Those familiar with international arbitration are aware of the concept of ‘seat of arbitration’ and the important role it plays. The arbitral seat is the juridical domicile of the arbitration. It determines which courts can exercise supervisory jurisdiction over the proceedings. Its arbitration law normally governs the arbitration itself (lex arbitri). Absent a choice of law, its substantive law governs the interpretation of the arbitration agreement. Under Article I of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the seat normally gives the award its nationality for enforcement purposes. This last detail is essential, as the New York Convention applies only to awards made in a country other than the place of enforcement (foreign) or that the place of enforcement does not consider domestic (non-domestic). This element of territoriality permeates the New York Convention, which mentions the arbitral seat (‘the country where the award is made’) in Articles I, V and VI.

In contrast, the 2019 Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), a treaty analogous to the New York Convention, does not mention the place where mediation takes place or where the settlement agreement is made. Why is that?

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While both are private dispute settlement mechanisms, arbitration and mediation are radically different. In arbitration, the third party has decision-making power to settle the dispute in a final and binding award. Arbitration is judicial in nature, and it is in judicial processes that one can usually speak of a ‘forum’ or seat.¹ Moreover, as the arbitrator substitutes the State judge, the country where that process legally takes place is interested in ensuring that the arbitration respects basic judicial standards. Due to supervisory jurisdiction, the arbitration derives part of its effects and validity from the legal system of the seat (although not exclusively). A breach of that law could result in the award being set aside at the seat.

In contrast, the mediator lacks decision-making power.² Mediation is not judicial, but contractual. The parties negotiate an amicable settlement themselves, albeit with the mediator’s assistance. Consider that the solution that results from mediation, according to the Singapore Convention, is a mediated settlement agreement – a contract.³ Unlike judicial processes, commercial negotiations do not have a ‘forum’. State supervision applies in the same way it would for any other person or activity within that State’s territory. A breach of the laws of the place of negotiation only leads to the contract’s nullity if that law governs the agreement or if the applicable law recognizes the

¹ As a mainstream example, see the legal definition of ‘forum’ in the Free Legal Dictionary: ‘A court of justice where disputes are heard and decided; a judicial tribunal that hears and decides disputes; a place of jurisdiction where remedies afforded by the law are pursued.’ Available at: https://legal-dictionary.thefreedictionary.com/forum

² See Article 2(2) of the Singapore Convention: “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.’ (emphasis added)

³ The Singapore Convention excludes settlements that are recorded in the form of third-party decisions. Article 1(3)(a) excludes settlements made before a court and Article 1(3)(b) excludes settlements recorded and enforceable as arbitral awards.
cause of nullity. Otherwise, the contract can be enforced regardless of the laws of the place where it is negotiated.

Note that while the New York Convention speaks of foreign arbitral awards, the Singapore Convention speaks of international settlement agreements. It appears that the Convention does not assign a nationality to the settlement contract and only subjects its enforceability to its applicable law and to the laws of the place where relief is sought (see Article 5(1)(b)). In that respect, it is notable that the concept of internationality in Article 1 matches the ones espoused by the 1980 Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (PICC).

The Singapore Convention, then, does away with the concept of a ‘seat of mediation’ because it is not necessary from an enforcement perspective. The approach is also sound from the policy perspective. Mediation tends to take place in multiple countries and even online. Sometimes, a single seat of mediation is difficult or impossible to identify – thus, requiring one would be as burdensome as it is unnecessary. Lastly, the elimination of a ‘seat of mediation’ frees the settlement agreement from the laws of that country (if identifiable). The courts of that place do not have the power to annul the settlement agreement, thereby preventing a system of double review as the one that exists in international commercial arbitration.