the parties who would need to use it, but also has an overall positive effect for the area that it is used in.

Additionally, the SMC has caused the view on mediation and arbitration to shift as the two are no longer viewed as mutually exclusive but rather as complementary processes that can coexist within the same jurisdiction and even cooperate to achieve the most desirable outcome. The use of hybrid dispute resolution methods such as med-arb have gained popularity as now parties can be assured that if they are to resolve the dispute through mediation then the decision will be enforceable, and they will not have to resort to using arbitration in order to achieve an enforceable outcome. The SMC has formed a more seamless integration between arbitration and mediation, encouraging parties to resolve their disputes with assurance as to the enforceability of the outcome. This also is seen in the arbitral institutions which have grown increasingly responsive to mediation, such as the ICC which have been developing their own set of rules to determine mediation[94] similar to their rules on arbitration.

Ultimately, the SMC is not to be seen as an instrument to replace the established arbitration rules and institutions but rather as a supplement to fill in the missing gaps, its implementation creating a more dynamic, flexible and globally accessible market for dispute resolution. The NYC and UNCITRAL remain as important and influential as they were previously, as the SMC does not diminish the value of these instruments, but rather is a bridge for the longstanding gap between the differing dispute resolution methods forming a more coherent system of international dispute resolution. The SMC does not offer a universal solution to every scenario, instead it has provided a critical addition and the future of dispute resolution is likely to see a more integrated universal approach with mediation and arbitration working hand-in-hand to provide parties with the most efficient and effective option for resolving their conflict.

[94] ICC Launches 2014 Mediation Rules in North America < https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/ > Accessed 03/01/25