Journal of Dispute Resolution

Volume 2022 | Issue 2 Article 5

2022

Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-à-vis International Commercial Litigations and Mediation in the Harmonization of the Rules Of Transnational Commercial Dispute Resolution

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APPRAISAL OF THE SUCCESS OF THE INSTRUMENTS OF INTERNATIONAL COMMERCIAL ARBITRATION VIS-A-VIS INTERNATIONAL COMMERCIAL LITIGATION AND MEDIATION IN THE HARMONIZATION OF THE RULES OF TRANSNATIONAL COMMERCIAL DISPUTE RESOLUTION

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ABSTRACT

This article compares the major instruments of International Commercial Arbitration (hereinafter 'ICA') with the instruments of International Commercial Litigation and Mediation. By so doing, the article comparatively assesses the success of ICA, litigation, and mediation as alternative mechanisms of transnational commercial dispute resolution. Accordingly, the article argues that, while the ICA is not the only means of transnational commercial dispute resolution, it will continue to be the most successful means of dispute resolution, playing the dominant role in harmonizing the rules of transnational commercial dispute resolution. However, the article also argues that, over time, transnational commercial litigation and mediation are becoming more viable alternatives to ICA in resolving transnational commercial disputes.

KEY WORDS

International Commercial Arbitration, Transnational Litigation, Mediation, Dispute resolution, Harmonization

INTRODUCTION

In the second half of the twentieth century, there was a massive expansion of international trade, which led to the development of the global economy. Such growth allowed the cross-border movement of people, products, services, and capital, resulting in an avalanche of international commercial contracts and a commensurate surge in transnational disputes, among other things.[1]

However, mainly due to the lack of internationally applicable rules on the applicable law, jurisdiction, and recognition and enforcement of foreign judgments[2], transnational

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[1] *See* Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 72 (2011), https://ssrn.com/abstract=1959851; *see also* Fabien Gelinas, *Arbitration and the Challenge of Globalization*, 17 J. INT'L ARB. 117, 122 (2000), http://ssrn.com/abstract=1342341.

[2] *See* Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 310 (2004), https://chicagounbound.uchicago.edu/cjil/vol5/iss1/20; *See* Andrew Sagartz, *Resolution of International*

commercial disputes become uncertain, expensive, and time-consuming to resolve uniformly and efficiently.[3]

Moreover, a large number of parties and proceedings, procedural complexity, a high chance of forum shopping, difficulty in enforcing foreign judgments, and higher costs have worsened the situation.[4]

The need for cheaper, faster, more flexible, and less risky international solutions that give disputants ex-ante assurance and predictability in the resolution of their commercial disputes arose as a result of the aforementioned problems.[5]

To address the aforementioned issues, international law-making bodies have been working for many years to harmonize the applicable substantive and conflicts of law rules to regulate and establish effective transnational commercial dispute resolution mechanisms such as ICA, transnational litigation, and mediation.[6] In that intention, this article comparatively analyzes the roles of these instruments that are destined to regulate transnational commercial disputes and argues that ICA was and continues to be the most practical mechanism of transnational commercial dispute resolution, while transnational litigation and mediation will continue to play a role in dispute resolution as an alternative.

Accordingly, this article contains four parts. Part one discusses the definition and role of ICA in the harmonization of the rules of transnational commercial dispute resolution. Then part two analyzes the role of the instruments of transnational commercial litigation in the harmonization of the rules of commercial dispute resolution. Then, part three assesses the role of the instruments of international commercial mediation in the harmonization of the rules of transnational commercial dispute resolution. Then, the final part contains the conclusion.

Commercial Disputes: Surmounting Barriers of Culture without Going to Court, 13 OHIO ST. J. DISP. RESOL. 675, 709 (1998), http://hdl.handle.net/1811/79806; *see also* Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation- Introduction,* 15 BOSTON U. INT'L L.J. 175, 178 (1997).

[3] ROY GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW: TEXT, CASES, AND MATERIALS 49, 73 (Oxford Univ. Press 2nd ed. 2015).

[4] Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L L. 187, 188; *see* CHRISTIAN BIHRING-UHILE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 31–68 (Kluwer L. Int'l ed., 2nd ed. 2006); *see also* CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 59 (Kluwer L. Int'l ed., 2005).

[5] *See* Ramona Martinez, R*ecognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions Introduction - Why is Choosing Your Dispute Resolution Method Important?*, 24 INT'L L. 487, 518 (1990), https://www.jstor.org/stable/40706404; *See* Giuseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and other alternative Dispute Resolution Techniques in Ten Southern Mediterranean*, 7 CARDOZO J. CONFLICT RESOL. 303, 314 (2007); Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?,* 5 PRIVATE INT'L L. J. 161, 180 (2009), https://ssrn.com/abstract=1691867.

[6] *See* REYADH MOHAMED SEYADI, THE EFFECT OF THE 1958 NEW YORK CONVENTION ON FOREIGN ARBITRAL AWARDS IN THE ARAB GULF STATES (Cambridge Scholars Publishing, 2017); s*ee* James Tancula & Miles Robinson, Arbitration vs. Litigation: Choosing Your Dispute Resolution Method Wisely (Nov. 15, 2017), https://www.mayerbrown.com//media/files/perspectivesevents/events/2017/11/arbitrationvslitigationchoosingyourdisputere/files/viewslides/fileattachment/mayerbrownwebinararbitrationvslitigationchoosingyo.pdf; *see also* Bobette Wolski, *Recent Developments in International Commercial Dispute Resolution: Expanding the Options*, 13 BOND L. R. 1, 30 (2001).

Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-a-vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

1. THE ROLE OF ICA IN THE HARMONIZATION OF THE RULES OF TRANSNATIONAL COMMERCIAL DISPUTE RESOLUTION

1.1 Definition of International Commercial Arbitration

Almost all the applicable international commercial laws discussed in this article do not directly define ICA.[7] This does not however imply that it is impossible to construct a consensual definition of the term. Accordingly, the term ICA is made up of three basic notions. These are international, commercial, and arbitration.[8]

First, the term "international" marks arbitrations that are purely national from those that transcend national boundaries.[9] Second, the term "international" generally refers to the fact that the nature of the dispute or the nationality of the parties or the chosen place of arbitration is essentially *anational* or characterized by a foreign element.[10]

On its part, the term "commercial" although it may cover a wide set of meanings, when it comes to arbitration, only applies to commercial contracts.[11] Accordingly, to indicate what types of activities are deemed "commercial" in nature, the UNCITRAL Model Law 2006 enumerates a non-exhaustive list of commercial relationships.[12]

On the other hand, the term "arbitration" does not have a universally accepted definition. However, it can be defined as a method of resolving disputes definitively and according to the parties' agreement that allows disputants to obtain a final and binding decision from independent or private third-party arbitrators, without recourse to a court of law.[13]

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[7] This includes the MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (UNITED NATIONS COMM'N ON INT'L TRADE L. 1985), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf, [hereinafter UNICTRAL MODEL LAW], United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002a36b, [hereinafter N.Y. Convention], the Hague Convention on Choice of Court Agreement of 2005, Jun. 30, 2005, 44 I.L.M. 1294, https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf, [hereinafter the COCA 2005], the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil Commercial Matters, July 2, 2019, https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf, [hereinafter the Judgment Convention of 2019], and United Nations Convention on International Settlement Agreements Resulting from Mediation, Aug. 7, 2019, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf,[hereinafter Singapore Convention 2018].

[8] The requirements of International and Commercial are adopted by all the relevant Conventions, the COCA 2005, the New York Convention 1958, the Singapore Convention 2018, and the Judgment Convention of 2019.

[9] ALAN REDFERN ET AL., INTERNATIONAL ARBITRATION 9, 12 (Oxford Univ. Press ed., 6th ed. 2015).

[10] UNICTRAL MODEL LAW, *supra* note 7, at art. 1(3); *see* N.Y. Convention, *supra* note 7, at art. 1(1); *see* ARB. RULES art. 1(1), 1(3)(a)–(b)(i)–(ii) & (c) (INT'L CHAMBER OF COM. 1998), https://www.trans-lex.org/750200/_/icc-arbitration-rules-1998/ [hereinafter ICC RULES]; *see* COCA 2005, *supra* note 7, art. 1(2)–(3).

[11] N.Y. Convention, *supra* note 7, at art. 1(3); *see* Protocol on Arbitration Clauses, Sept. 24, 1923, League of Nations, Treaty Series, vol. XXVII, p. 157, art. 1, https://www.trans-lex.org/511300/_/protocol-on-arbitration-clauses-signed-at-a-meeting-of-the-assembly-of-the-league-of-nations-held-on-the-twenty-fourth-day-of-september-nineteen-hundred-and-twenty-three/ [hereinafter Geneva Protocol].

[12] GOODE ET AL., *supra* note 3, at 563; *see* UNCITRAL Model Law, *supra* note 7, at art. 1(1).

[13] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 1 (Kluwer L. Int'l ed., 2nd ed. 2001); *see* EWAN MCKENDRICK, GOODE ON COMMERCIAL LAW 1299 (LexisNexis 4th ed.

Accordingly, by way of deduction, ICA can be defined as a transnational, private, and autonomous method of resolving disputes, via the decision of one or more arbitrators that leads to a final and binding determination of the rights and obligations of the parties, who are engaged in a cross-border commercial relationship.[14]

The following section argues that ICA was and continues to be the most realistic means of resolving transnational commercial disputes for the following four main reasons: (1) the advantageous features of ICA, (2) ICA is supported by a strong international legal framework, (3) ICA is supported by a strong institutional framework, and (4) the dominant role of ICA is evident from existing empirical research.

1.2 The Major Advantageous Features of ICA made it suitable for Dispute Resolution

The following are the major features of ICA that made it more suitable and preferable to resolve transnational commercial disputes in comparison to transnational litigation and mediation:

1. Unlike litigation, ICA provides the parties with autonomy over the process and the legal framework of dispute resolution.[15] As a result, disputants can predetermine the applicable substantive laws, the seat of the arbitration, and nominate the arbitrators.[16]

2. Unlike litigation, arbitral proceedings are essentially private and confidential that do not allow third parties to have access to them.[17] To that effect, the parties can ascertain

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2009); REDFERN ET AL., *supra* note 9, at 2; *see* KEREN TWEEDDALE & ANDREW TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE 33 (Oxford Univ. Press ed., 2007). However, arbitration may recourse to the court in exceptional cases related to the enforcement of arbitral awards.

[14] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19, 39 (2001); *see* Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOYOLA L.A. L. REV. 1337, 1341 (2007); *see* ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW 2, 67 (Routledge Publishers ed., 2014).

[15] GOODE ET AL., *supra* note 3, at 555, 560, 1302; Dalma R. Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT'L ARB. 441, 470 (2016). Accordingly, the freedom to choose arbitrators ensures an increased trust and enables the parties to select skillful arbitrators for each case. The parties are also at freedom to submit the arbitration to either *ad-hoc* or institutional arbitration.

[16] N.Y. Convention, *supra* note 7, at art. 2 & 5(1)(a); *see* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 83–85 (Wolters Kluwer ed., 2nd ed. 2014); *see* Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175 (1996); *see* Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. DISP. RESOL. 365, 368 (1985). Institutional arbitration, by providing the rules, infrastructure, and panel of arbitrators, results in the certainty of the procedure and trustworthiness of the arbitrators. The overall outcome will be trust, security, and predictability of the process to the parties, which are typical traits of an attractive procedure of dispute settlement.

[17] ARBITRATION RULES arts. 19(4), 30 (LONDON CT. OF INT'L ARB. 1998), https://lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx [hereinafter LCIA RULES]; *see* ARBITRATION RULES art. 52–53, 73–76 (THE WORLD INTELL. PROP. ORG. 1994), https://www.jus.uio.no/lm/wipo.arbitration.rules.1994/toc.html [hereinafter WIPO RULES]; *see* ICC RULES, *supra* note 10, at art. 21(3), 26(3); *see* ARBITRATION RULES art. 25(4), 28(3) & 32(5), (UNITED NATIONS COMM'N ON INT'L TRADE L. 1976), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf [hereinafter UNCITRAL RULES];; *see* INTERNATIONAL ARBITRATION RULES art. 20(4) (AM. ARB. ASSO'N 2021), https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf

confidentiality in the arbitral process by signing a confidentiality agreement as part of their dispute resolution clause.[18]

3. Unlike litigation, ICA is a one-step process that does not allow for appellate review, which results in a binding and final award with very limited grounds for judicial review.[19] Unlike mediation in which one of the parties may refuse to uphold the terms of the agreement there by forcing the other party to file a separate proceeding, arbitral awards are generally final, binding, and not appealable on the merits.[20]

4. Unlike the case of foreign judgments and mediated settlement agreements, due to the New York Convention of 1958, the global recognition and enforcement of the agreement to arbitrate and arbitral awards is the most important feature of ICA, which made it realistic.[21] This is very significant to the parties because it guarantees *ex-ante* predictability and certainty in the resolution of their commercial dispute. [22]

5. Unlike litigation, ICA is an autonomous and *anational* institution that is not subjected to the framework of national legal systems.[23] Agreeing to arbitration allows a party

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[hereinafter AAA INT'L ARB. RULES]; *see* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1, 10 (Cambridge Univ. Press ed., 2nd ed. 2012). There is a high degree of confidentiality in the underway of the tribunal, which requires keeping the contents of the proceeding and the award confidential. Moreover, public trials can harm arbitral proceedings. Additionally, ICA offers various degrees of confidentiality to the parties and enables them to preserve long-term relationships.

[18] DIFC ARBITRATION LAW NO. 1 art. 14 (2008), https://www.difc.ae/application/files/9816/4663/4031/Arbitration_Law_DIFC_Law_No_1_of_2008.pdf; *see* JOSEPH F. MORRISSEY & JACK M. GRAVES, ARBITRATION AS AN ALTERNATIVE TO NATIONAL COURTS IN INTERNATIONAL SALES LAW AND ARBITRATION: PROBLEMS, CASES AND COMMENTARY 313, 314 (Kluwer L. Int'l ed., 2008); *see* Roy Shapira, *A Reputational Theory of Corporate Law*, 26:1 STANFORD L. & POL. REV. 1, 60 (2015); *see* ELZA REYMOND-ENIAEVA, TOWARDS A UNIFORM APPROACH TO CONFIDENTIALITY OF INTERNATIONAL COMMERCIAL ARBITRATION 1, 30 (Springer Publishers ed., 2019). Unless otherwise agreed, there is a duty of confidentiality in arbitration proceedings conducted in England, Hong Kong, Dubai, or Singapore.

[19] Born, *supra* note 1, at 65; *see* UNCITRAL RULES, *supra* note 17, at art. 34(2); *see* Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L L. 187, 206 (1989); Emil Petrossian, *Developments, In Pursuit of the Perfect Forum: Forum Shopping in the United States and England*, 40 LOYOLA L.A. L. REV. 1257, 1260–63 (2007). By so doing, arbitration minimizes the risk of multiple proceedings for the parties.

[20] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: CASES AND MATERIALS 13 (Aspen Publishers ed., 2nd ed. 2011); *see* DAVID HOLLOWAY ET AL., SCHMITTHOFF: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 587 (Sweet & Maxwell eds., 12th ed. 2012). Nether the UNCITRAL Model Law nor the New York Convention allows for exceptional grounds of appeal. *See* Mateus Aimore Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration* 33 J. INT'L ARB. 185, 188 (2016). It is not generally a custom of arbitral institutions to include an appellate mechanism for arbitration. Therefore, finality results in a speedier, more efficient, and cheaper resolution of the dispute to the parties.

[21] N.Y. Convention, *supra* note 3, at art. 3; ICC RULES, *supra* note 10, at art. 28(6); S. I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. L. & POL'Y 11, 33, 40 (2014) (unlike a mediated settlement agreement, an agreement to arbitrate is not only an agreement to take part in arbitral proceedings but also an agreement to carry out the resulting arbitral award).

[22] MOSES, *supra* note 17, at 2–3. (stating arbitral awards have a similar legal effect as a court judgment and they will be directly enforceable by court action throughout the 163 member states of the New York Convention.).

[23] *See* Richard J. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?* 4 AM. UNIV. INT'L L. REV. 319, 323–24 (2011), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1676&context=auilr (describing how subjugating transnational disputes to national courts often gives rise to the risk of local bias, corruption,

to avoid litigation in an unknown foreign court jurisdiction and enables to pursue resolutions in delocalized, private proceedings.[24]

6. Because, unlike litigation, in the case of arbitration the dispute is resolved in a neutral place of arbitration rather than on the home turf of one of the parties, ICA reduces partiality and inequality between disputants.[25]

7. Unlike litigation, ICA provides the parties with the opportunity to tailor the dispute resolution mechanism to their favor by agreement. Therefore, arbitral proceedings are flexible and less formal than litigation, which gives the parties greater control over the procedures.[26]

8. Unlike litigation, ICA is the product of the voluntary agreement between the parties to submit their dispute to arbitration. Before there can be a valid arbitration, there must first be a written and valid agreement to arbitrate.[27] On the contrary, the jurisdiction of national courts and the appointment of local judges are not dependent upon the will of litigants.[28]

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national public policy exceptions, delay, lack of cross border expertise by local judges, lack of knowledge and respect to foreign laws, and the risk of litigation in an unfamiliar language and so on).

[24] Petra Butler & Christoph Katerndahl, *Kastom – A Public Policy Exception under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 INDIAN J. ARB. L. 104, 119 (2018), https://ssrn.com/abstract=3270313 (stating the atmosphere of arbitration is generally considered less hostile than that of litigation with the ICA empowering parties to escape the jurisdiction of hostile national courts by signing the agreement to arbitrate).

[25] Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes, in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 25, 31 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Gilles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 423 (2008); Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT'L L. 205, 244 (2005), https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1681167/Barraclough-and-Waincymer.pdf
(guaranteeing procedural equality and fairness of arbitrators in a neutral tribunal located in a third country, ICA reduces partiality and inequality between disputants as neutrality is also related to the appointment of neutral and impartial arbitrators by disputants that will preside on the case solely based on merit and expertise).

[26] Alessandra Casella, *On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration*, 40 EUR. ECON. REV. 155, 159 (1995); Eloise Henderson Bouzari, *Note: The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence,* 30 TEX. INT'L L. J. 205, 209 (1995). Accordingly, the parties can flexibly determine the number and qualifications of arbitrators, the location of the hearings, the language of the proceedings, or the rules of evidence and in the absence of party agreement, the arbitral tribunal has the discretion to determine procedural matters which avoids cumbersome procedures and facilitates a speedier and cheaper resolution to the parties.

[27] N.Y. Convention, *supra* note 7, at art. 2(3), 5(1)(a); UNCITRAL MODEL LAW, *supra* note 7, at art. 7(1), 35, 36(1); COCA 2005, *supra* note 7, at art. 9(a), Jun. 30, 2005, 44 I.L.M. 1294; TANG, *supra* note 14, at 2 & 67; James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent,* 4 PEPP. DISP. RESOL. L. J. 469, 493 (2004).

[28] MCKENDRICK, *supra* note 13, at 1300–02. Arbitration usually presupposes the existence of a dispute that is capable of settlement by arbitration, which the parties voluntarily submit for arbitration. Therefore, the voluntary nature of ICA is fundamental to the parties who are presumed to go to arbitration consensually after a cost-benefit assessment.

Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-a-vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

1.3 ICA is supported by Strong International Legal and Institutional Framework

The following section argues that ICA become a realistic method of commercial dispute resolution due to the strong legal framework provided by international commercial instruments and the existence of an international institutional framework destined to administer the arbitration.[29]

1.3.1 The Contribution of Strong International Legal Frameworks

1.3.1.1 The Existing International Legal Instruments of ICA

The first modern and genuinely international instrument was the 1923 Geneva Protocol. It had 40 member states. Like the case of the modern-day equivalent Conventions, the Protocol, at that time, had two objectives. Firstly, to ensure that arbitration clauses were enforceable internationally, and secondly, to ensure that arbitration awards would be enforced in the territory of the states in which they were made.[30] The 1923 Protocol was followed by the 1927 Geneva Convention, which was intended to widen the scope of the Geneva Protocol by providing additional recognition and enforcement to awards made also within the territory of any of the Contracting States.[31]

The other influential instrument was the Panama Convention, which has been adopted by 17 South American countries, including the USA, and Mexico. The Panama Convention, which is similar to the New York Convention in terms of object and nature, made arbitration much more acceptable in Latin American countries.[32]

The other significant instrument was the European Convention on International Commercial Arbitration 1961. It complemented the New York Convention in the Contracting States. It provides for several general issues concerning the party's rights in arbitration and specific limited reasons for refusing to recognize or enforce an award in another Contracting State.[33]

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[29] *See generally* Graving, *supra* note 23, 319–76.

[30] Julie Barker, *International Mediation–A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOYOLA L.A. INT'L COMPAR. L. REV. 1, 5–7 (1996), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1404&context=ilr.

[31] Convention on the Execution of Foreign Arbitral Awards art. 1, Sep. 26, 1927, 92 L.N.T.S. 2096 [hereinafter 1927 Geneva Convention].

[32] Inter-American Convention on International Commercial Arbitration art. 1–13, Jan. 30, 1975, 90 T.I.A.S. No. 1027, O.A.S.T.S. No. 42, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d06cc [hereinafter Inter-American Convention] (showing similarities to the New York Convention in terms of object and nature, making arbitration much more acceptable in Latin American countries with the Inter-American Convention on International Commercial Arbitration's adoption by the Governments of the Member States of the Organization of American States (OAS) in Panama and coming in to force in 1976 as per art. 10); *see also infra* § 1.3.1.3 (discussing the New York Convention).

[33] *Cf.* European Convention on International Commercial Arbitration art. 1–16, Jan. 7, 1964, 484 U.N.T.S. 349, https://www.jus.uio.no/english/services/library/treaties/11/11-05/european-commercial-arbitration.xml.

1.3.1.2 The Role of UNCITRAL in the Development of ICA

The harmonization and development of ICA law have been the major objective of the UNCITRAL since its inception in 1966.[34] The increase in the use of arbitration as a means of transnational dispute resolution is also greatly attributed to the considerable work of the UNCITRAL.[35] In this regard, the UNCITRAL made two fruitful contributions. Accordingly, The UNCITRAL Arbitration Rules of 1976 is the first major achievement of the UNCITRAL in the field of dispute settlement.[36] These rules were modern and played a great role to reconcile the procedural differences between the civil and the common law systems. The rules were successful in being referenced in innumerable arbitration agreements and were adopted by a substantial number of arbitral institutions.[37] A new version of the rules was adopted in 2010.[38] The new rules apply to any new arbitration agreements, concluded after August 15, 2010, that adopt the UNCITRAL rules.[39]

The second major contribution of the UNCITRAL was the enactment of the more comprehensive UNCITRAL Model Law of 1985, which is destined to govern ICA.[40] By 2021, it is evident that the Model Law has been a major success that has been adopted in 118 jurisdictions in 85 states.[41] The Model Law introduced the idea that it would be appropriate to have separate rules for domestic and international arbitrations. The Model Law was also successful in influencing domestic arbitration rules by providing essential default provisions to gradually improve and consolidate national arbitration laws to take into account the particular features and needs of international commercial arbitration.[42] Despite its success, however, the Model Law was revised in 2006, among other things, to modernize the form required of an arbitration agreement to better conform to international contract practices and to establish a more comprehensive legal regime dealing with interim measures in support of arbitration.[43]

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[34] Gerold Herrmann, *UNCITRAL's Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537, 537, 580 (1984).

[35] R. Mohamed S., *supra* note 6, 1-12.

[36] *See generally* Int'l Trade L. Comm'n, Rep. on the Work of Its Ninth Session, U.N. Doc. A/31/17 (1976).

[37] *See, e.g.,* PROCEDURES FOR CASES UNDER THE UNICITRAL ARBITRATION RULES 4 (AM. ARB. ASS'N, 2005),https://www.adr.org/sites/default/files/Procedures%20for%20Cases%20under%20the%20UNCITRAL%20Arbitration%20RULES.pdf.

[38] G.A. Res. 65/22, UNICITRAL Arbitration Rules (2010).

[39] THE UNCITRAL ARBITRATION RULES: A COMMENTARY 16–17 (David Caron & Lee Caplan eds., 2nd ed. 2013).

[40] The UNCITRAL Model Law is comprehensive in the sense that it covers all stages of the arbitral process, from the agreement to arbitrate to recognition and enforcement, and the judicial review of arbitral awards.. *See generally* UNCITRAL MODEL LAW, *supra* note 7.

[41] *See* UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNITED NATIONS, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Sept. 10, 2021) [hereinafter UNICTRAL Status].

[42] *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNITED NATIONS, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration ("The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure…").

[43] In July 2006, the UNCITRAL adopted amendments to articles 1 (2), 7, and 35 (2) and a new article 2 (a) and a chapter 4 (a) were added to replace article 17. The Revised Model Law was approved by the United Nations in December 2006. *See* UNCITRAL MODEL LAW, *supra* note 7, at p. 1.

Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-a-vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

1.3.1.3 The Role of the Instruments of ICA in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

i. The Success of the New York Convention in Dispute Resolution

The bedrock treaty for the preferred use of ICA as a means of transnational commercial dispute resolution is the New York Convention of 1958 (hereafter 'the Convention').[44] The main purpose of the Convention was to facilitate the international recognition and enforcement of arbitral awards and thereby result in a speedier and cheaper settlement of disputes.[45] It is evident that the Convention has been astonishingly successful in achieving these objectives.[46] Accordingly, by 2021, the Convention had been ratified by 169 countries, including almost all of the major trading nations of the world, and with wider geographic diversity in ratification.[47]

Over the past 60 years, the Convention has had a great deal of success in achieving its commercial objectives of providing disputants with ex-ante certainty and predictability in dispute resolution by ensuring prompt enforcement of the agreement to arbitrate and arbitral awards, as well as party autonomy in determining the governing law and jurisdiction. This has resulted in a dramatic increase in the use of arbitration to resolve international commercial disputes.[48] Accordingly, to date, there are 1750 court decisions in more than 65 countries that have uniformly interpreted and applied the provisions of the Convention to issues in a dispute.[49]

Moreover, the Convention, by equipping national courts and tribunals with a durable (dependable) and efficient means of enforcement of arbitration agreements and awards, regardless of the place of the forum, has facilitated the remarkable growth and success of ICA.[50] All of the benefits of ICA that are enjoyed by disputants in the course of their dispute resolution are made possible by the Convention's instrumentality, which contained the necessary tools in its provisions to achieve its intended objectives, resulting in a high rate of global enforcement.[51]

It should be noted that arbitration would have been invaluable absent this international agreement to recognize and enforce arbitral awards where the award debtor has

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[44] N.Y. Convention, *supra* note 7, at art. 38.

[45] *Id.* at p. 4 art. 1 (". . . on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes."

[46] GOODE, *supra* note 14, at 22.

[47] UNCITRAL Status, *supra* note 41; Erman Radjagukguk, *Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement of the Grounds of Public Policy*, 1(1) INDONESIA L. REV. 1, 1 (2011).

[48] DRAHOZAL & NAIMARK, *supra* note 4, at 341.

[49] *See generally Topic List of Court Decisions on the New York Convention Cases*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/court+decisions/decisions+per+topic (last visited Sept. 10, 2021); STEPHAN W. SCHILL, *YEARBOOK COMMERCIAL ARBITRATION VOL. XLVI* (ICCA & Kluwer L. Int'l eds., 2021).

[50] Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 115 (2018); REDFERN ET AL., *supra* note 8, at 69.

[51] Marike R.P. Paulsson, *The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from an Unusual Perspective: Moving Forward by Parting With It*, 5(2) INDIAN J. ARB. L. 23, 42 (2017).

sufficient assets.[52] By laying down the foundation for most national legislations governing the international arbitral process[53] and establishing uniform international standards for the recognition of arbitration agreements and arbitral awards, the Convention unified (harmonized) the legal regime and methods of deciding whether to recognize and enforce a foreign arbitral award.[54]

ii. The Role of the New York Convention as an Instrument of ICA

The Convention imposes on its parties the obligations to recognize and enforce: (a) the agreement to arbitrate unless it is found to be void[55] and (b) foreign awards under the agreement by efficient proceedings.[56] These provisions of enforcement are self-executing and directly applicable. Moreover, the fact that the Convention governs the arbitration agreements, the conduct of the arbitration itself, and the enforcement of the awards made it a comprehensive instrument that dealt with all major elements of the arbitral process.[57]

Furthermore, the Convention permits foreign courts to refuse to enforce an agreement to arbitrate only based on the ground of substantive invalidity under the ordinary principles of contract law. Consequently, domestic courts are prohibited from invalidating arbitration agreements based on any other domestic ground. Thus, by eliminating the imposition of exceptional local grounds for the invalidity of the agreement to arbitrate, this rule results in the harmonious recognition of arbitration agreements.[58]

Similar to the agreement to arbitrate, the Convention is industrious in establishing uniform international rules of validity and enforceability of foreign (non-domestic) arbitral awards.[59] In that respect, the Convention contains provisions that exclusively apply to foreign awards, which are destined to ensure the speedy and efficient recognition of arbitral awards, giving effect to the parties' underlying objectives in agreeing to resolve their disputes by arbitration.[60] On the other hand, the Convention also exhaustively enumerates seven exceptional grounds whereby recognition and enforcement of an award may be refused by a

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[52] Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 UCLA L. REV. 1385, 1412 (2007).

[53] For example, article 2 (3) requires the courts of Contracting States, when seized of a matter subject to arbitration, to refer the parties to arbitration (instead of litigation) while staying its proceeding, which is a crucial step towards the delocalization of arbitral rules and ascertainment of party autonomy. N.Y. Convention, *supra* note 7, at art. II.

[54] BORN, *supra* note 16, at 92–93; Nivedita Chandrakanth Shenoy, 'Public Policy under Article 5 (2) (b) of the New York Convention: Is There a Transnational Standard', 20 CARDOZO J. CONFLICT RESOL. 77, 103 (2018).

[55] N.Y. Convention, *supra* note 7, at art. II. (imposing mandatory substantive validity rules, directed specifically to national courts, for the recognition and enforcement of international arbitration agreements).

[56] *Id.* art. II–VI; GOODE ET AL., *supra* note 3, at 563.

[57] Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012(1) J. DISP. RESOL. 101, 104 (2012).

[58] N.Y. Convention, *supra* note 7, at art. II (1), III.

[59] Simon Burger, *55 Years after Austria's Accession to the New York Convention: Crucial Issues in Light of the Supreme Court's Case Law*, *in* 5 YEARBOOK ON INT'L ARB. ADR 93 (Marianne Roth & Michael Geistlinger eds., 2017).

[60] N.Y. Convention, *supra* note 7, at art. III(1)–(2), VI(1)–(2).

foreign court.[61] Therefore, the exhaustive (limited) nature of the recognized exceptional grounds to refuse enforcement under the Convention is a testament to its commitment to enforce arbitral awards.[62]

The other significant achievement of the Convention is the international choice-of-law rules that govern the selection of the law applicable to international arbitration agreements. The rule requires the Contracting States to give effect to the parties' choice of law governing their agreement to arbitrate and in the absence of any express or implied choice by the parties, to apply the law of the arbitral seat.[63] This rule ascertained party autonomy in determining the applicable law and provided essential clarity concerning the law applicable to the parties' arbitration agreement by guarantying the recognition of all material terms of international arbitration agreements including the parties' choice of the arbitral seat, the selection of institutional rules, the choice of arbitrators, and arbitral procedures.[64]

The other attractive feature of the Convention is its potential to be applied in harmony with other favorable multilateral or bilateral agreements related to the recognition and enforcement of arbitral awards to which the Contracting States are parties. Accordingly, the provisions of the Convention do not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[65]

Additionally, the Convention, by allowing States to make two specific reservations in due course of ratification, is proved flexible. One of them limits the Convention's application to awards in disputes having a commercial character and the other reservation pertains to reciprocity.[66] This empowers the Contracting States to take advantage of the reservations considering their local scenarios and still enables them to ratify the Convention.[67]

To conclude, the great deal of attention given by the Convention to the recognition and enforcement of the arbitration agreement and foreign awards, the expedited and simplified recognition procedures, party autonomy regarding arbitral procedures, the limited grounds of refusal, and the prescribed choice-of-law rules were central in establishing an efficient legal framework of ICA. The Convention has been central to these developments by providing the foundation for contemporary ICA and being one of the pillars of today's broader international legal system of commercial dispute resolution.[68] All the above qualities

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[61] *Id.* at art. VI(1)(a)–(e), (2)(a)–(b); Jonathan Hill, *The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958*, 36 (2) OXFORD J. LEGAL STUD. 304, 305 (2016).

[62] David Isidore Tan*, Enforcing National Court Judgments as Arbitration Awards under the New York Convention*, 34 (3) ARB. INT'L 415, 443 (2018); *see generally* May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the Unites States and England*, 23(3) ARIZ. J. INT'L & COMP. L. 748, 784–85 (2006).

[63] N.Y. Convention, *supra* note 7, at art. III–VI.

[64] *Id.* at art. II–VI.

[65] *Id.* at art. VII(1)–(2).

[66] *Id.* at art. I(3).

[67] RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 2, 71 (George A. Bermann & Springer Publisher eds., 2017).

[68] Gary B. Born, supra note 76, 115-87.

of the New York Convention enabled it to withstand the test of time and influence the lives of billions of people all over the world.[69]

1.3.2 The Contribution of Strong International and Regional Arbitration Institutions

One of the main reasons for the dominance of ICA in transnational dispute resolution is the presence of strong international and regional arbitration institutions that have an irreplaceable role in the development and harmonization of ICA law and practice. By providing established uniform rules, these institutions aim to maximize the effectiveness of the arbitral process, whilst minimizing judicial intervention, other than when it is needed to support arbitration agreements and awards.[70] In addition, the availability of such arbitral bodies has boosted competition in specialized arbitration and empowered the parties to select one that is best suited to their needs. Institutional arbitration offers substantial advantages in terms of permanent existence, experience, quality control, modern institutional and procedural rules, specialized staff, and reasonable charges.[71]

For the purpose at hand, it suffices to enumerate four of the major International and Regional Arbitral Institutions that are playing a major role in the harmonization of ICA law and practice. These are:

- The International Chamber of Commerce (ICC) International Court of Arbitration[72],
- The American Arbitration Association (AAA) International Center for Dispute Resolution[73],
- The London Court of International Arbitration 1892[74], and
- Other Arbitral Institutions such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the European Court of Arbitration, the German Institute of Arbitration (DIS), the Netherlands Arbitration Institute (NAI), the Vienna International Arbitration Centre (VIAC), the Singapore International Arbitration Centre (SIAC), the Permanent Court of Arbitration in The Hague (PCA), and the World Intellectual Property Organization (WIPO) Arbitration and Mediation.[75]

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[69] V. V. Veeder, *Is there a Need to Revise the New York Convention*?, 1 (2) J. INT'L DISP. SETTLEMENT 499, 506 (2010).

[70] MOSES, *supra* note 17, at 10–12.

[71] Redfern et al., *supra* note 8, at 45-50.

[72] Craig et al., *International Chamber of Commerce Arbitration* (3rd eds. 2000); Derains and Schwarz, *A Guide to the New ICC Rules of Arbitration*, Kluwer L. Int'l (2d ed. 2005); Jason Fry et al., *The Secretariat's Guide to ICC Arbitration* (ICC 2012).

[73] Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and other Global Alternative Dispute Resolution Processes*, LOYOLA LOS ANGELES L. REV. 1337, 1351 (2007).

[74] Wade & Clauchy, *Commentary on the LCIA Arbitration Rules* (Sweet & Maxwell 2015); LCIA Rules Art. XXII (1)(d), (e); LCIA Rules Art. XV (2); LCIA Rules Art. I-II, IV, V (5), XIV, XXVII (1) & CCLXXXVIII (2014).

[75] MOSES, *supra* note 17, at 22; Pete Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* 25 (Oxford Univ. Press 2d ed. 2009).

1.4 The Dominant Success of ICA is Evident from Existing Empirical Research

With the rise of the global economy, private dispute resolution processes in general and ICA, in particular, have quickly become a vital component of international business relationships.[76]

Studies made on the attitude of corporations towards international dispute settlement mechanisms reveal an overwhelming preference for ICA over litigation in national courts and arbitration is found to be the first-choice method of binding dispute resolution.[77] A standard-setting study made in 2016 also reveals that arbitration has been the primary means of resolving cross-border commercial disputes for decades after World War II and up to 90% of all international commercial contracts include an arbitration provision.[78] Similarly, a groundbreaking study in 2004 found that 90 percent of respondents preferred arbitration to cross-border litigation.[79] Moreover, the revised version of the same study in 2006 showed a 73 % preference for ICA.[80]

It is also evident from the 2018 comprehensive International Arbitration Survey that 97% of respondents (who are practitioners, arbitrators, counsels, and experts) indicate that ICA is their preferred method of dispute resolution, either on a stand-alone basis (of 48%) or in conjunction with ADR (of 49%).[81]

In addition, it is evident from the results of an International Arbitration Survey conducted in 2015 that 90% of the respondents indicated international arbitration as their preferred dispute resolution mechanism either as a stand-alone mechanism (56%) or together with ADR (34%).[82]

Moreover, although due to its confidential and institutional nature, empirical studies and data are mostly unpublished and infrequent concerning ICA, over the years, many scholars have undertaken eye-opening empirical studies revealing the dominant use of ICA as a preferred mechanism of transnational commercial dispute resolution compared to litigation and mediation.[83]

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[76] Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator involved in an International Commercial Mediation with Mexicans*, 19 LOYOLA L.A. INT'L & COMP. L. REV. 1, 3-4 (1996).

[77] Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. OF INT'L & COMP. LAW 499 (2006).

[78] S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commerical Mediation*, 73 WASHINGTON & LEE L. REV. 1973, 2085 (2016).

[79] Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices? Twelve Perceptions Tested Myths Data and Analysis Research Report*, 15 THE AM. REV. OF INT'L ARB. 525, 559 (2004).

[80] Loukas Mistelis & Gerry Lagerberg, *International arbitration: Corporate Attitudes and Practices 2006*, QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARBITRATION (2006).

[81] Queen Mary University of London School of International Arbitration, *International Arbitration Survey: The Evolution of International Arbitration,* White & Case 2 (2018) (An overwhelming 99% of the respondents stated that they would recommend ICA to resolve cross-border disputes in the future. By comparison, these surveys showed, both in 2015 and 2018, that only 4% of respondents expressed that they would rather opt for commercial litigation to resolve a cross-border dispute.).

[82] Queen Mary University of London School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, White & Case 2-6 (2015) (Including similar results from 2006, 2008, 2010, and 2013 surveys as well).

[83] Christopher Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 Jour. of Int'l Arbitration 23, 30 (2003); Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business*

2. THE ROLE OF THE INSTRUMENTS OF INTERNATIONAL COMMERCIAL LITIGATION IN THE HARMONIZATION OF THE RULES OF TRANSNATIONAL COMMERCIAL DISPUTE RESOLUTION

The following sections discuss the roles of the two typical international legal instruments of transnational litigation, which are the Hague Convention on Choice of Court Agreement of 2005 (hereinafter 'COCA') and the Hague Judgment Convention of 2019, in the harmonization of the rules of transnational commercial dispute resolution.

2.1 The COCA 2005

2.1.1 The Role of the COCA in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

The COCA was adopted on June 30, 2005.[84] The COCA entered into force in 2015 between the EU and Mexico. By 2021, 4 other countries ratified it including Denmark, Singapore, Montenegro, and the UK.[85]

The COCA is designed to create a mandatory international legal regime for the enforcement of exclusive jurisdiction agreements and the recognition and enforcement of judgments resulting from proceedings based on such agreements.[86] The COCA has the objective to create an internationally uniform legal framework to promote transnational trade by encouraging judicial cooperation via the recognition and enforcement of judgments concerning the choice of court agreements.[87] By so doing, the COCA has the objectives of facilitating parties' autonomy in forum selection, cross border movement of judgments, enhancing certainty and predictability to litigants, and harmonizing the rules of choice of court agreements in member states.[88]

The COCA is well equipped with the following rules (tools) to achieve its specific and commercial objectives as an instrument of transnational dispute resolution that influences the harmonization of the law and practice of transnational commercial litigation:

People, 30 INT'L BUS. L. REV. 203, 341 (2002); C.R. Drahozal & R.W. Naimark, *supra* note 4, 341; Christian Bohring-Uhle, *Arbitration and Mediation in International Business*, Kluwer L. Int'l 129, 134 (1996); Wang Sheng Chang, *Enforcement of Foreign Arbitral Awards in the People's Republic on China*, Improving the Efficiency of Arbitration Agreements and Awards: 40 years of Application of the New York Convention, Kluwer L. Int'l 461, 483 (1999); Andrew Myburgh & Jordi Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 J. L. & ECON. 597, 627 (2016).

[84] Trevor Hartley & Masato Dogauchi, *Hague Conference on Private International Law*, COCA (2005).

[85] Hague Conference on Private International Law, *The 2005 Choice of Court Convention enters into force*, HCCH, Oct. 1, 2015, https://www.hcch.net/en/news-archive/details/?varevent=428; Hague Conference on Private International Law, *Convention of 30 June, 2005 on Choice of Court Agreements*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98, (last updated Mar. 3, 2021).

[86] Ronald A. Brand, *Arbitration or Litigation? Choice of Forum after the 2005 Hague Convention on Choice of Court Agreements*, UNIV. OF PITTSBURGH, Legal Studies Research Paper No. 2009-14 (2009).

[87] Adrian Briggs, *The Conflict of Laws* 117 (Oxford Univ. Press 2d ed. 2013).

[88] Johannes Landbrecht, *The Hague Convention on Private International Law: Shaping a Global Framework for Party Autonomy*, 1 INT'L BUS. L. JOUR. 35, 36-40 (2017).

1. The chosen court in an exclusive choice of court agreement shall have jurisdiction to decide a dispute unless the agreement is invalid under the law of that state.[89] Accordingly, the designated court has no power to stay its proceedings on grounds related to *forum non-conveniens* or the *lis alibi pendens* doctrine.[90] First, this provision helps local judges to determine the competent court of jurisdiction. Second, by ascertaining the adjudication of the dispute in the selected court, this rule provides to the disputants the required level of *ex-ante* security, certainty, and predictability that the court will resolve the dispute and the parties will not be frustrated after having selected a court.[91] Third, the provision guarantees even greater certainty by presuming that a choice-of-court agreement is exclusive unless expressly stated as non-exclusive.[92] Fourth, it also assures party autonomy and freedom to predetermine the court of jurisdiction by signing an exclusive choice of court agreements.[93] Accordingly, because the identity of the forum is crucial in transnational litigation in determining the substantive outcome of a case, the ability to choose the forum court allows the parties to consider the related risk.[94] Fifth, the exclusive nature of the agreement enables the parties to exclude, by agreement, hostile jurisdictions or choose a neutral jurisdiction including a court that has no factual connection with the dispute.[95]

2. Any court, in member states, other than the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[96] Accordingly, the courts other than the chosen court must decline jurisdiction if it is established that there is a valid and exclusive choice-of-court agreement in favor of the chosen court. The nominated court shall exercise jurisdiction whilst all other courts are required to stay and eventually decline jurisdiction unless in case of the stated exceptional grounds.[97] This rule is crucial to avoid unnecessary competition for jurisdiction, forum shopping, and parallel proceedings and provides a certain, predictable, speedier, and cheaper method of dispute resolution to parties.

3. A judgment given by the chosen court shall be recognized and enforced in the courts of the other Contracting States[98] and recognition and enforcement of such judgment may be refused only on the grounds specified in the COCA.[99] First, by imposing the duty of enforcement on member states, the COCA removes the element of discretion and thus a degree of uncertainty thereby promoting the use of national courts in transnational dispute

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[89] The Convention on Choice of Court Agreement ("COCA") 2005, art. 3 (a, c).

[90] *Id*. art. 5 (2).

[91] Matthias Weller, *Choice of Court Agreements under Brussels La and Under the Hague Convention: Coherences and Clashes*, 13 J. PRIVATE INT'L L. 91, 129 (2017).

[92] The COCA, *supra* note 89, art. 3 (b); Brooke Marshall & Mary Keyes, *Australia's Accession to the Hague Convention of the Choice of Court Agreements*, 41 MELBOURNE UNIV. L. REV. 246, 272 (2017).

[93] *Id*. at art. 3 (a, c-d); Trevor Harley & Masato Dogauchi, *supra* note 84; Ronald A. Brand, *supra* note 86.

[94] Michael Douglas, *Will Australia Accede to the Hague Convention on Choice of Court Agreements*, 17 MACQUARIE L. J. 148 (2017).

[95] *Id*.

[96] The COCA, *supra* note 89, at art. 6.

[97] *Id.* at art. 6(a-e).

[98] *Id. At* art. 8; Huang Zhang, *'International Jurisdiction under the 2005 Hague Convention on Choice of Court Agreements: Implications for China'*, 47(2) HONG KONG L. J. 555, 583 (2017).

[99] *Id.* art. 9; RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE-OF-COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 111 (Cambridge Univ. Press 2008); Caroline Edsall, *Implementing the Hague Convention on Choice of Court Agreements in the United States: An Opportunity to Clarify Recognition and Enforcement Practice* 120 YALE L. J. 397, 397-406 (2010).

settlement.[100] Second, by limiting the grounds of refusal to recognize and enforce the judgments of the selected courts, the COCA is proved pro-enforcement and facilitates the cross-border movement of judgments, providing a foundation for further international judicial cooperation and harmonization of transnational litigation.[101] Third, the ascertainment of recognition and enforcement of the judgments of the designated court throughout the courts of member states is crucial to the disputants because it avoids the further risk of re-litigation of the same cause of action in a foreign court due to the lack of recognition and enforcement in the first instance.[102]

4. Each Contracting State has the opportunity to declare that its courts will recognize and enforce judgments given by courts of the other Contracting States designated in a non-exclusive choice of court agreement.[103] This rule is significant for the harmonization of transnational litigation for it enables states to increase the productivity of the COCA by many folds.[104] Although nonexclusive agreements would not receive the benefits in articles 5 and 6, the resulting judgment could receive the benefits of recognition and enforcement in article 8.[105] By so doing, the scope of application of the COCA can be exceptionally extended to cover transnational disputes where the parties have signed a non-exclusive choice of court agreements.[106]

5. The scope of application of the COCA is exclusively limited to international cases in civil and commercial matters and there is a broad exclusion of subject matter.[107] Accordingly, it applies only to resolve disputes of international and commercial nature where an exclusive choice of court agreements is signed.[108] The specific application of the COCA to such disputes is a testament to its determination to contribute its part to the development of transnational commercial dispute resolution. Moreover, it should be noted that the broad exclusion mostly refers to non-commercial matters that are irrelevant for the purposes of the COCA, and despite the exclusions, a large number of relevant commercial contracts still fall within the scope of application of the COCA.[109]

On the other hand, the fact that the provisions of the COCA have been ratified and incorporated into the national laws of all of its Contracting States, the provisions of the COCA was uniformly interpreted and applied in the High Court of Singapore in 2018 to resolve an issue in a dispute[110], and the provisions of the COCA are flexible and suitable for harmonious application with other relevant international instruments are practical testaments

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[100] Alex Mills, *The Hague Choice of Court Convention and Cross-Border Commercial Dispute Resolution in Australia and the Asia-Pacific*, 18 MELBOURNE J. INT'L L. 1, 10 (2017).

[101] The COCA, *supra* note 89, at art. 9(e); Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. PRIV. INT'L. L. 243, 286 (2006).

[102] Siriporn Denkesineelam, *The impact of accession to the Hague Convention on Choice of Court Agreements on Thai Law and Practice*, 9 THAMMASAT BUS. L. J. 1, 20 (2019).

[103] The COCA, *supra* note 89, at art. 22.

[104] Matthew H. Adler & Michele C. Zarychta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Ban* 27 NORTHWESTERN J. INT'L L. BUS. 1, 35 (2006).

[105] Brand, *supra* note 86, at 5.

[106] The COCA, *supra* note 89, Preamble; Garnett, *supra* note 5, at 164.

[107] *Id*. at art. 2.

[108] *Id*. at arts. 1(1), 2(2).

[109] *Id*. at art. 2; Schulz, *supra* note 101, at 439; Adler & Zarychta, *supra* note 104, at 2.

[110] *First case under the Choice of Court Convention*, HCCH, https://www.hcch.net/en/publications-and-studies/details4/?pid=6616&dtid=55 (last visited Apr. 8, 2022).

that the COCA is well equipped with the needed rules (tools) to achieve its specific and commercial objectives.[111] Additionally, the COCA has passed through an extensive deliberation procedure before adoption and after it has been adopted in 2005, the necessary post-adoption aids and adequate endorsements were made to it by the relevant national and international stakeholders from 2005 to 2015, which adequately indicates the quality of the instrument.[112]

Moreover, if backed by wide ratification, similar to the New York Convention, the COCA, given it has been brought into force only recently, has vast potential to alleviate the age-old problem of the lack of enforcement of court judgments in transnational commercial litigation.[113]

The COCA is designed to provide international litigants with an alternative means of dispute resolution to arbitration.[114] The COCA acts as the analog for the New York Convention in litigation as it would afford to choice-of-court agreements and resulting foreign judgments many of the same advantages of enforcement that arbitral agreements and awards enjoy under the latter.[115]

2.1.2 The Success of the COCA as Instrument of Transnational Commercial Litigation

Although the COCA has the potential to bring in transnational litigation as an alternative to ICA, it will not be successful to compete with the dominant position of ICA in the short run. Accordingly, the following are the major factors that constrain the success of the COCA in the near future:

- The COCA was in force for only 7 years (compared to the 60-year-old New York Convention),
- The COCA has a very limited number of signatories[116],
- The COCA has not been ratified by the major trading states such as the USA, China, and India[117],
- The provisions of the COCA are only applicable between the courts of the Contracting States, which is a fact that made the future success of the COCA directly dependent on the amount and quality of ratification that it will attract[118], and

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[111] The COCA, *supra* note 89, at arts. 19-23, 26.

[112] International Chamber of Commerce, *ICC urges governments to ratify Hague choice of court convention*, *https*://iccwbo.org/media-wall/news-speeches/icc-urges-governments-to-ratify-hague-choice-of-court convention/. (last visited September 11, 2021).

[113] Paulsson, *supra* note 51, at 23-24.

[114] Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation,* 94 CORNELL L. REV. 1, 5 (2008).

[115] Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention On Choice of Court Agreements*, 42 INT'L L. & POL'Y. 237, 241 (2009).

[116] *Convention of 30 June 2005 on Choice of Court Agreements*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last visited Apr. 8, 2022). The EU, Mexico, Singapore, Denmark, and Montenegro are currently the only parties to the convention.

[117] Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 Houston J. Int'l L. 1, 33 (2010). China and the USA have signed on the Convention.

[118] Mukarrum Ahmed, *BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*, 27 EUR. BUS. L. R. 989, 994-95 (2016).

- The provisions of the COCA are not adequately interpreted in national courts.

Moreover, the following subsidiary factors will also constrain the immediate success of the COCA[119]:

- The COCA has a narrow scope of application,
- The COCA imposes a wider variety of exclusions from its scope, especially regarding intellectual property rights,
- The COCA lacks provisions on civil procedure rules and for parties with no choice of court agreements, and
- The COCA does not accord protection to small and micro-enterprises.

However, it should be noted that, since the COCA has been enforced in 2015 its story is changing as increasing numbers of states are actively considering ratification.[120]

Besides, as proved from the case law precedent in Singapore in 2018, the COCA is fully in force and applicable between the courts of the Contracting States as an instrument of transnational litigation. As a result, in the long run, as long as it is backed by wide ratification, there is no obvious reason why the COCA would not be successful.[121]

2.2 The Hague Judgment Convention of 2019

2.2.1 The Role of the Judgment Convention in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

The Hague Judgments Convention (hereafter 'the Convention') was adopted in 2019 after 27 years of deliberation under the auspices of the Hague Conference.[122] By 2021, the Convention is signed by only Ukraine, Uruguay, Russia, Israel, and Costa Rica. However, the Convention is yet to be ratified and brought into force.[123]

The Convention has the specific objective of facilitating cross-border trade by reducing the costs and risks associated with cross-border dealings and enhancing predictability and certainty in dispute settlement.[124] Accordingly, the Convention creates a common, binding, multilateral framework for the recognition and enforcement of foreign judgments on civil and commercial matters among its Contracting States.[125]

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[119] The COCA, *supra* note 89, at arts. 2(1), 2(a-p).

[120] *Ukraine signs the 2005 Choice of Court Convention and the 2007 Hague Protocol*, HCCH, https://www.hcch.net/en/news-archive/details/?varevent=478 (last visited Apr. 8, 2022).

[121] As long as the disputants are willing to sign a choice of court agreement, the case law precedent in the High Court of Singapore in 2018 proved that the provisions of the COCA could be applied to resolve a case in a dispute resulting in a cross-border judicial cooperation or movement of judgments between the UK and Singapore (Contracting States).

[122] The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 (The "Judgement Convention"), https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

[123] *Id.* https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

[124] *Id.* Preamble.

[125] Michael Douglas, Mary Keyes, Sarah McKibbin, & Reid Mortensen, *The HCCH Judgments Convention in Australian Law,* 47 FED. L. REV. 420, 443 (2019).

By helping to escape national borders and enhancing transnational circulation and enforcement of judgments, the Convention helps litigants to enforce judgments awarded in other countries and acquire practical relief abroad based on such judgments.[126]

Moreover, the Convention targets to alleviate the age-old problem of uncertainty of getting judgments recognized and enforced abroad due to the lack of an internationally enforceable litigation instrument.[127] As a transnational litigation instrument, the Convention also seeks to provide the same certainty for court judgments that the New York Convention has provided for the global recognition and enforcement of arbitral awards.[128]

The Convention also gives a great deal of emphasis to the global enforcement of foreign judgments, among others, by[129]:

- Giving priority to identifying the judgments that are eligible for recognition and enforcement,
- Stipulating the process for recognition and enforcement of such judgments,
- Dealing exclusively with the recognition and enforcement of final judgments given by the forum court, and
- Disregarding judgments given by courts from the Non-contracting States.

Furthermore, by providing the minimum bases of jurisdiction that make a judgment eligible for recognition and enforcement, the Convention disregards hostile and stringent jurisdictional rules laid out by domestic laws for the recognition and enforcement of a foreign judgment.[130] Hence, any judgment of the forum court delivered based on one of the bases of jurisdiction laid out in article 5 of the Convention shall be recognized and enforced throughout the courts in the Contracting States of the Convention.[131] However, it should be noted that the decision to recognize and enforce judgments that are not eligible based on the stated grounds in the Convention is left to the discretion of the law of the domestic court, which still broadens the chance of enforcement of foreign judgments by providing an extra opportunity of recognition and enforcement to non-eligible judgments that could have been rejected otherwise.[132]

In conclusion, from the above discussion, the Convention, by exclusively defining the criteria for refusing recognition or enforcement, enhances legal certainty and predictability and simplifies the recognition and enforcement of foreign judgments in other jurisdictions ultimately facilitating the global circulation of judgments and access to justice.[133]

On the other hand, the following additional factors indicate that the Convention is well equipped with the needed rules (tools) to be successful in the future[134]:

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[126] David Goddard, *The Judgments Convention - The Current State of Play*, 29 DUKE J. COMPAR. INT'L L. 473, 490 (2019).

[127] Louise Ellen Teitz, *Another Hague Judgments Convention: Bucking the Past to Provide for the Future*, 29 DUKE J. COMPAR. INT'L L., 491, 512 (2019).

[128] Sarah E. Coco, *The Value of a New Judgments Convention for U.S. Litigants*, 94 (5) N.Y.U. L. REV. 1209, 1212 (2019).

[129] The Judgement Convention 2019, *supra* note 122, at arts. 1-5.

[130] *Id*. at art. 5.

[131] *Id*. at art. 4.

[132] *Id*. at arts. 7 and 16.

[133] *Id*. at art. 7.

[134] *Id*. at arts. 1-3 and 19.

- The Convention is characterized by exclusivity and specificity of subject matter and scope (international and commercial),
- The Convention provides the necessary flexibility to acceding states via the possibility of declarations, and
- The provisions of the Convention are open to compatible application with other relevant Conventions.

2.2.2 The Success of the Judgment Convention as Instrument of Transnational Commercial Litigation

Although the Convention is adequately crafted and well equipped with the needed rules (tools) to achieve its specific and commercial objectives, the fact that the Convention is only applicable between the courts of Contracting States has made the success of the Convention directly dependent on the number of ratification it will attract in the future. To date, given the fact that the Convention was adopted only 4 years ago, it is highly constrained by lack of ratification.[135]

Accordingly, the following factors constrain the success of the Convention in impacting the landscape of transnational commercial dispute settlement in the near future:

- The Convention was only adopted very recently in July 2019,
- The Convention has not been brought into force yet because it has not attracted an adequate number and quality of ratification, and therefore
- The provisions of the Convention have not been incorporated into national laws of Contracting States, and
- The provisions of the Convention are yet to be uniformly interpreted in domestic courts of Contracting States to resolve issues in a dispute.

Therefore, in the absence of the attributes stated above, for the near future, the Convention remains to be a paper-tiger and the quest to utilize the Convention as an alternative transnational litigation instrument to arbitration remains unfulfilled.

3. THE ROLE OF THE INSTRUMENTS OF TRANSNATIONAL COMMERCIAL MEDIATION IN THE HARMONIZATION OF THE RULES OF TRANSNATIONAL COMMERCIAL DISPUTE RESOLUTION

The following section discusses the role of the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as, the Singapore Convention on Mediation of 2018 (hereafter 'the Convention') as an instrument of transnational mediation in the harmonization of the rules of transnational commercial dispute resolution.

[135] The Judgment Convention 2019, *supra* note 123.

Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-a-vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

3.1 The Singapore Convention on Mediation 2018

3.1.1 The Role of the Singapore Convention on Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

The Convention was adopted in 2018.[136] The Convention came into force on 12 September 2020.[137] By 2021, the Convention is ratified by only 9 countries namely Belarus, Ecuador, Fiji, Georgia, Honduras, Qatar, Saudi Arabia, Singapore, and Turkey, and signed by 55 countries.[138]

The Convention provides a uniform and efficient international framework for the cost-effective and prompt recognition and enforcement of mediated settlement agreements to resolve transnational commercial disputes amenable to States with different legal, social, and economic systems.[139] By so doing, the Convention aims to render mediation more efficient and attractive to commercial disputants globally, as an alternative to international arbitration and litigation.[140]

Similarly, by avoiding the uncertainties in the enforcement of mediated agreements, reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties, and producing savings in the administration of justice by States, the Convention has great potential to bolster the use of mediation as a method for resolving cross-border commercial disputes and thereby avoiding the risk of re-litigation in case one of the parties fails to comply.[141]

The lack of a transnational instrument for giving legal effect to mediated settlement agreements has been a significant barrier to the willingness of international commercial disputants to use mediation.[142] Accordingly, the Convention, as a gap-filling transnational mediation instrument, is destined to alleviate this long-standing problem of transnational mediation by giving mediation the same type of boost that arbitration received from the New York Convention.[143]

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[136] The United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 (the "Singapore Convention on Mediation 2018"), the Convention was adopted on 20 December 2018 by resolution 73/198, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

[137] *Id.*

[138] *Id*., https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

[139] The Singapore Convention on Mediation 2018, *supra* note 136, Preamble.

[140] *Id.*

[141] *Id*.; Herisi Ahdieh Alipour & Wendy Trachte-Huber, *Aftermath of the Singapore Convention: A Comparative Analysis between the Singapore Convention and the New York Convention*, 12 AM. J. OF MEDIATION 154, 173 (2019); Abramson Hal, *The New Singapore Mediation Convention: The Process and Key Choices*, 20(4) CARDOZO J. CONFLICT RESOL. 1037, 1062 (2019), https://digitalcommons.tourolaw.edu/scholarlyworks.

[142] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements,* 19 PEPP. DISP. RESOL. L. J. 1, 3 (2019).

[143] Ellen E. Deason, *What's in a Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation*, 20(4) CARDOZO J. CONFLICT RESOL. 1149, 1172 (2019); Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L. J. 1, 61 (2019).

The Convention applies to settlement agreements that are mediated, international, and commercial, and not subjected to a specific exclusion.[144] Accordingly, the delimitation of the scope to international commercial matters is a testament to its dedication to providing mediation as an alternative means of transnational commercial dispute resolution.[145]

Moreover, the Convention does not apply to settlement agreements: that have been approved by a court or concluded in the course of proceedings before a court or that are enforceable as a judgment in the State of that court, and settlement agreements that have been recorded and are enforceable as an arbitral award.[146] This rule, by avoiding possible overlap in subject matter and scope with existing and future relevant international legal instruments or Conventions, boosts both the compatible application of the Convention with other relevant instruments and the use of mediation as an alternative to arbitration and litigation.[147] Similarly, the rule, by encouraging disputants to resort to alternative mechanisms of dispute settlement such as arbitration or litigation, has proven that the Convention is a pro-harmonization instrument, which gives priority to the efficient resolution of transnational commercial disputes by using the most suited method of dispute resolution.[148]

The other beneficial attribute of the Convention is the fact that it does not require the disputants to choose a local seat for their mediation (delocalization of forum) so long as they have concluded a written agreement resulting from a mediation to resolve their commercial dispute. This rule by ascertaining neutrality of the forum and avoiding unnecessary procedures related to the forum court guarantees a speedier and cheaper dispute resolution.[149] Furthermore, the Convention guarantees more flexible enforcement of valid mediated settlement agreements by forcing the contracting States to enforce such agreements as per their domestic rules of procedure and in line with the requirements of the Convention.[150]

On the other hand, the Convention is also committed to guaranteeing the global enforcement of valid mediated settlement agreements by exhaustively enumerating the grounds for the Contracting States to deny recognition and enforcement.[151] Accordingly, it is only based on the following grounds that the Contracting States are allowed to refuse to enforce valid mediated settlement agreements[152]:

- If a party to the settlement agreement was under some incapacity;
- If the settlement agreement sought to be relied upon is null and void, inoperative or incapable of being performed or is not binding, or is not final, according to its terms, or has been subsequently modified;

[144] The Singapore Convention on Mediation 2018, *supra* note 136, at art. 1 (a, b).

[145] *Id.* at arts. 1 (1), 1(2) (a-b), 2 (3).

[146] *Id*. at art. 1 (3) (a-b).

[147] Corinne Montineri, *The United Nations Commission on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation,* 20 CARDOZO J. CONFLICT. RESOL. 1023, 1034, (2019).

[148] The Singapore Convention on Mediation 2018, *supra* note 136, at art. 1 (3) (a) (b).

[149] *Id.* at arts. 1, 4.

[150] *Id*. at art. 3 (1-2); Timothy Schnabel, *Recognition by Any Other Name: Article 3 of the Singapore Convention on Mediation,* 20 CARDOZO J. CONFLICT RESOL., 1181, 1189 (2019).

[151] The Singapore Convention on Mediation 2018, *supra* note 136, at art. 5 (1-2).

[152] *Id.*

- If the obligations in the settlement agreement have been performed, or are not clear or comprehensible, or granting relief would be contrary to the terms of the settlement agreement;
- If there was a serious breach by the mediator of standards applicable to the mediator or the mediation;
- If 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 if granting relief would be contrary to the public policy of that Contracting State or the subject matter of the dispute is not capable of settlement by mediation under the law of that Contracting State.

The other fascinating quality of the Convention is the fact that it provides the necessary degree of flexibility to ratifying States by guarantying their right to make or withdraw, at any time, only two types of reservations, which are destined to restrict the scope of application of the Convention.[153] Accordingly, the Contracting States to the Convention may either declare that the Convention shall not apply to 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, or declare that the Convention shall apply only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.[154] This attribute of the Convention is practically proved beneficial, as it is quite evident from the ratification history of some of the Contracting States such as Belarus, Georgia, and Saudi Arabia.[155] Similarly, as evident from its recent ratification history, the inclusion of the rules concerning the right to declare reservations in the Convention was one of the reasons for the successful adoption and enforcement of the Convention in a relatively short record time.[156]

On the other hand, the Convention is also committed to ascertaining the harmonious application of its provisions with other relevant Conventions by guaranteeing the rights of any interested party to exercise any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Contracting States of the Convention where such settlement agreement is sought to be relied upon.[157]

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[153] *Id.* at arts. 8(a-b), 12, 13.

[154] *Id.* at art. 8(a-b).

[155] In accordance with article 8(1)(a) of the Convention, the Republic of Belarus and Saudi Arabia declared that they shall not apply the Convention to settlement agreements to which they are a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party; However, Georgia declared both types of reservation recognized under article 8(1)(a), (b) of the Convention.

[156] Itai Apter & Coral Henig Muchnik, *Reservations in the Singapore Convention – Helping to Make the "New York Dream" Come True,* 20 CARDOZO J. CONFLICT RESOL. 1267, 1281 (2019) (The Convention was adopted in 2018 and brought into force only after two years in 2020).

[157] The Singapore Convention on Mediation 2018, *supra* note 136, at art. 7.

3.1.2 The Success of the Singapore Convention as Instrument of Transnational Commercial Mediation

All of the aforementioned characteristics demonstrate that the Convention is well-equipped with the necessary rules (tools) to achieve its specific and commercial goals.[158] It seems after having recognized these beneficial features of the Convention that an increasing number of countries have signed or ratified the Convention and brought it into force within a relatively shorter period since its adoption in 2018. However, whether the Convention will be successful in the future depends on the amount and quality of ratification that it will attract and the underway of an effective scheme of awareness creation to that effect. On contrary, in the absence of adequate ratification, the Convention remains to be unsuccessful to play its part in bringing mediation as an alternative mechanism of transnational commercial dispute resolution.[159]

Currently, the following factors constrain the Convention from achieving similar success to the New York Convention:

- The Convention has been adopted only two years ago,
- The Convention has been ratified by only 9 countries and yet it has not been ratified by the major commercial nations such as the USA, China, India, and the EU,
- The provisions of the Convention have not been adequately incorporated into national laws, and
- The provisions of the Convention are yet to be applied in a court of law to resolve an issue in a dispute.[160]

However, as is, this does not rule out the possibility of the Convention playing a role in dispute resolution. As a result, disputants, coming from the Contacting States, in a transnational commercial dispute can still use it as an alternative to arbitration or litigation to resolve their problems.[161]

CONCLUSION

When compared to litigation and mediation, ICA was and will continue to be the realistic means of transnational commercial dispute resolution. Various factors contributed to the relative success of ICA.

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[158] *See generally* Convention, *supra* note 146; Yvonne Guo, *From Conventions to Protocols: Conceptualizing Changes to the International Dispute Resolution Landscape,* 11 J. INT'L DISP. SETTLEMENT 217 (2020).

[159] *Cf.* Hector Flores Senties, *Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and their Importance for the Success of the Convention,* 20 CARDOZO J. CONFLICT RESOL. 1235, 1256 (2019) (stating the desired resolution upon publication of the Singapore Convention).

[160] Johannes Landbrecht, *Commerical Arbitration in the Era of the Singapore Convention and the Hague Court Conventions,* 37 ASA BULLETIN 871, 873, 880 (2019).

[161] *See generally* Bobette Wolski, *Recent Developments in International Commercial Dispute Resolution: Expanding the Options,* 13 BOND L. REV. 1 (2001) (explaining how the Convention is used in Australia); S.I. STRONG, USE AND PERCEPTION OF INTERNATIONAL COMMERCIAL MEDIATION AND CONCILIATION: A PRELIMINARY REPORT ON ISSUES RELATING TO THE PROPOSED UNCITRAL CONVENTION ON INTERNATIONAL COMMERCIAL MEDIATION AND CONCILIATION 2 (2014); Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes,* 40 LOYOLA LOS ANGELES L. REV. 1337 (2007).

On the one hand, the distinctive advantageous features of ICA such as party autonomy, confidentiality, finality, recognition and enforcement, delocalization, neutrality, and flexibility made it more suitable to resolve transnational disputes. On the other hand, the availability of strong international legal and institutional frameworks for ICA is the other major factor that contributed to its success.

However, the predominant use and success of ICA were not acquired instantly. It is rather the outcome of many years of concerted efforts of various international law-making bodies such as the UNCITRAL and many arbitral institutions to find an efficient transnational solution to international commercial problems.

Moreover, the most invaluable attribute of ICA that contributed to its success is the fact that the agreement to arbitrate and arbitral awards are recognized and enforced globally. The global enforcement of arbitral awards is the outcome of the success of the New York Convention 1958 in attracting a substantial amount and quality of ratification in 163 countries in the world. This ended the long-standing problem of the lack of recognition and enforcement of foreign awards in transnational dispute resolution and accorded to disputants an *ex-ante* certainty and predictability in the resolution of their commercial disputes.

On the other hand, ICA is not the only means of transnational commercial dispute resolution. It is not even the default mechanism of dispute resolution for that matter. ICA became dominant not because it is perfect but also because of the lack of other realistic means of transnational dispute resolution. Recently, however, mainly due to the adoption of various international instruments of dispute resolution on litigation and mediation, the latter methods are being considered viable alternatives to ICA in the area of transnational commercial dispute resolution.

Except for the difference in their basic nature or subject matter, all the newly adopted relevant Conventions, discussed in this study, are crafted as an analog to and to achieve the success of the New York Convention of 1958. Therefore, the Conventions have stark similarities with the latter in terms of their intended specific and commercial objectives, the tools that they use to achieve such objectives, and their main objective of alleviating the long-standing problem of lack of global enforcement of foreign judgments and mediated settlement agreements.

Accordingly, the COCA of 2005, the Judgments Convention of 2019, and the Singapore Convention of 2018 are inspired by the New York Convention in defining their scope of application (international and commercial), their specific and exclusive nature, their flexible and compatible nature, the priority they give to recognition and enforcement, the limited grounds stipulated for refusal to recognize and enforce, the fact that their application is limited between member states and so on. These aforementioned attributes of the Conventions are testaments to their devotion to providing viable mechanisms of transnational dispute resolution in the form of litigation and mediation as an alternative to ICA.

However, unlike the New York Convention, the aforementioned Conventions will not result in a dramatic change in the current landscape of commercial dispute resolution. Thus, ICA will remain to be the dominant method in that regard. This is because, unlike the New York Convention, (1) these Conventions are only recently adopted and enforced, (2) the application of the Conventions is delimited between member states and their success depends on the amount of ratification that they will attract, (3) the Conventions are not adequately ratified and enforced in terms of number and quality of ratification, (4) The provisions of the Conventions are not adequately incorporated into domestic laws, and (5) The provisions of

the Conventions are not adequately and uniformly interpreted in courts to resolve issues in a dispute.

Therefore, it is quite evident from the above points that, currently, despite their adoption and enforcement, the Conventions have little or no practical role in transnational commercial dispute resolution. Hence, the Conventions are currently unsuccessful to achieve their specific and commercial objectives in providing transnational litigation and mediation as an alternative to ICA. Finally, however, if the Conventions have the necessary support from the relevant international law-making bodies, and if they are ratified by a larger number of countries, there is no reason why they will not be effective in offering a more diverse and viable alternative to ICA in the future.