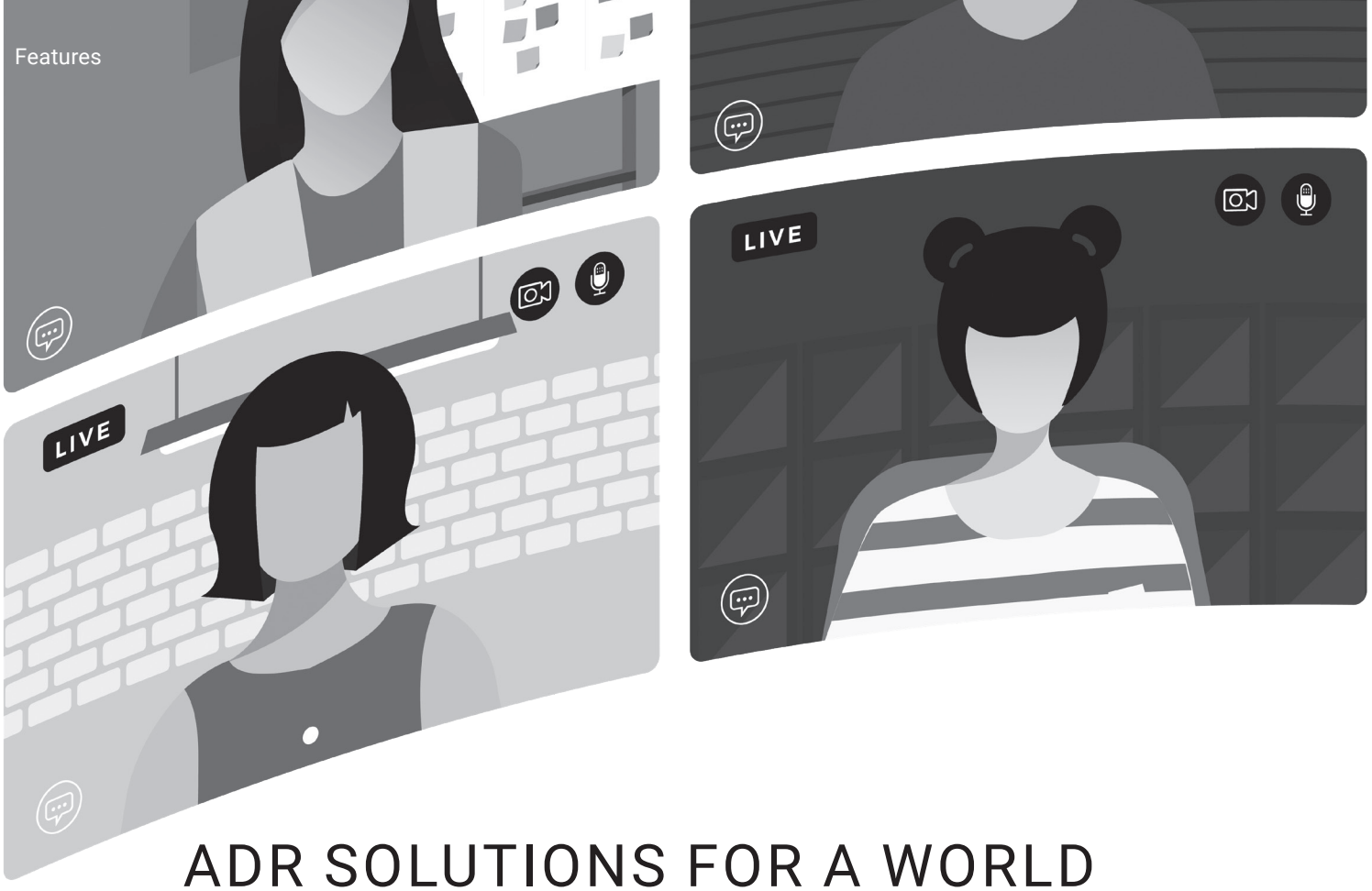

ADR SOLUTIONS FOR A WORLD REORDERED BY PANDEMIC – REMOTE IS CLOSER THAN YOU THINK

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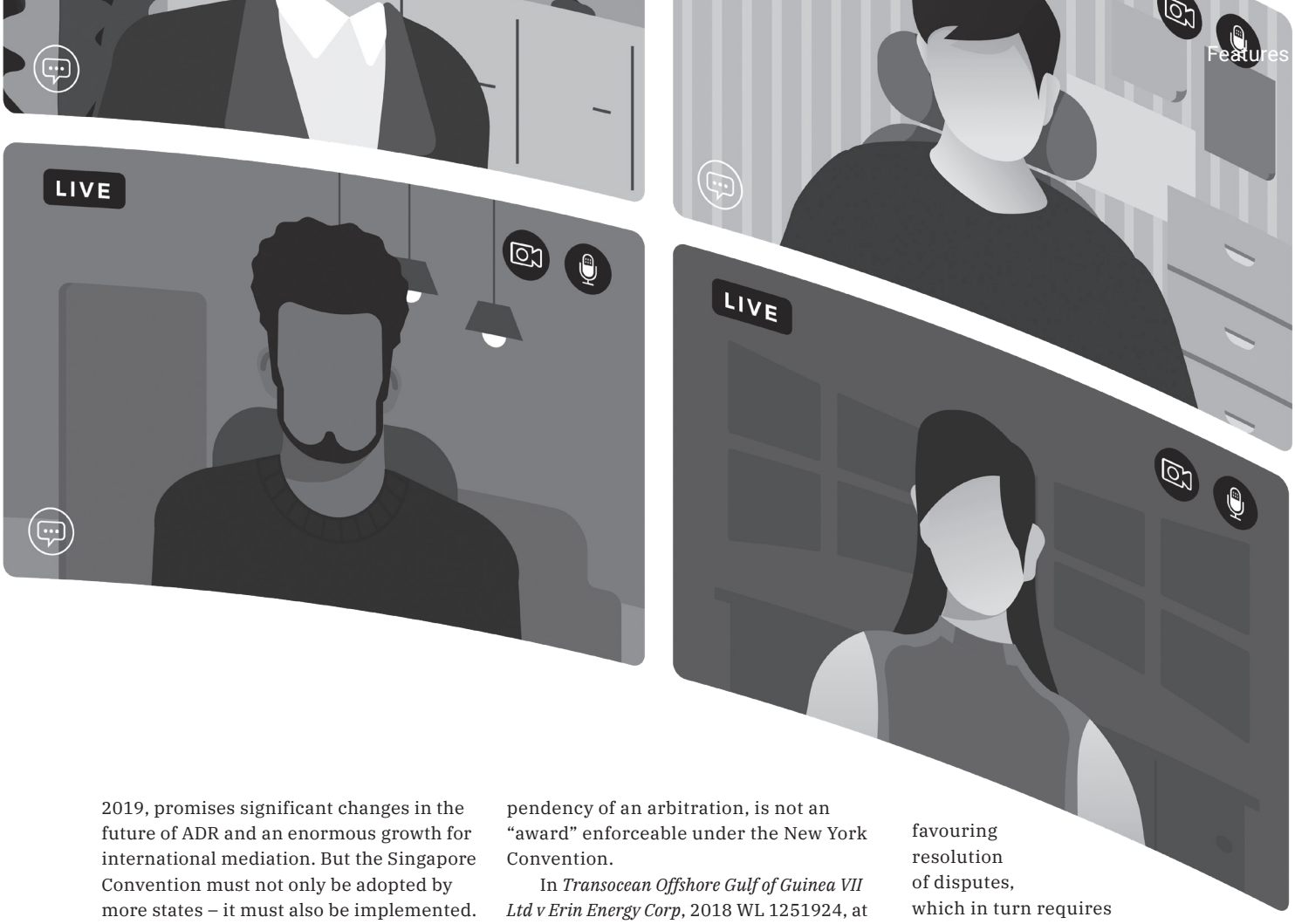
The clearest lesson of the pandemic is that we are all connected. Supply chains and the movement of goods and people by air, land and water mean we are all part of a huge interactive web. Now, businesses around the world are trying to combat the multiple impacts of covid-19, economic peril and, in the USA, racial injustice. Just as the challenges and new issues mount, the courts have had to cope with slowdowns and lockdowns. In an astoundingly quick transition, ADR providers and neutrals have shifted focus to providing dispute resolution services remotely online. They have issued protocols and set up processes, and many online mediations and arbitrations have already been conducted to a positive reception by many prior sceptics. Delay and backlog do not have to hamper an economic recovery that depends in part on cost-effective and efficient dispute resolution taking place now. We knew that businesses with cross-border disputes would require better and less expensive ways to address both routine and bet-the-company disputes, but the need is not yet being fully met. Help is at hand. An arb-med-arb process resulting in a consent award is a solution to an expressed need and it can happen right now (even remotely) before the long process of approval wends its way to completion for the UN Convention on International Settlement Agreements resulting from Mediation (Singapore Convention).

The Singapore Convention was the product of years of work by the UN Commission on International Trade Law (UNCITRAL) Working Group II. The effort was instigated by the USA and multinational corporations responding in part to the increased cost of international arbitration and the serious underuse of mediation in international disputes. The disuse of mediation largely resulted from the fact that in international matters, mediation results (usually in the form of a settlement) were not enforceable before the Singapore Convention.

In 2018, while Working Group II was creating a solution, the final report of the Global Pound Conferences was issued, reporting on the conferences held from 2016 to 2017 in 24 countries and obtaining over 4,000 responses to a set of questions about the needs and desires of the users of ADR. Among the Global Pound's many important conclusions, contained in its 2018 report, was that users of ADR – primarily international arbitration – desire more streamlined and cost-effective dispute resolution and expect the process to be flexible enough to incorporate mediation.

The enormous growth and success of international arbitration and international arbitral tribunals and centres was predominantly the outgrowth of the New York Convention; it gave us the ability to enforce arbitral awards worldwide. It took half a century to get to this point. The New York Convention has been adopted in over 160 countries. The acceptance of the Singapore Convention, signed in August



2019, promises significant changes in the future of ADR and an enormous growth for international mediation. But the Singapore Convention must not only be adopted by more states – it must also be implemented. We don't need to wait.

Right now, advocates and neutrals have the ability to attain many of the benefits of mediation by the careful use of consent awards that must technically start with an arbitration, but may proceed immediately to mediation. In fact, in New Jersey, a special statute has recognised the availability of the New York Convention to provide this resource now.

THE CURRENT LAW

What is the status of the law now on consent awards in arbitration or awards that are based on a mediated settlement?

First, if a pending arbitration results in a settlement and that settlement is reflected in a consent award, it is currently enforceable under the New York Convention. There is no basis in the New York Convention itself or in the rules of various arbitral bodies that could justify a distinction between an award and a consent award.

Second, if careful steps are taken, under the New York Convention a mediated settlement entered as a consent award in an arbitration can be enforced. This is an important option that international practitioners and disputants desire.

CONSENT AWARDS IN PENDING ARBITRATIONS

Two 2018 US district court cases reject the contention that a consent award entered by an arbitral tribunal, and reflecting the settlement by the parties during the pendency of an arbitration, is not an "award" enforceable under the New York Convention.

In *Transocean Offshore Gulf of Guinea VII Ltd v Erin Energy Corp*, 2018 WL 1251924, at *1–2 (SD Tex, 12 March 2018), an arbitration before the London Court of International Arbitration arose from a dispute over a contract for oil-drilling equipment, personnel and services in the waters off the coast of Nigeria. Before the arbitration hearing was held, the parties consented to the entry of an arbitral award by the tribunal. In the subsequent district court proceeding in Texas, Transocean and Indigo petitioned for confirmation of the awards under the New York Convention. Erin Energy challenged summary enforcement of the consent award, asserting that consent awards are not subject to the Convention. Erin Energy's argument was founded on the contention that a consent award is fundamentally different from other arbitral awards because an arbitral award represents the tribunal's conclusions, while a consent award reflects only the parties' agreement.

The *Transocean* district court rejected Erin Energy's proposition that the Convention's silence on the question of its applicability to awards that record the terms of settlement between the parties meant that the Convention was not intended to apply to consent awards. The *Transocean* court instead relied heavily on the earlier decision in the Southern District of New York in *Albtelecom SH.A v UNIFI Commc'ns, Inc*, 2017 WL 2364365 (SDNY, 30 May 2017), which viewed any prohibition to enforcement of a settlement reached during the pendency of an arbitration as against public policy favouring resolution of disputes, which in turn requires enforceability of the result. *Transocean* specifically rejected the argument that enforcement under the New York Convention depends on the arbitral tribunal actually making its own findings:

> *No binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention. As the* Albtelecom *court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide.*

These authorities are persuasive as to US application. Is it different elsewhere? England's Arbitration Act of 1996, c.23 § 51, is clear on this point, providing that "an agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case". And the UNCITRAL Model Law on Commercial Arbitration article 30(2) provides that "an award on agreed terms has the same status and effect as the award on the merits of the case".

French law appears to be silent on the issue, but that does not by itself suggest that consent awards will not be enforced. However, a French case has given some pause. In *Receivers of Viva Chemical (Europe) NV [Belgium] v Allied Petrochemical Trading*

& Distribution LC [Isle of Man] (Regional Court of Appeal, Paris 1e ch. (section C), 9 April 2009, case no. 07/177690) the Paris Court of Appeal annulled an enforcement order of the Parisian lower court. However, the French court did not rely on the fact that it was a consent award alone. It held that the enforcement of that award would be contrary to French international public policy.

On 28 September 2006, *Viva Chemical* purchased 3,400 tons of base oil from a company called Petroval. Viva Chemical never paid for the oil. Nevertheless, Viva sold the oil to Allied Petrochemical. On 22 May 2007, two days before Viva filed for bankruptcy, Allied Petrochemical and Viva jointly appointed a sole arbitrator who rendered an award by consent.

The Court of Appeal found that the award by consent had been made in the absence of a dispute between the parties and that the award was fraudulent and contrary to public policy. There is nothing extraordinary about the refusal to enforce the award in Viva Chemical. The UNCITRAL Model Law and most national arbitration acts permit voiding an award (whether or not by consent) on the grounds of public policy. The UNCITRAL Model Law on Arbitration, note 8 supra, article 34(2)(b)(ii), states:

> *An arbitral award may be set aside by the court [in the seat of arbitration] only if the court finds that . . the award is in conflict with the public policy of this State.*

CONSENT AWARDS BASED ON A MEDIATED AGREEMENT

There is no logical distinction between a settlement that was derived from the parties acting independently and a settlement that results from a mediation that the parties then bring to the arbitrators. The resulting consent awards are indistinguishable. However, a question of enforceability of mediated settlements (or any settlement for that matter) entered as a consent award arises when no arbitration is pending, and the parties either ask the mediator to enter a consent award as an arbitrator (changing hats), or ask to convene an arbitration for the sole purpose of entering the mediated settlement as an award.

The problem derives from language in article I(1) of the New York Convention providing that:

> *This Convention shall apply to the recognition and enforcement of arbitral awards ... arising out of differences between persons, whether physical or legal.*

Some scholars posit that if a settlement has already been reached or mediated, there is no longer a "difference" between the parties and the Convention does not apply. Edna Sussman, in *The New York Convention Through a Mediation Prism*, argues that the Convention does not specify that a difference has to exist at the time of the appointment of the arbitrator. Although there are sound arguments against this approach, no settling parties would want to have to litigate the issue. The Singapore Convention provides one solution.

But for now, the most efficient approach is to initiate the arbitration before, or at the same time as, the mediation. This is the solution under the Singapore International Mediation Centre and Singapore International Arbitration Centre (SIAC) Arbitration-Mediation-Arbitration Protocol, and others, including the New Jersey statute NJSA 2A:23 E-3[illegible]ich permits enforcement of mediated awards. Under this arb-med-arb approach, whether the arbitrator appointed also acts as mediator (subject always to the express written consent of the parties), the resulting consent award should be enforceable under the New York Convention.

International disputants want solutions that include a mediation opportunity. Cross-border disputes can be resolved now with an enforceable result. These disputes can be resolved with remote proceedings by videoconference. The Singapore Convention is going to be implemented, but the future is already here. Challenge and change go hand in hand.