



THE SINGAPORE CONVENTION ON MEDIATION:
WHAT EVERYONE SHOULD KNOW ABOUT IT.

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Abstract

The Singapore Convention on Mediation is a new multilateral treaty aiming to provide a worldwide uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international commercial disputes which countries will be able to be part of it. This paper will analyze and explain the text of the Convention in a language accessible to non-lawyers as well as will compare the treatment given to the enforcement and recognition of mediated settlement agreements resolving international commercial conflicts by the Convention, by Spanish law and by Brazilian law. The results will show that currently the treatment given to the subject matter vary from country to country and the Convention. This result highlights the importance that each country reviews the terms of the proposed Convention analyzing the impacts of becoming a part of it and, if the decision is to become a part of the Convention, the approach that will be given to certain subjects when internalizing the Convention in its legal system.

Key words: mediation, Singapore Convention, alternate dispute resolution – ADR, enforcement, mediated settlement agreement, international commercial disputes.

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I. INTRODUCTION

The Singapore Convention on Mediation, formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Convention”), is a new multilateral treaty developed by the United Nations Commission on International Trade Law (UNCITRAL) which aim to provide a uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international commercial disputes (Schnabel, 2018). The Convention was approved and adopted by the General Assembly of the United Nations by means of Resolution 73/198 on December 20, 2018. The ceremony for the opening for signature of the Convention (when countries will be able to join the Convention) will be held in Singapore on August 7, 2019. As of this date, countries and regional economic integration organizations will be able to become a party to the Convention.

This paper will briefly contextualize the momentum in which the Convention was created, the reasons why it is believed the Convention is necessary and describe and analyze the content of the new Singapore Convention on Mediation. After that I will proceed to a comparison of the provisions of the Convention and the currently in force Spanish and Brazilian law on judicial recognition and enforcement of international mediated settlement agreements. Before starting the comparison, I will explain the methodology utilized to compare and the choice made to do a questions and answers items to show the results of such comparison. I will then proceed to the comparison itself, including comments in specific items, and finally conclude with some considerations.

Before moving forward, I would like to stress out that, although the Convention is a legal text and I will be doing an analysis of the content of such legal text and then proceed to a comparative analysis of Spanish and Brazilian law, I decided to give a practical approach to such analysis in order to non-lawyers be able to understand it easily. Having in mind that many participants of the mediation process, including some mediators, are not lawyers and this subject matter deals with a very important part of the mediation process – the settlement agreement and its judicial recognition and enforcement – I decided to write for non-lawyers in an attempt to reach as many as possible stakeholders involved in the mediation process. Having said that, I will try to avoid using complicated legal concepts and when necessary will explain it in an easy way and will try to be as didactic

as possible. Finally, this does not mean that this work is not done with a lot of research and study, but it means that I will try to go to the essence of the subject matter and what practical effects the Convention may produce.

The Convention will be soon open for signature, in August 2019, by any country which wish to adhere to it. Before signing the Convention and implementing it domestically, countries that have not yet done so, will need to analyze the Convention and its legal consequences, specifically considering the current legal treatment (if any) given to the enforcement and recognition of mediated settlement agreements. It is an important exercise to verify if the Convention has similar terms or different terms from countries current domestic law and how these terms will cope together or how to merge the treatment given by the Convention and domestic law. In this sense, I believe this paper can help the public in general to get to know the Convention as well as understand its practical consequences and provide a suggestion guide to compare what is proposed by the Convention and domestic laws. In the case of this paper, we will be comparing the Convention with the currently in force in Spanish and Brazilian law.

The success of the Convention will depend on whether a critical mass of countries choose to join and transplant the Convention in its domestic legal systems, which in turn will depend on whether lawyers, mediators and other stakeholders make clear that the potential benefits of the Convention make the pursuit of ratification worthwhile (Schnabel, 2018). Therefore, I hope this paper can give stakeholders not familiar with the Convention information on the subject matter and suggested guidance on how to analyze the practical consequences of the potential adoption of the Convention and consequently help on the decision of being in favor or against the proposed Convention.

II. THE SINGAPORE CONVENTION ON MEDIATION

The Convention was prepared by the Working Group II of UNCITRAL. UNCITRAL is the core legal body of the United Nations system in the field of international trade law and it was established by the General Assembly of the U.N. in 1966 by means of Resolution 2205(XXI) of December 17, 1966. UNCITRAL was created considering that international trade co-operation among States is an important factor in the promotion of

friendly relationships and, consequently, in the maintenance of peace and security. UNCITRAL pursues the betterment of conditions favoring the extensive development of international trade with the conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the extensive development of international trade. Its main goal is the promotion of the progressive harmonization and unification of the law of international trade and it pursues its mandate by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law (United Nations, General Assembly resolution 2205 (XXI)).

As the name says, the Singapore Convention on Mediation is a convention and therefore a legislative text that may be adopted by countries through the enactment of domestic legislation or as a self-executing document (depending on the case). In other words, this Convention may become law to the countries that decides to ratify it. As we will further explain in more detail, at this point it is important to have in mind that the Convention is only applicable to mediated settlement agreements that are international and that resolve a commercial dispute. The definition given by the Convention to the terms “international” and “commercial” will be soon explained in this paper.

2.1. Why to have an international convention on the enforcement of mediated settlement agreements on international commercial disputes?

Uncertainties over the effect of mediated settlement agreements could create an impediment to promoting mediation in resolving civil and commercial disputes at domestic, regional and international levels (Koo, 2017). As mediation is more widely used as an alternative dispute resolution method in all kinds of fields, experience in the domestic sphere suggests that voluntary compliance with settlement agreements is declining, thereby increasing the need for a legal enforcement mechanism (Strong, 2016).

Nowadays, the lack of a standard mechanism among countries for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation (Schnabel, 2018). Companies are very pragmatic and driven by cost efficiency and therefore will not make an investment (money and time) in

mediation if the result of the process is a document with an enforceability equal to a regular civil private agreement.

Unlike a judicial decision or an arbitral award, in many countries mediation does not result in a binding outcome and a mediated settlement agreement may have the same legal effect of a regular private contract. A significant amount of time and energy might be needed in order to reach an agreement, and if the other party fails to perform, the party seeking compliance would essentially have to start over in litigation or arbitration.

Except for the case of the European Union that pioneered harmonization of mediation regulation in its Member States through the Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (the “Directive”) and through the uniformization of Recognition and Enforcement of Mediated Settlement Agreements certificated by a public notary (Regulation 1215/2012), enforceability of settlement agreements resulting from international mediation remains a matter of domestic law (Koo, 2017). In many cases, the judicial enforcement of an international mediated settlement agreement may lead to a tremendously cumbersome, expensive and time-consuming procedure to enforce the settlement agreement (Reed, 2019). The procedure would be the same as the enforcement of a regular civil contract which mainly consist in suing the party in breach in a domestic court on the settlement agreement, as a breach of contract claim, and then enforce the resulting judgment (if any). The uncertainty of this enforcement process for international mediated settlement agreements may well lead people to opt for an arbitration which its arbitral awards are under the scope of the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)” (the “New York Convention on Arbitration”).

2.1.1. The New York Convention on Arbitration

The New York Convention on Arbitration is a convention also prepared by UNCIRAL opened for signature on June 10, 1958 and entered into force in June 7, 1959. It currently (May 2019) has 159 countries as parties and it is universally considered the most successful commercial treaty in the world (Strong, 2016). The New York Convention on Arbitration was created by the recognition of the growing importance of international arbitration as a means of settling international commercial disputes. It seeks to provide

common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of non-domestic arbitral awards in the same way as domestic awards. An ancillary aim of the New York Convention on Arbitration is to require courts of the countries to give full effect to arbitration agreements by requiring such courts to deny the parties access to judicial court in contravention of their agreement to refer the matter to an arbitral tribunal.

For decades, arbitration has been the primary means of resolving cross-border business and investment disputes. The popularity of arbitration in the international context is undeniable: up to 90% of all international commercial contracts include an arbitration provision, with similar mechanisms in place in approximately 93% of the 3,000–5,000 interstate investment treaties (including bilateral investment treaties (BITs)) now in effect (Strong, 2016). Curiously, the popularity and success of arbitration in the international context is relatively recent. Before World War II, most international commercial disputes were resolved through consensual procedures such as mediation rather than through arbitration. It is unclear why international commercial mediation fell into disuse in the post-War period, although some scholars have hypothesized that the absence of a mechanism facilitating international enforcement of mediation and settlement agreements similar to that involving arbitration under the New York Convention on Arbitration is to blame (Strong, 2016).

2.1.2. World context

The United Nations General Assembly has stated that, by means of its Resolution 57/18 of January 24, 2003, the use of mediation “results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States”. In addition to that, we should have in mind that enforcement of settlement agreements is often cited as one crucial aspect that would make mediation a more efficient tool for resolving disputes (U.N. Document A/CN.9/WG.II/WP.187, November 27, 2014).

U.N. Document A/CN.9/WG.II/WP.187 of November 27, 2014 which describes UNCITRAL’s past work in international mediation, posed questions to be addressed in

the future and described the results of a 2012 survey about the prevalence of mediation and arbitration in disputes stemming from international investments. According to such document, the use of mediation for settling commercial disputes has increased considerably since the adoption of the UNCITRAL Conciliation Rules in 1980. Legislation on mediation has been enacted in a growing number of jurisdictions; conciliation and mediation institutes have proliferated, as well as specific training for conciliators or mediators. However, the use of mediation varies greatly depending on jurisdictions. For instance, in the European Union (“EU”), a recent study showed that one country has a reported number of mediation cases exceeding 200,000 annually, while a significant number of EU Member States reported less than 500 mediation cases per year. The study also suggests that if enforcement of settlement agreements were uniform, mediation would become more attractive, in particular, in the international business sector. Uniformity would also limit the likelihood of forum shopping among parties (U.N. Document A/CN.9/WG.II/WP.187, November 27, 2014).

Currently, when existent, domestic legislation addressing the enforcement of mediated settlement agreements may vary in several ways. Some States have no special provisions on the enforceability of such settlements, with the result that general contract law applies, meaning that a mediated settlement agreement has the same enforcement procedure as a regular civil contract among parties. In other jurisdictions, mediated settlement agreements may be enforced as court judgements. Such status sometimes depends on whether or not the mediation took place within the court system as a legal proceeding and in other cases the situation may differ depending on whether the settlement agreement is reached through mediation by a qualified arbitrator (in which case the mediated settlement agreement may have the same effect as an arbitral award). In other jurisdictions, after having reached an agreement in the course of the mediation proceeding, the parties could at the same time establish an ad hoc arbitration and appoint the mediator as a sole arbitrator, which practice is known as “med-arb” procedure. In that case the parties are able to transform their settlement agreement into an arbitral award for enforcement purposes (and including having the benefits of the New York Convention on Arbitration). On the other hand, that practice is prohibited in certain jurisdictions. In many jurisdictions, in order for a settlement agreement to have an expedite enforcement procedure, it is necessary to go the notary public to notarize the agreement. In other countries in order to have a differential treatment to mediated settlement agreements it is

either necessary to deposit or to register the agreement at the court (U.N. Document A/CN.9/WG.II/WP.187, November 27, 2014).

Over the last few decades, international commercial arbitration has been the preferred means of resolving cross-border business disputes. This preference is due to a variety of reasons but specifically because international arbitration provides parties with an easy, predictable, and relatively inexpensive means of enforcing arbitral awards across borders through various international treaties such as the New York Convention on Arbitration (Strong, 2016). However, as a result of international arbitration's increasing legalism and the resulting rise in cost and time of the procedure, many international actors are considering other means of resolving cross-border business disputes, specifically mediation. Mediation replicates many of the benefits of arbitration (such as confidentiality, use of an impartial and independent third-party neutral who is not prone to the parochialism exhibited by many national courts) and it is said to be faster and less expensive than arbitration (Strong, 2016).

Furthermore, UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation to resolve cross-border disputes. It was said that many companies find it hard to convince their business partners in some jurisdictions to engage in mediation based on the views that it lacks a stamp of international legitimacy like the New York Convention has given to arbitration (Schnabel, 2018).

Although arbitration still remains the preferred alternate dispute resolution method in international commercial disputes, the last few years have seen a variety of public and private initiatives meant to encourage mediation in international commercial disputes and the most ambitious of these initiatives is the new multilateral treaty developed by UNCITRAL to create a simple and inexpensive mechanism for enforcing settlement agreements arising out of international commercial mediation in a manner similar to that used for arbitral awards under the New York Convention on Arbitration (Strong, 2016) - the Singapore Convention on Mediation.

2.1.3. Uniqueness of a mediated settlement agreement. Should mediated settlement agreements have a different legal treatment than normal civil contracts?

By nature, mediated settlement agreements on civil matters are private contracts and, as such, in many jurisdictions they are treated as private contracts. Private contracts are those contracts we generally enter into in our daily life with other private parties such as when we hire someone to do a specific work or when we buy something. However, we should note that mediated settlement agreements are different from ordinary contracts of our daily life in three ways: (i) they originate from a dispute and typically the settlement agreement represents full and final settlement of the dispute that was the subject matter of mediation; (ii) the process of mediation is structured and governed by procedural rules and the presence of a mediator is not only essential for facilitating, negotiating and drafting settlement terms, but also for preventing abuse and possible irregularities in the process; and (iii) the non-compliance of a mediated settlement agreement constitute a breach of contract (Koo, 2017).

Considering that mediated settlement agreements are not regular private contracts, it is reasonable to say that it should have a differentiated legal treatment and particularly a specific enforcement mechanism. Recently, there have been growing enthusiasm in mediation in various parts of the globe, specially to supplement court adjudication as part of the civil justice reform or dispute system design in government bureau. Several private and public entities have also been supporting the increased use of mediation, which could yield benefits such as maintaining commercial relationships, administering international transactions by commercial parties and producing savings in the administration of justice by countries (UNCITRAL, 2002). Bringing more certainty to the enforcement procedure of mediated settlement agreements would make mediation a more efficient means for resolving civil and commercial disputes and also encourage disputants to use mediation and consider investing resources in the process (Koo, 2017).

Moreover, according to the U.N document A/CN.9/506 of December 21, 2001 – in which it is discussed a draft model for legislative provisions on international commercial mediation and which then became the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 – it was agreed that every effort should be made to establish a more

effective enforcement regime through which a mediated settlement agreement would be accorded a higher degree of enforceability than any unspecified contract.

2.1.4. Creation of the Convention

In this context, in the year of 2014, the United States of America proposed work on a mediation convention on the 47th Commission Session of UNCITRAL, which after brief discussion, UNCITRAL delegated consideration of the topic to Working Group II, assigning it to discuss the matter at its February 2015 session (UNCITRAL document A/CN.9/822). As works evolved, the text of the Convention was finalized by UNCITRAL on June 25, 2018, and after adoption by the U.N. General Assembly, it will be open for signature in August 2019 (Schnabel, 2018).

2.2. The Convention Text and Content: Description

I will now proceed to the analysis of the text of the convention (annexed herein). As mentioned, I will do it in a very straight forward way in order to be didactic and understandable to everyone. Please note that when I use the term “relief”, which is the term used in the Convention, it may mean either, or both, “recognition” or “enforcement”. Recognition is when a party is seeking that a legal court recognizes the document as a mediated settlement agreement and enforcement is the situation where a party is asking for a court to use its powers to obligate the other party to comply with what was agreed in the mediated settlement agreement.

2.2.1. Scope of the Convention (Article 1 of the Convention): in order for a settlement agreement to be included in the scope of the Convention it must be mediated, international, in writing, and commercial, and must not be the subject of a specific exclusion.

Mediated: Mediation is defined as any process in which “*parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons... lacking the authority to impose a solution upon the parties to the dispute*” (Article 2(3) of the Convention). The definition is very broad since (i) the name given to the process is not important; (ii) it is not necessary that the settlement agreement is reached as a

consequence of a “structured, organized” process. The basis on which mediation begins is not relevant (it can be based on agreement between the parties before or after the dispute, a legal obligation, a direction of a court, etc.) and the involvement of an administering institution is also irrelevant (Schnabel, 2018). Finally, it is important to note that the mediator is defined as a third person lacking authority to impose a solution to the parties and nothing else. It was not included a requirement that the mediator must meet certain qualifications.

International: The scope of the Convention is restricted to settlements that are in some sense international (Article 1(1) of the Convention). This decision was made in order to make it easier for countries to join the Convention without requiring significant changes to their existing law addressing purely domestic settlements (Schnabel, 2018). The Convention is clear that the international element must be met at the conclusion of the settlement (regardless whether the criteria would have been met earlier during the mediation or at the time relief is requested). In most cases, the requirement will be met by the parties having their places of business in different states. If both parties have their places of business in one state, the mediated settlement can still qualify as international if that state is different from either the state where the obligations of the mediated agreement are to be performed or the state with which the subject matter of the settlement is most closely connected (Schnabel, 2018). The definition is broad and flexible in the sense of including any settlement that has more than one state “involved”. Finally, important to note that, unlike the New York Convention on Arbitration, the Singapore Convention does not attempt to incorporate the concept of a seat of the mediation. Intentionally, replicating the concept of the place of arbitration and its consequences in terms of applicable law was avoided. In a very summarized and brief explanation, in the case of the seat of arbitration, once you have a place defined, you will have to comply with domestic law requirements of the place, use locally licensed arbitrators, a particular institution etc. Thus, a mediated settlement is essentially made a stateless instrument that is generally not subject to domestic law requirements except insofar as the Convention permits a State to apply some domestic concepts and procedures when relief is requested (contrary to public policy or the subject matter of the dispute is not capable of settlement by mediation under domestic law – Article 5(2) of the Convention) (Schnabel, 2018).

In writing: The mediated settlement must be recorded, but it can be in any form, including electronic formats such as an email or an exchange of emails. The Convention does not require that the settlement agreement be contained in one document and it can also be contained in an exchange of emails for example.

Commercial: The settlement agreement must resolve a commercial dispute in order to fall within the scope of the Convention. There is no definition in the Convention of what is commercial and therefore it should be read in a broad manner having in mind the exclusions mentioned below.

Exclusions: The Convention excludes certain types of disputes and certain types of settlement agreements:

With respect to the types of disputes (Article 1(2) of the Convention), it does not apply to settlements resolving: (a) consumer disputes; (b) family law issues; (c) employment law; and/or (d) inheritance law.

With respect to types of settlement agreements (Article 1(3) of the Convention), the exclusions are: (a) mediated settlements that are enforceable as judgements are excluded. To be excluded in accordance with this provision, a mediated settlement would have to be approved by a court or concluded before the court during proceedings, in a manner that enables the settlement to be enforced as a judgment in the courts of that state (Schnabel, 2018) (Article 3(a) of the Convention); and/or (b) mediated settlements that have been recorded and are enforceable as arbitral awards – noting that this exclusion must be analyzed from the perspective of the state where relief is being sought, rather than from the perspective of the seat of the arbitration (Schnabel, 2018) (Article 3(b) of the Convention).

2.2.2. Obligations the Convention creates to the countries that adhere to it (Article 3 of the Convention): In legal terms we can say that the Convention creates two main obligations to a country which decides to be a part of the Convention. The first obligation is to recognize a document that fulfills the requirements contained in the Convention and it is under its scope. The second obligation is, once the presented

document is considered an international mediated settlement agreement resolving a commercial dispute, to enforce the mediated settlement agreement under the relevant country's rules of procedure for enforcement. This means that a judicial court of a country that is a party to the Convention will have to consider a certain document as a mediated settlement agreement if such document fulfills the conditions established by the Convention and such judicial court will have to enforce the settlement agreement in accordance with the procedural rules of such country.

In addition, Article 3(2) of the Convention determines that *"if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement..."* the courts of a country that adhered to the Convention must allow a party to invoke the settlement agreement and prove that the matter has been already resolved. This is to prevent the situation in which parties have already concluded a mediation and have already signed a settlement agreement on a specific subject matter that was in dispute and then a party wants to relitigate the same subject matter that was previously resolved by mediation. This means that, once parties reach a settlement agreement by mediation, such parties will not be able to discuss the same subject matter in a judicial court for example. The Convention gives mediated settlement agreements the power of *res judicata*, which is the same power a judicial decision has when it gives the final word on the subject matter and prevent parties to discuss the subject matter again in courts.

2.2.3 Requirements (Article 4 of the Convention): A mediated settlement agreement must meet two formality requirements to be covered by the Convention. The settlement agreement must be signed by the parties and it must be evident that resulted from a mediation.

Signed by the parties (Article 4(1)(a)): Important to note that this requirement does not include the obligation to have a signature from the mediator. Also, in accordance with the Convention (Article 4(2)), for electronic documents, a method must be used to identify the parties and to indicate their intentions with respect to the information contained in the electronic documents, such as the email coming from the party's account.

Resulted from mediation (Article 4(1)(b)): In case a party wants to enforce a mediated settlement agreement in a court under the rules of the Convention, it will have to provide

evidence that the agreement resulted from mediation. The Convention lists three types of evidence that are primarily acceptable (but do not exclude others if those three are not available) which are: (i) mediator's signature on the settlement agreement; (ii) a document signed by the mediator indicating that the mediation was carried out; or (iii) an attestation by the institution that administered the mediation. If any one of these three evidences are not available, any evidence acceptable to the court in which enforcement is being requested can be presented to meet this requirement (Article 4(1)(b)(iv)).

2.2.4. Grounds for refusal (Article 5 of the Convention): This article sets an exclusive list of situations on which a court can refuse to recognize or enforce a mediated settlement agreement. What this article does is that, if one of the situations listed therein occurs, the court does not have the obligation to recognize and/or enforce the mediated settlement agreement. In addition to the situations listed therein, if a mediated settlement agreement does not meet the requirements established by the Convention and/or does not fit under the scope of the Convention, then such settlement agreement will also not be under the rules of the Convention.

Article 5(1) lists 6 situations on which a court can refuse recognition and/or enforcement: (a) in case of incapacity of a party to a settlement agreement; (b) if the settlement agreement is (i) invalid (null and void, inoperative or incapable of being performed) – this situation is very legal and therefore I decided not explain in more detail since the scope of this work is to give a general idea of the Convention but it is important to note that in theory (I say in theory because my understanding is that this a controversial issue and I have doubts how domestic courts may interpret the absence of domestic law requirements), this ground for refusal does not encompass arguments that a mediated settlement is not valid because of a failure to comply with domestic law requirements such as any requirements that mediators be licensed in a particular jurisdiction or that mediations must be conducted under certain rules or by certain institutions (Schnabel, 2018) –, (ii) is not binding or is not final, according to its terms or (iii) it has been subsequently modified; (c) if the obligations of the settlement agreement (i) have been performed, or (ii) are not clear or comprehensible – noting that this exception is meant only to protect competent authorities from being forced to act in situations in which they truly do not know what relief to provide (Schnabel, 2018); (d) if granting relief would be contrary to the terms of the settlement agreement (for example in case the parties agreed

that they must return to the mediator before seeking relief in court and this was not made) – including situations where the parties agreed that they do not want the Convention to apply to their settlement agreement; (e) in case of serious breach of standards applicable to (i) the mediator or (ii) the mediation, without which breach that party would not have entered into the settlement agreement (this is the case where the party resisting relief must clearly demonstrate that if the breach had not occurred that party would not have entered into the mediated settlement which means that the party must establish a causal link between the breach and the decision to settle (Schnabel, 2018)); (f) in case the mediator fails “*to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement*” (Article 5(1)(f)) – this is the situation where there was a failure of the mediator to disclose and such failure had a material impact or an undue influence on the party resisting relief.

Article 5(2) of the Convention contains the typical grounds for refusal of public policy or subject matters not capable of settlement by mediation. In this case, one party or the court on its own – without demand by any of the parties – can refuse to provide relief if (a) granting relief would be contrary to the public policy of the country or (b) the subject matter of the dispute is not capable of settlement by mediation under the law of that country. The definition of public policy may vary from country to country and usually is not something defined by law but rather a concept. According to the Black’s Law Dictionary, 7th Edition, public policy “are principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society”. Important to note that, although the public order concept may exist in a lot of jurisdictions, it may vary from country to country and cultural aspects may have an influence on this concept which means that it is a complex concept that we will not analyze further in this paper. With respect to the other situation, of a subject matter not capable of being settled by mediation, this provision applies to situations where a party would not have been legally able to agree to undertake certain obligations or give up certain rights via mediation (such as fundamental rights a person may have and which we will explain in more detail in the Questions and Answers part).

2.2.5. Reservations (Article 8): Article 8 of the Convention permits two things: (i) that the Convention will not be applicable to settlement agreements whereby the country or one of its governmental agencies are a party or (ii) that the Convention will only be applicable to the extent the parties to the settlement agreement have explicitly agreed to the application of the Convention. These two provisions do not apply by default, which means that these two carve-outs to the application of the Convention will only apply if a country explicitly say that one or both of these conditions apply for the Convention in its territory. With respect to the first item, it is important to note that if a country exempts a particular set of its own governmental actors from being subject to the Convention in its courts, other countries would have no obligation to permit those actors to seek relief under the Convention in their courts. Also, important to note that this declaration does not apply to state-owned companies (Schnabel, 2018). With respect to the second item, if a country choses to apply this condition then mediated settlement agreements will only be covered by the Convention if they explicitly say so (this does not mean that there is the need to explicitly mention the Singapore Convention, parties could simply include a choice of law clause that points to the law of a jurisdiction where the Convention applies by default for example (Schnabel, 2018)).

2.2.6. REIOs and Territorial Units (Articles 12 and 13): Article 12 of the Convention permits that the Convention may be signed by a regional economic integration organization (REIOs) such as the European Union, but only in certain situations described in the Convention and that we will not analyze further. Article 13 of the Convention permits a country that has two or more territorial units in which different systems of law apply to declare that the Convention is to extend to all of the territorial units or only to one or more of them.

2.2.7. Effect, Signature and Entry into Force (Articles 9, 11 and 14): The Convention will be opened for signature as of August 7, 2019 in Singapore (Article 11), shall apply only to settlement agreements concluded after the date when the Convention enters into force for the country the Convention is concerned (Article 9) and it will enter into force six months after the third signature of country – meaning that the Convention will only start to be in force six months after the third country has adhered to it. After that, when a country adheres to the Convention the Convention shall enter into force in respect of that country six months after the date of its adhesion.

III. METHODOLOGY FOR COMPARISON

According to Mathias Siems in his book “Comparative Law”:

“First, a comparative analysis starts with preliminary considerations, deciding on the research question and the choice of legal systems. Secondly, the comparatist has to describe the laws of these countries. Thirdly, she has to compare them, in particular exploring the reasons for unexpected similarities and differences. Fourthly, she should critically evaluate her findings, possibly also making policy recommendations.”

In order to choose a research topic many comparative lawyers recommend that a real-life, socio-economic problem should be the starting point. In the words of Ernst Rabel, “we compare the solutions produced by one state for a specific factual situation...” (Siems, 2018). In the case of this paper, the broad research topic chosen is the recognition and enforcement of mediated settlement agreements resolving international commercial disputes. This is a current real-life problem whereby each country has its own particular rules, and which is the object of the Convention that will be the paradigm “law” for our comparison. It is also said by many comparative lawyers that a comparative analysis should not start with a particular topic, but with a functional question. Following this suggestion, the way I structured the comparative analysis in this paper was by making specific questions that addresses each of the relevant topics contained in the Convention.

Then we would move to the choice of legal systems. Although the core interest of traditional comparative law is in the laws of countries, the main purpose of this paper is to analyze the potential impacts the adhesion of a country to the Convention may cause therefore, in addition to select Spain – where I am concluding my master in conflict mediation – and Brazil – where I am a lawyer authorized to practice law by the bar of the State of São Paulo –, we will be also analyzing the proposed solutions given by the Convention to the research topic.

As recommended by the doctrine, the comparison shall concern current laws only and therefore I will analyze the current laws of Spain and Brazil and the current final text of the Convention. A sometimes controversial question is how many legal systems should be included having a clear trade-off between the depth of a focused comparison and the generalizability of a more wide-ranging study. A frequent suggestion is that three may be a good number because two may overemphasize the contrast between these legal systems, whereas with three the comparison may be nicely able to show what determines both similarities and differences (Siems, 2018). As already mentioned in this paper, I opt to compare Spain and Brazil with the Convention as the paradigm. Additionally, traditional comparative lawyers are hesitant to compare legal systems which are too different since this would lead to comparisons between “apples and oranges” (Siems, 2018). Both Spain and Brazil are what we call civil law systems. Important to note that, as explained, the Convention was not created within the legal system of a country but rather by an international organization – UNCITRAL. However, the Convention plays a different role here because it is used as the paradigm for the relevant analyzed topics and the final analysis I give to the Convention is how it would be internalized in the legal systems of Spain and Brazil. Finally, it is good advice to analyze primary resources, such as laws published in the original language. In the case of this paper, since I am fluent in English, Spanish and Portuguese, I was able to analyze the Convention in English, Spanish law in Spanish and Brazilian law in Portuguese.

With respect to the perspective to be adopted for describing a legal system, opinion is divided on whether to adopt the viewpoint of the legal system you are analyzing or to try to take a neutral stance (Siems, 2018). I opted for the first option with the consequence that I tried to present the legal materials in the same manner as a lawyer from the legal system in question. Therefore, in the case of Spain I based my analysis with papers of Spanish lawyers and in the case of Brazil I mostly based my analysis on my own opinions since I am a Brazilian lawyer. In the case of the Convention, I mostly based my analysis on the opinions of Timothy Schnabel who proposed and negotiated the Convention on behalf of the United States.

It is said that legal systems must be studied in their entirety because, across countries, problems may be addressed by different areas of law (Siems, 2018). Since both Spain and Brazil have specific laws governing mediation, most of the topics analyzed are contained in the respective mediation laws but I also considered the whole legal system of each country in my analysis and I point this out in the analysis when necessary.

With respect to the identification and explanation of the differences found on the comparison, it is recommended that, in addition to the description of the laws and the identification of similarities and differences, a distinction between formal (content) and functional (how it works) aspects should be made. When explaining, consideration should be given to the reasons why a topic may be different or similar between legal systems. It is important to note however that in this paper I will not go into this analysis since the final goal of the comparative analysis made here is not the comparison itself but rather the impacts the implementation of the Convention may have in a legal system. Additionally, this paper aims the public in general and not only lawyers so such deep analysis would be out of the scope of the paper.

Finally, I will not make policy evaluations or recommendations, but I will rather propose a simple and direct method to analyze the impacts of implementing the Convention in a legal system and I will point out the main implications I found for Spain and Brazil to implement the Convention.

IV. COMPARISON OF CERTAIN ASPECTS OF THE CONVENTION, SPANISH LAW AND BRAZILIAN LAW: Q&A

I will now proceed to the Questions and Answers part which aims to give a practical and comparative approach to what I believe are the most important subject matters contained in the Convention. The way I decided to structure the questions and its order is taking the Convention as the paradigm for comparison. This means that all the questions were made in a way that for the Convention the answers to the questions are always “yes”.

Important to note that: (i) when I refer to “law” in the questions, I am also referring to the Convention (although the Convention is not a law of a country it is a legislative text and

may become law of the countries in the future); (ii) with respect to Spain, the answers “yes” or “no” refer only to the analysis of Spanish Law 5/2012 (*Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles.*) (“Spanish Mediation Law”). Still with respect to Spain, although the Real Decree 980/2013 (*Real Decreto 980/2013, de 13 de diciembre*) contains additional rules related to the Spanish Mediation Law, since the topics treated therein are so specific I decided not to include the analysis of this text in this paper; (iii) with respect to Brazil, as in Spain, the answers “yes” or “no” only refer to Brazilian Law 13.140/2015 (*Lei No. 13.140 de 26 de Junho de 2015*) (“Brazilian Mediation Law”).

Consequently, a “no” answer is only related to the respective specific mediation law (Spanish or Brazilian) and does not mean that the legal system of the country (Spain or Brazil) does not cover the question and/or have not an answer to the question by the interpretation of other laws or general principles of law. For those who are not lawyers, in a very simplified and summarized way of explaining, the laws of a country are not isolated, and they must be read and interpreted in the context of the whole legal system which consists in all laws of the country and its legal principles. So, when you want a legal answer for a question you have to analyze the whole legal system of a country. However, as explained, for didactic and comparison purposes as well as to be able to compare specific legal texts and approaches, the first “yes” or “no” answer will take into account only the specific mediation laws and the Convention. After the “yes” or “no” answer, I will explain how the subject matter of the question is treated in the Convention and for the cases of Spain and Brazil the explanation will consider the whole legal system of the country. In other words, the “yes” or “no” answer was obtained by only looking to the text of the relevant mediation law since I wanted to compare the current existing mediation laws of those two countries and the Convention. The fact that certain subject matters dealt in the Convention may have an impact or be under the scope of other laws (other than the mediation law) show us the complexity of enacting a new law and therefore the necessity of a detailed analysis for the implementation of the Convention in domestic legislation.

Finally, in the “comments” box I may do general comments that are not only related to the Convention, Spain or Brazil, rather it may be a comparison or calling for attention on how each of the Convention, Spain or Brazil approaches a specific matter.

Question 1:	<i>Specific law (separate law) dealing only with mediated settlement agreements resolving international commercial disputes?</i>
Convention:	Yes. The Singapore Convention on Mediation only applies to <u>mediated settlement agreements</u> that resolve <u>international commercial disputes</u> as determined by Article 1(1) of the Convention.
Spain:	No. According to Article 2 of the Spanish Mediation Law, it applies to <u>mediation on civil and commercial matters</u> , including international disputes, whenever it does <u>not affect rights and obligations that a person cannot waive</u> , as determined by applicable law (Article 2(1)). Although not explicitly excluded in the text of the law, Spanish Mediation Law does not set the rules for judicial mediation (meaning a mediation procedure within a legal lawsuit or approved by a judge) and mediation with public entities.
Brazil:	No. Brazilian Mediation Law applies to <u>mediation on any right a person can waive or on rights a person cannot waive but can negotiate</u> under the supervision and approval of the State (Article 3). It also includes judicial mediation and mediation with public entities, but I will not analyze these topics (judicial mediation and mediation with public entities) since they are out of the scope of this paper.
Comments:	Whenever possible, I am trying to avoid mentioning complex legal concepts only familiar to lawyers. However, the scope of application of both Spanish and Brazilian laws mention the concept of rights that can be waived or cannot be waived, so I think it is important for everyone involved with mediation to have an idea of what this concept is. In a very summarized and simplistic way of explaining (since the intent of this paper is not to provide a deep analysis of legal concepts), there are rights that a person (physical person or a company) can waive, for example the right to receive a certain product within a certain period of

	<p>time. You can give up your right to receive the product for exchange of another thing and/or you can agree on extending the period on which you will receive such product. On the contrary, there are some rights that are so important that are protected by the State and a person cannot waive. For instance, the right to life or the right to dignity of all human beings. You cannot agree on a mediation agreement that you will kill yourself or that you will be a slave of another person. In the case of Brazil, the law says that in addition to the rights you can waive, you can also mediate rights that are not waivable but are allowed to be negotiated. For example, in Brazil the right children have to financial support from parents cannot be waived but can be negotiated. In these situations of mediating rights that cannot be waived but may be negotiated, Brazilian mediation law says that the final mediation agreement must be approved by a judge after the analysis of the Brazilian Public Ministry – meaning that this important right may be privately negotiated by the parties but is still under the protection of the State since the State has the final word if the agreement reached by the parties is acceptable or not.</p> <p>By comparing the Convention, Spain and Brazil, we can notice that both Spain and Brazil have a general mediation law covering mediation of civil and commercial conflicts by private parties (Brazilian Mediation Law also includes judicial mediation and in its Chapter II also provides for mediation when a public entity is involved but, as mentioned, I will not include these topics in my analysis). On the other hand, the Convention has a much narrower scope covering only international commercial disputes.</p> <p>Finally, important to mention that the Convention diverges from the New York Convention by only addressing recognition and enforcement of mediated settlement agreements, rather than including agreements to enter into a dispute settlement process (i.e., agreements to mediate, clauses providing for mediation in the case of a conflict etc.). On the</p>
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	other hand, Brazilian Mediation Law in its Article 22 does provide for the minimum requirements an agreement to mediate must have.
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Question 2:	<i>Defines what an international commercial dispute is?</i>
Convention:	Yes. The definition of what is an international commercial dispute is contained in Article 1(1) combined with Article 2(1). Since the Convention is only about mediated settlement agreements (and not about the mediation procedure), what will determine if the conflict is international is the location of the parties to the settlement agreement and the location where the obligations of the mediated settlement agreement shall be performed. If the parties have their places of business in different states or if the state where the obligations of the mediated agreement are to be performed or the state with which the subject matter of the settlement is most closely connected is different from the state where the parties reside, <u>at the time of the conclusion of the mediated settlement agreement</u> , then we have an international commercial dispute as per the Convention.
Spain:	Yes. The definition of “international conflict” (which includes international commercial mediation) is contained in Article 3.1 of the Spanish Mediation Law and such definition derives from Article 2.1 of the European Union Directive 2008/52/CE (“EU Directive”) (however it does not fully correctly reflects the definition of the EU Directive (Esplugues, 2013)). Under Spanish Mediation Law, there are two elements that can determine if a conflict is international: (i) the location the parties to the conflict are domiciled. Meaning that the conflict is considered international if one of the parties is domiciled in a country that is different from the country the other parties are domiciled <u>at the time they agree to make use of mediation or at the time it is mandatory for the parties to mediate in accordance to applicable law.</u>

	<p>Differently from the Convention, in Spain the moment the parties decide to go to mediation is fundamental for the determination if the conflict is international. One could say that the moment the parties decided to go on mediation was when they were not in conflict and decided to insert a mediation clause in a “regular agreement” (I mean “regular” in the sense that I am not referring to a mediated settlement agreement, for instance a Purchase and Sale of Goods Agreement) or you could also say that the moment they decided to go on mediation was when a conflict related to that “regular agreement” arose and the parties decided to start a mediation process (Esplungues, 2013). A “regular agreement” may take years to generate a dispute and the domicile of the parties may change in this time frame meaning that this definition may cause some controversy on the determination of the exact moment the parties decided to engage in a mediation process;</p> <p>(ii) any conflict subjected to a mediation agreement (irrespective of where the mediation process took place) that, as a consequence of the change of domicile of a party, the agreement reached by mediation or any of its consequences are to be enforced in a country that is different from the original country where the settlement agreement was made.</p>
Brazil:	<p>No. There is no mention to what an international conflict is or whether if Brazilian Mediation Law may be applicable to resolve an international conflict. The only reference Brazilian Mediation Law makes to an international element on the mediation process is in its Article 46, sole paragraph where it says that a party with domicile abroad (out of Brazil) may be part of a mediation governed by the rules of the Brazilian Mediation Law. By being silent, it does not mean that Brazilian Mediation Law may not be applicable to mediations resolving international conflicts, on the contrary, since the law says a foreign party may subject itself by a mediation under such law, the understanding is that Brazilian Mediation Law may be applicable to mediations resolving international disputes (including international commercial disputes).</p>

<p>Comments:</p>	<p>For the Convention, defining an international commercial dispute is essential because the rules of the Convention will only apply to mediated settlement agreements <u>that resolved an international commercial dispute</u>.</p> <p>In the case of Spain, the definition of an international conflict contained in Article 3(1) of the Spanish Mediation Law is used in the scope of the law. Meaning that, as per Article 2(1), the scope of the Spanish Mediation Law includes international conflicts, in other words, international conflicts may be subjected to Spanish Mediation Law.</p> <p>Brazilian Mediation Law do not define what an international conflict is, but it says that a foreign party may subject itself to the Brazilian Mediation Law, meaning that a conflict with parties outside Brazil may be subjected to a mediation in accordance with such law and therefore an international conflict may be resolved by a mediation governed by Brazilian Mediation Law.</p> <p>The Convention puts the definition of international on the characteristics (parties and/or place where the obligations will be performed) of the mediated settlement agreement while Spanish Mediation Law uses the characteristics of the conflict itself to determine whether a conflict is international. While the Convention sets the verification of the international element on the moment the mediated settlement agreement is concluded, Spanish Mediation Law uses the moment the parties decided to make use of mediation or when it was mandatory to do it – whether when this moment happens may be controversy. For the Convention, the settlement must be international at the time the agreement was concluded, regardless of whether the relevant criteria would have been met earlier during the mediation or at the time relief is requested. For purposes of the Convention, whether a mediated</p>

	settlement is international will depend on the identity of the parties to the settlement agreement.
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Question 3:	<i>Excludes from the scope of the law certain subject matter(s)?</i>
Convention:	Yes. Article 1(2) of the Convention explicitly excludes certain types of disputes, namely: consumer disputes, family law issues, employment (labor) law, and/or inheritance law. Article 1(3) of the Convention excludes types of settlement agreements, namely: mediated settlements that are enforceable as judgements, which means that any judicial mediation is excluded from the scope of the Convention, and mediated settlements that have been recorded and are enforceable as arbitral awards, meaning mediations which at the end were converted into an arbitral proceeding and the final result is an arbitral award.
Spain:	Yes. According to Article 2(2) of the Spanish Mediation Law, such law shall not apply to criminal mediation, mediation with public entities and labor mediation. As mentioned in Question 1 above, although not explicitly excluded, judicial mediation is not contemplated in the Spanish Mediation Law and therefore it is excluded from its scope.
Brazil:	No. Brazilian Mediation Law does not explicitly exclude any type of mediation but in its Article 42, sole paragraph it says that labor mediation shall be governed by a specific law. Although not explicitly excluded as well, from the interpretation of the law, criminal mediation is not under the scope of Brazilian Mediation Law (BRASIL. Câmara dos Deputados (Comissão de Constituição e Justiça e de Cidadania). Parecer do Relator nº 1, de 10 de junho de 2014). Interesting to note that the original law project (the document created as a draft of law to be discussed by congressman) had some exclusions to the law but at the end congressmen decided to delete such exclusions since it was

	understood that the way the scope of the law was drafted was already clear on what was and was not included. It was also said that the way the exclusions were drafted could lead to controversy, especially with respect to family law matters (BRASIL. Câmara dos Deputados (Comissão de Constituição e Justiça e de Cidadania). Parecer do Relator nº 1, de 10 de junho de 2014).
Comments:	As we can see here, all three laws exclude labor mediation from its scope (although Brazilian Mediation Law does explicitly exclude, we can interpret that it is excluded). Important to remember – as previously mentioned – that the scope of the Convention is very narrow (recognition and enforcement of mediated settlement agreements resolving international commercial disputes) and, on the other side, Spanish and Brazilian laws are general mediation laws applicable to mediation on all types of civil and commercial conflicts (in the case of Brazil the scope of the law is even broader including judicial mediation and mediation with public entities – which I will not analyze in this paper).

Question 4:	<i>Is the law applicable to the <u>recognition and enforcement</u> of mediated settlement agreements resolving international commercial disputes?</i>
Convention:	Yes. These are the problems (recognition and enforcement) the Convention wants to solve. For any signatory country, the rules of the Convention shall apply on the <u>recognition and enforcement</u> of any and all mediated settlement agreements resolving international commercial disputes. Article 3(1) of the Convention requires countries to directly enforce mediated settlement agreements, in accordance with their rules of procedure for enforcement and under the conditions laid down in the Convention (Schnabel, 2018). Article 3(2) then provides the functional description of “recognition” without using the word (Schnabel, 2018).

Spain:	<p>Yes. Spanish Mediation Law is applicable to <u>mediation on civil and commercial matters</u>, including international disputes, and therefore it is the law in Spain which governs the recognition and enforcement of mediated settlement agreements in general and specifically the enforcement of <u>mediated settlement agreements that resolved an international commercial dispute</u> as well as governs the enforceability of <u>foreign mediated settlement agreements</u> in Spanish courts. In this respect, Article 27 of the Spanish Mediation Law provides for the enforcement of foreign mediated settlement agreements (mediated settlement agreements that were not made in Spain and/or that are not governed by Spanish Mediation Law). Important to say that Article 27 talks about “transnational” mediated settlement agreements instead of “foreign” mediated settlement agreements however, “transnational” is not a proper term because Spanish Mediation Law can only sets rules for Spain and not for other countries therefore, in practical terms, Article 27 of the Spanish Mediation Law is applicable to mediated settlement agreements that were created and concluded outside Spain not governed by Spanish Mediation Law (foreign mediated settlements) that will be enforced in Spanish courts.</p>
Brazil:	<p>Yes. Brazilian Mediation Law, as in Spain, governs <u>mediation in all civil and commercial matters</u> as well as the <u>recognition and enforcement of mediated settlement agreements in general</u>. Differently from Spain, Brazilian Mediation Law does not have any specific provision on mediated settlement agreements resolving international disputes neither on the enforcement of foreign mediated settlement agreements. This does not mean that mediated settlement agreements resolving international disputes and foreign mediated settlement agreements are not recognized and enforced in Brazil. What it means is that, with respect to mediation on international disputes, as mentioned above, Brazilian Mediation Law may apply and with respect to foreign mediated settlement agreements, it will fall on the scope of the general</p>

	rules in Brazil for the recognition and enforcement of foreign documents in a Brazilian court.
Comments:	<p>This Question reveals the topics the Convention wants to standardize worldwide, which are the <u>recognition and enforcement</u> of mediated settlement agreements resolving international commercial disputes. The purpose of “solving” this problem is to avoid uncertainties among different countries on whether how a mediated settlement will be recognized and enforced creating predictability and encouraging the use of mediation.</p> <p>In order for an agreement to be recognized as a mediated settlement agreement, there are some requirements the agreement must meet, which I will discuss in Question 5 below. With respect to the enforcement of mediated settlement agreements (domestic and foreign agreements), I will explain how the enforcement works in each of the Convention, Spain and Brazil in the following Question 6.</p>

Question 5:	<i>Specify requirements the mediated settlement must have to be recognized as a mediated settlement agreement?</i>
Convention:	Yes. According to Article 4(1) of the Convention the settlement agreement must be signed by the parties and it must be evident that the settlement of the dispute resulted from a mediation.
Spain:	Yes. Article 23(1) of the Spanish Mediation Law determines that its domestic mediation settlement agreement must have: (i) identity and place of residence (business) of the parties; (ii) location where it was signed; (iii) date; (iv) obligations of each of the parties and that such agreement was reached by a mediation process in accordance with Spanish Mediation Law; (v) name of the mediator(s); and, if applicable (vi) the mediation chamber where the mediation was held. Article 23(2)

	determines that the mediation settlement agreement must be signed by the parties or its attorneys-in-fact.
Brazil:	No. Brazilian Mediation Law does not explicitly specify any requirement a domestic settlement agreement must have. Although not explicit, from a logical perspective, only agreements that resulted from a mediation procedure will be considered as a mediated settlement agreement and will have the treatment of such an agreement in accordance with Brazilian Mediation Law.
Comments:	The minimum requirements a mediation settlement agreement must have are simple and are those expected from a legal document. With respect to Brazilian Mediation Law although it does not specify any requirements the mediated settlement agreement must have, general principles of contract law apply, and it is common practice in Brazil to have the parties sign the agreement and to make it clear that those agreements were reached by a mediation process. Neither Spanish nor Brazilian Mediation Laws sets any requirements a foreign mediation settlement agreement must have to be accepted in their respective jurisdictions meaning that if the foreign document is considered a mediated settlement agreement under its applicable law then it will be considered a foreign mediated settlement agreement in Spain or Brazil.

Question 6:	<i>Determine that all <u>mediated settlement agreements resolving international commercial disputes</u> must be directly enforced in courts (you can file an enforcement lawsuit with the mediated settlement agreement)?</i>
Convention:	Yes. The Convention creates the obligation to, once a mediated settlement agreement which is under the scope and in accordance with the Convention is presented before the courts of a country that is a party to the Convention, directly enforce the mediated settlement agreement

	<p>under the relevant country's rules of procedure for enforcement (Article 3). This means that any document that fulfills the requirements to be a mediated settlement agreement under the scope of the Convention must be enforced in a member country.</p>
Spain:	<p>No. Before explaining specifically the treatment given to foreign mediated settlement agreements in Spain, I will briefly explain the general rule in Spain and then go the treatment given to foreign mediated settlement agreements.</p> <p>Spanish Mediation Law does not provide that any mediated settlement agreement should be a direct enforceable document. Article 25 says that the parties may transcript (elevate) the mediated settlement agreement before a public notary in order for the agreement to be a direct enforceable document. This means that in Spain you can have mediated settlement agreements that were not transcript before a public notary and that are not directly enforceable in courts (you will first need to file a recognition of right lawsuit and then, with a judicial decision you can start an enforcement lawsuit) as well as mediated settlement agreements that are direct enforceable documents if elevated to public before the notary.</p> <p>Article 27 of the Spanish Mediation Law provides for the enforcement in Spain of a foreign mediated settlement agreement (a settlement agreement that was concluded outside Spain). In this situation, in order to analyze how enforcement in Spain would occur, we should separate mediated settlement agreements into two categories: (i) agreements from an EU Member State and; (ii) agreements that were concluded in a country that is not an EU Member State (Esplugues, 2013):</p> <p>(i) for such EU agreements, EU internal rules will apply. Spanish Mediation Law will not apply in this situation and the enforcement of</p>

	<p>mediated settlement agreements will be governed only by EU Regulations (Esplugues, 2013).</p> <p>(ii) for mediated settlement agreements that were concluded in a non-EU Member State, it is first necessary to check whether the country of origin of the mediated settlement agreement and Spain have a bilateral or multilateral agreement on the judicial enforcement of foreign documents. If they don't, and only then, what it is established in Spanish Mediation Law shall apply, which is: in order to directly enforce in Spanish courts a mediated settlement agreement such agreement must have obtained direct enforcement power in its country of origin and such enforcement power must have been given by a competent foreign authority. If the foreign mediated settlement agreement does not have a direct enforcement power given by a competent authority, then Spanish Mediation Law says that the foreign agreement may be elevated to public deed by a Spanish notary per request of the parties or by one of the parties with the consent of the other parties.</p>
Brazil:	<p>Yes, only with respect to domestic mediated settlement agreements.</p> <p>Brazilian Mediation Law is silent on the topic of foreign mediated settlement agreements. The general rule contained in its Article 20, sole paragraph, is that mediated settlement agreements are considered a direct enforceable document (and if registered in a judicial court, are considered a judicial enforceable document). This rule applies to all mediated settlement agreements governed by Brazilian Mediation Law.</p> <p>With respect to a foreign mediated settlement agreement that may be presented in Brazilian courts to be enforced, my understanding as a Brazilian lawyer is that currently the law is not clear on how a judge should proceed and therefore different approaches may be taken by a Brazilian judge. The scope of this paper is not to analyze this specific situation but just to show how the situation is unclear I will describe two different approaches a Brazilian judge may take. If a foreign mediated</p>

	<p>settlement agreement is presented to a Brazilian judge to be enforced in a Brazilian court, then the judge may use the treatment given under Brazilian Mediation Law to domestic mediated settlement agreements (meaning that this agreement is a direct enforceable document) or the judge could not accept to directly enforce the document and ask for clarifications on the subject matter that is being requested to be enforced as well as an opinion of an expert in the foreign law (as per Article 14 of Decree-Law 4.657 of September 4, 1942, as amended) on whether such mediated settlement is a direct enforceable document in accordance with its governing laws or not. In case Brazil is a party to the Convention then, with respect to foreign mediated settlement agreements resolving international commercial disputes this uncertainty would not exist anymore.</p>
Comments:	<p>First important thing to note is that the Convention, Spanish and Brazilian Mediation Laws do not talk about rules of procedure for the enforcement of a mediated settlement. Generally, these rules will be established in the general law of civil procedure as for instance in the case of Brazil, such rules are included in the Brazilian Code of Civil Procedure (Law 13.105 of March 16, 2015, as amended).</p> <p>As mentioned before, the Convention only aims to determine the recognition and enforceability of mediated settlement agreements resolving an international commercial dispute while Spanish and Brazilian laws provide for the enforceability of all civil and commercial mediated settlement agreements. In the case of Spain, Spanish Mediation Law also provides for the enforcement of foreign mediated settlement agreements. This is because Spanish and Brazilian Mediation Laws shall be read and interpreted having in mind the distinction of domestic mediated settlement agreements where certain rules apply and foreign mediated settlement agreements where other specific rules may apply. That is why when we talk about Spain and Brazil, we have to make the distinction of mediated settlement agreements that may resolve</p>

	<p>international conflicts and foreign mediated settlement agreements resolving either local or international conflicts. When I say “foreign”, I mean either or both a mediated settlement agreement that is governed by a different law from the country where you are trying to enforce it and an agreement that was signed abroad. For instance, you may want to have recognized and enforced in Spanish courts a mediated settlement agreement resolving an international dispute governed by Spanish Mediation Law and in this case the rules that will apply are the rules for a domestic mediated settlement agreement. Or you may want to have recognized and enforced in Spanish courts a mediated settlement agreement resolving any dispute (local or international) governed by Brazilian Mediation Law and in this case the Spanish rules for foreign mediated settlement agreements will apply.</p> <p>Currently in Spain, in order for a foreign mediated settlement agreement to be directly enforced in Spanish courts, it must have obtained direct enforcement power in its country of origin and such enforcement power must have been given by a competent foreign authority or it must be elevated to public deed by a Spanish notary per request of the parties or by one of the parties with the consent of the others. In Brazil, the enforcement power of a foreign mediated settlement is not clear. The idea of the Convention is to standardize worldwide the enforcement power of mediated settlement agreements resolving international commercial conflicts as well as to avoid registration or elevation to public deed requirements such as the currently existent requirement in Spain (elevation to public deed).</p> <p>Assuming that Spain decides to be a part of the Convention, Spain will have to decide whether to create a specific category under its law where foreign mediated settlement agreements resolving international commercial disputes do not need to have been given enforcement power by a foreign authority or to be elevated to public deed in Spain or Spain will have to change its law for all mediated settlement agreements by</p>
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	<p>not requiring elevation to public deed as necessary for a mediated settlement to have direct enforcement power. Or Spain could create a different category for all mediated settlement agreements resolving commercial disputes (independently if it is an international or local dispute) etc. In the case of Brazil acceding to the Convention, it will have to decide on whether to clarify the situation of all foreign mediated settlement agreements to be enforced in Brazil or only to clarify the situation of foreign mediated settlement agreements resolving international commercial disputes.</p> <p>When a country decides to be part of the Convention, it will have to decide if it will create a special category for foreign mediated settlement agreements resolving an international commercial dispute or will change its current existing laws on enforceability of all mediated settlement agreements or just to all foreign mediated settlements. Analyzing the cases of Spain and Brazil give us very interesting and different examples of the necessity of a specific analysis for each country.</p> <p>Another important topic to have in mind here is the requirements determined by the law of a country to present a foreign document (in the case of this paper a foreign mediated settlement agreement) in its judicial courts. For example in Brazil (and this may be the case for other countries as well), there is a general rule of the Brazilian Code of Civil Procedure applicable to any and all foreign document to be presented in Brazilian courts that determines that, signatures made outside Brazil must be notarized (or Apostille) and the document must be translated by a sworn translator. This is a general rule applicable to any and all foreign documents to be presented in courts in Brazil (including international arbitral awards under the scope of the New York Convention which Brazil is a signatory). Interestingly, the Convention does not attempt to incorporate a seat of the mediation (what we could call the “nationality” of the mediation) so, with respect to the Convention, one cannot say that relief is being sought in a jurisdiction other than the mediated</p>
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	<p>settlement's country of origin, as no particular country of origin is designated by the Convention (Schnabel, 2018). The reason the Convention does not incorporate the concept of a seat of the mediation is to avoid the following: (i) the sometimes-difficult task of determining where a mediation took place since many jurisdictions may be involved in a cross-border mediation. For instance, a particular dispute may involve parties that do business in two jurisdictions but are physically present in two other jurisdictions at the time of the mediation with the mediator in a fifth jurisdiction, with applicable law from a sixth country, and especially if the settlement agreement is developed via email (Schnabel, 2018); (ii) that neither the mediation nor the settlement, for purposes of the Convention, has to comply with domestic legal requirements of any particular state of origin (with the exception of the legal requirements determined by the law applicable to the mediation procedure that shall be observed). If enforcement is sought under the terms of the Convention, a party cannot raise domestic law requirements (apart from applicable law requirements) of the place where the mediation was held since, as per the Convention, a mediated settlement is essentially a stateless instrument that is generally not subject to domestic law requirements from the state of origin (Schnabel, 2018). This is a different approach from the laws of Spain and Brazil where the legal system is created in a way where it is necessary to identify if the mediated settlement is a domestic mediated settlement agreement or if it is a foreign mediated settlement agreement. My understanding, and not going further on this subject matter because this would require another field of study that is not in the scope of this paper, is that, when the Convention is internalized in the legal system of a country, the identification of whether a mediated settlement agreement is domestic or foreign might be necessary because of the way the legal system is structured.</p> <p>Finally, I would like to analyze the hypothetical situation of the enforcement of a Brazilian mediated settlement agreement in Spain</p>
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	<p>because this situation will show us the importance of the harmonization of rules and therefore the importance of the Convention itself. Currently (without the rules of the Convention and considering that there is no bilateral agreement between Spain and Brazil for the enforcement of documents), a mediated settlement agreement governed by Brazilian Mediation Law (that was not registered in a judicial court in Brazil) it is a direct enforceable document in Brazil but, since this enforcement power derives from the law and not from an authority in Spain this document does not have direct enforceable power if it is not elevated to public deed with a Spanish notary. Which means that currently we have an awkward situation where the mediated settlement is a direct enforceable document in accordance with its governing law but in a different country it is not.</p>
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Question 7:	<i>Specify when the law shall be applicable?</i>
Convention:	<p>Yes. For any signatory country, the rules of the Convention shall apply to all mediated settlement agreements resolving international commercial disputes. Article 3(1) of the Convention requires countries to enforce mediated settlement agreements, in accordance with their rules of procedure for enforcement and under the conditions laid down in the Convention (Schnabel, 2018) and Article 3(2) to recognize such an agreement if fulfills what is determined by the Convention.</p>
Spain:	<p>Yes. According to Article 2(1), the rules of the Spanish Mediation Law shall apply when at least one of the parties is domiciled in Spain and the mediation takes place in Spanish territory.</p>
Brazil:	<p>No. Brazilian Mediation Law does not mention anything about its applicability so we should take a look at the general rules for this matter in Brazil. As part of Brazilian law scholars understand (there is also a great number of scholars that do not agree with this view but the purpose</p>

	<p>of this paper is not to discuss this specific issue of Brazilian law), my opinion as a Brazilian lawyer (with exceptions depending on the subject matter) is that parties in Brazil are free to choose the law that will govern its private relations. So, theoretically in Brazil parties may choose which law will govern their mediation process. If no decision is made, Brazilian Decree-Law 4,657 of September 4, 1942 says that goods will be governed by the law of the place where they are located, and obligations will be governed by the law of the place where the obligations were created.</p>
Comments:	<p>This is a tricky question because, with respect to the Convention, its rules only apply at the time a mediated settlement agreement is presented to a judicial court. With respect to Spanish and Brazilian Mediation Laws, the rules may apply to a mediation procedure and therefore govern a mediated settlement agreement as well as such respective rules will always apply at the time a mediated settlement agreement (either domestic or foreign) is presented to a local judicial court. It is also tricky because when a country is part of the Convention then the Convention will be the law of that country.</p> <p>The rules of the Convention will be applicable when a mediated settlement agreement resolving an international commercial dispute is presented to a judicial court to be recognized and/or enforced in such court. The laws of Spain and Brazil may be applicable to a mediation procedure and govern a mediated settlement agreement as well as will be always applicable at the time a mediated settlement agreement is presented to be recognized and enforced in its respective domestic courts. When accessing a judicial court of a specific country, always the rules that will govern this access is the legal system of that country (which, if the Convention is internalized in the legal system of a country, the rules of the Convention will apply). For instance, when accessing the courts of Brazil, Brazilian laws will dictate the treatment given to mediated settlement agreements, what are the requirements to present a</p>

	<p>foreign document in Brazil, etc. On the other hand, the law that will govern a mediation procedure and a mediated settlement agreement in many cases may vary because usually it may be chosen by the parties and in some situations, especially when the parties do not chose a governing law to its mediation and mediated settlement, the law of a country may say what shall be the applicable law in certain situations. Below I will explore a little further this topic.</p> <p>First it is important to have in mind that applicable law and place where a mediation procedure occurs are different things. The place where the mediation occurs, or to use a similar term used in the New York Convention, the seat of the mediation, could be compared to the “nationality” of a mediation process – where the mediation is from. As mentioned, the place of a mediation may have an influence on the determination of the law applicable to a mediation process (but it is not the only factor that determines the applicable law to a mediation process). In some cases, the place of a mediation may not have any influence on such determination of applicable law, it will always depend on the specific case. Using the example of Spanish Mediation Law, the law says that if a <u>mediation takes place in Spanish territory</u> and one of the parties is domiciled in Spain, then Spanish Mediation Law shall apply. As we can see in Spanish Mediation Law, the place of the mediation is one of the elements (and not the only one) that affects the applicability of Spanish Law. On the other hand, Brazilian Mediation Law does not specify mandatory situations when it shall apply but, if a mediation takes place in Brazil, the parties are in Brazil and they have not elected any governing law for their mediated settlement agreement, then Brazilian Mediation Law will apply because according to Article 9 of the Brazilian Decree-Law 4.657 of September 4, 1942, <u>obligations will be governed by the law of the place where the obligations were created</u>. On the contrary, if a mediation occurs in Brazil with Brazilian parties but they elect another law to be applicable to their mediation</p>
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	<p>process and to their mediated settlement, then the place of the mediation will not have an influence on the determination of the applicable law.</p> <p>Finally, depending on the governing law of a mediated settlement agreement, certain specific procedures and requirements of applicable law will have to be observed even though the Convention is silent on this issue.</p>
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Question 8:	<i>Determine grounds for refusing enforcement of a mediated settlement agreement?</i>
Convention:	Yes. Article 5 of the Convention sets an exclusive list of situations on which a court can refuse to recognize or enforce a mediated settlement agreement.
Spain:	Yes. Article 23(4) of the Spanish Mediation Law says that against a mediated settlement agreement the only available legal action is the nullity legal action based on the causes that invalidates a legal agreement. This means that Spanish Mediation Law explicitly refers to the general contract law rules currently in force in Spain providing for the situations under which an agreement can be invalid.
Brazil:	No. Brazilian Mediation Law does not specify grounds for refusing a mediated settlement agreement. In this case, general civil law rules mainly contained in the Brazilian Civil Code will apply. Rules such as those applicable to the creation of a legal transaction and specifically with respect to obligations. These rules are similar to those included in the Convention such as legal capacity of the parties, validity of the legal transaction (not null or nullable), which in this specific case is the mediated settlement, etc.

Comments:	The grounds for refusing enforcement of a mediated settlement are applicable only in serious and important situations. These situations are mainly the ones affecting the freedom of the parties to reach an agreement, misleading a party to agree on a certain thing or the situation where what was agreed is illegal or incapable of being mediated. The Convention, Spanish and Brazilian legal systems are aligned in this topic.
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V. CONCLUSION

The Convention is a good initiative and has the potential to boost international commercial mediation as the New York Convention on Arbitration did with arbitration. In a globalized and interconnected world, the continuous rise of international trade and commercial exchanges is a reality and what it is expected in the future. The raise of such continuous international commercial relations will increase international commercial conflicts and therefore the demand for alternate dispute resolutions methods such as mediation. As mentioned, after World War II and the creation of the New York Convention on Arbitration, arbitration has been the major alternate dispute resolution method for resolving international commercial disputes because it provides a standard effective and predictable solution worldwide. But in many cases arbitration became expensive, slow and does not promote a continuous relationship among the disputing parties. In combination with that, recently we have seen the spread worldwide of an awareness of the benefits of mediation as well as many countries have created and enacted mediation laws. If the Convention is successful, it can exponentially expand the use of mediation by global actors creating a high demand for qualified professionals on this field of work. The Convention has the potential to provide to the result of a mediation process (the mediated settlement agreement) the enforcement power and the certainty globally it may be needed for mediation to be seen as an effective solution for international commercial disputes. As we saw in this paper, using the cases of Spanish and Brazilian Laws on Mediation, currently each country has its own specific rules for the recognition and enforcement of mediated settlement agreements resulting in awkward situations such as a mediated settlement agreement in Brazil having direct enforcement power and the same agreement not having such power in a Spanish court. This show us the importance

of a standard rule (the Convention) giving predictability to the outcome of a mediation resolving an international commercial dispute.

In order for the Convention to be successful, a great number of countries will have to be part of it, especially those countries that are relevant on the international trade scene. And, in order to countries to be part of the Convention, first awareness of it must be given to the relevant stakeholders and second an analysis of the implementation of the Convention in each jurisdiction should be carefully made. As we have learned, depending on the current mediation rules a country may have in place, it will need to decide whether to create a special category for mediated settlement agreements resolving international commercial disputes or to standardize its rules for all mediated settlements. For example, in the case of Spain, it will need to decide to give a less bureaucratic treatment only for mediated settlements resolving international commercial conflicts or if it will change the law for all mediated settlements. And in the case of creating a special category, Spain would need to have a good argument for that and not changing the law for every mediated settlement. Acceding to the Convention may also have other impacts on the legal system of a country such as in Brazil where currently the treatment given to a foreign mediated settlement is not clear. Brazil will have to decide whether to clarify this situation only to foreign mediated settlements resolving international commercial disputes or to clarify the law for all foreign mediated settlements in Brazil that are to be enforced in Brazilian courts. Another important topic that will have to be discussed by both Spain and Brazil it is whether it will give an unique approach in its legal system to a mediated settlement under the scope of the Convention by not applying the concept of domestic or foreign or how it will incorporate the Convention making the distinction on domestic and foreign mediated settlement agreements. The final conclusion is that each country will have to do its own analysis on the impacts the incorporation of the Convention to its legal system may have and the results of such analysis will not be the same for each country.

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VII. APPENDIX

The Singapore Convention on Mediation

United Nations Convention on International Settlement Agreements Resulting from Mediation



UNITED NATIONS

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United Nations Convention on International Settlement Agreements Resulting from Mediation



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Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation¹ and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission² recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

¹ Resolution 57/18, annex.

² *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,³

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,⁴

Taking note with satisfaction of the draft convention approved by the Commission,⁵

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the “Singapore Convention on Mediation”;

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

³ Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

⁴ Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 49.

⁵ Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

- (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - (ii) The State with which the subject matter of the settlement agreement is most closely connected.
- 2. This Convention does not apply to settlement agreements:
 - (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
 - (b) Relating to family, inheritance or employment law.
- 3. This Convention does not apply to:
 - (a) Settlement agreements:
 - (i) That have been approved by a court or concluded in the course of proceedings before a court; and
 - (ii) That are enforceable as a judgment in the State of that court;
 - (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

- 1. For the purposes of article 1, paragraph 1:
 - (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;
 - (b) If a party does not have a place of business, reference is to be made to the party's habitual residence.
- 2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.
- 3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

- (i) The mediator's signature on the settlement agreement;
- (ii) A document signed by the mediator indicating that the mediation was carried out;
- (iii) An attestation by the institution that administered the mediation; or
- (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

- (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
- (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.
4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.
5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

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

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.



Lei No. 13.140 de 26 de Junho de 2015 – “Brazilian Mediation Law”



CÂMARA DOS DEPUTADOS
Centro de Documentação e Informação

LEI Nº 13.140, DE 26 DE JUNHO DE 2015

Dispõe sobre a mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de conflitos no âmbito da administração pública; altera a Lei nº 9.469, de 10 de julho de 1997, e o Decreto nº 70.235, de 6 de março de 1972; e revoga o § 2º do art. 6º da Lei nº 9.469, de 10 de julho de 1997.

A PRESIDENTA DA REPÚBLICA

Faço saber que o Congresso Nacional decreta e eu sanciono a seguinte Lei:

Art. 1º Esta Lei dispõe sobre a mediação como meio de solução de controvérsias entre particulares e sobre a autocomposição de conflitos no âmbito da administração pública.

Parágrafo único. Considera-se mediação a atividade técnica exercida por terceiro imparcial sem poder decisório, que, escolhido ou aceito pelas partes, as auxilia e estimula a identificar ou desenvolver soluções consensuais para a controvérsia.

CAPÍTULO I **DA MEDIAÇÃO**

Seção I **Disposições Gerais**

Art. 2º A mediação será orientada pelos seguintes princípios:

- I - imparcialidade do mediador;
- II - isonomia entre as partes;
- III - oralidade;
- IV - informalidade;
- V - autonomia da vontade das partes;
- VI - busca do consenso;

VII - confidencialidade;

VIII - boa-fé.

§ 1º Na hipótese de existir previsão contratual de cláusula de mediação, as partes deverão comparecer à primeira reunião de mediação.

§ 2º Ninguém será obrigado a permanecer em procedimento de mediação.

Art. 3º Pode ser objeto de mediação o conflito que verse sobre direitos disponíveis ou sobre direitos indisponíveis que admitam transação.

§ 1º A mediação pode versar sobre todo o conflito ou parte dele.

§ 2º O consenso das partes envolvendo direitos indisponíveis, mas transigíveis, deve ser homologado em juízo, exigida a oitiva do Ministério Público.

Seção II Dos Mediadores

Subseção I Disposições Comuns

Art. 4º O mediador será designado pelo tribunal ou escolhido pelas partes.

§ 1º O mediador conduzirá o procedimento de comunicação entre as partes, buscando o entendimento e o consenso e facilitando a resolução do conflito.

§ 2º Aos necessitados será assegurada a gratuidade da mediação.

Art. 5º Aplicam-se ao mediador as mesmas hipóteses legais de impedimento e suspeição do juiz.

Parágrafo único. A pessoa designada para atuar como mediador tem o dever de revelar às partes, antes da aceitação da função, qualquer fato ou circunstância que possa suscitar dúvida justificada em relação à sua imparcialidade para mediar o conflito, oportunidade em que poderá ser recusado por qualquer delas.

Art. 6º O mediador fica impedido, pelo prazo de um ano, contado do término da última audiência em que atuou, de assessorar, representar ou patrocinar qualquer das partes.

Art. 7º O mediador não poderá atuar como árbitro nem funcionar como testemunha em processos judiciais ou arbitrais pertinentes a conflito em que tenha atuado como mediador.

Art. 8º O mediador e todos aqueles que o assessoram no procedimento de mediação, quando no exercício de suas funções ou em razão delas, são equiparados a servidor público, para os efeitos da legislação penal.

Subseção II Dos Mediadores Extrajudiciais

Art. 9º Poderá funcionar como mediador extrajudicial qualquer pessoa capaz que tenha a confiança das partes e seja capacitada para fazer mediação, independentemente de integrar qualquer tipo de conselho, entidade de classe ou associação, ou nele inscrever-se.

Art. 10. As partes poderão ser assistidas por advogados ou defensores públicos.

Parágrafo único. Comparecendo uma das partes acompanhada de advogado ou defensor público, o mediador suspenderá o procedimento, até que todas estejam devidamente assistidas.

Subseção III Dos Mediadores Judiciais

Art. 11. Poderá atuar como mediador judicial a pessoa capaz, graduada há pelo menos dois anos em curso de ensino superior de instituição reconhecida pelo Ministério da Educação e que tenha obtido capacitação em escola ou instituição de formação de mediadores, reconhecida pela Escola Nacional de Formação e Aperfeiçoamento de Magistrados - ENFAM ou pelos tribunais, observados os requisitos mínimos estabelecidos pelo Conselho Nacional de Justiça em conjunto com o Ministério da Justiça.

Art. 12. Os tribunais criarão e manterão cadastros atualizados dos mediadores habilitados e autorizados a atuar em mediação judicial.

§ 1º A inscrição no cadastro de mediadores judiciais será requerida pelo interessado ao tribunal com jurisdição na área em que pretenda exercer a mediação.

§ 2º Os tribunais regulamentarão o processo de inscrição e desligamento de seus mediadores.

Art. 13. A remuneração devida aos mediadores judiciais será fixada pelos tribunais e custeada pelas partes, observado o disposto no § 2º do art. 4º desta Lei.

Seção III Do Procedimento de Mediação

Subseção I Disposições Comuns

Art. 14. No início da primeira reunião de mediação, e sempre que julgar necessário, o mediador deverá alertar as partes acerca das regras de confidencialidade aplicáveis ao procedimento.

Art. 15. A requerimento das partes ou do mediador, e com anuência daquelas, poderão ser admitidos outros mediadores para funcionarem no mesmo procedimento, quando isso for recomendável em razão da natureza e da complexidade do conflito.

Art. 16. Ainda que haja processo arbitral ou judicial em curso, as partes poderão submeter-se à mediação, hipótese em que requererão ao juiz ou árbitro a suspensão do processo por prazo suficiente para a solução consensual do litígio.

§ 1º É irrecorrível a decisão que suspende o processo nos termos requeridos de comum acordo pelas partes.

§ 2º A suspensão do processo não obsta a concessão de medidas de urgência pelo juiz ou pelo árbitro.

Art. 17. Considera-se instituída a mediação na data para a qual for marcada a primeira reunião de mediação.

Parágrafo único. Enquanto transcorrer o procedimento de mediação, ficará suspenso o prazo prescricional.

Art. 18. Iniciada a mediação, as reuniões posteriores com a presença das partes somente poderão ser marcadas com a sua anuência.

Art. 19. No desempenho de sua função, o mediador poderá reunir-se com as partes, em conjunto ou separadamente, bem como solicitar das partes as informações que entender necessárias para facilitar o entendimento entre aquelas.

Art. 20. O procedimento de mediação será encerrado com a lavratura do seu termo final, quando for celebrado acordo ou quando não se justificarem novos esforços para a obtenção de consenso, seja por declaração do mediador nesse sentido ou por manifestação de qualquer das partes.

Parágrafo único. O termo final de mediação, na hipótese de celebração de acordo, constitui título executivo extrajudicial e, quando homologado judicialmente, título executivo judicial.

Subseção II

Da Mediação Extrajudicial

Art. 21. O convite para iniciar o procedimento de mediação extrajudicial poderá ser feito por qualquer meio de comunicação e deverá estipular o escopo proposto para a negociação, a data e o local da primeira reunião.

Parágrafo único. O convite formulado por uma parte à outra considerar-se-á rejeitado se não for respondido em até trinta dias da data de seu recebimento.

Art. 22. A previsão contratual de mediação deverá conter, no mínimo:

- I - prazo mínimo e máximo para a realização da primeira reunião de mediação, contado a partir da data de recebimento do convite;
- II - local da primeira reunião de mediação;
- III - critérios de escolha do mediador ou equipe de mediação;
- IV - penalidade em caso de não comparecimento da parte convidada à primeira reunião de mediação.

§ 1º A previsão contratual pode substituir a especificação dos itens acima enumerados pela indicação de regulamento, publicado por instituição idônea prestadora de serviços de mediação, no qual constem critérios claros para a escolha do mediador e realização da primeira reunião de mediação.

§ 2º Não havendo previsão contratual completa, deverão ser observados os seguintes critérios para a realização da primeira reunião de mediação:

- I - prazo mínimo de dez dias úteis e prazo máximo de três meses, contados a partir do recebimento do convite;
- II - local adequado a uma reunião que possa envolver informações confidenciais;
- III - lista de cinco nomes, informações de contato e referências profissionais de mediadores capacitados; a parte convidada poderá escolher, expressamente, qualquer um dos cinco mediadores e, caso a parte convidada não se manifeste, considerar-se-á aceito o primeiro nome da lista;

IV - o não comparecimento da parte convidada à primeira reunião de mediação acarretará a assunção por parte desta de cinquenta por cento das custas e honorários sucumbenciais caso venha a ser vencedora em procedimento arbitral ou judicial posterior, que envolva o escopo da mediação para a qual foi convidada.

§ 3º Nos litígios decorrentes de contratos comerciais ou societários que não contenham cláusula de mediação, o mediador extrajudicial somente cobrará por seus serviços caso as partes decidam assinar o termo inicial de mediação e permanecer, voluntariamente, no procedimento de mediação.

Art. 23. Se, em previsão contratual de cláusula de mediação, as partes se comprometerem a não iniciar procedimento arbitral ou processo judicial durante certo prazo ou até o implemento de determinada condição, o árbitro ou o juiz suspenderá o curso da arbitragem ou da ação pelo prazo previamente acordado ou até o implemento dessa condição.

Parágrafo único. O disposto no *caput* não se aplica às medidas de urgência em que o acesso ao Poder Judiciário seja necessário para evitar o perecimento de direito.

Subseção III Da Mediação Judicial

Art. 24. Os tribunais criarão centros judiciários de solução consensual de conflitos, responsáveis pela realização de sessões e audiências de conciliação e mediação, pré-processuais e processuais, e pelo desenvolvimento de programas destinados a auxiliar, orientar e estimular a autocomposição.

Parágrafo único. A composição e a organização do centro serão definidas pelo respectivo tribunal, observadas as normas do Conselho Nacional de Justiça.

Art. 25. Na mediação judicial, os mediadores não estarão sujeitos à prévia aceitação das partes, observado o disposto no art. 5º desta Lei.

Art. 26. As partes deverão ser assistidas por advogados ou defensores públicos, ressalvadas as hipóteses previstas nas Leis nºs 9.099, de 26 de setembro de 1995, e 10.259, de 12 de julho de 2001.

Parágrafo único. Aos que comprovarem insuficiência de recursos será assegurada assistência pela Defensoria Pública.

Art. 27. Se a petição inicial preencher os requisitos essenciais e não for o caso de improcedência liminar do pedido, o juiz designará audiência de mediação.

Art. 28. O procedimento de mediação judicial deverá ser concluído em até sessenta dias, contados da primeira sessão, salvo quando as partes, de comum acordo, requererem sua prorrogação.

Parágrafo único. Se houver acordo, os autos serão encaminhados ao juiz, que determinará o arquivamento do processo e, desde que requerido pelas partes, homologará o acordo, por sentença, e o termo final da mediação e determinará o arquivamento do processo.

Art. 29. Solucionado o conflito pela mediação antes da citação do réu, não serão devidas custas judiciais finais.

Seção IV

Da Confidencialidade e suas Exceções

Art. 30. Toda e qualquer informação relativa ao procedimento de mediação será confidencial em relação a terceiros, não podendo ser revelada sequer em processo arbitral ou judicial salvo se as partes expressamente decidirem de forma diversa ou quando sua divulgação for exigida por lei ou necessária para cumprimento de acordo obtido pela mediação.

§ 1º O dever de confidencialidade aplica-se ao mediador, às partes, a seus prepostos, advogados, assessores técnicos e a outras pessoas de sua confiança que tenham, direta ou indiretamente, participado do procedimento de mediação, alcançando:

I - declaração, opinião, sugestão, promessa ou proposta formulada por uma parte à outra na busca de entendimento para o conflito;

II - reconhecimento de fato por qualquer das partes no curso do procedimento de mediação;

III - manifestação de aceitação de proposta de acordo apresentada pelo mediador;

IV - documento preparado unicamente para os fins do procedimento de mediação.

§ 2º A prova apresentada em desacordo com o disposto neste artigo não será admitida em processo arbitral ou judicial.

§ 3º Não está abrangida pela regra de confidencialidade a informação relativa à ocorrência de crime de ação pública.

§ 4º A regra da confidencialidade não afasta o dever de as pessoas discriminadas no *caput* prestarem informações à administração tributária após o termo final da mediação, aplicando-se aos seus servidores a obrigação de manterem sigilo das informações compartilhadas nos termos do art. 198 da Lei nº 5.172, de 25 de outubro de 1966 - Código Tributário Nacional.

Art. 31. Será confidencial a informação prestada por uma parte em sessão privada, não podendo o mediador revelá-la às demais, exceto se expressamente autorizado.

CAPÍTULO II

DA AUTOCOMPOSIÇÃO DE CONFLITOS EM QUE FOR

PARTE PESSOA JURÍDICA DE DIREITO PÚBLICO

Seção I

Disposições Comuns

Art. 32. A União, os Estados, o Distrito Federal e os Municípios poderão criar câmaras de prevenção e resolução administrativa de conflitos, no âmbito dos respectivos órgãos da Advocacia Pública, onde houver, com competência para:

I - dirimir conflitos entre órgãos e entidades da administração pública;

II - avaliar a admissibilidade dos pedidos de resolução de conflitos, por meio de composição, no caso de controvérsia entre particular e pessoa jurídica de direito público;

III - promover, quando couber, a celebração de termo de ajustamento de conduta.

§ 1º O modo de composição e funcionamento das câmaras de que trata o *caput* será estabelecido em regulamento de cada ente federado.

§ 2º A submissão do conflito às câmaras de que trata o *caput* é facultativa e será cabível apenas nos casos previstos no regulamento do respectivo ente federado.

§ 3º Se houver consenso entre as partes, o acordo será reduzido a termo e constituirá título executivo extrajudicial.

§ 4º Não se incluem na competência dos órgãos mencionados no *caput* deste artigo as controvérsias que somente possam ser resolvidas por atos ou concessão de direitos sujeitos a autorização do Poder Legislativo.

§ 5º Compreendem-se na competência das câmaras de que trata o *caput* a prevenção e a resolução de conflitos que envolvam equilíbrio econômico-financeiro de contratos celebrados pela administração com particulares.

Art. 33. Enquanto não forem criadas as câmaras de mediação, os conflitos poderão ser dirimidos nos termos do procedimento de mediação previsto na Subseção I da Seção III do Capítulo I desta Lei.

Parágrafo único. A Advocacia Pública da União, dos Estados, do Distrito Federal e dos Municípios, onde houver, poderá instaurar, de ofício ou mediante provocação, procedimento de mediação coletiva de conflitos relacionados à prestação de serviços públicos.

Art. 34. A instauração de procedimento administrativo para a resolução consensual de conflito no âmbito da administração pública suspende a prescrição.

§ 1º Considera-se instaurado o procedimento quando o órgão ou entidade pública emitir juízo de admissibilidade, retroagindo a suspensão da prescrição à data de formalização do pedido de resolução consensual do conflito.

§ 2º Em se tratando de matéria tributária, a suspensão da prescrição deverá observar o disposto na Lei nº 5.172, de 25 de outubro de 1966 - Código Tributário Nacional.

Seção II

Dos Conflitos Envolvendo a Administração Pública Federal Direta, suas Autarquias e Fundações

Art. 35. As controvérsias jurídicas que envolvam a administração pública federal direta, suas autarquias e fundações poderão ser objeto de transação por adesão, com fundamento em:

I - autorização do Advogado-Geral da União, com base na jurisprudência pacífica do Supremo Tribunal Federal ou de tribunais superiores; ou

II - parecer do Advogado-Geral da União, aprovado pelo Presidente da República.

§ 1º Os requisitos e as condições da transação por adesão serão definidos em resolução administrativa própria.

§ 2º Ao fazer o pedido de adesão, o interessado deverá juntar prova de atendimento aos requisitos e às condições estabelecidos na resolução administrativa.

§ 3º A resolução administrativa terá efeitos gerais e será aplicada aos casos idênticos, tempestivamente habilitados mediante pedido de adesão, ainda que solucione apenas parte da controvérsia.

§ 4º A adesão implicará renúncia do interessado ao direito sobre o qual se fundamenta a ação ou o recurso, eventualmente pendentes, de natureza administrativa ou judicial, no que tange aos pontos compreendidos pelo objeto da resolução administrativa.

§ 5º Se o interessado for parte em processo judicial inaugurado por ação coletiva, a renúncia ao direito sobre o qual se fundamenta a ação deverá ser expressa, mediante petição dirigida ao juiz da causa.

§ 6º A formalização de resolução administrativa destinada à transação por adesão não implica a renúncia tácita à prescrição nem sua interrupção ou suspensão.

Art. 36. No caso de conflitos que envolvam controvérsia jurídica entre órgãos ou entidades de direito público que integram a administração pública federal, a Advocacia-Geral da União deverá realizar composição extrajudicial do conflito, observados os procedimentos previstos em ato do Advogado-Geral da União.

§ 1º Na hipótese do *caput*, se não houver acordo quanto à controvérsia jurídica, caberá ao Advogado-Geral da União dirimi-la, com fundamento na legislação afeta.

§ 2º Nos casos em que a resolução da controvérsia implicar o reconhecimento da existência de créditos da União, de suas autarquias e fundações em face de pessoas jurídicas de direito público federais, a Advocacia-Geral da União poderá solicitar ao Ministério do Planejamento, Orçamento e Gestão a adequação orçamentária para quitação das dívidas reconhecidas como legítimas.

§ 3º A composição extrajudicial do conflito não afasta a apuração de responsabilidade do agente público que deu causa à dívida, sempre que se verificar que sua ação ou omissão constitui, em tese, infração disciplinar.

§ 4º Nas hipóteses em que a matéria objeto do litígio esteja sendo discutida em ação de improbidade administrativa ou sobre ela haja decisão do Tribunal de Contas da União, a conciliação de que trata o *caput* dependerá da anuência expressa do juiz da causa ou do Ministro Relator.

Art. 37. É facultado aos Estados, ao Distrito Federal e aos Municípios, suas autarquias e fundações públicas, bem como às empresas públicas e sociedades de economia mista federais, submeter seus litígios com órgãos ou entidades da administração pública federal à Advocacia-Geral da União, para fins de composição extrajudicial do conflito.

Art. 38. Nos casos em que a controvérsia jurídica seja relativa a tributos administrados pela Secretaria da Receita Federal do Brasil ou a créditos inscritos em dívida ativa da União:

I - não se aplicam as disposições dos incisos II e III do *caput* do art. 32;

II - as empresas públicas, sociedades de economia mista e suas subsidiárias que explorem atividade econômica de produção ou comercialização de bens ou de prestação de serviços em regime de concorrência não poderão exercer a faculdade prevista no art. 37;

III - quando forem partes as pessoas a que alude o *caput* do art. 36:

a) a submissão do conflito à composição extrajudicial pela Advocacia-Geral da União implica renúncia do direito de recorrer ao Conselho Administrativo de Recursos Fiscais;

b) a redução ou o cancelamento do crédito dependerá de manifestação conjunta do Advogado-Geral da União e do Ministro de Estado da Fazenda.

Parágrafo único. O disposto neste artigo não afasta a competência do Advogado-Geral da União prevista nos incisos VI, X e XI do art. 4º da Lei Complementar nº 73, de 10 de fevereiro de 1993, e na Lei nº 9.469, de 10 de julho de 1997. [Parágrafo único com redação dada pela Lei nº 13.327, de 29/7/2016, produzindo efeitos a partir de 1/8/2016](#)

Art. 39. A propositura de ação judicial em que figurem concomitantemente nos polos ativo e passivo órgãos ou entidades de direito público que integrem a administração pública federal deverá ser previamente autorizada pelo Advogado-Geral da União.

Art. 40. Os servidores e empregados públicos que participarem do processo de composição extrajudicial do conflito, somente poderão ser responsabilizados civil, administrativa ou criminalmente quando, mediante dolo ou fraude, receberem qualquer vantagem patrimonial indevida, permitirem ou facilitarem sua recepção por terceiro, ou para tal concorrerem.

CAPÍTULO III DISPOSIÇÕES FINAIS

Art. 41. A Escola Nacional de Mediação e Conciliação, no âmbito do Ministério da Justiça, poderá criar banco de dados sobre boas práticas em mediação, bem como manter relação de mediadores e de instituições de mediação.

Art. 42. Aplica-se esta Lei, no que couber, às outras formas consensuais de resolução de conflitos, tais como mediações comunitárias e escolares, e àquelas levadas a efeito nas serventias extrajudiciais, desde que no âmbito de suas competências.

Parágrafo único. A mediação nas relações de trabalho será regulada por lei própria.

Art. 43. Os órgãos e entidades da administração pública poderão criar câmaras para a resolução de conflitos entre particulares, que versem sobre atividades por eles reguladas ou supervisionadas.

Art. 44. Os arts. 1º e 2º da Lei nº 9.469, de 10 de julho de 1997, passam a vigorar com a seguinte redação:

"Art. 1º O Advogado-Geral da União, diretamente ou mediante delegação, e os dirigentes máximos das empresas públicas federais, em conjunto com o dirigente estatutário da área afeta ao assunto, poderão autorizar a realização de acordos ou transações para prevenir ou terminar litígios, inclusive os judiciais.

§ 1º Poderão ser criadas câmaras especializadas, compostas por servidores públicos ou empregados públicos efetivos, com o objetivo de analisar e formular propostas de acordos ou transações.

§ 3º Regulamento disporá sobre a forma de composição das câmaras de que trata o § 1º, que deverão ter como integrante pelo menos um membro efetivo da Advocacia-Geral da União ou, no caso das empresas públicas, um assistente jurídico ou ocupante de função equivalente.

§ 4º Quando o litígio envolver valores superiores aos fixados em regulamento, o acordo ou a transação, sob pena de nulidade, dependerá de prévia e expressa autorização do Advogado-Geral da União e do Ministro de Estado a cuja área de competência estiver afeto o assunto, ou ainda do Presidente da Câmara dos Deputados, do Senado Federal, do Tribunal de Contas da União, de Tribunal ou Conselho, ou do Procurador-Geral da República, no caso de interesse dos órgãos dos Poderes Legislativo e Judiciário ou do Ministério Público da União, excluídas as empresas públicas federais não dependentes, que necessitarão apenas de prévia e expressa autorização dos dirigentes de que trata o *caput*.

§ 5º Na transação ou acordo celebrado diretamente pela parte ou por intermédio de procurador para extinguir ou encerrar processo judicial, inclusive os casos de extensão administrativa de pagamentos postulados em juízo, as partes poderão definir a responsabilidade de cada uma pelo pagamento dos honorários dos respectivos advogados." (NR)

"Art. 2º O Procurador-Geral da União, o Procurador-Geral Federal, o Procurador-Geral do Banco Central do Brasil e os dirigentes das empresas públicas federais mencionadas no *caput* do art. 1º poderão autorizar, diretamente ou mediante delegação, a realização de acordos para prevenir ou terminar, judicial ou extrajudicialmente, litígio que envolver valores inferiores aos fixados em regulamento.

§ 1º No caso das empresas públicas federais, a delegação é restrita a órgão colegiado formalmente constituído, composto por pelo menos um dirigente estatutário.

§ 2º O acordo de que trata o *caput* poderá consistir no pagamento do débito em parcelas mensais e sucessivas, até o limite máximo de sessenta.

§ 3º O valor de cada prestação mensal, por ocasião do pagamento, será acrescido de juros equivalentes à taxa referencial do Sistema Especial de Liquidação e de Custódia - SELIC para títulos federais, acumulada mensalmente, calculados a partir do mês subsequente ao da consolidação até o mês anterior ao do pagamento e de um por cento relativamente ao mês em que o pagamento estiver sendo efetuado.

§ 4º Inadimplida qualquer parcela, após trinta dias, instaurar-se-á o processo de execução ou nele prosseguir-se-á, pelo saldo."(NR)

Art. 45. O Decreto nº 70.235, de 6 de março de 1972, passa a vigorar acrescido do seguinte art. 14-A:

"Art. 14-A. No caso de determinação e exigência de créditos tributários da União cujo sujeito passivo seja órgão ou entidade de direito público da administração pública federal, a submissão do litígio à composição extrajudicial pela Advocacia-Geral da União é considerada reclamação, para fins do disposto no inciso III do art. 151 da Lei nº 5.172, de 25 de outubro de 1966 - Código Tributário Nacional."

Art. 46. A mediação poderá ser feita pela internet ou por outro meio de comunicação que permita a transação à distância, desde que as partes estejam de acordo.

Parágrafo único. É facultado à parte domiciliada no exterior submeter-se à mediação segundo as regras estabelecidas nesta Lei.

Art. 47. Esta Lei entra em vigor após decorridos cento e oitenta dias de sua publicação oficial.

Art. 48. Revoga-se o § 2º do art. 6º da Lei nº 9.469, de 10 de julho de 1997.

Brasília, 26 de junho de 2015; 194º da Independência e 127º da República.

DILMA ROUSSEFF

José Eduardo Cardozo

Joaquim Vieira Ferreira Levy

Nelson Barbosa

Luís Inácio Lucena Adams