



ISSN : 1875-4120  
Issue : Vol. 18, Issue 3  
Published : April 2021

#### Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

© Copyright TDM 2021  
TDM Cover v9.0

# Transnational Dispute Management

[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

## Summary of Young-OGEMID Symposium No. 10: "Mediation as the New Arbitration? Effects of the Singapore Convention (June 24 - July 3 2019)" by S. Chiappino

### About TDM

**TDM** (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) for full Terms & Conditions and subscription rates.

### Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at [info@transnational-dispute-management.com](mailto:info@transnational-dispute-management.com): we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

**TDM** is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

# Summary of Young-OGEMID Symposium No. 10: “Mediation as the New Arbitration? Effects of the Singapore Convention (June 24 – July 3 2019)”

by Suyay Chiappino\*

## *Executive Summary*

*Young-OGEMID’s tenth virtual symposium (“Symposium”) focused on the effects of the United Nations Convention on International Settlement Agreements Arising from Mediation - commonly known as the Singapore Convention on Mediation (“Singapore Convention”). Over the past years, the development of mediation in the international commercial dispute resolution scenario has been progressive and somewhat intriguing. The release of the Singapore Convention raised a multitude of questions and thus created the perfect opportunity for assessing mediation’s growth; the milestones and their consequences and the future perspectives.*

*The Symposium brought together experts from around the world that addressed a wide variety of matters. From ‘what effect will this new instrument have on international commercial dispute resolution?’ to ‘what is mediation, anyway?’, participants provided their insights from both the experience and knowledge they have developed, particularly, in the mediation’s field. Prof. S.I. Strong coordinated this exchange of views during the ten-days virtual discussion.*

*The list of speakers who contributed as panellists to the Symposium reads as follows:*

1. *Monday, Jun 24*  
*LIM Tat<sup>1</sup> – Aequitas Law, Singapore*  
*Iram Majid<sup>2</sup> – Indian Institute of Arbitration and Mediation*
2. *Wednesday, June 26*  
*Noah Hanft<sup>3</sup> – AcumenADR LLC, US*

---

\* PhD candidate at the Sorbonne University. Her thesis focuses on the impact digital technologies are having on dispute resolution mechanisms, especially on arbitration.

<sup>1</sup> Mr LIM Tat is the founding partner of the Aequitas Law firm in Singapore and heads the firm's dispute resolution practice. He is also the founding member of Maxwell Mediators, an international mediation practice based in Singapore. Tat’s legal practice has been ranked in *The Legal 500*. He has also received recognition for his mediation practice in *Who’s Who Legal: Mediation* since 2016. He serves as a board member of Singapore Mediation Centre, a member of IMI’s Independent Advisory Committee, Co-Chair of the Law Society of Singapore’s Mediation Committee, immediate past Co-Chair of the IBA Mediation Committee, and Chair of the Society of Mediation Professionals (Singapore).

<sup>2</sup> Ms Iram Majid is the director of the Indian Institute of Arbitration and Mediation and an IMI (International Mediation Institute) certified mediator. She has extensive experience in the legal profession and has handled a wide range of commercial and civil disputes through her career. After graduating at the top of her class in the LL.M. course at Kurukshetra University, Ms Majid underwent additional training in dispute resolution at the Harvard Negotiation Institute and Pepperdine University.

<sup>3</sup> Noah Hanft is the co-founder of AcumenADR LLC, a new ADR platform. He is an independent mediator, arbitrator and dispute resolution advisor and the outgoing President and CEO of the CPR Institute, where he served for the last five years. He was previously the General Counsel and Chief Franchise Officer of MasterCard, a position he held for 13 years.

3. Friday, June 28

*Diana Paraguacuto-Mahéo<sup>4</sup> – Foley Hoag, France*

4. Monday, Mar 23

*Catharine Titi<sup>5</sup> – French National Centre for Scientific Research (CNRS)-CERSA, University Paris II Panthéon-Assas*

## **Speakers 1: Lim Tat – Aequitas Law, Singapore and Iram Majid – Indian Institute of Arbitration and Mediation**

The Symposium started with **Mr. Lim's and Ms. Majid's** contributions addressing the following question: “*What is mediation? The mediator's perspective*”. Each author's posts focused on different region (Singapore and India respectively), thus presenting diverse experiences on how mediation is understood and practiced. Indeed, while mediation is highly developed in Singapore, ADR is, on the contrary, still “*very nascent*” in India.

In his first post of the day, **Mr. Lim**, shared an abstract of Prof. Eunice Chua's paper<sup>6</sup> on the topic of the Singapore Convention and its positive impact on the future of Asian dispute resolution, which reads as follows:

*“On 26 June 2018, the United Nations Commission on International Trade Law (UNCITRAL) approved, largely without modification, the final drafts of the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) and amendments to the Model Law on International Commercial Mediation prepared by Working Group II. These instruments aim to promote the enforceability of international commercial settlement agreements reached through mediation in the same way that the New York Convention facilitates the recognition and enforcement of international arbitration awards.*

(...)

*Compared with the options of cross-border enforcement of mediated*

---

<sup>4</sup> Diana Paraguacuto-Mahéo is a partner in Foley Hoag's Paris office, where she specializes in international arbitration and litigation as well as alternative dispute resolution (ADR). Diana regularly serves as counsel, arbitrator and mediator in complex arbitral proceedings and is a court member of the International Court of Arbitration of the ICC, where she scrutinizes hundreds of awards from all over the world. Diana was also recently named Co-Chair of the IBA Mediation Techniques Committee and is President of the Global Pound Conference in Paris. She is admitted to practice law in Paris, Madrid and New York.

<sup>5</sup> Catharine Titi, Dr iur., FCI Arb, is a tenured Research Associate Professor at the French National Centre for Scientific Research (CNRS)-CERSA, University Paris II Panthéon-Assas, France. She serves on the Steering Committee of the Academic Forum on ISDS, she is Co-Chair of the ESIL Interest Group on International Economic Law, Member of the International Law Association (ILA) Committee on Rule of Law and International Investment Law and she serves on the Editorial Board of the Yearbook on International Investment Law & Policy (Columbia/OUP). Prof. Titi holds a PhD from the University of Siegen in Germany (*Summa cum laude*, Rolf H. Brunswick PhD Prize), she is a Fellow of the Chartered Institute of Arbitrators (FCI Arb) and she is designated to the Pool of Arbitrators of the Court of Arbitration for Art (CAFA). She has previously been a consultant at the United Nations Conference on Trade and Development (UNCTAD). In 2016, Prof. Titi became the first woman to be awarded the prestigious Smit-Lowenfeld Prize of the International Arbitration Club of New York for the best article published in the field of international arbitration.

<sup>6</sup> Chua E. “The Singapore convention on mediation - A brighter future for Asian dispute resolution”, *Asian Journal of International Law, Research Collection School of Law* (2019). Available at: [https://ink.library.smu.edu.sg/sol\\_research/2861](https://ink.library.smu.edu.sg/sol_research/2861)

*settlement agreements as a court order and arbitration award, the Singapore Convention presents a more straightforward, efficient path, given the divergent practice in Asia for enforcing foreign judgments, as well as the complications involved when mixing mediation and arbitration. The Singapore Convention will obligate competent authorities to enforce mediated settlement agreements emanating from other jurisdictions, and restrict the grounds on which they can decline enforcement. The current draft of the Singapore Convention provides a simple framework for making an enforcement application and setting out the exceptions to enforcement. It is hoped that Asian jurisdictions will widely support the Singapore Convention, and thereby usher in a brighter future for Asian dispute resolution."*

As a first point, **Mr. Lim** noted that all the attention was focused on the signing ceremony scheduled in Singapore on 7 August 2019. He then wondered whether many states would sign and ratify the Singapore Convention. He further asked whether this instrument would prove to be as (if not more) successful than the New York Convention; and whether the text would indeed, as suggested by Prof. Chua's article, "*usher a brighter future for ... dispute resolution*", not only in Asia but on a broader geographic scope.

Finally, he encouraged the readers to react to the points raised, remembering that we could always learn from each other. He concluded by expressing his enthusiasm to read the comments, questions and contributions to come.

First response came from **Prof. Strong**, who thanked Mr. Lim for his "*great summary*" of the Singapore Convention. She suggested, at a preliminary stage, to get back to basics and have a quick rundown on what mediation is (as opposed to arbitration and litigation). She also suggested Mr. Lim and Ms. Majid to share what kinds of special issues they see in their practice as an experienced mediator and mediation advocate respectively. She noted in this regard that some participants might not have as much familiarity with the process, particularly in the cross-border setting, as Singapore for example. Indeed, the latter is at the forefront of international commercial mediation, "*as shown by very quick bid to host the signing ceremony for the Singapore Convention*". She recalled this happened before the Convention was even finalized and approved.

Prof. Strong then invited Mr. Lim to reply in due course because of time differences. Indeed, she pointed out that the Symposium's program was specially adapted to this kind of circumstances. That said, she encouraged people in the listserv to start replying to Mr. Lim's initial post and said that Ms. Majid was facing some technical difficulties but would share her first post very soon.

In response to Prof. Strong's suggestion, **Mr. Lim** addressed to those who were new to the dispute resolution landscape by referring the following two frames that capture in his view "*the essential characteristics of several dispute resolution processes, including litigation, mediation and arbitration*":

1. **Communality**: "*Can you spot the common characteristics?*"
2. **Diversity**: "*What are the key differences? Are there differences in the way these processes work for domestic disputes vs. cross-border / international disputes?*"

The author of the fourth post was **Maryam Salehijam**, a PhD researcher at the University of Ghent. She started by noting that her PhD focused on mediation and ways to promote it. She

also mentioned that she assisted to the UNCITRAL Working Group II<sup>7</sup> sessions and had written extensively on the content thereof.

As a preliminary remark, Ms. Salehijam shared her opinion that the Singapore Convention's was perfectly named after Singapore's push for mediation. She nonetheless expressed her pessimism regarding the Singapore Convention's effectiveness to promote mediation. She emphasized this was a problem, since the goal behind the Convention's creation was precisely to increase the recourse to mediation. She further explained that she doubted the effectiveness of the proposed instrument because "*it does not address the beginning of the mediation process*". Based on the Chapter I of her PhD, she shared the view that "*the inconsistency of the various approaches to the enforcement of mediation clauses has created barriers to the use of mediation especially in the cross border context*". Indeed, in Ms. Salehijam's opinion, promotion of mediation cannot be efficiently met without addressing the agreement to mediate. She noticed that this argument was also valid for arbitration, where thanks to Article II of the New York Convention many arbitration proceedings have taken place.

Moreover, Ms. Salehijam emphasized that, in her view, the limited scope of the Singapore Convention and extensive defences strengthen its unlikeliness to facilitate mediation's use. The applicability of the Convention to the enforcement phase and the international scope could be perceived as restrictive since only "*commercial parties that carry on activity outside in different places of business can benefit from the proposed instrument*". She further added that, at the enforcement stage, the form requirements of the Singapore Convention could be "*at times more extensive than the form requirements of a simple contract*".

As a consequence, Ms. Salehijam shared her scepticism about the text's effectiveness "*and even the need for adoption thereof*". She concluded by arguing that parties could "*simply record their mediated settlement agreement as an arbitral award, thereby make their settlement surely enforceable in the states party to the New York Convention*".

In response to Ms. Salehijam's observations, **Prof. Strong** signalled that mediated settlement agreements could not always be recorded as arbitral awards because of many circumstances and in many jurisdictions. She referred to one of her past posts, which shared a decision of the Appeals for the Ninth Circuit Court<sup>8</sup> that dealt with this issue. Prof. Strong explained that "*there are many more circumstances and many more jurisdictions in which it is unclear whether and to what extent parties can transform a mediated settlement agreement as an arbitral award*". She also noted that during the UNCITRAL Working Group ("WK") II meetings those points were extensively discussed.

In addition, Prof. Strong highlighted the importance, for the mediation community, of combating the perception that mediated settlement agreements are more difficult to enforce internationally (either in their home jurisdiction or a foreign jurisdiction). Indeed, such perception could put people off of mediation even when they consider it to be the best mechanism for them. Regarding these points, she referred to her empirical research<sup>9</sup> on an

---

<sup>7</sup> [https://uncitral.un.org/en/working\\_groups/2/arbitration](https://uncitral.un.org/en/working_groups/2/arbitration)

<sup>8</sup> Post on the listserv on the 17<sup>th</sup> May 2019 about the court case: *Castro v. Tri Marine Fish Co.*, 921 F.3d 766 (9th Cir. 2019). Available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/02/27/17-35703.pdf>

<sup>9</sup> Strong S. "Realizing Rationality: An Empirical Assessment of International Commercial Mediation", 73 *Washington and Lee Law Review* 1973 (2016). Available at : [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302)

assessment on mediation, which preliminary findings were presented to UNCITRAL WK II early in the deliberations.

The sixth post was authored by the co-speaker of the symposium, **Ms. Majid**, who presented the mediation scenario in India (the current understanding and types of mediation) as both a collaborative lawyer and mediator. Ms. Majid explained that the practice of mediation in her country is not common and therefore, a real effort to cultivate more into the mediation field is taking place. The main constraint is, however, that they do not count with any specific law or act to this effect.

On a broader scope, ADR methods are “*very nascent*” in India. As a consequence, there is a lack of awareness about their usefulness and advantages. The dispute resolution is still anchored in court justice despite the cost and length this may entail. In Ms. Majid’s opinion, mediation could be an effective alternative to explore among other dispute resolution processes due to its significant benefits, which are the following:

- **Regarding the process:** It is “*cost-effective, hassle-free, and time saving process*”.
- **Regarding the parties:** It “*allows parties decide a mutually beneficial outcome a co-operative manner, and with the help of a neutral third party mediator*”.

Ms. Majid pointed out that “*the decision making power with respect to the dispute rests with the parties*”. This is with regard to (i) the parties’ freedom to decline adherence since the decision of the mediator and the outcome of the process is not binding on them, and (ii) the fact that parties could “*walk out in the event they believe that the process has not been fruitful*”.

She then presented two types of mediation in India:

1. **Court mediation:** “*courts refer the parties appearing before them for mediation in light of Section 89 of the Civil Procedure Code, 1908, and is often done in cases of matrimonial disputes*”.
2. **Private mediation:** “*where a mediator is voluntarily appointed by any party such as companies, individuals and government bodies to help arrive at amicable solutions to their disputes*”.

She further emphasized the following two advantages of mediation: (i) it is a cost and time effective process; (ii) it ensures confidentiality of proceedings. She opined that mediation is thus perfectly suited for highly sensitive disputes.

Ms. Majid concluded sharing her belief that “*mediation must be preferred dispute resolution process*”, as she is persuaded that this process could (i) ease the burden on the judiciary, and (ii) promote dispute settlement in a co-operative manner.

In the following post, **Prof. Strong** thanked Ms. Majid for her introduction to mediation practice and for the “*primer*”, since she noted India is, indeed, advancing quickly in all areas of dispute resolution.

Prof. Strong referred to Ms. Majid's point on the two types of mediation in India. She noted that generally *"most commercial mediations around the world, and certainly most international commercial mediations, tend to arise through contract rather than through court order"*. In this regard, she asked Ms. Majid what are party expectations of private mediation in her country and how she presented mediation to the parties. In this regard, she pointed out the difference between parties' education in India and Singapore, where this process is very well known. Concretely, Prof. Strong was interested to know how Ms. Majid generally presents the nature of mediation during her proceedings and how she does this.

This led **Ms. Majid** to confirm, in her next post, that the approach to teach and prepare clients for mediation in India is different from the Singapore's example. She noted that because of the lack of awareness about mediation in her country the private practice is not yet as much developed as court annexed mediation, which is currently being a good way to promote this process.

Ms. Majid pointed out that in the absence of any mediation law or enactment there are no materials to prepare clients. There is room to *"reprogrammed the psyche"* and big efforts are being taken to raise awareness about mediation's benefits, specifically the reciprocity and mutual gain in the outcome of the process. However, she recognized the main problem is the lack of a proper legal framework on this subject. She lastly expressed her expectancy on the Singapore Convention effectiveness to both enforce mediation agreements and for the promotion of cross-border mediation in her country.

The author of the ninth post, **Joseph Matthews**, an independent arbitrator, mediator and advocate, widened the discussion by sharing his thoughts on *"forced mediation"*. He expressed his hope that on the occasion of Singapore Convention's release *"one of the leading arbitral institutions will consider introducing a rule that mandates mediation in all cases administered under its (international) rules"*. He further observed that *"the perfect time to impose this requirement would be within one month after the date when the parties receive an invoice based on the estimate of arbitrator compensation"*. In Mr. Matthews' opinion the use of mediation in transnational commercial disputes would be jump-started through the combination of *"sticker shock"* with a *"mandate within the rules"*.

Mr. Matthews expressed, however, little expectation that any of the arbitral institutions will include such a mandate as he opined *"neither one is likely to risk going first"*. Nonetheless, he strongly believes such a mandatory rule would dramatically increase mediation processes *"even if it were adopted as an "opt in" rule"*. In the latter case, he opined that mediation practice in international commercial arbitration would become equivalent to the Florida's mediation practice for the last 30 years, *"where it is mandated by statute before civil disputes can be set for trial"*.

**Prof. Strong** found Mr. Matthews' idea interesting. Quoting Cass Sunstein and Richard Thaler<sup>10</sup> (authors of the theory of "nudge"), she admitted it could be, indeed, an interesting way to implement a strong *"nudge"* against the *"power of defaults"*. She noted the importance of ensuring consistency of the legal regime. Specially, in the case the community adopted a default of this nature. On this point, she made reference to one of her papers, which deals with *"how the UK is struggling to adjust a heavy nudge toward mediation in a system that is*

---

<sup>10</sup> Thaler R. H., Sunstein C. R., Nudge: Improving Decisions About Health, Wealth, and Happiness, Yale University Press (2008).

*set up with a litigation default*<sup>11</sup>. Deepening on the UK case, she explained that part of the problem “*is that they are dealing with court-ordered mediation instead of private (contract-based) mediation, which is the norm in international commercial matters*”. Prof. Strong shared then her enthusiasm to hear Mr. Lim’s input on this matter, since she opined that Singapore would be (if any) the leading jurisdiction in this sense.

In the concluding post of the day, **Prof. Strong** highlighted the interest of the raised topics and introduced the next speaker, Noah Hanft.

## **Speaker 2: Noah Hanft – AcumenADR LLC, US**

The second speaker was **Noah Hanft** and his presentation dealt with “*What do clients think about mediation?*”. In his opening post, Mr. Hanft thanked for the opportunity to contribute with his insight on this topic and started by noting that it was a challenge to speak to the views of clients. That being said, he noted that one thing is clear: “*clients do not speak with a single voice and, as is the case with most matters, clients have different views on mediation*”. He added that client’s view is based on “*where they sit*”, that is: “*from an industry perspective, from a geographic perspective, and from a whole lot of other perspectives*”.

Mr. Hanft shared his belief that, generally, clients (that is in-house lawyers and their ultimate client) like mediation more than arbitration or litigation. Notwithstanding the specificities of each case, “*mediation has increasingly become a go-to means of resolving cases*”. Mediation is widely used around the globe, for instance in the UK, Canada, the United States and, increasingly so, elsewhere. He went on to list the main reasons clients are attracted to mediation:

- “*the voluntary nature of it provides the ability to have say over the outcome and input into fashioning a resolution;*
- *confidentiality;*
- *the ability to avoid fracturing a relationship, perhaps permanently*”.

On the other hand, he noted that this is not a universal view and, oppositely, there is fair amount of frustration with mediation as well. He mentioned the following two:

- “*the perception that there are only a few mediators with appropriate expertise in some jurisdictions;*
- *the glaring lack of diversity in the field*”.

Further, Mr. Hanft outlined that one major source of criticism against mediation is “*clients want to see more choice, particularly with respect to major disputes where there tend to be only a small number of mediators that occupy that space*”. Along the same lines, Mr. Hanft proceeded to highlight what clients don’t like about mediation process in order to evaluate how it might evolve to “*even better suit their needs*”.

### What gets clients frustrated about mediation?

1. **Unproductive mediations:** “*Clients do not like having to go through a process that they perceive to be a waste of time*”.

---

<sup>11</sup> Strong S. “Defining the Litigation Default”, 37 *Civil Justice Quarterly* 463 (2018).

While conceding that a “failed” mediation could lead ultimately to a resolution, Mr. Hanft pointed out that client’s perception of process effectiveness is key.

2. **Wasting time:** Clients do not appreciate mediators “*who they perceive as acting as carrier pigeons, simply conveying offers and demands and not demonstrating an understanding of the factual or legal issues involved*”.
3. **Mediator’s performance:** Clients are reticent to use mediators that lack business acumen and “*don’t understand how decisions are made, either by small or large companies*”.

### What kind of mediator does a client want?

Mr. Hanft expanded further on what clients want from mediators and raised the following points they are expected to do:

1. will dig in to a dispute,
2. understand the dynamics of the relationship between the parties, and
3. understand, more generally, the dynamics of the individuals involved (i.e. they have a good understanding of the corporate world, its *modus operandi* and they have the capacity to identify the subtleties and complexities of the reality behind the negotiation table).

On another note, Mr. Hanft reflected on the escalation or “multi-step” clauses in contracts. Although there is no common view, he noted clients like to include “*a mandatory mediation provision that requires that a mediation occur in advance of either arbitration or litigation*”. Furthermore, clients are generally of the view that “*negotiation directly between the parties is a good first step*”.

On the bad side of this, during ADR proceedings parties may be in a highly emotional state, which will likely come with incomplete information. In this case, the process becomes a merely “*check the box exercise*” that will cause some discontent regarding mediation. As a solution to this situation, Mr. Hanft suggested more “*flexible provisions that while still requiring mediation, allow the parties to defer it to a point in time when a resolution is more likely attainable*”. For example, he proposed that in arbitration the tribunal “*set a mediation window at a point likely to provoke a meaningful mediation*”. He compared litigation in the US, where mediation is becoming the norm, to arbitration, where it is not. However, he shared his belief that clients want to “*see mediation built in to the arbitration process*”.

As a last point, Mr. Hanft confessed what concerns him the most is the mediator’s trust issue, which he described as a sensitive matter. He noted that some in-house lawyers have simply said they can’t trust mediators. He has also heard that “*it is not uncommon for mediators to share (not even subtly) information that is mentioned in caucus, which clients intended to be confidential*”. In this respect, it is Mr. Hanft’s strong belief that the “*lion’s share of mediators are very careful about maintaining confidences, but all it takes to create a lack of trust in the process is to be burned once*”. He has experienced this as a client. He signalled that openness with the mediator is a crucial factor for success of the process. Therefore, the fact of hearing “*clients express the view that they can’t be forthcoming unless they want information shared with the other side*” is, in his view, a serious matter.

In order to address this issue, Mr. Hanft’s suggested to repeatedly remind clients that there is a presumption that “*information garnered in caucus won’t be shared without clear*

authorization”. He recalled the importance to honour confidentiality requests “*even where the mediator believes breaching confidentiality would help drive a resolution*”.

In the following post, **Mark Kantor**, an independent arbitrator from Washington D.C., asked Mr. Hanft whether he has noticed in his experience in the mediation field “*differing levels of embrace*” between civil law and common law jurisdictions. Indeed, he shared the saying that parties and in particular their counsel “*in civil law jurisdictions are less open to mediation than their counterparts in common law jurisdictions*”. He pointed out, however, that these overgeneralizations are often inaccurate. A possible explanation, Mr. Kantor had also heard, was the following:

*“That common law commercial dispute procedures treat the commencement of the litigation/arbitration as initiating a process of judicially-enforced investigation (document production or, in the US arena, the broader notion of discovery). In contrast, since there is little or no such investigation after commencement of the dispute in a civil law forum, the investigation by the parties must largely be completed before initiation of the dispute in the forum. As a consequence, negotiation between the parties is more likely to have occurred prior to formal initiation of the dispute in the forum and thus there is less scope for institutional encouragement of mediation”.*

In response, **Mr. Hanft** noted that he had not observed a distinction “*as to the extent or timing of investigations or as to the timing of direct negotiations*” between the two jurisdictions. He outlined, however, that he had noticed “*a similar reticence about early mediation from in-house counsel from both civil and common law jurisdictions*”.

Next post came from **Michael McIlwrath**, Global Litigation Counsel at Baker Hughes, who expressed his enthusiasm for counting with Mr. Hanft’s experienced insight in the Symposium.

Mr. McIlwrath agreed with Mr. Hanft’s assumption that “*not all in-house counsel are alike*”. While frequently asked, he opined that the question “*what do in-house counsel want in dispute resolution [or some sub-category]?*” was inadequate, as it neglects in his view: (i) the particularities of each company offering original products and services, (ii) geographical differences, and (ii) people’s uniqueness. He further noted this kind of question could be demeaning in failing to recognize the singularity of each corporate reality and the pressure in-house lawyers endure in the dispute resolution context or could potentially be going through in a given proceeding.

Another point Mr. McIlwrath addressed was the challenge of choosing a qualified mediator. Indeed, he agreed with Mr. Hanft that “*finding a mediator that suits your purpose and has the right level of competency in a domestic case (between parties of the same country) is a challenge in many cases, and these challenges are only amplified in international disputes*”. He asked Mr. Hanft what initiatives has the CPR undertaken to attack this particular problem. He confessed, however, this was a “*loaded question*” considering CPR’s active role in this area.

In response, **Mr. Hanft** thanked Mr. McIlwrath’s kind words and admitted it was an honour to participate in the Symposium. He then referred to Mr. McIlwrath’s third point and thanked again both for the question and the comment about CPR’s efforts on this matter. The CPR has indeed been addressing the challenge of lack of (enough) qualified mediators for many years.

The institution has engaged “in a multi-pronged effort to increase the interest in and availability of mediators in many jurisdictions around the world”. Concretely, the CPR has held forums and events and has run training programs in numerous countries (including Brazil and throughout Europe). Mr. Hanft outlined the importance of these actions and described this issue as “a bit of a chicken and egg situation”.

#### The chicken-egg dilemma or the problem of finding a well-suited mediator

- a) **The chicken – Insufficient demand from the mediator’s perspective:** “People with the intellect and innate skills to mediate are not inclined to train and enter the field where there isn’t sufficient demand”.
- b) **The egg - Insufficient demand from the client’s perspective:** “At the same time, potential users are reluctant to embrace mediation absent a universe of qualified mediators”.

#### The Brazilian example

- **What CPR did:** “CPR took this on in Brazil with success by both training mediators and holding forums where leaders in the field would speak about the benefits of mediation”.
- **The results:** “There is now an increasingly robust mediation community in Brazil with some highly talented and gainfully employed mediators”.

Mr. Hanft admitted that this remains “a very serious challenge which clearly cannot be addressed by any single organization”. For this reason, among others, the “CPR has partnered with CEDR to provide international mediation training in venues around the world”. While moving forward one step at a time, Mr. Hanft is hopeful about the future with the arrival of “young and enthusiastic attorneys (and non-attorneys)” who bring with them both enthusiasm and expertise into the mediation field.

In the following post, **Prof. Strong** addressed the following two points:

Firstly, Prof. Strong reflected on the use of multi-tiered dispute resolution clauses. She opined that the latter have been for a long time “touted as a good way to get past the problem of both parties not wanting to raise mediation as a possibility lest they lose face/lose negotiating power”. Prof. Strong then shared her approval of “not making mediation a precursor to filing suit/arbitration”. She agreed that, since that may not be the optimal time to mediate, it might be better to make it “a precursor to initiating the hearing”. However, she noted that the idea of a single hearing is a common law concept and civil law lawyers will have a series of hearings. Regarding this, she concluded the above proposition is “more akin to some of the local rules on mediation in US courts”. Prof. Strong closed her first entry by asking Mr. Hanft or any member of the listserv whether they have “any sample language that might be able to achieve this approach”.

Secondly, Prof. Strong addressed the issue of confidentiality breach by mediators. She recalled an experience during a CLE webinar “where the instructor bragged about how, as a mediator, he had bullied parties into settlement”. In line with a previous point raised by Mr. McIlwrath, Prof. Strong went on explaining that the instructor in question considered that achievement to be a success. She confessed she was “appalled” since “all it takes is a few bad apples/bad experiences to sour a client on mediation”. She wondered what the dispute

resolution community could do about this. She further added that even when several programs/rosters require mediator's training, if the content of such training was like this one, then the problem was only going to spread. She asked the panellists to share their ideas on what could be done. Prof. Strong clarified that she was obviously not suggesting the international community "*seek to impose a single type of mediation on all mediators*".

Finally, Prof. Strong encouraged members of the listserv to participate. She recalled that if some would like to preserve anonymity, this was a possibility. They should contact her directly and she would then forward the post. "*No question is too general or basic*" was her concluding remark.

In response to Prof. Strong's question, **Mr. Hanft** confessed he did not have any "*precise language yet as this is a concept being explored and presents several challenges*" such as the one Prof. Strong mentioned. Further, Mr. Hanft wondered whether it would work in civil law countries if it was required that mediation take place prior to any hearing on the merits, or any substantive hearing.

Mr. Hanft then addressed Prof. Strong's second point. He explained that in the ADR field, when confronted with a bad experience, the tendency would be to turn towards litigation, the "*traditional mode*" of resolution. This would be also the case of a company coming back to litigation as a result of a bad arbitration, "*notwithstanding prior bad litigation experiences*". The difficulty in addressing this problem is that "*just like poor judges and poor arbitrators, there will always be poor mediators*". What Mr. Hanft found most regrettable about Prof. Strong's anecdote was that the individual in question was an instructor. He suggested in such circumstances one alternative could be to complain to the sponsoring organization.

Another post in reaction to Prof. Strong's post came from **Mr. McIlwrath** who shared his opinion that "*mediation is a true profession requiring specific skills*". Therefore the real problem, he opined, is the lack of awareness in this sense. When judges or arbitrators do not have such appreciation of mediation they might "*believe they know how to mediate because they are good at telling the parties who is right and wrong*". Despite their good intentions they are missing the point of the mediator's role. Mr. McIlwrath emphasized this could enhance parties' animosity as a result of such experience of "mediation".

In this respect, Mr. McIlwrath shared a personal illustration noticing with some humour that Prof. Strong might have called her mum a "bad apple". His anecdote went as follows:

*"When I became an in-house counsel years ago, I told my mother, then a sitting judge, how I had "discovered" mediation and that I'd never realized how powerful it could be. She tried to share my enthusiasm, saying, "mediation is great! I mediate almost all of the disputes in my court."*

*She'd never mentioned that before, so I asked how she mediates. She gave me a look like I was naïve, and said. "I make the parties settle!"*

*We probably then accused each other of having no clue of what the other was talking about, but who remembers every argument they had with their mother?"*

Mr. McIlwrath shared then the lesson learned: "*As an in-house lawyer, bad experiences taught me quickly that mediation should be done by mediators, arbitrating by arbitrators,*

*and judging by judges*". He clarified he has no problem with people crossing over categories; for instance he has had past experiences with an expert (an accountant or an engineer) acting as mediator. However, he highlighted the importance of ensuring that once the person wears the mediator's hat, he or she is "*a true mediator*". He emphasized there should be reasonable assurance in this sense.

#### Criteria to determine what is a "true mediator"

Mr. McIlwrath explained years ago, the only way to determine whether a mediator qualified as such was "*by looking at a candidate's training (did they take CEDR, CPR or a similarly high quality course?)*". Nowadays, there are national and international "*excellent*" accreditation schemes that provide aspiring candidates with more than just training. He suggested this could be a good way to consider new names within the field.

**Mr. Matthews** joined in the discussion and mentioned he and Mr. Hanft attended the CEDR Advanced Mediation Skills Training together the year before, which proved to be a great experience. He highlighted that "*one of the trainers was a former Scotland Yard hostage negotiator*". He further noticed this was a "*very different skill set than advocacy*" and ended by describing it as a "*very intensive training*".

In his first point, Mr. Matthews noted that in mediation "*the distinction between lawyer and client is not always clear*". He explained that he would develop some observations from the perspective of counsel, taking into perspective different type of clients from those of Mr. Hanft and Mr. McIlwrath. He said he has been a counsel for 30 years in a State where the law mandates mediation prior to any case going to trial. This has caused him to participate in a number of mediations equal to the other intervening panelists, Mr. Hanft and Mr. McIlwrath, notwithstanding their specific roles in two of the largest multi-national corporations in the world, which entails diverse experiences of dispute resolution.

From that position, the first point Mr. Matthews addressed was the issue of well-suited mediators. He agreed in this regard "*one size definitely does not fit all when it comes to mediation. And the line between good practices and ethics is not always clear*" and gave an example in this regard:

*"When I represented a contractor or subcontractor in a construction dispute, there was a handful of mediators I would go to and for the most part, they are "in your face" type A personalities who can make you feel like you are being bullied when they say "nice to meet you. (He referred back to the instructor from Prof. Strong's anecdote and noted that if he happened to be one of those mediators that would not surprise him).*

*Whenever I was representing a more refined personality (e.g., a very sophisticated and erudite Brazilian business-man) I would never have considered using one of those mediators. Instead, in the specific example, we went with a wonderful senior lawyer who in addition to a massive intellect was able to make everyone comfortable, including my client".*

From his now mediator standpoint, Mr. Matthews pondered whether the mediator should try to modify his/her personality traits to fit different settings (he asks this question to himself). He confessed that while performing as young lawyer he appeared before a number of judges

who conducted settlement of disputes in a coercive or authoritarian manner (he compared these to the above example of Mr. McIlwrath's mom who "made parties settle" at court). He felt, in those occasions, often offended when he considered his clients to be pressured into settlements that did not suit their best interest. However, he admitted that looking back then he "*was probably sometimes pleased that a judge strong-armed an opponent or two*".

Further, Mr. Matthews wondered whether he should consider adapting his attitude (more or less aggressive) regarding the circumstances or even adapting his character with "*different parties to the same dispute*". He particularly shared this situation during some of the mock proceedings during the above-mentioned training; he was criticized for treating one party differently than the other. While accepting the criticism from the perspective of "best practices", he confessed he found it ridiculous not to approach each party differently.

As a second point, Mr. Matthews shared his somewhat disagreement with Mr. McIlwrath's "*commitment to keeping the roles of judge/arbitrator and mediator completely separate*" even when his western legal tradition would prevent him from crossing those lines himself. He mentioned Tom Stipanowich's research work in the area of hybrid processes and expressed his enthusiasm to see the results in due course. Mr. Matthews noted at this point that China's role in transnational dispute resolution has grown enormously. This, he suspects, will oblige the dispute resolution international community to re-evaluate some of its most established assumptions, "*such as the view that fairness requires an adversary process with a neutral and independent decision maker*".

Lastly, regarding "bad experiences", Mr. Matthews noted that after being involved in more than a thousand mediations as counsel over 30 years it was "*impossible not to have plenty*". He has had experiences where both (i) he thought mediators breached a confidence, and (ii) they clearly turned into advocates. Mr. Matthews hears those complaints every day from both clients and counsels. As a mediator he expressed his concern over these matters and he admitted his efforts to not do them himself. With regard to his experience as a "*consumer of mediation services*" he quoted Mark Twain to remember "*not to over-learn lessons*":

*"If a cat sits on a hot stove, that cat won't sit on a hot stove again. That cat won't sit on a cold stove either. That cat just doesn't like stoves"*.

The next post came from **Mr. McIlwrath**, who replied to Mr. Matthews' second point. He noted that he had "*no objection to mixed modes or other hybrid procedures of dispute resolution*". He explained his concern was (the same Mr. Hanft had referred to) "*a market where users do not yet have access to a supply of good mediators, and so they get people moonlighting in a profession they don't understand*". He opined the chicken-egg paradox was spot on. Mr. McIlwrath explained that after just one experience with a good mediator users love it so much they will come back to mediation. However, despite having seen this many times he highlighted the double-way problem that persists is that "*until there is demand, it's tough to create a supply of good mediators, and mediocre/poor experiences do not help*". He opined there is a desire in many countries to promote mediation in order to help reduce the court overload. Nonetheless, "*they are struggling with the chicken-egg dilemma*".

#### What are the alternatives to overcome the chicken-egg dilemma?

Mr. McIlwrath mentioned that the main way countries are attempting to overcome this issue is through licensing/accreditation schemes, which simultaneously increase supply and

demand. He referred to the medical profession as he considered it a good analogy; he said that he “*wouldn’t want a doctor treating [him] or members of [his] family if they did not have a proper medical license. Licensing also protects real doctors by excluding competition from non-qualified providers*”.

As a concluding remark, he said that, at the risk of sounding heretical sharing this view on OGEMID, the accreditation/licensing schemes might be useful for international arbitration as well.

In the next post, **Prof. Strong** thanked for the excellent contributions and shared her excitement about finding a “*treasure trove*” of information in her inbox. She pulled out from one of Mr. Matthews’ posts the concept of “fit” as dependent on party personality, which she noted “*can be affected by national culture*”. She referred to a previous post on the listserv<sup>12</sup> where it was discussed the concept of high context and low context cultures, as well as monochronism and polychronism. She opined these are the type of concerns that any advocate involved in mediation should keep in mind. In her view, those principles will help advocates (i) understand how they should conduct themselves, and (ii) choose an appropriate mediator for the specific parties.

At this point she made a distinction she thinks is more accurate:

- **In arbitration:** it is about “*picking the right arbitrator for the dispute*”.
- **In mediation:** it is about “*picking the right mediator for the parties*”.

She pointed out the slightly difference between “parties” and the “dispute” in one field and the other. Indeed, she distinguishes them “*since the parties are the ones who will be settling the case*” in mediation whereas in arbitration “*the arbitrator resolves the dispute, not the parties*”.

She then referred to Mr. Matthews’ anecdote of the Brazilian party and noted that “*coming from a polychronist country, [the Brazilian party] needed someone who understood the importance of relationships*” and congratulated Mr. Matthews for choosing the good mediator who reflected those values. Prof. Strong explained that in the mediation world there is a lot of attention to “*mediator styles, evaluative vs. facilitative*”. However, she considered that “*high context/low context and poly/monochronism should also factor into the discussion in international disputes particularly*”.

In her final point, Prof. Strong referred back to Mr. Twain’s lesson “not to over-learn lessons”. She agreed both with Mr. Twain and Mr. Matthews as she thinks “*lawyers are particularly prone to this, since we tend to be professionally and personally small-c conservative (meaning risk-adverse and cautious - nothing to do with politics)*”. In her opinion lawyers:

- “*need to try things a few times before we decide whether something is good or bad; (...)*”

---

<sup>12</sup> For example see post by Prof. S.I. Strong on May 25, 2020 titled: “Online mediation: steps towards best practice”; where she shared the following post on monochronism and polychronism: <https://www.pmi.org/learning/library/everything-time-monochronism-polychronism-orientation-6902> (Last accessed 30 April 2020).

- *need to be self-aware about our own personality quirks and how/why they affect our perspectives”.*

Prof. Strong opined that (and believed senior folk on the listserv would agree with her) “*self-evaluation is a critical part of being a good lawyer*”. In her concluding remark she referred to one of her former colleagues, Stephen D. Easton’s paper<sup>13</sup> on self-evaluation throughout one’s career, which was published years ago. She confessed still teaching this to her first year students.

In the following post, **Mr. Matthews** asked Mr. Hanft and Mr. McIlwrath in their dual roles as “*major users of arbitration services*” and “*sincere proponents of mediation in the world*”, whether they would consider choosing an arbitral institution and arbitral rules that included a mandatory mediation rule. He detailed his proposition explaining that such rule could presumably (a) require licensing or other qualification of the mediators, or (b) could leave that to the marketplace. Furthermore, Mr. Matthews pointed out some benefits of this rule:

- it would create a demand for mediators and thus eliminate the chicken-egg dilemma, and
- it might provide some data to answer Mr. Kantor’s earlier remark about the different legal systems’ willingness to incorporate mediation. In this regard, he opined that “*if parties from civil law traditions abandon arbitral institutions and rules that incorporate mandatory mediation, it would become pretty clear pretty quickly*”. He recalled the lawyers striking in Italy over mandatory mediation.

### The medical profession analogy

Mr. Matthews referred then to Mr. McIlwrath’s medical analogy and said the problem he saw with it was that “*demand exists by virtue of need for healthcare*”. Oppositely, “*the mere existence of disputes to be resolved either by litigation or arbitration does not in itself create demand for mediation*”.

Further, he cited his own home jurisdiction’s example; he explained that Florida adopted “*mandatory mediation legislatively*” over 30 years ago. At the time, this generated some negative reaction from lawyers. Today, however, he noted mediation is as much a part of their civil justice process as the judge, the lawyer or the clerk of the court.

As a concluding remark, Mr. Matthews said he did not think it was heretical to promote accreditation/licensing for international arbitrators.

In response to Mr. Matthews’ question, **Mr. Hanft** expressed his delight for this issue being raised. He expressed his strong belief that “*mediation needs to become an integral component of the arbitration process*”. Mr. Hanft shared this is “*an issue, or even a cause*” he has taken up and spoken on repeatedly. He defined himself as a “*strong proponents of court-annexed mediation*” and admitted he had participated as mediator “*in the fabulous Southern District, NY pro bono program*”. That said, Mr. Hanft noted a distinction between arbitration and litigation, describing the latter as a “*blunt instrument*”:

---

<sup>13</sup> Easton S. D. "My Last Lecture: Unsolicited Advice for Future and Current Lawyers", 56 S.C. L. Rev. 229 (2004). Available at: <https://taxprof.typepad.com/files/easton-last-lecture.pdf>

- **Consistency of mandatory mediation in litigation:** in litigation *“the parties have little say as to how the process works so imposing mediation is consistent with how it works”*.
- **Party autonomy vs. mandatory mediation in arbitration:** arbitration *“provides the parties with the ability to determine the “rules of the road” so to speak. In fact, virtually all of the institutions’ rules can be overridden by agreement of the parties. The beauty of arbitration is, at least in part, party autonomy”*.

#### Is there any room for mandatory mediation in arbitration?

Mr. Hanft opined that, despite party autonomy’s principle in arbitration, *“there is a role, a very significant role, for institutions to play in embracing and encouraging mediation, short of mandating it”*.

#### The CPR’s engagement on mediation’s promotion

Mr. Hanft mentioned that mediation is the cornerstone of the CPR’s recently revised international rules. He particularly noted that mediation:

- *“(…) is a topic for the preliminary conference and the rules address arbitrator’s concerns about bringing up mediation by allowing for CPR to raise it at any time”*.
- *“(…) is addressed in a number of provisions throughout the rules”*.

#### The cautious approach to mandatory mediation in international arbitration

In his concluding remarks, Mr. Hanft opined that even when mediation might be underutilized, requiring it for fear might not be the right approach. He explained this is *“much like as happens with step provisions (and that’s where the parties have actually opted for it contractually), that it will not only be used in a meaningful way but may adversely impact the way mediation is viewed”*. He thanked for the opportunity of sharing his thoughts.

In the last post of the day **Prof. Strong** thanked the panellists for the *“scintillating discussion”* and introduced the third speaker, Diana Paraguacuto-Mahéo.

### **Speaker 3: Diana Paraguacuto-Mahéo – Foley Hoag, France**

The third speaker, **Ms. Paraguacuto-Mahéo**’s contribution was focused on *“What do private practitioners think about mediation”*. She started by thanking Prof. Strong and the organizers of the Young OGEMID forum; she felt honoured to share some of her thoughts. As a lawyer in international arbitration and mediation fields, she noted that she would only focus on the private practitioner’s perception about commercial mediation.

Based on her international practice, Ms. Paraguacuto-Mahéo first remark was that *“although the perception is different from one country to another, mediation is picking up almost everywhere”*. She noted that there are a number of reasons why mediation gained momentum, which is not only limited in her opinion to the publicity around the Singapore Convention. She went on to list some additional grounds underlying mediation’s growth:

- **Engagement to spread the word about the benefits of mediation:** Some scholars, some non-profit organizations such as IMI, arbitration and mediation institutions such as CPR, CEDR and the ICC, have worked relentlessly for mediation's development.
- **Advocacy effort:** Attorneys have also contributed in raising awareness about mediation because they are "*convinced that mediation offers an effective alternative, which allows disputants to address numerous barriers to settlement*". Furthermore, some bar associations "*convinced that lawyers are best positioned to advise their clients in favour of mediation, have embraced the trend; they are aware that if lawyers do not fill in the gap, some other professions will*".

### Mediation's three-level growth curve

1. Mediation has not yet received the level of widespread acceptance that is required for it to move into the mainstream of legal practice.
2. However, it is becoming increasingly accepted.
3. Mediation is even imposed in some places.

Further, Ms. Paraguacuto-Mahéo highlighted in this regard that "*European laws have forced private practitioners to pay attention and to consider mediation*".

### What has the role of practitioners been in mediation's promotion?

Ms. Paraguacuto-Mahéo shared then her opinion that "*private practitioners have not always been the motor of change that we would have expected them to be as specialists of dispute resolution*". She opined indeed there is still some resistance to mediation from practitioners, which limits its expansion. She went on to list diverse examples and their underlying cause:

- **Mediation perceived as a lack of faith:** Some practitioners "*fear that suggesting mediation to clients might be interpreted as not believing in their own client's case and thereby potentially weakening their client relationship*".
- **Mediation seen as a weakness:** "*Some might also argue that opposing counsel might interpret suggesting mediation as a sign of weakness*".
- **Neglecting the process' value:** Some "*genuinely think they "mediate" every day, not understanding the value-add of a neutral third party*".
- **Bad experiences – bad perception:** Some "*may have had a bad experience with mediation and then see it negatively*".
- **Mediation seen as a threat:** "*Some unsettled attorneys may feel that mediation is a threat to their business model*".
- **Mediation seen as a "soft practice":** Some have "*the perception that mediation does not involve law and only deals with personal and emotional barriers*".

### Mediation perceived as a "utopian" dispute resolution tool

In Ms. Paraguacuto-Mahéo's view the perception that mediation does not involve law and thus is a merely "*utopian dispute resolution tool*" remains "*the most important obstacle*". She emphasized this is a damaging perception of mediation, which "*hinders the embracement of mediation by certain practitioners, including in international arbitration, where some consider that mediation is non-technical, non-legal, hence beneath them*".

### Ways of developing mediation

In Ms. Paraguacuto-Mahéo's opinion mediation will develop through both (i) education, and (ii) marketing. Precisely, there is a difference between community mediation and family mediation, and commercial mediation. She emphasized that "*mediation cannot be dissociated with the law*". The law is key at several stages of the mediation process:

- *"It is part of the parties' BATNA<sup>14</sup>.*
- *It is an integral part of any risk assessment analysis.*
- *It is key to drafting the settlement agreement".*

### The business opportunity for private practitioners

On another note, Ms. Paraguacuto-Mahéo commented on mediation development perceived as a market opportunity by private practitioners. She opined that the 2008 financial crisis "*has helped private practitioners realize that litigation and arbitration have become expensive and time consuming and that their clients cannot all afford to litigate, mostly in countries where discovery can be akin to a fishing expedition and where very few cases proceed to trial*". Against this background, private practitioners noted one main advantage: "*even if mediation does not always lead to a settlement on the spot it can begin a process that could ultimately lead to a settlement by obtaining an impartial assessment of the case; being able to confidentially exchange key documents without a discovery; narrowing issues; and giving each party a right to say*". Once private practitioners acknowledge the benefits of mediation, they understood that mediation was in their clients' best interests.

Further, Ms. Paraguacuto-Mahéo affirmed "*a practitioner who understands mediation will also understand that he has a role in mediation*". Therefore, the practitioner will have an active role and will assume a number of tasks:

- *"He is the one who will assess that mediation is the appropriate method for dispute resolution in any given case, including by drafting proper jurisdictional clauses.*
- *He will assist his client in the selection of the mediator.*
- *He will prepare his client for the mediation sessions.*
- *He will assist his client during the meetings.*
- *He will draft the settlement agreement.*
- *He will be instrumental in the enforcement phase of the settlement".*

### Practitioners' awareness of the mediation's power through educational efforts

As a conclusion to her first post, Ms. Paraguacuto-Mahéo shared her view that "*private practitioners are becoming more aware of the challenges and opportunities of mediation*". Mediation is just becoming widespread and she suggested one way it will spread further is "*if we change more private practitioners' perceptions of mediation through an on-going educational effort in their environments: law schools, CLEs programs, chambers of commerce and industry conferences, amongst others*". At this point, Ms. Paraguacuto-Mahéo welcomed any comment or question on the above-mentioned observations.

---

<sup>14</sup> Best Alternative to a Negotiated Agreement.

The second post's author, **Prof. Strong**, thanked Ms. Paraguacuto-Mahéo for her *“excellent and insightful post”*. She was convinced many questions and comments would arise from it. As for her, Prof. Strong particularly highlighted *“the part about how many people see mediation as more about emotion and therefore non-legal and not important”*. She confessed having herself probably *“fell into this category”* earlier in her career. This allowed her to fully *“appreciate how much that can colour one's thinking”*. Prof. Strong asked her how she thought this perception could be combat in the commercial community. She referred then to some speciality fields (such as family law) where mediators *“definitely focus on the emotional element”*. She opined that *“perception carries over to the commercial realm”*.

In this regard, Prof. Strong pondered a two-way question:

- **Mediation is not only about emotions:** she wondered how could it be made clear *“that commercial mediation is not just about emotion and interpersonal relationships without making the process too technical”*.
- **Mediation is about emotions:** conversely, she asked how could it be made clear to people that *“commercial disputes actually do reflect emotional elements”*.

Prof. Strong noted that CEOs and GCs, particularly of small companies, *“can feel personally attacked by a lawsuit, and even those that do not may feel that their job is on the line if they do not vindicate themselves (of course, in some companies, "vindication" can simply be the most cost-effective resolution of the dispute, which may be mediation, but not all businesses adopt that perspective)”*. In this regard, she shared something she often tells her students (and before that, her junior associates):

*“The minute the client utters the words "it's a matter of principle," you're going all the way, because emotion has now taken over what was previously a business decision”*.

As her final point, Prof. Strong reflected on mediation fees. She first noted that *“another obstacle in mediation in domestic disputes in some countries has involved the attorneys' fee structures”*. She then explained that *“if attorneys are only paid according to court appearance, there is no incentive to mediate/settle a dispute”*. Finally, Prof. Strong asked whether Ms. Paraguacuto-Mahéo thought this is a live issue in international disputes. As a concluding remark, she said that although *“we may not operate under the same fee structures, perhaps the perception of mediation as a non-starter could affect the willingness (and, let's face it, ability) of a lawyer or client to pursue mediation”*.

In response to Prof. Strong's post, **Ms. Paraguacuto-Mahéo**'s said that she would attempt to address all the *“very interesting points”* raised by her. Regarding the two first points, *“which deal with the perception that mediation is more about emotion and therefore non-legal and not important in the eyes of CEOs, GCs or even in the eyes of some lawyers”*, she opined that *“this is more a question of communication/marketing of mediation in the commercial arena than a question of what is the mediation process about”*. She clarified she did not doubt mediation involves emotions and *“actually allows disputants to address personal and emotional barriers to settlement”*. On the contrary, Ms. Paraguacuto-Mahéo said it might not be necessary *“to “sell”/market mediation through that angle when it comes to “selling” it/“marketing it” to CEOs and GCs or other attorneys”*. She opined, however, that emotional mediation would not be the best marketing strategy when targeting these people. Indeed, in her view, they will not *“easily admit that their emotions are part of the reasons why they*

*could not find an amicable solution or that their emotions have contributed to the dispute". She added, this is typically evidenced by "the say "business is business", which translate into the fact that in business there is no emotion". Ms. Paraguacuto-Mahéo pointed out that even when "this is not true, yet the mediation community needs to be aware of the audience and the market that it is trying to convince". She outlined the importance of adapting language. For instance, one needs to adapt the language when trying to convince a family member to use mediation and the CEO of an oil and gas company to use mediation.*

Further on this point, Ms. Paraguacuto-Mahéo shared her belief that *"commercial mediation would benefit from being associated less with dealing with emotions and more from being associated with reasoned negotiations for example". She suggested this could be "more appealing to C-level people, GCs or even lawyers who would more easily be able to sell mediation internally". That being said, her last thought on this topic was that even when adapting the mediation's communication to the target, this would not ultimately change "the fact that during a mediation session the mediator would of course deal with emotions and other interpersonal barriers".*

While addressing Prof. Strong's latest question regarding fees, Ms. Paraguacuto-Mahéo said this is *"extremely relevant in the development of mediation because it tackles the incentive of an attorney to recommend mediation". In her view, the right incentives are a key aspect of the ADR system, which is still in construction. She noted that right incentives include "having the attorney negotiate some sort of a success fee with his client in mediation". Further, she explained that the current situation is not effective since "the actual system of hourly billings does not encourage attorneys to be efficient nor to add most value relative to the time spent". Ms. Paraguacuto-Mahéo suggested that some sort of a success fee would, on the contrary, be efficient "in that the interest of the client and that of the attorney are better aligned". She agreed that addressing fee structures is always uncomfortable, however she opined that "if success fees were associated with the term mediation, commercial mediation would develop much faster". This would nonetheless raise the question of: what is a success in mediation?*

In the fourth post of the day, **Prof. Strong** agreed with Ms. Paraguacuto-Mahéo that her last question is critical: What is "success" in mediation? She noted that *"a number of individuals (both parties, clients and mediators) think that success only arises when the entire dispute is resolved at the time of the mediation". However, she explained that some studies have shown that "even if the parties do not resolve the matter in part or in its entirety at the mediation, the discussions often have a knock-on effect, with settlement arising later". She recalled this was something mentioned by Mr. Mellwrath earlier in the discussion. Furthermore, she noted that "there are significant cost and time savings to be achieved even if only some of the issues are made subject to a settlement agreement". Finally, she underlined the importance of these nuances, which are usually unknown to those who do not work frequently in the field.*

Further on this topic, Prof. Strong pointed out that *"a settlement that is achieved at "mediation" via strong-arm tactics from the "mediator" can be "unsuccessful" if the parties later suffer from post-settlement regrets". She noted that those terms were used advisedly. She opined that would be particularly true "if the parties were seeking to salvage an on-going relationship and came to an imperfect (for lack of a better term) agreement in an effort to put the matter behind them". Prof. Strong shared her opinion that a good mediation requires "a goodly amount of time (though not as long as a litigation or arbitration) as well as expertise". This last point has been raised earlier in the discussions as well. She also added*

that *“the process is not yet fully appreciated throughout the world”*.

Prof. Strong concluded by inviting Ms. Paraguacuto-Mahéo to reply to her comments but she also encouraged new voices to jump in the discussion. She asked panellists and members of the listserv what were their thoughts on the discussed topics. Particularly, she asked what they consider to be “success” in mediation in their minds and their experience.

She noted in a humoristic way that even if a Friday afternoon/evening may not be the best time to try to foster a discussion, she usually found that *“Saturdays generate a lot of posts from people who are doing a few hours of work but who are a bit more relaxed about things”*. She expressed her enthusiasm about hearing thoughts/questions/comments and recalled that the anonymous posting was always a possibility for those who felt nervous about speaking up.

In the fifth post, **Mr. Matthews** thanked Ms. Paraguacuto-Mahéo by her *“very thoughtful analysis of the primary issues”*. He addressed three of the issues raised from the counsel’s perspective.

Firstly, with respect to fees of counsel and their impact on the acceptance of mediation, in his jurisdiction *“contingent fees are common for attorneys representing claimants and hourly fees at very reduced rates are common for insurance defence counsel”*. He explained that *“the relationships between those fees and counsel’s approach to mediation have evolved”*.

Anecdotally, he pointed out that at first, the plaintiffs’ bar was *“almost uniformly against mandatory mediation”*. Over time lawyers realized that *“many of their cases could be resolved earlier, before they incurred a lot of time and costs, for reasonable value”*. Today there is no doubt *“the plaintiffs’ bar has embraced mediation”*. Mr. Matthews referred at this point to the old saying that *“verdicts feed egos but settlements feed families”*.

Secondly, with respect to the insurance defence bar, Mr. Matthews opined that *“mandatory mediation has pressed them hard as insurance companies and other repeat defendants have incorporated the timing of mediation sessions into their settlement strategies”*. He further noted that some *“previously “successful” insurance defence firms saw their revenues fall”* and explained that this was because their *“insurance company clients became more and more sophisticated in the strategic use and timing of mediators”*.

Thirdly, Mr. Matthews shared his view on what “success” of mediation means. For him “success” depends also on (i) the number of parties, and (ii) the number of “payors” (i.e., insurance and bonding companies and the number of claims). He gave the example of mediation process in high stakes multi-million or billion dollar disputes with many parties:

- *“The mediation process begins shortly after the suit is filed and the first case management conference takes place.*
- *Many mediators remain involved from shortly after the first defendant is served with the complaint until the judge or jury has the case under consideration.*
- *Many mediation efforts result in settlements with some but not all the parties.*
- *Then, there are additional mediation opportunities while the case is on appeal”*.

In response to Mr. Matthews’ post, **Prof. Strong** said that he raised *“a point that is not often discussed - the use of mediation (and negotiation) during the post-verdict/award period”*.

She explained that, in reality, the post-litigation phase (whether in arbitration or litigation) translates into parties engaging in continued discussions. Although we tend to think about these proceedings as “final”, subject only to an appeal (in litigation) or enforcement proceeding (in arbitration), parties usually pursue their relationship during the post-verdict period. In this regard, Prof. Strong suggested that *“post-verdict/award negotiations/mediations would be an excellent field to study, since there is relatively little material out there”* and added that empirical studies on this topic would be especially beneficial.

In the seventh post, **Mr. Matthews**, shared that *“the U.S. Circuit Court for the 11<sup>th</sup> Circuit had an appellate mediator for many years”*. He wasn’t sure but the statistics related to that position were probably accessible.

In **Prof. Strong**’s response to Mr. Matthews post she advised those interested in data on the 11th Circuit (or other US federal circuit courts) appellate mediator to consult the publications from the Federal Judicial Center<sup>15</sup>, *“which is the research and education arm of the US federal judiciary”*. She also invited them to contact the centre directly since she noted *“staff there might also be willing to field some calls from those undertaking reputable scholarly research”*.

In the ninth post, a YO listserv member, expressed his passion to talk about mediation holistically, despite his limited knowledge of and experience in (commercial) ADR. However, he noted that he has acted for a couple of years as a ‘neighbourhood mediator’, which allowed him to deal with mostly noise complaints.

This YO listserv member agreed with the previous speakers that “success” in mediation is *“very hard to define”*. He opined this difficulty extends to the definition of mediation as such. He shared the view indeed that *“since the parties are central in the process, every mediation will be different, requiring a certain fluidity of said process. Exactly this fluidity makes it hard for (national) legislation to ‘tie-down’ mediation in a one-size-fits-all definition. This also causes success to be different in each mediation – success will be what the parties perceive as such”*. He suggested Ms. Salehijam could elaborate on the difficulty of *“one-size-fits-all definition”* with regards to EU legislation.

These assumptions lead the YO listserv member to the *“whole different problem of party expectations and how to prepare parties before mediation, specially when mediation is underused and/or unknown”*.

Lastly, regarding the fee structures, he confessed this was something he had never really thought of. He outlined the importance of success in the eye of the beholder, and thus suggested a strategy based on a *“pay what you want”* principle. In this YO listserv member’s view, this would have a series of advantages:

- This would *“create an incentive for the mediator to properly facilitate the process (without strong-arming a single party or prolonging unnecessarily) without jeopardising impartiality”*.
- This could *“also be used in marketing, strengthening mediation as the cheaper alternative”*.

---

<sup>15</sup> See Federal Judicial Center website, <https://www.fjc.gov/>

- This “also fits with the voluntary nature of mediation”.

On another note, he suggested that, “*abuse of this strategy could possibly be prevented a little by imposing a bare minimum*”. That said, he admitted this could be a “*utopian idea*” but would be happy to hear the panellists’ thoughts.

**Prof. Strong** replied that this “pay what you want” approach was an interesting idea. However, she doubted this would work in commercial mediation “*since competent and experienced mediators will want to be paid appropriately for their time and expertise, particularly if the parties are multimillion-dollar entities*”. She outlined the existence of a tradition of pro bono mediation in some countries/arbitral institutions. These are, however, usually limited to parties that have difficulty in paying the process. Moreover, Prof. Strong wondered “*whether mediation would get the respect it deserves from the parties and from the legal community if it was on a voluntary basis*”. In her view, mediation would continue to be marginalized in that situation. As a final remark Prof. Strong noted it is important to carry on looking for new alternatives.

Additionally, Prof. Strong wondered whether “*arbitral institutions/mediators could offer discounted rates if the parties have never mediated before - a kind of taster*”. She asked if anybody had any other ideas on fee structures and invited participants to pursue the discussions in parallel to the fourth panel.

In the last post of the day, **Prof. Strong**, introduced the fourth and final speaker, Catharine Titi.

#### **Speaker 4: Catharine Titi – French National Centre for Scientific Research, University Paris II Panthéon-Assas**

**Catharine Titi**’s contribution titled “*What's next with the Singapore Convention? Implementation and beyond*” was developed in two successive posts. In the first post, she presented the key features of the Singapore Convention. In the second post, she turned to its implementation and prospective impact.

In her opening post, **Prof. Titi** thanked the organizers and Prof. Strong. She did not necessarily have in mind to discuss implementation at the national level, but she said she would try to advance some relevant thoughts all the same.

Firstly, Prof. Titi shared a brief overview of the Singapore Convention life-cycle:

*“On 20 December 2018, the United Nations Commission on International Trade Law (UNCITRAL) adopted a convention on the enforcement of mediated settlement agreements, bringing to a close a three-year-long work cycle of UNCITRAL's Working Group II. The United Nations Convention on International Settlement Agreements Resulting from Mediation, commonly known as the Singapore Convention, will open for signature on 7 August 2019 in Singapore and thereafter at UN Headquarters in New York. It will enter into force six months after the third instrument of ratification, acceptance, approval, or accession has been deposited”.*

Secondly, Prof. Titi shared the view that “*to all intents and purposes, the Singapore Convention has the potential to be to mediated settlement agreements what the New York*

*Convention is to arbitral awards*". She noted that, contrary to international arbitration, international mediation did not have until now "a binding instrument to ensure recognition and enforcement of agreements. The Singapore Convention aims to fill this gap".

In this regard, she explained that "to appreciate the potential impact of the Singapore Convention, it is essential to consider its scope". She developed further on the Convention's scope as follows:

*"Pursuant to Article 1 of the Convention, it applies to an international 'agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement')'. The Convention does not apply to settlement agreements concluded to resolve consumer disputes or disputes relating to family, inheritance or employment law. Equally, the Convention does not apply to settlement agreements approved by a court or concluded in the course of court proceedings and which are enforceable as a judgment in the state of that court, and settlement agreements that have been incorporated in an arbitral award and that are consequently enforceable as such.*

*The Singapore Convention is silent on investment disputes. However, it appears that such disputes should be covered by the convention. Like the UNCITRAL Model Law on International Commercial Arbitration, the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation requires that the term "commercial" be interpreted in a broad manner, "so as to cover matters arising from all relationships of a commercial nature, whether contractual or not", including "investment". Investment does not figure as one of the exceptions in the Convention's coverage mentioned above. It seems then — and a brief overview of the travaux préparatoires did not point to a different conclusion — that the Singapore Convention must cover investment disputes. This is an important aspect that can maximise the impact of the Convention and which does not appear to have been discussed thus far".*

Thirdly, Prof. Titi observed that another noticeable element was that "the Singapore Convention abandoned the term "conciliation" in favour of the term "mediation". She quoted the UN General Assembly<sup>16</sup>, which explained this was "in an effort to adapt to the actual and practical use of the terms without any substantive or conceptual implications".

Fourthly, another relevant aspect of the Singapore Convention she tackled was the enforcement of settlement agreements:

*"The Singapore Convention allows leeway to states to enforce mediated settlement agreements. A state shall enforce settlement agreements 'in accordance with its rules of procedure and under the conditions laid down in [the] Convention'. A state may "refuse to grant relief" under circumstances broadly redolent of those in Article V of the New York Convention, including situations where granting relief would be contrary to the state's public policy and when the subject-matter of the dispute is not capable of mediation under the state's domestic law".*

---

<sup>16</sup> For rationale for change from the term "conciliation" to the term "mediation" throughout the draft instrument see A/CN.9/934, para. 16 and A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120. (Source: United Nations website).

Fifthly, Prof. Titi highlighted another relevant aspect of the Singapore Convention: the fact that *“it make[s] provision for regional economic integration organisations (REIOs) to sign, ratify, accept, approve or accede to it”*. She found this significant since *“it means that REIOs, such as the European Union (EU), could become signatories to the Singapore Convention”*. In this respect she noted that *“the European Union participated in the negotiations in Working Group II and that investment agreements concluded by the EU, such as CETA, include extensive provisions on mediation”*.

Later in the day, **Prof. Titi**, followed up with her second post and developed on the next steps and implications of the Singapore Convention.

She first noted that *“the Convention will ‘easily’ enter into force”* since the threshold of three signatories (either states or REIOs) should be sufficient for this. However, she opined that (unlike the recent UNCITRAL Transparency Convention<sup>17</sup> – whose success as of the moment of writing was uncertain –) the Singapore Convention would likely attract broad membership quickly. She pointed out that the Convention came at a time when interest in mediation kept growing.<sup>18</sup> In this regard, Prof. Titi referred to the international investment law field where she used as an example the following developments:

*“In 2012, the International Bar Association (IBA) adopted the IBA Investor-State Mediation Rules; in July 2016, the Energy Charter Conference adopted a Guide on Investment Mediation; and a number of new investment treaties, such as CETA mentioned previously, contain detailed provisions on mediation and include a code of conduct for mediators. The Singapore Convention blends easily into this new landscape of increased interest in mediation”*.

In her opinion *“acceptance of the Convention need not be controversial”*, for two main reasons:

1. *“because mediation is a voluntary process and the Singapore Convention deals with recognition and enforcement of mediation agreements voluntarily reached, but also*
2. *because the Convention allows states to lodge certain reservations, such as that a party to the Convention shall not apply it to settlement agreements to which itself is a party”*.

Indeed, she highlighted that *“the Convention offers sufficient flexibility to allow for broad endorsement”*.

On another note, Prof. Titi expressed her optimism that *“the Convention is further likely to encourage mediation, since it corrects one of mediation’s weaknesses: the absence of a binding enforcement mechanism”*. Regarding mandatory mediation, she noted that mediation should remain a voluntary process. She further shared the view that for her *“it appears (...) a contradiction in terms to ask for compulsory mediation, since mediation relies de facto on the willingness of the parties to engage in the process and come to an agreement”*. However, she

---

<sup>17</sup> <https://uncitral.un.org/en/texts/arbitration/conventions/transparency>

<sup>18</sup> To consult the current state of the Singapore Convention see official website. As of 8 May 2020 a total of 52 States have signed and 3 have already ratified the instrument.

pointed out *“that once a mediation agreement has been reached, the parties will be able to rely on it, i.e. enforce it”*.

In her conclusion, Prof. Titi was rather optimistic about the Singapore Convention’s success. While the first couple of years would be crucial to understanding its full potential she opined that, a preliminary remark at that stage, the Convention appeared *“rather promising”*. She invited then participants to share their comments.

In the third post of the day, **Prof. Strong** thanked Prof. Titi for her interesting contribution. She wondered about Prof. Titi’s line *“that it was about time that mediation had an instrument similar to the New York Convention”*. She asked whether that meant she believed;

- a) *“the Singapore Convention will be frequently used to enforce settlement agreements, or*
- b) *that the presence of a mechanism to enforce settlement agreements will either (1) deter non-compliance with settlement agreements, since an easy mechanism to enforce will now exist or (2) increase the incidence of mediation, since an easy mechanism to enforce will now exist”*. In this regard, Prof. Strong added that *“the Singapore Convention could have a variety of different effects”*, which makes it difficult to predict.

Further, Prof. Strong referred to Prof. Titi’s point about the possibility a REIO has to adhere to the Singapore Convention. She wondered whether the EU would sign at the signing ceremony or shortly thereafter and asked Prof. Titi about her thoughts on this.

In the fourth post, **Prof. Titi** addressed all Prof. Strong’s questions.

Regarding the first point raised by Prof. Strong, she completely agreed that the Convention *“could have several different effects”*. She noted, however, that *“the ones are not incompatible with the others”*. She opined that the scenarios that Prof. Strong mentioned *“are cumulatively likely”*:

- *“the Convention will be used to enforce settlement agreements,*
- *it will deter non-compliance with settlement agreements, and*
- *especially, it will increase recourse to mediation”*.

Regarding the EU’s signature, she expressed some doubts. She explained that the EU had indeed participated actively in the WK meetings and consultations. The DG Justice was in charge of this issue within the European Commission and Norel Rosner, Legislative Officer, had acted as the EU negotiator of the Convention. She confessed she did not know what that meant for the EU signing the Convention. She shared her understanding that *“sometime ago, the EU was not necessarily pushing for the Convention”* but added that the delay was likely due to internal competence questions and the situation might have changed.

On another note, she developed on the articulation of different instruments regarding the enforcement stage within the EU:

*“First, within the EU, the enforcement of cross-border mediation agreements is addressed in the Brussels I (recast) Regulation (this is Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and*

*the recognition and enforcement of judgments in civil and commercial matters (recast)) and in European Enforcement Order regulations. The Singapore Convention would bring about changes, but it would allow the enforcement of 'extra-EU' (for lack of a better term) settlement agreements”.*

Further on this matter, Prof. Titi opined that *“it is clear that the EU is in favour of mediation and it is also competent to sign the Convention”*. She listed several examples, such as CETA and other recent investment agreements she had previously referred to, that include detailed provisions on mediation, and the most recent example: *“Today’s agreement in principle of the EU-MERCOSUR Trade Agreement explains that ‘the Parties have agreed to establish a detailed mediation procedure’ and dedicates a short paragraph to the topic”*.<sup>19</sup>

In her concluding remark, Prof. Titi noted that while the EU’s interest in mediation might appear as incidental, she would expect that the EU would eventually sign the Convention.

The fifth post came from, **Christian Campbell**, director of the Center for International Legal Studies. He thanked Prof. Titi for sharing her insight into the Singapore Convention, some of the motivations behind it and its prospects. He referred to her point about the fact that the Convention will “easily” enter into force. While adhering to this assumption, he asked Prof. Titi whether she thought *“it will be easily (or better ‘widely’) applicable, given for instance the qualifications and carve outs in the Convention text and the prospect of a potpourri of reservations”*.

**Prof. Titi** replied to Mr. Campbell that this was indeed tricky to answer. Firstly, she noted that *“certainly, flexibility comes with a price”*. Then, she explained that *“the Singapore Convention provides for (...) “a potpourri of reservations” and allows for the establishment of a partially ‘fragmented’ regime”*. She noted that an example of this fragmented regime is provided in Article 13:

*“a party to the Convention with two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in the Convention, may declare that the Convention is to extend to all or some of its territorial units. It can further amend this declaration at any time”*.

She highlighted that the main concern was that *“the above provisions could lead to considerable variability in obligations states undertake and might undermine (to some extent) legal certainty”*.

Furthermore, she invited reflection on *“the enforcement of mediated agreements where one of the parties is a state”*. She observed that in such cases *“one would have to double-check that the state party to the dispute has not lodged a reservation excluding application of the Convention in such a case”*. She further noted that *“all this information will in principle be publicly available and easily accessible”*. As a final point, she added that what would concern her most would be *“parties being ‘encouraged’ to lodge reservations and not subscribe to entirely Convention”*.

That said, she embraced the benefits of flexibility, which she noted *“is there to encourage broad membership, by allowing the more hesitant prospective members to adhere, e.g. by*

---

<sup>19</sup> [http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157964.pdf](http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf)

lodging a reservation, instead of not adopting the Convention at all". Therefore, her conclusion was that *"flexibility is a double-edged sword"*.

In the seventh post, **Prof. Strong** thanked for the discussion of potential restrictions on the Singapore Convention. The one thing she wanted to note, particularly *"for those who are not well-versed in international law"*, was that *"reservations and declarations are common in international treaties (including, among other private international law instruments, the New York Convention)"*. Therefore, Prof. Strong explained that, *"the mere existence of such provisions does not necessary lead to a highly fragmented international regime"*. However, she agreed with Mr. Campbell's observation that practitioners will need to be diligent when seeking to apply the document and verify for applicable declarations and reservations.

She described the Singapore Convention as *"somewhat unusual"* instrument, because in its Article 8(1)(b),<sup>20</sup> it allows states to give the parties the opportunity to opt in or opt out of the Convention. She admitted this was problematic from the perspective of the "nudge" theory<sup>21</sup>, *"since it applies an uneven and confusing default"*. She referred to an article by Timothy Schnabel<sup>22</sup> for those interested in reading further about why this approach was adopted. She noted that Mr. Schnabel was the (now-former) attorney from the US State Department and had been largely responsible for shepherding the convention through UNCITRAL.

**Prof. Titi** thanked Prof. Strong for bringing up Article 8(1)(b), which had not been mentioned before in the discussion. She also drew attention to Hal Abramson's chapter<sup>23</sup> on the Singapore Convention in which the author *"discusses the "compromise", including the opt-in opt-out issue"*. Prof. Titi then shared a concluding remark about a related aspect that she found interesting; she explained that *"although Article 8 does not allow private parties to opt out of the Singapore Convention (private parties are not Parties to the Convention, therefore this is in perfect order) in reality they can do so"*. In other words, private parties have the option of including a statement in the settlement agreement that the Convention shall not apply to their mediated settlement even when the state may have opted-in in the Convention. Then according to Article 5(1)(d) of the Convention, enforcement *"may be refused"* as *"contrary to the terms of the settlement agreement"*. However, Prof. Titi doubted this is going to happen too often.

**Prof. Strong** concluded the symposium by inviting all those interested in following up with some late-breaking thoughts to raise them on or offline. In any event, she asked all participants to join her in thanking the speakers for their time and insights.

In a very last post, **Prof. Titi** reiterated her gratitude to Prof. Strong.

\* \* \* \* \*

---

<sup>20</sup> [https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf)

<sup>21</sup> From Sunstein and Thaler, op.cit.

<sup>22</sup> Schnabel T. "The Singapore Convention on Mediation: A Framework for the Cross-Border Enforcement of Mediated Settlements", *19 Pepp. Disp. Resol. L.J.* 1 (2019). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239527&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527&download=yes)

<sup>23</sup> Abramson H. "New Singapore Convention on Cross-Border Mediated Settlements: Key Choices", Chapter 19 in Catharine Titi & Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes*, OUP, 2019. From the same publication see Chapter 3: Strong. S "Applying the Lessons of International Commercial Arbitration to International Commercial Mediation. A Dispute System Design Analysis".

**Transnational Dispute Management** is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration.

This article was made available as a free download from [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com).

Young professionals and students with an interest in transnational disputes, international investment law developments and related issues, are hereby invited to join the Young-OGEMID discussion group. Membership is free.

Simply visit [www.transnational-dispute-management.com/young-ogemid/](http://www.transnational-dispute-management.com/young-ogemid/) and fill in the registration form. Other summaries of our Young-OGEMID virtual seminars focussing on career development can also be found there.