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Arbitration and Dispute Resolution

## International Arbitration Law Library

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VOLUME 59

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# New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution

Edited by

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Wolters Kluwer

*Published by:*

Kluwer Law International B.V.  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
E-mail: [international-sales@wolterskluwer.com](mailto:international-sales@wolterskluwer.com)  
Website: [lrus.wolterskluwer.com](http://lrus.wolterskluwer.com)

*Sold and distributed by:*

Wolters Kluwer Legal & Regulatory U.S.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com)

*Printed on acid-free paper.*

ISBN 978-94-035-2855-7

e-Book: ISBN 978-94-035-2863-2  
web-PDF: ISBN 978-94-035-2871-7

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Printed in the United Kingdom.

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## CHAPTER 14

# Promoting International Mediation Through the Singapore Convention on Mediation

S.I. Strong\*

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*This chapter seeks to determine whether and to what extent the recent promulgation of the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation will promote the use of mediation within the international legal and business communities. The discussion analyses the issue from a unique interdisciplinary perspective, applying concepts from dispute system design (DSD), default theory, psychology, and law and economics to both identify and resolve potential problems with the convention. The chapter also includes data from a recent empirical study conducted by the author on the use of mediation in international commercial disputes. Through this discussion, the chapter hopes to identify how individuals and institutions can complement the effect of the convention to support the development of international commercial mediation in the coming years.*

### §14.01 INTRODUCTION

For decades, arbitration has been considered the preferred method of resolving cross-border commercial disputes.<sup>1</sup> While that predilection long appeared virtually unassailable, the 2010s saw rising concerns about increased costs, delays and procedural formality in international commercial arbitration, both in the Asia Pacific and

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\* Although the author was involved with the process of proposing and negotiating the Singapore Convention on Mediation as both a private individual and non-governmental organisation (NGO) representative, the views reflected herein are the author's own and not those of any particular organization.

1. Gary B. Born, *International Commercial Arbitration* 73-93 (2d ed. Wolters Kluwer 2014).

elsewhere. The concerns triggered an intensive debate about potential alternatives to arbitration.<sup>2</sup>

One possibility involved litigation. Advocates of this approach sought to make judicial mechanisms more palatable for multinational actors through two techniques. The first involved the development of international commercial courts that reflect many of the attributes of international commercial arbitration (such as the use of English as the language of choice and/or by the use of foreign judges in addition to national judges).<sup>3</sup> The second involved the adoption of international instruments that increase the international enforceability of forum selection agreements and foreign judgments,<sup>4</sup> thereby mimicking the enforcement regime created in arbitration by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).<sup>5</sup>

The other solution focused on the expansion of consensus-based mechanisms, such as mediation and conciliation.<sup>6</sup> The latter movement culminated with the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), which was adopted on 20 December 2018.<sup>7</sup> On 7 August 2019, an unprecedented forty-six nations signed the instrument at a gala

2. S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973, 1982-3 (2016) (hereinafter 'Strong, *Empirical*'); Luke Nottage, *In/Formalisation and Globalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia*, in *Formalization and Flexibilisation of Dispute Resolution* 211 (Joachim Zekoll, Moritz Baelz & Iwo Amelung eds., Brill Nijhoff 2014); Nobumichi Teramura, *Ex Aequo et Bono as a Response to the 'Over-judicialisation' of International Commercial Arbitration* (Wolters Kluwer 2020).
3. *International Business Courts – A European and Global Perspective* (Xandra Kramer & John Sorabji eds., Eleven International Publishing 2019); Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge University Press 2018); see also Bath, Chapter 8 in this volume; Warren & Croft, Chapter 2 in this volume.
4. Convention on Choice of Court Agreements, 30 Jun. 2005, 44 I.L.M. 1294; Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague Judgments Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. At this point, only one country has signed the Hague Judgments Convention. Thirty-two countries (including the Member States of the European Union, which signed on as a regional and international organization) have signed the Convention on Choice of Court Agreements since it opened for signature in 2005.
5. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (hereinafter 'NYC'). See further generally Warren and Croft, *supra* n. 4 at 41.
6. Consensus-based forms of dispute resolution rely on the parties to identify and agree to the terms of the final settlement agreement, either with the assistance of a neutral third-party facilitator (as in mediation and conciliation) or without such an individual (as in negotiation). Although some commentators distinguish between mediation and conciliation, most people have concluded the two terms are basically synonymous. That is the approach that was adopted by UNCITRAL in the Singapore Convention on Mediation and that will be adopted herein: UN Comm. on Int'l Trade Law, Report of the UN Comm. on Int'l Trade Law, Fifty-first Session, UN Doc. A/73/17 (2018) at Annex I, Article 2(3) (hereinafter 'Singapore Convention').
7. *Ibid.*

opening day ceremony in Singapore.<sup>8</sup> Just over one year later, on 12 September 2020, the treaty went into force following ratifications by Singapore, Fiji and Qatar.<sup>9</sup>

Although the Singapore Convention on Mediation was met with a great deal of initial fanfare, it is unclear what effect the instrument will actually have on the use of mediation in the cross-border commercial context. This chapter, therefore, considers whether and to what extent international mediation will be promoted through the Singapore Convention on Mediation, focusing on several issues that have seldom been addressed in the legal literature. In so doing, the discussion does not parse through the individual provisions of the convention itself, since other commentators have already provided those types of analyses.<sup>10</sup>

The chapter begins with a brief outline of the goals of the Singapore Convention on Mediation (section 14.02), followed by a DSD analysis to determine the future efficacy of the convention (section 14.03). The chapter then describes certain structural issues that could create problems going forward (section 14.04) before identifying potential solutions to those concerns (section 14.05). The final substantive section focuses on the effect that various non-legal forces might have on the development of international commercial mediation (section 14.06). The chapter concludes with several forward-looking observations (section 14.07).

#### §14.02 MEASURING ‘SUCCESS’: GOALS OF THE SINGAPORE CONVENTION ON MEDIATION

There are a variety of ways to evaluate the success of a legal instrument like the Singapore Convention on Mediation. For example, success could be associated with an increase in the number of mediation agreements signed by international commercial actors or an increase in the number of mediations actually conducted in international commercial settings. Alternatively, success could be associated with a reduction in the amount of time or money it takes to enforce settlement agreements in the cross-border context. These and other measures can and should be studied in the coming years. However, such analyses require not only an empirical baseline to be established but also the passage of a sufficient amount of time in which to measure change. As a result, this chapter ties the success of the Singapore Convention on Mediation to the goals

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8. 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, 8 (2019) (hereinafter ‘Schnabel, Convention’).

9. *Status, Singapore Convention on Mediation*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-4&chapter=22&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en) (listing 52 signatories as of 2 May 2020).

10. For example, Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer 2019); Eunice Chua, *The Singapore Convention on Mediation: A Brighter Future for Asian Dispute Resolution*, 9 Asian J. Disp. Resol. 195, 209 (2019); Schnabel, *Convention*, *supra* n. 8, at 14-59; Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, 42 ICC Bull. (2018).

enunciated in the initial proposal for this treaty.<sup>11</sup> According to that document, ‘a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation’ was needed in order to ‘encourag[e] conciliation in the same way that the NYC facilitated the growth of arbitration’.<sup>12</sup> Thus, this analysis focuses on comparisons between the Singapore Convention on Mediation and the NYC.

Empirical studies conducted prior to the adoption of the Singapore Convention on Mediation indicated that, at that time, mediation was used relatively infrequently in cross-border business disputes, as compared to other mechanisms.<sup>13</sup> While these findings provide a useful baseline from which to measure future progress in the area of international commercial mediation, they do not provide any information about causation.<sup>14</sup> Indeed, while the empirical findings might seem to suggest that international commercial mediation was a relatively new or underdeveloped phenomenon prior to the signing of the Singapore Convention on Mediation, mediation and conciliation were, in fact, the preferred means of resolving international commercial conflicts in the first half of the twentieth century.<sup>15</sup> It was only after World War II that arbitration became the predominant mode of addressing cross-border business disputes.<sup>16</sup> While the shift may have been due to a number of contributing factors, one major reason was the doubtless the ability of the 1958 NYC to provide easy enforcement of arbitration agreements and arbitral awards in cross-border commercial matters.<sup>17</sup>

When considered from a law and economics perspective, it is clear that the NYC’s ability to facilitate easy and predictable enforcement of arbitral awards acted as a ‘nudge’ in favour of arbitration since neither litigation nor mediation offered an equally efficient enforcement regime.<sup>18</sup> Indeed, the proposal for the Singapore Convention on Mediation explicitly noted that ‘[o]ne obstacle to greater use of conciliation ... is that

11. Proposal by the Government of the United States: Future Work for Working Group II, UN Doc. A/CN.9/822, at 3 (2 Jun. 2014) (hereinafter ‘US Proposal’).

12. *Ibid.*

13. Chua, *supra* n. 10, at 204; Kim M. Rooney, *Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL’S Working Group on the International Enforcement of Settlement Agreements*, 18 Asian Disp. Rev. 195, 197-8 (2016); Strong, *Empirical*, *supra* n. 2, at 2023.

14. Empirical researchers must be careful not to extrapolate beyond the boundaries of the data. Lee Epstein & Gary King, *The Rules of Inference*, 51 U. Chi. L. Rev. 1, 9-10 (2002).

15. Eric A. Schwartz, *International Conciliation and the ICC*, 10 ICSID Rev.-Foreign Investment L.J. 98, 99 (1995).

16. Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 Fordham Int’l L.J. 578, 614-5 (1991); Schwartz, *supra* n. 15, at 107.

17. Lucy Reed, *Ultima Thule: Prospects for International Commercial Mediation* 21 (18 Jan. 2019), NUS Centre for International Law Research Paper No. 19/03, <https://ssrn.com/abstract=3339788> or <http://dx.doi.org/10.2139/ssrn.3339788>; S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 Wash. U. J. L. & Pol’y 11, 38 (2014) (hereinafter ‘Strong, Promise’).

18. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 6 (Yale University Press 2008). In 2019, this phenomenon changed for both mediation and litigation. *See supra* n. 4. ‘Nudges’ can be defined as ‘interventions that maintain freedom of choice, that do not impose mandates or bans, but that nonetheless incline people’s choices in a particular direction’. Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 5 (2013).

settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply'.<sup>19</sup> The Singapore Convention on Mediation was, therefore, intended to level the playing field as between arbitration and mediation by providing an equally quick and inexpensive means of enforcing settlement agreements arising out of international commercial mediation.<sup>20</sup>

In so doing, the drafters of the Singapore Convention on Mediation did not seek to give preferential treatment to mediation but instead merely intended to eliminate one of the primary discrepancies between international commercial mediation and international commercial arbitration.<sup>21</sup> The question, therefore, is whether a change in the enforceability of mediated settlement agreements will have the desired effect on the use of mediation in international commercial settings. The answer may be discovered through a DSD analysis.

### §14.03 DSD AND THE SINGAPORE CONVENTION

DSD 'is not a dispute resolution methodology itself' but instead reflects 'the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system'.<sup>22</sup> DSD has been used to understand the historical evolution of particular dispute systems; to evaluate the operation of existing disputes systems; and to design or redesign dispute systems.<sup>23</sup> A full DSD analysis includes four stages: '(1) taking design initiative, (2) assessing or diagnosing the current situation, (3) creating systems and processes, and (4) implementing the design, including evaluation and process or system modification'.<sup>24</sup> Notably, this final step – implementation – is iterative in nature, requiring periodic reevaluation of the system to determine whether and to what extent it is meeting the goals identified by the designers.<sup>25</sup>

DSD has been a fundamental part of the Singapore Convention on Mediation from its inception.<sup>26</sup> Indeed, the United States (US) Government's proposal for a new convention in the area of international commercial mediation was triggered by a 2014 law review article that consciously undertook a DSD analysis to understand why

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19. US Proposal, *supra* n. 11, at 2.

20. Alexander & Chong, *supra* n. 10, at 7-11.

21. Strong, *Promise*, *supra* n. 17, at 28.

22. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 Minn. L. Rev. 161, 177-8 (2007); see also Nancy H. Rogers et al., *Designing Systems and Processes for Managing Disputes* 4-5 (2d ed. Wolters Kluwer 2018).

23. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 Harv. Negot. L. Rev. 123, 124 (2009).

24. Rogers et al., *supra* n. 22, at 16. Other commentators suggest a seven-step process, although the basic elements are relatively similar. Hallie Falder, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 Harv. Negot. L. Rev. 481, 486-7 (2008).

25. Rogers et al., *supra* n. 22, at 16.

26. S.I. Strong, *Applying the Lessons of International Commercial Arbitration to International Commercial Mediation: A Dispute System Design Analysis*, in *Mediation in International Commercial and Investment Disputes* 39, 39-60 (Catharine Titi & Katia Fach Gómez eds., Oxford University Press 2019).

multinational businesses preferred arbitration over mediation, despite the various benefits associated with mediation.<sup>27</sup> That article not only provided a historical overview of the development and legal status of international commercial mediation in the twentieth and early twenty-first centuries but also compared the legal environment surrounding international commercial mediation to that of international commercial arbitration and international commercial litigation.<sup>28</sup> The text ultimately concluded that systemic reform of the legal framework surrounding international commercial mediation was necessary to eliminate invisible ‘nudges’ in favour of arbitration<sup>29</sup> and provided specific guidance on what a new international convention in the area of international commercial mediation should look like.<sup>30</sup> While the Singapore Convention on Mediation ultimately diverged from the suggestions contained in the article, the article nevertheless described how filling a gap in the legal environment surrounding international commercial mediation could effectively promote the use of mediation in the cross-border business context.<sup>31</sup> This rationale was subsequently reflected in the US proposal to the United Nations.<sup>32</sup>

The first three steps of the DSD process – taking the design initiative, assessing the current legal environment and creating a new system or feature – have now been completed for the Singapore Convention on Mediation.<sup>33</sup> The fourth stage of the process – implementation – is currently underway, as states work to ratify the convention and adopt national legislation intended to give domestic effect to that instrument.<sup>34</sup> However, the concept of implementation, from a DSD perspective, also involves an evaluation of the effectiveness of the new system or feature.<sup>35</sup> While this latter process is in some ways premature, given that the convention has only recently gone into effect, it may be useful to keep a watchful eye on certain structural issues in order to determine whether additional modifications to the design of the system will eventually need to be made.<sup>36</sup> This analysis is found in the following section.

27. Strong, *Promise*, *supra* n. 17, at 11. The article was presented to and discussed at a public meeting of the US State Department’s Advisory Committee on Private International Law (ACPIL) in February 2014. Hal Abramson, *The New Singapore Mediation Convention: The Process and Key Choices*, 20 *Cardozo J. of Conflict Resol.* 1037, 1040 (2019); Schnabel, *Convention*, *supra* n. 8, at 4, n. 17.

28. Strong, *Promise*, *supra* n. 17, at 19-28.

29. *Ibid.*, 12-13, 31-2.

30. *Ibid.*, 16-32.

31. *Ibid.*, 29-38.

32. US Proposal, *supra* n. 11, at 2.

33. Rogers et al., *supra* n. 22, at 16; S.I. Strong, *The Role of Empirical Evidence and Dispute System Design in Proposing and Developing International Treaties: A Case Study of the Singapore Convention on Mediation*, 20 *Cardozo J. on Conflict Resol.* 1103 (2019) (hereinafter ‘Strong, *Case Study*’).

34. This is a lengthy and important task. For example, Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 *Am. Rev. Int’l Arb.* 265, 273-88 (2019) (hereinafter ‘Schnabel, *Implementation*’).

35. Rogers et al., *supra* n. 22, at 16.

36. It would also be useful to conduct a variety of empirical studies on international commercial mediation now to help establish a baseline that can be used to measure future progress on a variety of issues. These might include issues like the number of international commercial contracts that currently include mediation provisions or the length of time it currently takes for a settlement agreement arising out of international commercial mediation to be enforced.

#### §14.04 STRUCTURAL CONCERNS

As noted previously, this chapter does not undertake a detailed analysis of the individual provisions of the Singapore Convention on Mediation since other scholars have already conducted such studies.<sup>37</sup> Instead, it is sufficient for current purposes to note that the Singapore Convention on Mediation was intentionally modelled on the NYC, both in terms of its intended impact and as a matter of structure.<sup>38</sup> For example, both instruments include only a limited number of grounds upon which an objection to the enforcement of the final outcome of a proceeding can be based.<sup>39</sup> However, the Singapore Convention on Mediation diverges from the NYC in at least one important regard, namely with respect to the way the Singapore Convention on Mediation focuses exclusively on the back end of the mediation process (i.e., the settlement agreement) while the NYC addresses both the back end (i.e., the award) as well as the front end (i.e., the arbitration agreement) of the arbitral process.

This strategy is, in many ways, contrary to what might have been expected. At a conceptual and practical level, international commercial arbitration appears to have benefitted as much from provisions in the NYC relating to the easy enforcement of arbitration agreements as it has from provisions relating to the easy enforcement of arbitral awards, although the drafters of the NYC did not decide to add a provision facilitating enforcement of arbitration agreements until relatively late in the deliberation process.<sup>40</sup> Given the success of the dual-purpose model, the initial DSD analysis that triggered the US proposal for the Singapore Convention on Mediation strongly suggested the development of a mediation convention that, like the NYC, addressed both the front end of the mediation process (i.e., the initial agreement to mediate) as well as the back end of the process (i.e., the final settlement agreement).<sup>41</sup>

These suggestions were subsequently supported by empirical research presented to Working Group II of the United Nations Commission on International Trade Law (UNCITRAL), the body responsible for drafting the Singapore Convention on Mediation, early in the deliberation process.<sup>42</sup> The research in question involved a large-scale

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However, but there are many other matters that could usefully be measured now, before the Convention comes into force on a widespread basis.

37. Alexander & Chong, *supra* n. 10; Chua, *supra* n. 10, at 209; Schnabel, *Convention*, *supra* n. 8, at 14-59; Sussman, *supra* n. 10, at 42.

38. Schnabel, *Convention*, *supra* n. 8, at 1.

39. NYC, *supra* n. 5, Article 5; Singapore Convention, *supra* n. 6, Article 5. Article 5 of the Singapore Convention on Mediation sets out three main categories of objections: one involving the disputing parties, another involving the settlement agreement and a third involving the mediation procedure itself. *Ibid.* The convention also allows courts to refuse to grant relief *sua sponte* on the grounds of public policy grounds or the fact that the subject matter of the dispute cannot be settled by mediation. *Ibid.*

40. NYC, *supra* n. 5, Articles II(1), V; Warren & Croft, *supra* n. 3.

41. Strong, *Promise*, *supra* n. 17, at 32.

42. S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report of Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302). The study was cited by the Secretariat and various governments in their submissions to Working Group II and discussed orally during the Working Group II meeting in February 2015. UN Secretariat, *Settlement of Commercial Disputes: Enforceability of Settlement Agreements*



international survey<sup>43</sup> that investigated behaviours and attitudes relating to international commercial mediation as well as various normative issues relevant to a possible convention involving international commercial mediation.<sup>44</sup> According to the data, enforcement of settlement agreements that had some type of international element was, or was perceived to be, significantly more difficult than enforcement of settlement agreements that were entirely domestic.<sup>45</sup> This data was useful from a DSD perspective because it justified a back-end convention like the Singapore Convention on Mediation. However, the data also showed that enforcement of mediation agreements that had some type of international element was, or was perceived to be, significantly more difficult than enforcement of mediation agreements that were entirely domestic.<sup>46</sup> This information suggested an equal need for international action addressing the front end of the mediation process.<sup>47</sup>

Respondents were also asked to indicate whether they thought an international instrument on international commercial mediation would encourage the use of mediation in cross-border business disputes, and if so, what type of instrument. According to the study, 68% of the respondents believed that a convention addressing mediation agreements would encourage mediation within their home jurisdictions, with an additional 20% indicating that such an instrument might be useful.<sup>48</sup> A slightly higher percentage of respondents – 74% – believed that an international instrument dealing with the back end of the mediation process would encourage mediation in their jurisdiction, with an additional 18% indicating that such an instrument might be useful.<sup>49</sup> While these results may initially appear to justify UNCITRAL's decision to focus on the back end of the process, no statistical studies were run on the data, so it is unknown whether the difference in percentages (68% versus 74%) is significant.

The respondents were then asked whether they thought international action in this field should proceed on a single-subject basis (i.e., either relating only to mediation

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Resulting From International Commercial Conciliation/Mediation – Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, Comments Received from States, Note by the Secretariat, UN Doc. A/CN.9/WG.II/WP.188 at 6 n. 7 (23 Dec. 2014); Note by UNCITRAL Secretariat, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation, UN Doc. A/CN.9/WG.II/WP.187, at 6 n. 16 (27 Nov. 2014); UNCITRAL, Working Group II, Sound Recordings of Meetings, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html); Schnabel, *Convention*, *supra* n. 8, at 4, n. 17. The final version of the study was subsequently published in the *Washington and Lee Law Review*. Strong, *Empirical*, *supra* n. 2, at 1973.

43. Strong, *Empirical*, *supra* n. 2, at 2017, 2019-20. The study generated responses from 221 participants in 51 countries and included private practitioners and neutrals (arbitrators, mediators, conciliators and judges) as well as those who worked as in-house counsel or in governmental or institutional settings, such as arbitral institutions. *Ibid.* (noting 15% of respondents came from the Asia-Pacific region).

44. *Ibid.*, 1998.

45. *Ibid.*, 2053-5.

46. *Ibid.*, 2050-1.

47. This conclusion was reinforced by data indicating that the vast majority of cross-border commercial mediations arise as a matter of contract rather than through other means. *Ibid.*, 2026.

48. *Ibid.*, 2051-2.

49. *Ibid.*, 2055-6. The open comments section of the survey also demonstrated the intensity of support for a convention in this area of law. *Ibid.*, 2061-3.



agreements or only to settlement agreements) or on a dual-subject basis (i.e., relating to both mediation agreements and settlement agreements), as is the case in arbitration.<sup>50</sup> Survey participants were overwhelmingly (75%) in favour of a dual-subject convention that addressed both the beginning and end of the mediation process.<sup>51</sup> However, of the respondents who preferred a single-subject convention, more supported an instrument focusing on settlement agreements (19%) rather than on mediation agreements (6%).<sup>52</sup>

Respondents were asked to describe, in their own words, why they favoured the approach they did. One principle that was repeated numerous times reflected the idea that:

addressing both the beginning and the end of the mediation process would ‘ensure effectiveness’, ‘give [international commercial mediation] more legitimacy’, and ‘encourage more general acceptance’. Thus, one respondent stated that if the proposed convention ‘does not address both issues, its practical effectivity is doubtful’. This result would likely occur because, in the words of another participant, ‘[t]he enforceability of one without the other will fall short of providing the level of confidence needed for parties to embark in mediation or conciliation’.<sup>53</sup>

Given the amount of support for a dual-subject convention, it may seem odd that UNCITRAL nevertheless chose to focus exclusively on the back end of the mediation process. According to those involved in the deliberation process, the US only included settlement agreements in its initial proposal because of a desire to simplify the deliberation process.<sup>54</sup> The idea was that it was better to obtain agreement on a more limited instrument rather than fail to reach agreement on a more ambitious project. That strategy appeared wise, given that the proposal almost stalled in the first days of deliberation,<sup>55</sup> but the question nevertheless arises whether adopting a single-subject instrument will achieve the goals identified by proponents of the convention.

Looking forward, two outcomes appear possible. On the one hand, the absence of a front-end enforcement mechanism in the Singapore Convention on Mediation may preclude the type of full flourishing of mediation that proponents of the instrument hoped for. This is the result anticipated by commentators who believe that the absence of provisions allowing the easy enforcement of mediation agreements could lead to diminished use as well as diminished usefulness of the instrument because parties would not have sufficient confidence in the mediation process overall.<sup>56</sup> On the other hand, the convention may lead to an increase in the use of mediation in the

50. *Ibid.*, 2056-7.

51. *Ibid.*, 2057.

52. *Ibid.*, 2057.

53. *Ibid.*, 2058.

54. US Proposal, *supra* n. 11, at 3; Alexander & Chong, *supra* n. 10, at 17-18.

55. Schnabel, *Convention*, *supra* n. 8, at 5.

56. Alexander & Chong, *supra* n. 10, at 17-18; Maryam Salehijam, *The Role of the New York Convention in Remediating the Pitfalls of Multi-Tiered Dispute Resolution Clauses*, in *60 Years of the New York Convention: Key Issues and Future Challenges* 35, 40, 51-2 (Katia Fach Gómez & Ana M. Lopez-Rodriguez eds., Wolters Kluwer 2019); *see also* Lars Kirchhoff, *Constructive Interventions: Paradigms, Process and Practice of International Mediation* 285 (Wolters Kluwer

international commercial arena despite the absence of a provision on mediation agreements,<sup>57</sup> partially as a result of the convention and partially as a result of other ‘nudges’, such as those promoting mediation as a matter of domestic law<sup>58</sup> and as a matter of international investment law.<sup>59</sup> However, the expanded use of mediation would likely generate increased litigation about potential breaches of mediation agreements<sup>60</sup> since the vast majority of mediations in the international commercial realm arise as a matter of contract rather than through other means.<sup>61</sup>

Interestingly, both scenarios would appear to benefit from a parallel instrument that addresses mediation agreements. While such an initiative would be welcomed by many individuals and institutions, little if anything is known or written about how national and international actors decide to develop and pursue particular proposals for new international instruments.<sup>62</sup> Indeed, the initial process of determining which ideas to develop is almost entirely hidden from public view, even though the decisions are critical to international law and policy, ‘since whoever controls the agenda has control over the scope of the governance system and its ability to change over time’.<sup>63</sup> As a result, it is useful to discuss how DSD might help generate useful solutions going forward. Those matters are addressed in the next section.

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2008); Carrie Menkel-Meadow, *The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation*, in *Essays on Mediation: Dealing With Disputes in the 21st Century* 21, 30, 36 (Ian Macduff ed., Wolters Kluwer 2016).

57. The concept of ‘increased use’ might be reflected in more actual mediations and/or more mediation agreements, either on their own or as part of multi-tiered dispute resolution provisions (step clauses).
58. Somewhat unusually, UNCITRAL revised the 2002 Model Law on International Commercial Conciliation (now referred to as the 2018 Model Law on International Commercial Mediation and Settlement Agreements Resulting From Mediation) at the same time it drafted the drafting of the Singapore Convention on Mediation. Schnabel, *Convention*, *supra* n. 8, at 7; see also UNICTRAL Model Law on International Commercial Mediation and Settlement Agreements Resulting From Mediation, [https://uncitral.un.org/en/texts/mediation/modellaw/commercial\\_conciliation](https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation). A number of countries in the Asia-Pacific region have adopted some form of the 2002 model law, including Malaysia in 2011 and Bhutan in 2015. Shahla Ali, *Forming Transnational Dispute Settlement Norms: Soft Law and The Role of UNCITRAL’s Regional Centre for Asia and the Pacific* (Edward Elgar 2021). Other regions within Asia have been influenced by the rules, including Hong Kong, Singapore, Japan and to some extent mainland China. *Ibid.*, 77.
59. At least one investment treaty has recently required foreign investors to mediate if requested by the host state prior to proceeding to arbitration. Indonesia-Australia Comprehensive Economic Partnership Agreement (2019) (hereinafter ‘IA-CEPA’), <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default>; see also Ubilava & Nottage, Chapter 5 in this volume. The Singapore Convention on Mediation might be extended to address at least some investment disputes, such as those involving construction or natural resource extraction. Schnabel, *Convention*, *supra* n. 8, at 22-3 (offering the view of one of the primary drafters of the Singapore Convention on Mediation). However, the primary focus of the Convention is on commercial disputes. *Ibid.*
60. Strong, *Promise*, *supra* n. 17, at 32-4.
61. Strong, *Empirical*, *supra* n. 2, at 2026.
62. Ian Brownlie, *Principles of Public International Law* 609-11 (7th ed. Oxford University Press 2008).
63. Eric B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 *Brook. J. Int’l L.* 139, 162 (2005) (noting that ‘[s]elf-interest may dominate such agenda-setting formulations, as actors with an interest in the status quo may reject change through the formulation of the agenda’).

### §14.05 POTENTIAL SOLUTIONS TO STRUCTURAL CONCERNS

The best, if not the only, real solution to structural concerns involving the Singapore Convention on Mediation involves the creation of a parallel instrument facilitating the enforcement of mediation agreements.<sup>64</sup> However, development and adoption of an international convention is not a simple endeavour since proponents of such an endeavour must not only comply with best practices in DSD but must also cultivate connections with individuals and institutions with the skills, knowledge and desire to take and sustain a design initiative.<sup>65</sup> Because international lawmaking is, for the most part, a state-centric process,<sup>66</sup> prospective reformers are, therefore, advised to find a way to connect with representatives in their national governments who can and will champion the idea both within the relevant organization and with external audiences.<sup>67</sup>

The experience of the Singapore Convention on Mediation demonstrates how such access can be gained. First, prospective dispute system designers can offer their assistance directly to their national governments, as occurred when the author of the 2014 law review article that ultimately led to the Singapore Convention on Mediation presented the idea for a new instrument at a meeting of the US State Department's Advisory Committee on Private International Law (ACPIL).<sup>68</sup> Individuals who are based in the US are fortunate in that Federal Advisory Committee Act requires the State Department to establish Advisory Committees in a number of different fields, thereby providing interested individuals with the means of connecting with first-level decision makers.<sup>69</sup> However, there is no guarantee that the State Department will adopt any particular proposal. Indeed, some ideas languish for years without any forward

64. Strong, *Promise*, *supra* n. 17, at 32-4 (providing suggestions on the shape of such an instrument).

65. Rogers et al., *supra* n. 22, at 60-1.

66. Cedric Rynjaert, *Non-State Actors: Carving Out a Space in a State-Centered International Legal System*, 63 Neth. Int'l L. Rev. 183, §§1, 6 (2016).

67. S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 Akron L. Rev. 495, 508-9 (2017) (hereinafter 'Strong, *Epistemic Communities*') (discussing internal and external audiences in the international lawmaking process). It can be useful to find support within the hierarchical line of authority in a decision-making institution, as shown by the experience with the Singapore Convention on mediation. Schnabel, *Implementation*, *supra* n. 34, at 265 n. \* (noting the role that John Kim, then Assistant Legal Adviser for Private International Law, played in the proposal process).

68. Abramson, *supra* n. 27, at 1040; Schnabel, *Convention*, *supra* n. 8, at 4; Strong, *Case Study*, *supra* n. 33, at 1107, 1115.

69. FACA Database, <https://www.facadatabase.gov/FACA/FACAPublicPage> (last visited 20 Dec. 2019). ACPIL and other State Department Advisory Committees not only allow the State Department to gauge stakeholder support for various international initiatives but also to obtain ideas from the public about areas where law reform is necessary or useful. Notice of public meetings of these groups is provided through the US Federal Register. For example, 82 Fed. Reg. 43068-01 (13 Sep. 2017) (giving notice of a meeting to discuss upcoming work at UNCITRAL involving arbitration and mediation); 81 Fed. Reg. 72639-01 (20 Oct. 2016) (giving notice of a meeting to discuss ongoing projects involving private international law); 81 Fed. Reg. 50591-01 (1 Aug. 2016) (giving notice of a meeting to discuss the work of UNCITRAL on international settlement agreements); 80 Fed. Reg. 51864-01 (26 Aug. 2015) (giving notice of a meeting to discuss ongoing projects involving private international law, including those involving mediation and conciliation); 79 Fed. Reg. 60229-01 (6 Oct. 2014) (providing notice of a meeting to discuss ongoing projects at UNCITRAL); 79 Fed. Reg. 38642-01 (8 Jul. 2014) (providing notice of

movement, thereby underscoring the need to conduct proper research and analysis (optimally a full DSD analysis) before presenting a proposal to the relevant decision makers.<sup>70</sup>

The US is not the only country with a public consultation process. Other nations, including those in the Asia-Pacific region, have adopted similar mechanisms to allow interested individuals and organizations to provide input on proposed actions. For example, Australia engages in public consultations in a number of fields, including matters governed by the Department of Foreign Affairs and Trade.<sup>71</sup>

While a number of countries have adopted public consultation processes, not all of the procedures are the same. For example, although ACPIL appears open to receiving new ideas for international initiatives from members of the public, other advisory committees in both the US and elsewhere limit the type of assistance that is sought.<sup>72</sup> Canada's Department of Justice is an example of the latter approach, noting in its Policy Statement and Guidelines for Public Participation that:

[r]ather than a broad commitment to public participation on every issue, the Policy Statement supports participation activities only where the issues and timelines are such that public input will make a contribution to the policy development process. ... Determining the policy areas that will include a public participation component is the responsibility of the appropriate departmental authority.<sup>73</sup>

While these types of restrictions undoubtedly appear reasonable from the perspective of a government agency seeking to streamline its operations and focus on its own policy priorities, mechanisms that limit the ability of individuals and groups to propose new projects involving international law can pose problems as a matter of both practice and principle. Indeed, one commentator has argued that recent initiatives regarding transparency and public consultations in international law have done little to increase the diversity of voices in the realm of international lawmaking.<sup>74</sup> Fortunately, individuals seeking to take the design initiative have other ways of conveying their ideas and research to the appropriate authorities.

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a meeting to discuss the US proposal to UNCITRAL prior to the UNCITRAL Working Group II meeting); Strong, *Case Study*, *supra* n. 33, at 1115.

70. Strong, *Case Study*, *supra* n. 33, at 1115.

71. Business Consultation, Australian Government, <https://consultation.business.gov.au/Consultation/Common/Search/ConsultationAdvancedSearch.aspx>. In recent years, in addition to issue-specific public and private consultations, the Department's Trade and Investment Law Branch has invited experts from various groups (including non-governmental organizations) to participate in twice-yearly 'outreach event' workshops aimed at providing an update on the government's current activities and thinking as well as hearing suggestions for future work. International law experts from the federal Attorney General's Department are involved in these events as well.

72. Strong, *Case Study*, *supra* n. 33, at 1116.

73. Policy Statement and Guidelines for Public Participation – Department of Justice, Government of Canada, <https://www.justice.gc.ca/eng/cons/pol.html>.

74. Diane Desierto, *Are 'Transparency' Procedures and Local Community 'Consultations' Enough? A Human Rights 'Feedback Loop' to International Economic Law Reforms of 2018*, EJIL: Talk! (12 Dec. 2018), <https://www.ejiltalk.org/are-transparency-procedures-and-local-community-consultations-enough-a-human-rights-postscript-to-2018-reforms-in-international-economic-law/>.

One way that individuals interested in helping the international lawmaking process can become engaged is through direct communications with supranational organizations responsible for promulgating international law. Perhaps the most forward-looking body in this regard is the European Union, which has created the European Citizens' Initiative (ECI) to provide 'a unique and innovative way for citizens to shape Europe by calling on the European Commission to make a legislative proposal'.<sup>75</sup> Although this initiative has a number of problems, most notably with respect to the level of discretion exercised by the Commission in deciding whether to pursue a citizen proposal, the ECI at least provides people with no formal connection to government agencies with an opportunity to shape international law.<sup>76</sup>

The European Union has also created the Civil Society Dialogue, which operates as part of the European Commission Directorate General (DG) for Trade.<sup>77</sup> This initiative is slightly more bureaucratic in that it involves representatives from various stakeholder groups engaging in discussions with DG Trade officials rather than individual citizens participating directly with the officials, but it still facilitates the transmission of ideas about new international instruments to the relevant decision makers.<sup>78</sup>

Another model is seen at UNCITRAL, which occasionally issues open calls for interested individuals and organizations to engage in discussions about possible future works.<sup>79</sup> However, this type of direct communication is relatively infrequent.<sup>80</sup> Instead, UNCITRAL, like many other UN and international bodies, typically obtains the views of non-state-affiliated individuals and groups through recognized NGOs.<sup>81</sup> While this process is meant to foster transparency and public participation in the international lawmaking process, there can be significant discrepancies in how and when NGOs can

75. Official Register, The European Citizens' Initiative, <http://ec.europa.eu/citizens-initiative/public/welcome> (noting that the process is initiated through a petition with one million signatures).

76. Nikos Vogiatzis, *Between Discretion and Control: Reflections on the Institutional Position of the Commission Within the European Citizens' Initiative Process*, 23 Eur. L.J. 250, 250-1 (2017).

77. European Commission, Objectives, Civil Society Dialogue, [https://trade.ec.europa.eu/civilsoc/csd\\_proc.cfm](https://trade.ec.europa.eu/civilsoc/csd_proc.cfm).

78. *Ibid.* In 2020, the European Commission initiated a study to determine how well the Civil Society Dialogue was operating, which complies with best practices in DSD. Consultations, European Commission, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2134>.

79. For example, Events, UNCITRAL, <https://uncitral.un.org/en/events/25-26.03.2019> (advertising an open public meeting for 'experts from governments, private sector, academic and the non-profit sector' to assist UNCITRAL Working Group I on Micro, Small and Medium-sized Enterprises (MSMEs) regarding possible work involving multiparty contracts).

80. FAQ – Methods of Work, UNCITRAL, [http://www.uncitral.org/uncitral/en/about/methods\\_faq.html](http://www.uncitral.org/uncitral/en/about/methods_faq.html) (discussing whether individuals can take part in UNCITRAL and Working Group sessions). However, such interactions may be on the rise. UN Comm. on Int'l Trade Law, Report of the UN Comm. on Int'l Trade Law, Forty-third session, UN Doc. A/65/17 (2010) at Annex III, paras 11, 15 (hereinafter 'UNCITRAL Working Procedures') (encouraging increased contact between the Secretariat and outside experts, including through the convening of colloquia).

81. *A Guide to UNCITRAL: Basic Facts About the United Nations International Trade Commission* 8 (2013) (hereinafter 'UNCITRAL Guide'), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>; Strong, *Epistemic Communities*, *supra* n. 67, at 507.

participate in international discourse.<sup>82</sup> For example, NGOs may be allowed to observe proceedings freely but may be limited with respect to the extent to which they can contribute to floor debate, provide materials for the consideration of delegates and/or propose new initiatives.<sup>83</sup> This latter feature is particularly important since, as previously noted, the ability to control the agenda of a particular group or meeting has a significant impact on the lawmaking process.<sup>84</sup>

While some differences in the treatment of NGOs and other groups can be found in the rules of procedure governing the relevant body, other protocols are less transparent since they may rely on unwritten discretionary norms, such as the personal preferences of the chair of the group in question.<sup>85</sup> Although UNCITRAL has tried to minimize these types of differences by instituting a standardized work process for chairs to follow, discretion is, of course, necessary when managing complex multilateral deliberations.<sup>86</sup> However, the lack of transparency can be problematic, particularly for those who are new to the system. Indeed, the effectiveness of new and diverse voices in international lawmaking can be severely hindered in a variety of ways. The first involves well-known disparities regarding funding, sophistication and institutional knowledge.<sup>87</sup> The second involves a more subtle but equally pervasive phenomenon known as the status quo bias, which is discussed in the following section.

82. Alexander Gillespie, *Transparency in International Environmental Law: A Case Study of the International Whaling Commission*, 14 Geo. Int'l Environ. L. Rev. 333, 337 (2001). Some of the most detailed guidance on NGO participation at the UN is found in a 1996 document adopted by the Economic and Social Council (ECOSOC), which gives effect to Article 71 of the United Nations Charter regarding NGO participation in international lawmaking at the United Nations. ECOSOC Res. 996/31, Consultative Relationship Between The United Nations And Non-Governmental Organizations, 49th plen. mtg. (25 Jul. 1996); see also UN Charter, Article 71 (giving NGOs status in ECOSOC); Note by the Secretariat, UNCITRAL Rules of Procedure and Methods of Work, UN Doc. A/CN.9/638/Add.5 (2007) at 12 (hereinafter 'UNCITRAL Methods of Work') (discussing the rights of observers).

83. UNCITRAL Guide, *supra* n. 81, at 1, 8, 11-12; UNCITRAL Working Procedures, *supra* n. 80, at Annex III (outlining the working methods of UNCITRAL); UNCITRAL Methods of Work, *supra* n. 82, at 11-18; Gillespie, *supra* n. 82, at 337, 339-40. At UNCITRAL and particularly Working Group II, the norm has been to allow NGOs to contribute in the debate concurrently with state delegates. However, there is no way to know how the chair prioritizes interventions that are pending since he or she has broad discretion to decide how to control the course of discussion. Note by the Secretariat, UNCITRAL Rules of Procedure and Methods of Work, UN Doc. A/CN.9/638/Add.3 (2007) at 2-3 (hereinafter 'UNCITRAL Presiding Officer'). Furthermore, NGOs at UNCITRAL do not appear able to independently propose new work projects. UNCITRAL Working Procedures, *supra* n. 80, at Annex III, paras 5, 7.

84. Bluemel, *supra* n. 63, at 162.

85. Potentially significant variations arise across different fields of substantive expertise. For example, Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 Ind. J. Global Legal Stud. 579, 591-2 (1999); Strong, *Case Study*, *supra* n. 33, at 1118.

86. UNCITRAL Presiding Officer, *supra* n. 83, at 3-6 (discussing the duties of the presiding officer).

87. Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. Rev. 264, 267-8 (2016) (noting that businesses can experience a marked advantage over other groups in terms of access to and influence over the international lawmaking process); Genevieve Tung, *International Trade Law and Information Policy*, 42 Int'l J. Legal Info. 241, 251-2 (2014) (noting the US Trade Act of 1974 gave corporate NGOs a preferential role in advising on international treaties). The persuasiveness of a particular NGO can also vary depending on the field of endeavour (since some issues may be considered more suitable for NGO participation than others) or on the reputation of the



### §14.06 EFFECT OF NON-LEGAL FORCES ON THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL MEDIATION

Lawyers are often most comfortable analysing legal phenomena, such as those relating to structural defects in international instruments or problems associated with the development of new conventions. However, the biggest challenge to the development of mediation in the cross-border commercial context may arise not as a matter of law and policy but instead as a result of certain non-legal forces, most notably a psychological phenomenon known as the status quo bias.

Empirical researchers have defined the status quo bias as an emotional preference for the established legal or social norm, regardless of the rationality of that preference.<sup>88</sup> In most cases, litigation is considered the status quo in dispute resolution, but the ‘nudge’ created by the NYC may have created a new status quo – arbitration – in the international commercial setting.<sup>89</sup> In either event, mediation is viewed as the newcomer to the field and, therefore, may be viewed more critically than would be appropriate under a purely rational analysis.

Because the status quo bias is largely unconscious, it can be very difficult to overcome. The first step is for people to recognize that they may be operating under this type of cognitive distortion. A heuristic known as the ‘Reversal Test’ can help individuals appreciate whether and to what extent their thinking is affected by the status quo bias.<sup>90</sup>

Psychologists have suggested that there is little that can be done to offset the pull of the status quo beyond calling on decision makers to be even-handed in weighing up the available options.<sup>91</sup> However, law and policymakers may be able to neutralize some or all of the weight of the status quo bias through the strategic use of nudges.<sup>92</sup>

Perhaps the strongest type of nudge involves the creation of a legal default.<sup>93</sup> Long before the concept of nudges became popular, law and economics scholars recognized that legal defaults affect rational decision-making by increasing the attractiveness of the established norm at both a psychological and economic level.<sup>94</sup> At this

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NGO itself, in that those organizations that have relevant technical expertise and that demonstrate unbiased analysis will likely be more influential than those that appear largely or entirely self-interested. UNCITRAL Guide, *supra* n. 81, at 11; Strong, *Epistemic Communities*, *supra* n. 67, at 507.

88. Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 *Ethics* 656, 660 (July 2006); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Decision Making*, 88 *Cornell L. Rev.* 583, 597 (2003).

89. S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 *U. Ill. L. Rev.* 533, 564 (hereinafter ‘Strong, *Status Quo Bias*’).

90. *Ibid.*, 576-8.

91. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 *J. Risk & Uncertainty* 7, 9 (1988).

92. Sunstein, *supra* n. 18, at 5 (defining nudges); Thaler & Sunstein, *supra* n. 18, at 6 (same).

93. Sunstein, *supra* n. 18, at 5 (2013) (noting that ‘default rules, even or perhaps especially if they appear to be invisible, count as prime “nudges”’).

94. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 *Cornell L. Rev.* 608, 612 (1998). Parties are often unwilling to incur the transaction costs associated with contracting around legal defaults.

point, the default mechanism for dispute resolution is clearly litigation.<sup>95</sup> However, the pull of the default in the cross-border commercial context is offset to a large degree by the NYC, which imposes a significant ‘nudge’ in favour of arbitration by offering certain benefits (such as a fast, predictable and relatively inexpensive means of enforcing arbitration agreements and arbitral awards) to actors in that particular market.<sup>96</sup>

Notably, the Singapore Convention on Mediation – like the NYC – does not seek to change the dispute resolution default norm in international commercial matters. However, the process of offering an additional benefit to parties in international commercial mediations (i.e., easy enforceability of settlement agreements) may help the Singapore Convention on Mediation offset the pull of the litigation default.<sup>97</sup>

As useful as this technique may be, it may not be enough. However, countries that are inclined to increase the use of mediation in cross-border business disputes can adopt other types of nudges that can visibly or invisibly move popular beliefs and behaviours regarding this particular mechanism. For example, some countries have ‘nudged’ their residents toward mediation in the domestic realm by requiring parties to pursue mediation either prior to filing a claim or prior to trial.<sup>98</sup> Additional nudges could arise at the international level, either by explicitly requiring mediation as a precondition to investment arbitration<sup>99</sup> or by increasing the use of mediation in interstate disputes.<sup>100</sup> While these techniques would not change litigation’s status as the legal default or affect the structural defects of the Singapore Convention on Mediation, they might perhaps minimize the influence of the status quo bias by normalizing mediation as part of the dispute resolution process.<sup>101</sup>

## §14.07 CONCLUSION

The unprecedented number of initial signatories to the Singapore Convention on Mediation would seem to suggest similarly unqualified success for mediation now that

95. Strong, *Promise*, *supra* n. 17, at 28; Strong, *Status Quo Bias*, *supra* n. 89, at 564-6.

96. Strong, *Promise*, *supra* n. 17, at 28; Strong, *Status Quo Bias*, *supra* n. 89, at 564-66.

97. While states have promulgated various international instruments that are meant to minimize the differences between litigation and other dispute resolution mechanisms (such as arbitration and mediation) in the international commercial realm, those initiatives have not been very successful to date. *See supra* n. 4.

98. Civil Procedure Act 2005 s. 26 (Australia); Civil Procedure Rules (England and Wales), Practice Direction – Pre-Action Conduct and Protocols, para. 8 (suggesting use of alternative dispute resolution prior to filing of an action in England and Wales); Sarah Konnerth, Note, *Pro Se, No Say?: The Impact of Presumptive Mediation in the New York State Court System on Self-Represented Litigants*, 88 Fordham L. Rev. 1365, 1382 (2019) (discussing a 2019 requirement in New York that all matters filed in state court will presumptively be sent to mediation); S.I. Strong, *Defining the Litigation Default*, 37 Civ. J. Q. 463, 467-8 (2018) (hereinafter ‘Strong, *Default*’) (discussing mediation in England and Wales).

99. IA-CEPA, *supra* n. 59; *see also* Ubilava & Nottage, *supra* n. 59.

100. Claxton, Nottage & Williams, Chapter 11 in this volume (proposing a solution to the trade and investment tensions between Japan and Korea that escalated in 2019).

101. Strong, *Default*, *supra* n. 98, at 467-8.



the instrument has come into force.<sup>102</sup> However, there is no guarantee that the convention will indeed promote mediation in the way that the drafters intended. As a result, proponents of international commercial mediation can and should do more to ensure the wide flourishing of mediation in this field.

First and foremost, individuals and institutions should seek to broaden the reach of the convention by encouraging states that have not yet signed and ratified the instrument to do so as soon as possible.<sup>103</sup> The Singapore Convention on Mediation can only achieve its goal of promoting and expanding the use of mediation ‘in the same way that the NYC facilitated the growth of arbitration’ if the instrument is in force in a significant number of countries.<sup>104</sup>

Next, proponents of international commercial mediation can try to offset the pull of the status quo bias by educating individuals about the existence and nature of these types of cognitive distortions and by seeking to normalize mediation within their legal systems. State actors can assist in this process by increasing the role that mediation plays in domestic forms of dispute resolution. While it is impossible to change litigation’s status as the legal default, some of the distorted thinking that arises in this area of law and practice might be minimized or neutralized by various nudges. One type of nudge that has been discussed herein involves requirements to attempt mediation prior to initiating an action in court or prior to trial. While the private nature of arbitration precludes would make it difficult for governments to impose similar types of requirements in the arbitral process, arbitral institutions might amend their rule sets to reflect similar requirements in the future. Alternatively, arbitrators can encourage parties to engage in mediation in the early stages of a dispute, even in the absence of a formal requirement to do so.

Finally, the international community can consider the possibility of adopting a parallel convention addressing the enforceability of mediation agreements in the international commercial sphere. This type of initiative may be some years away, but steps can be taken now to assist in that process. For example, it would be useful for scholars to conduct empirical research on a variety of issues to provide a baseline for future comparisons and DSD analyses. Particular attention can and should be made to issues relating to the enforceability of mediation agreements since those appear to be an area of weakness in the existing legal regime.

As important as the Singapore Convention on Mediation may be in encouraging the use of mediation in cross-border business disputes, it is only a single instrument. If international commercial mediation is to flourish, individuals and institutions around the world must continue their efforts to educate, inform and implement change. Only then will the goals of drafters be met.

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102. See *supra* nn. 7-8.

103. Schnabel, *Implementation*, *supra* n. 34, at 265.

104. US Proposal, *supra* n. 11, at 3.

