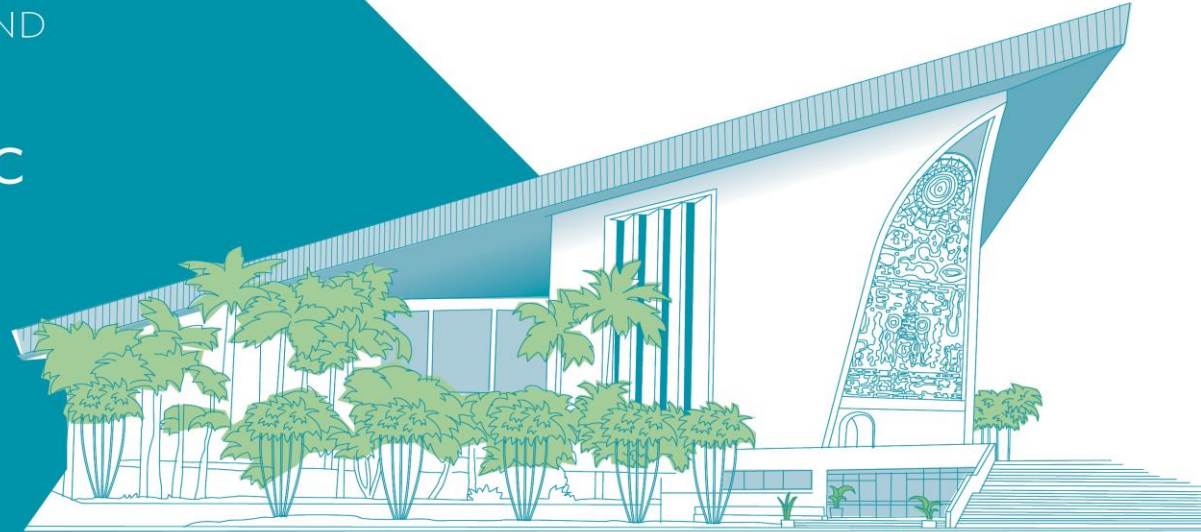




INTERNATIONAL MEDIATION AND
ARBITRATION CONFERENCE

2nd South Pacific International Arbitration Conference

25–26 March 2019
Stanley Hotel, Port Moresby
Papua New Guinea



THE INTERSECTION OF THE NEW YORK CONVENTION AND THE SINGAPORE CONVENTION

Professor Khory McCormick (BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb)

This is not an ADB material. The views expressed in this document are the views of the author/s and/or their organizations and do not necessarily reflect the views or policies of the Asian Development Bank, or its Board of Governors, or the governments they represent. ADB does not guarantee the accuracy and/or completeness of the material's contents, and accepts no responsibility for any direct or indirect consequence of their use or reliance, whether wholly or partially. Please feel free to contact the authors directly should you have queries.

26 March 2019

Table 1 – Growth of Arbitration Cases

INSTITUTION	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
ICC	521	593	599	663	817	793	796	759	767	791	801
AAA/ICDR	580	586	621	703	836	888	994	996	1165	1052	1064
LCIA	118	137	137	221	285	267	237	277	301	302	332
SCC	100	170	170	176	216	197	199	177	203	183	181
TOTAL	1319	1453	1527	1763	2154	2145	2226	2209	2436	2238	2378

The 60th Anniversary of the New York Convention (abstract)

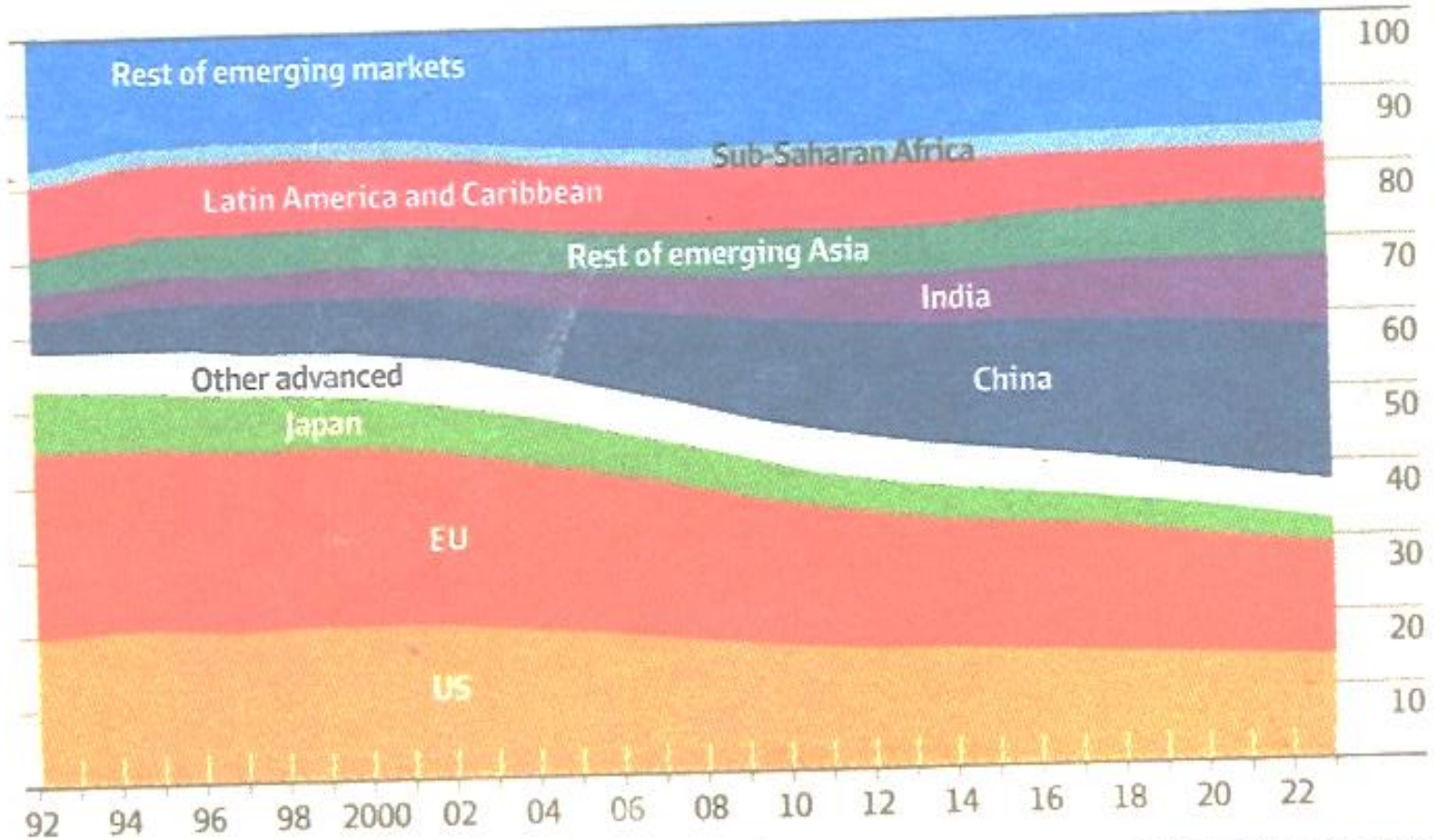
Pelin Usted

University of Canberra

17 September 2018

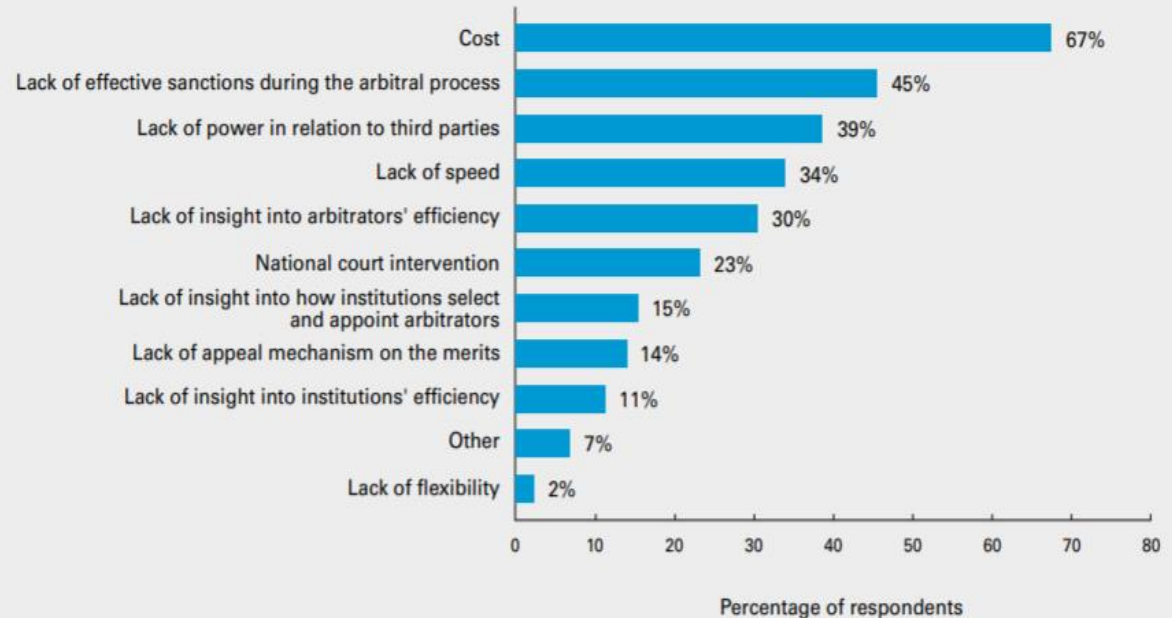
Equal terms

Share of world GDP, at purchasing power parity (%)



SOURCE: FINANCIAL TIMES

Chart 4: What are the three worst characteristics of international arbitration?

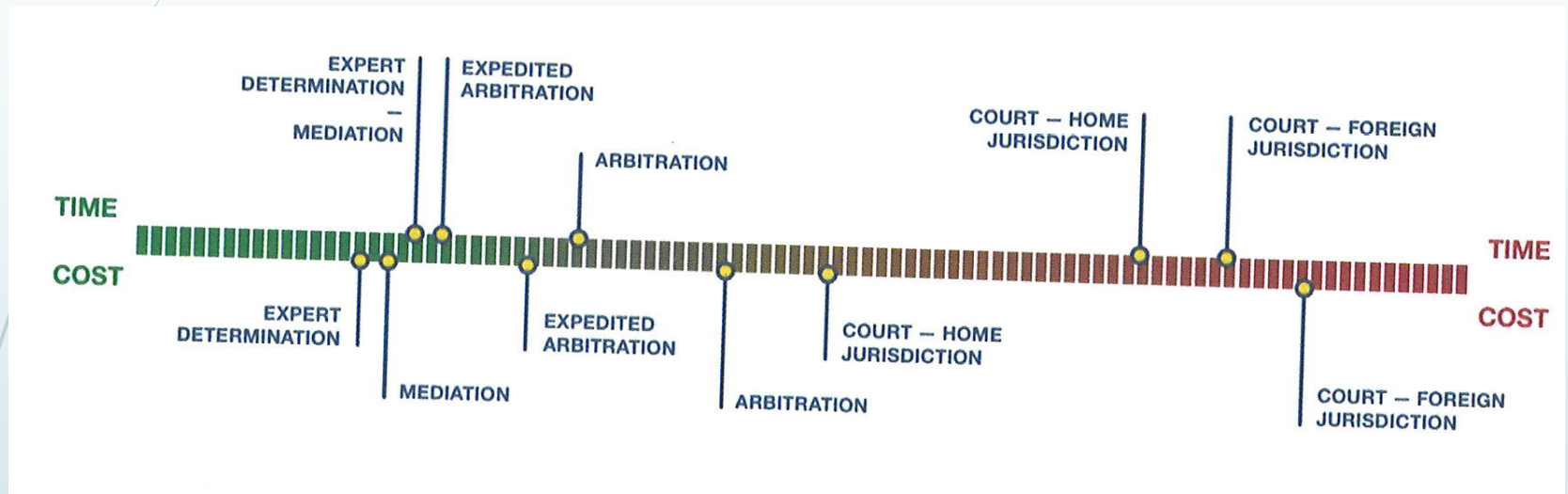


White & Case Survey

2018 International Arbitration Survey: The Evolution of International Arbitration
Queen Mary University of London; School of International Arbitration

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb

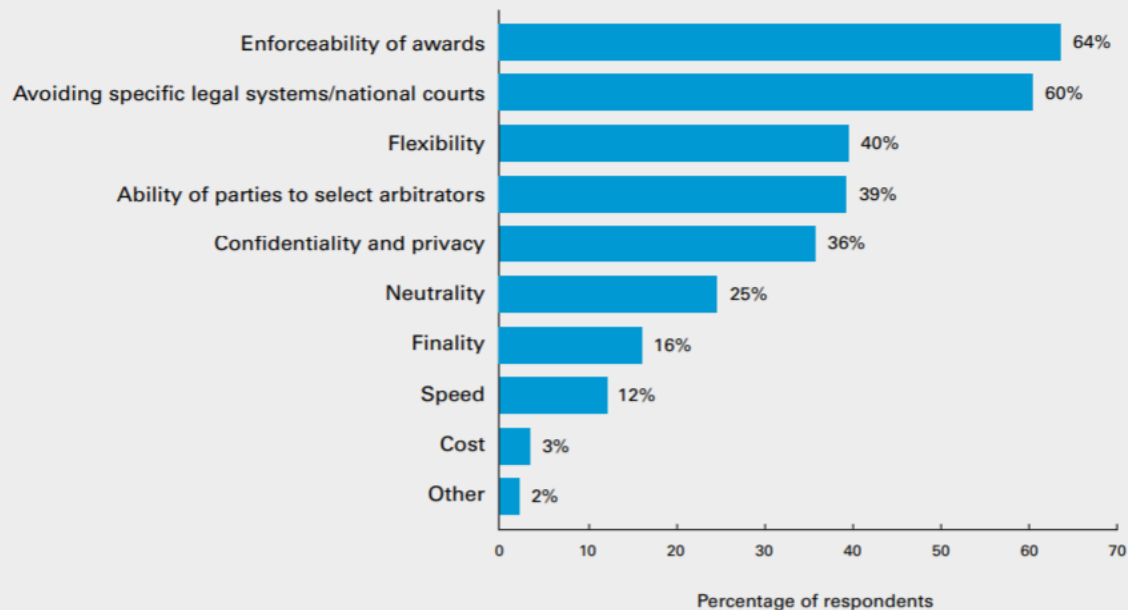
RELATIVE TIME AND COST OF TECHNOLOGY DISPUTE RESOLUTION



WPO Centre Report on International Survey of Dispute Resolution in Technology Transactions

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb

Chart 3: What are the three most valuable characteristics of international arbitration?



64%

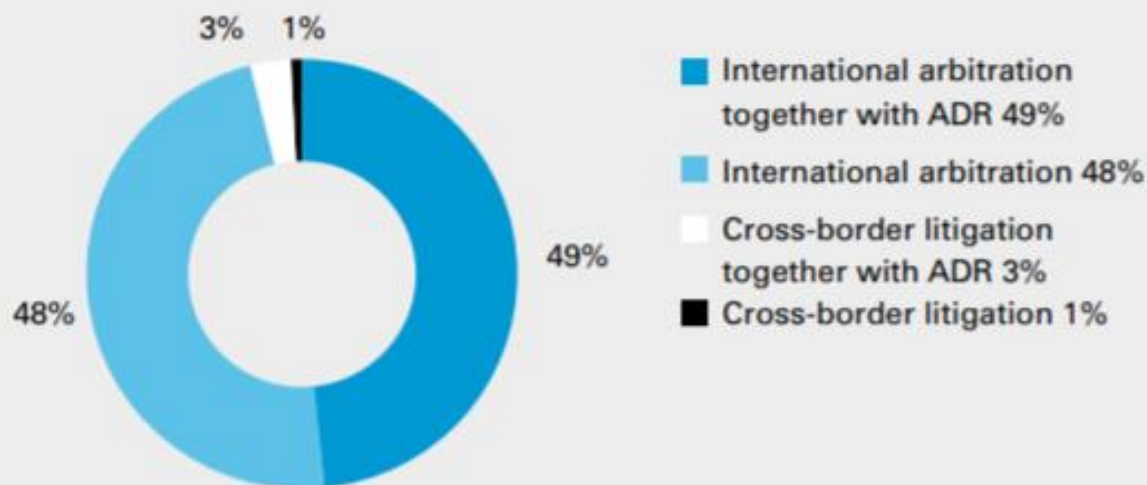
of respondents indicated that **"enforceability of awards"** is the most valuable characteristic of arbitration

White & Case Survey

2018 International Arbitration Survey: The Evolution of International Arbitration
Queen Mary University of London; School of International Arbitration

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb

Chart 1: What is your preferred method of resolving cross-border disputes?



97%

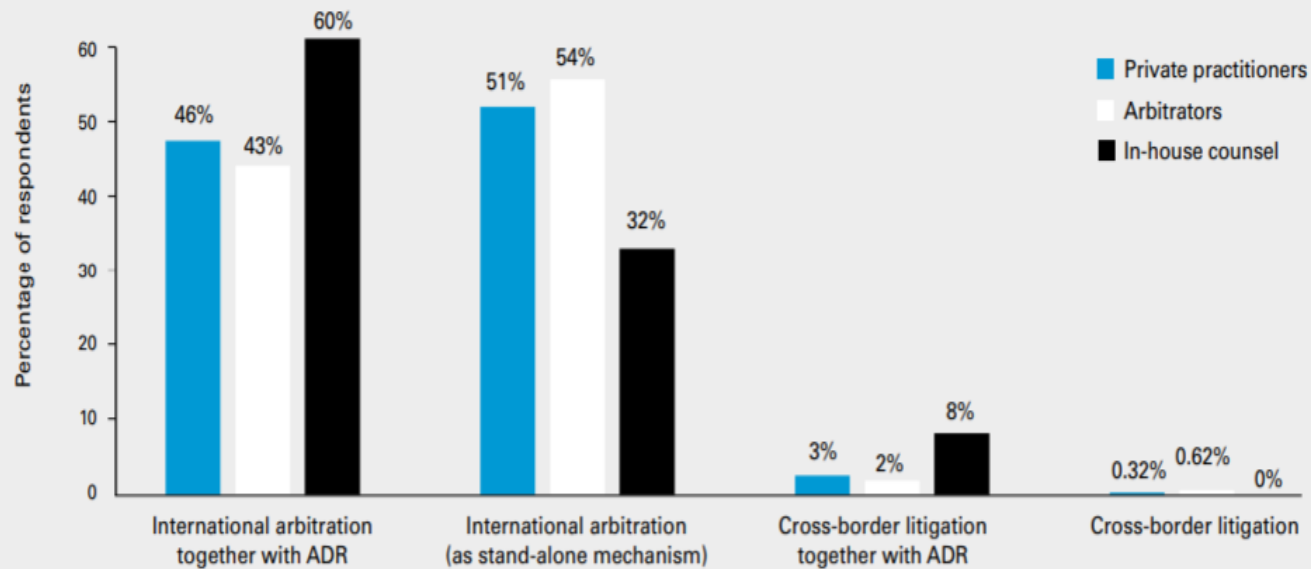
of respondents expressed that **international arbitration** is their preferred method of resolving cross-border disputes

White & Case Survey

2018 International Arbitration Survey: The Evolution of International Arbitration
Queen Mary University of London; School of International Arbitration

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb

Chart 2: Preferred method of resolving cross-border disputes – subgroups based on primary role



of in-house
counsel prefer
**international
arbitration
together
with ADR**

White & Case Survey

2018 International Arbitration Survey: The Evolution of International Arbitration

Queen Mary University of London; School of International Arbitration

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb



Singapore Convention on Mediation (Convention)

Preamble

- “*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,

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb



Convention

Article 2(3). Definitions

“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.

PROFESSOR KHORY MCCORMICK
BA, LL.M, DUniv, FRIArb1, FACICA, FCIArb



Convention

Article 2(2). Definitions

“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; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

PROFESSOR KHORY MCCORMICK
BA, LL.M., DUniv, FRIArb1, FACICA, FCIArb

Convention

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.



Convention

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.



Draft Convention

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...



Convention

Article 1(3). Scope of application

“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.



Convention

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.



Convention

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.

Convention

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;

PROFESSOR KHORY MCCORMICK

BA, LLM, DUniv, FRIArb1, FACICA, FCIArb



Convention

Article 5. Grounds for refusing to grant relief continued.

(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.

Contact



Khory McCormick

**Consultant and
Independent Neutral**

T +61411403344

E 1stneutral@gmail.com