7-2019

Supporting party autonomy in the enforcement of cross-border mediated settlement agreements: A brave new world or unchartered territory?

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- **Dorcas Quek Anderson**[1]

I. Introduction

1. The last decade has seen a palpable rise of domestic and international instruments to facilitate the enforcement of cross-border mediated settlement agreements. The EU Mediation Directive required member states to provide for enforcement of such agreements. Common law jurisdictions including Singapore, Ireland and Ontario have enacted legislation to allow mediated settlement agreements to be recorded as court judgments. Other countries have provided for such agreements to be akin to arbitral awards for enforcement purposes. Most recently, the United Nations Commission on International Trade Law (UNCITRAL) has agreed to create multilateral convention and to amend the Model Law on International Commercial Conciliation to facilitate cross-border enforcement of commercial disputes via mediation. It was rightly observed in the Global Pound Conference series that there is a significant desire – notably in Asia – for enforcement legislation to be passed in order to increase the use of mediation.

2. The mediation process is one of many ways in which dispute resolution has been privatized and taken out of the formal court system. The first wave of privatization probably commenced with the growth of arbitration, leading to the wide ratification of the New York Convention. Mediation now appears to be following the same path treaded by arbitration, spawning the growth of mediation regulations, professionalization systems and now enforcement instruments. Both dispute resolution processes allow the parties to participate more fully in comparison to litigation. Party autonomy is a common attraction shared in both these processes. However, party autonomy plays a much more integral role within mediation. Under most mediation frameworks, the disputing parties not only choose their mediator and type of mediation process, but also have to freely consent to the mediated settlement. In this regard, the UNCITRAL's current draft wording of a convention recognised that the mediator "lacks the authority to impose a solution upon the parties" and the parties must arrive at an amicable settlement.[2]

3. Parodoxically, the legitimacy of mediation "requires the use of the very litigation system which the parties eschewed in the first place".[3] The exercise of party autonomy within this process has to be validated through the courts' willingness to enforce the mediated agreement

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[2] UNCITRAL, *International commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation,* UN Doc A/CN.9/943 (2 March 2018), at 3 draft article 1(3).
[3] Laurence Boulle, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 Contemp. Asia Arb. J. 35 (2014), at 58.

across borders. Mediated settlement agreements require the courts' support by ascribing legal effect to them when the need arises. The efforts by UNCITRAL to create an expedited cross-border enforcement mechanism thus raise the crucial question about how best the litigation system can support the exercise of party autonomy within mediation.

4. This article discusses both the great potential and likely difficulties faced in giving weight to consensual agreements reached through the private mediation process. Part II explores the need for a mechanism to be created to support autonomy, while Part III provides an overview of the key provisions of the convention. Two areas of tension will then be explored. Part IV discusses the difficulties in giving effect to party autonomy amidst the plurality of domestic and international mediation standards; and Part V examines the tension between respecting party autonomy and giving weight to the enforcing state's public policies.

5. It will be argued in Parts IV and V that the challenges arising from the proliferation of enforcement regimes are not insurmountable. The brave new world of cross-border enforcement may bring about some unavoidable challenges. Nevertheless, the very effort to facilitate international enforcement provides the much-needed impetus to overcome these challenges by encouraging greater convergence of mediation standards and more candid discussion about managing the relevant tensions. In navigating these tensions, the emerging enforcement regime may well usher in a promising sea change to the development of international commercial mediation and mediation standards.

II. The emerging need to give effect to the exercise of party autonomy within cross-border mediations

6. Cross-border dispute resolution has been growing in diversity, driven in no small part by the parties' increasing desire to exercise self-determination in resolving conflicts. While court adjudication used to be the prominent mode of dispute resolution, resulting in the creation of various instruments for cross-border recognition of judgments, arbitration emerged as an alternative to resolving commercial disputes. Unlike a court trial, party autonomy is amply exercised within arbitration in respect of the choice of arbitrator, place of arbitration, procedure and governing law.[4] The widespread ratification of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") attests to the burgeoning popularity of arbitration. The increasing uniformity of arbitration rules along the lines of the Convention has contributed significantly to the relative ease in enforcing arbitral awards across borders.

[4] See Model Law on International Commercial Arbitration of the United National Commission on International Trade Law, GA Res 51/33, adopted at 61st Session (18 December 2006), article 19 (1) (which provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings); and article 11(2) (providing that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5)). See also Elizabeth Shackelford, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, 67 University of Pittsburgh Law Review (2006) 897 at 900 (stating that the arbitration agreement is the primary resource of arbitration and the strongest evidence of party autonomy).

7. The growth of mediation represents yet another marked shift towards exercise of party autonomy in dispute resolution. In contrast to arbitration, party autonomy plays a much more integral role within mediation. Under most mediation frameworks, the disputing parties not only choose their mediator and type of mediation process, but also have to freely consent to the settlement outcome.[5] In this regard, the 2002 Model Law on International Commercial Conciliation ("Model Law") defined conciliation (or mediation) as involving a third person who "does not have the authority to impose…a solution to the dispute" assisting parties to reach "an amicable settlement of their dispute".[6] Mediation and conciliation have been treated interchangeably by UNCITRAL in relation to the settlement of commercial disputes.

8. More than a decade ago, the United Nations highlighted the benefits of mediation, including significant costs savings and preservation of relationships.[7] However, some have deemed mediation to be the poorer cousin of arbitration due to the glaring absence of a harmonized framework to enforce international mediated settlement agreements ("MSAs").[8] A survey conducted by Strong indicated that 74% respondents thought an international instrument akin to the New York Convention would encourage the use of mediation.[9] More significantly, an international enforcement regime would put mediation on comparable standing with arbitration in terms of competitive advantages, thus increasing the attraction of mediation as a dispute resolution option.[10] Nonetheless, although the UNCITRAL Commission recognised that quick and easy enforcement of MSAs should be promoted, the Model Law left the specific method of enforcement to be determined by individual states.[11] A wide variety of domestic mechanisms exist, ranging from the use of general contract law to specific legislation allowing a MSA to be enforced as a court order or an arbitral award. The great diversity of enforcement modes, coupled with the lacuna in the cross-border enforcement regime, has led

[5] *Supra* note 3, at 48.
[6] Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, article 1(3).
[7] UNCITRAL Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, GA Res 57/18, adopted at 57th Session (January 24, 2003), at 1 ("Considering that the use of such dispute settlement methods 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").
[8] *Supra* note 3, at 57; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015),* UN Doc A/CN.9/832 (11 February 2015) at 5 (stating that a convention would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement agreements could be relied on and easily enforced, and thqt the preparation of a convention would itself encourage the use of conciliation).
[9] S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*73 Wash. & Lee L. Rev. 1973, 2088 (2016) at 2055; *See also* International Mediation Institute, *How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements*, available online https://imimediation.org/uncitral-survey-results-news-item.
[10] Laurence Boulle and Jay Qin, *Globalising Mediated Settlement Agreements,* 2 J. Int'l & Comp. L. 33 (2016) at 44.
[11] Article 14 of the Model Law on International Commercial Conciliation ("If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable **...** [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].").

to the creation of hybrid processes such as "med-arb" or "arb-med-arb" to convert MSAs into arbitral awards that could be enforced through the New York Convention.[12]

9. Following a proposal by the United States to develop a multilateral convention for enforcing MSAs, the UNCITRAL Working Group II on Dispute Settlement ("Working Group") has been addressing the above gap since 2015.[13] Many issues raised in the discussions reflect the foremost concern about preserving party autonomy, a foundational tenet of the mediation process. The Working Group recognized that the flexible and consensual nature of mediation should not be undermined by excessive formal requirements involved in enforcement. Moreover, individual autonomy had to be respected within the confines of public policy for the state of enforcement. In addition, the Working Group was acutely aware that any regime had to require the parties' consent to be bound by it.[14] Certain types of disputes such as consumer and labour contracts were thought to be unsuitable for this convention due to the lack of full party autonomy in these relationships.[15] There were difficult conversations concerning the formality requirements an MSA should fulfil before it could be enforced. Above all, there were varying understandings of how self-determination was to be properly exercised within mediation, the qualifications of the mediator as well as how due process was to limit the exercise of autonomy.

10. Given the plethora of views and the great diversity in mediation practices, some states were far from optimistic about reaching consensus.[16] However, in February this year, the Working Group reached an agreement on the wording of a convention and an amended model law, which has been tabled for approval by the UNCITRAL Commission in July.[17] This is a most promising development for the future of international mediation.

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[12] Edna Sussman, *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements,* Transnational Dispute Management 6 (2015), at 6-7; Ellen Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation* 80 Notre Dame L. Rev. 553 (2004-2005) at 588.

[13] UNCITRAL, *Planned and possible future work – Part III, Proposal by the Government of the United States of America: Future work for Working Group II,* UN Doc A/CN.9/822 (2 June 2014); UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015),* UN Doc A/CN.9/832, 11 February 2015, at 2 (stating that the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area).

[14] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015),* UN Doc A/CN.9/832, 11 February 2015, at 6-8, paras 23, 30 and 37.

[15] See Germany's comments at UNCITRAL, *Settlement of commercial disputes: Comments received from States (New York, 2-6 February 2015),* UN Doc A/CN.9/WG.II/WP.188, 23 December 2014, at 3 (stating that since the basis for any instrument is full party autonomy, the scope must be limited to commercial agreements between businesses only; and consumer contracts, labour contracts, housing contracts (rents) have to be excluded from its scope).

[16] *Supra* note 14, at 6 para 19.

[17] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session (New York, 5-9 February 2018),* UN Doc A/CN.9/934, 19 February 2018; UNCITRAL, *Provisional agenda, annotations thereto and scheduling of meetings of the fifty-first session (New York, 25 June – 13 July 2018),* UN Doc A/CN.9/927/Rev.1, at 1 (provisional agenda item 4 – Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation).

III. The framework for giving weight to party autonomy in the draft UNCITRAL convention

11. The framework of the draft instruments will be briefly summarised before the central issue of party autonomy is discussed. This article focuses primarily on the convention presently known as the United Nations Convention on International Settlement Agreements Resulting from Mediation ("the Convention") [18] as the provisions of the draft amended Model Law are *in pari materia* to the Convention. The wording of the Convention has been finalised by the Working Group but will require approval of the UNCITRAL Commission and the UN General Assembly before coming into effect.[19]

12. The aim of the Convention was not to deal with procedural aspects within domestic enforcement legislation, but to provide a simple mechanism allowing a party to an MSA to seek enforcement in a contracting state, or to rely on the MSA as a defence against a claim.[20] Art 2 thus provides that the contracting state "shall enforce a settlement agreement in accordance with its rules of procedure". It was decided that there would be no additional requirement of a review mechanism in the state where the MSA was concluded.[21]

a. The scope of the Convention

13. The Convention only deals with international commercial disputes. An "international" MSA entails parties having their places of business or habitual residence in different states; or having their place of business in a state different from where the obligations are to be substantially performed or where the subject matter of the MSA is most closely connected. [22] Commercial disputes would exclude conflicts relating to family, inheritance or employment law, as well as consumer disputes.[23] The Convention also will not apply to MSAs that were arrived at in the course of court or arbitral proceedings.[24]

b. The necessary connection with mediation

14. Although there were proposals to extend the application of the Convention to any negotiated agreement, the final draft applies the instrument only to agreements "resulting from mediation". This position effectively confers MSAs a higher status than ordinary contracts and

[18] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session (New York, 5-9 February 2018),* UN Doc A/CN.9/934, 19 February 2018, at 20, para 143.
[19] *Supra* note 14.
[20] *Supra* note 18, at 6, para 36.
[21] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fifth session (Vienna, 12-13 September 2016),* UN Doc A/CN.9/896, 30 September 2016, at 15-16, paras 80-85; Natalie Morris-Sharma, *The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements*, Austrian Yearbook on International Arbitration 2018, 123 at 130.
[22] *Supra* note 2, articles 3(1), 3(2)(b).
[23] *Supra* note 2, article 1(2).
[24] *Supra* note 2, article 1(3).

gives credence to mediation as an established mode of dispute resolution.[25] Notably, the Working Group agreed to replace the term "conciliation" with "mediation" to reflect the current usage and understanding of the term. The substantive definition of mediation is premised on article 1(3) of the Model Law, focusing on the key features of mediation such as the lack of authority of the mediator to impose a solution on the parties. Art 1(4) accommodates the diversity of mediation practices by noting that it does not depend on the expression used by the parties or the basis upon which the process is carried out. To prove that the MSA was arrived at in the course of mediation, the relevant party has to show the mediator's signature on the MSA, any other document confirming mediation, or an attestation by the body administering the mediation.[26]

c. Form requirements

15. After considering the need to keep the enforcement mechanism as simple as possible, the Working Party agreed on minimal formality requirements to facilitate the enforcement process and prevent any abuse.[27] The MSA only has to be reduced to writing and signed by the parties. The practical realities of using electronic communications to conclude an MSA were acknowledged.[28]

d. Grounds for refusing to grant relief

16. Much of the Working Group's deliberations centered on the limits to giving effect to party autonomy within the MSA. The agreed article 5 in the Convention provides for the following grounds to decline enforcement of an MSA:[29]

> **Article 5. Grounds for refusing to grant relief**
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> 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

[25] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015),* UN Doc A/CN.9/861, 17 September 2015, at 5, para 19.
[26] *Supra* note 2, article 4(1)(b).
[27] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fifth session (Vienna, 12-13 September 2016),* UN Doc A/CN.9/896, 30 September 2016, at 13, paras 70.
[28] *Supra* note 2, article 4(1)(a).
[29] *Supra* note 2, article 5.

(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.

17. Since the agreed expedited mechanism was not to include any review process,[30] the only restraint to the exercise of personal autonomy would be stipulated within art 5. It is therefore not surprising that the Working Group spent substantial time deliberating on these grounds. The challenge was to agree on grounds that were not excessively burdensome, thus undermining the overall goal of creating an expedited enforcement mechanism that was sufficiently flexible.[31] Furthermore, the international enforcement regime should not indirectly import requirements of specific domestic legislation. This delicate balance was finally reached through the above grounds for refusing enforcement, which may be broadly grouped into grounds relating to:

(a) the parties (1(a));
(b) the MSA (1(b), (c) and (d));
(c) the mediation process (1(b)(i), (e) and (f)); and
(d) the enforcing state's policies and mandatory laws (2(a) and (b)).[32]

18. Given that the proposal for a multilateral convention drew inspiration from the highly successful New York Convention, many of the grounds bear remarkable resemblance to portions of Article V of the latter convention. Article 5(1)(a) concerning the party's lack of capacity is identical to the New York Convention, referring to the legal ability of a person to enter into an agreement on its own behalf.[33] Likewise, draft article 5(2) mirrors the two grounds which the enforcing state may raise *ex officio* (on its own initiative) to decline enforcement – a conflict with the state's public policies, and the subject matter being "not capable of settlement by mediation" (instead of arbitration).

[30] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015),* UN Doc A/CN.9/861, 17 September 2015, at 15-16, paras 83-84.
[31] *Id,* at 17, para 93.
[32] *Supra* note 27, at para 35.
[33] See Ignacio Suarez Anzorena, "The Incapacity Defence Under the New York Convention", in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (E. Gaillard, D. Di Pietro eds., 2008), at 615, 621; UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016 ed) at 135.

19. The similarities with the New York Convention end in relation to the other grounds for declining relief, principally because of the consensual nature of an MSA. While an arbitral award is premised on due process in decision-making by the arbitrator, an MSA is founded on parties' consent or autonomy in arriving at the agreed solution. Accordingly, the aspects of due process in arbitration involve procedural matters such as proper notice of the appointment of the arbitrator, opportunity to present one's case (5(1)(b)) and the panel having a composition reflecting the parties' agreement (5(1)(d)). By contrast, elements of fairness within mediation directly impinge on autonomy instead of procedural rules. Factors relating to coercion such as duress and undue influence, as well as elements that affected informed exercise of autonomy such as fraud, mistake or misrepresentation, would undermine the exercise of self-determination to arrive at the settlement.[34] Drawing from the language in art 2(3) of the New York Convention, the Working Group referred to a MSA being "null and void, inoperative or incapable of being performed", in order to broadly encapsulate the common grounds rendering a contract void or voidable.[35]

20. Apart from discussing defences directly impinging on party autonomy, the Working Group went further to consider other aspects of due process and fair treatment within the mediation process. There were strong views that other elements in professional mediation ethical rules such as impartiality, neutrality and equal treatment of parties had to be endorsed as due process within mediation.[36] The discussions thus focused heavily on the aspects of serious mediator misconduct warranting a refusal of enforcement. Consequently, the Working Group agreed to two additional grounds of non-relief – one relating to fair treatment, and the other relating to the mediator's failure to disclose information that was likely to raise doubts about mediator impartiality.[37] These aspects of misconduct had to be sufficiently serious and objective grounds, "without which failure that party would not have entered into the settlement agreement".[38] The former ground was eventually articulated as a serious breach of "standards applicable to the mediator or mediation", while the latter was encapsulated as a failure to "disclose…circumstances that raise justifiable doubts as to the mediator's impartiality or independence".[39] The applicable mediation standards referred to legislation governing the mediation or professional codes of mediation conduct. Furthermore, it was agreed that the text accompanying the Convention would provide an illustrative list of such standards that would refer to elements such as independence and fair treatment.[40]

[34] *Supra* note 30, at 9-10 para 46.
[35] There was broad agreement that such grounds were clearly to be included in the draft convention; *supra* note 27, at 16 -18 paras 88, 99 and 100.
[36] *Supra* note 30, at 17 para 90; *supra* note 11, at 19 para 104-105.
[37] *Supra* note 27, at 20 paras 108-109.
[38] *Supra* note 27, at 20 para 107; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 16 para 84.
[39] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 16 paras 81-85; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session (New York, 5-9 February 2018),* UN Doc A/CN.9/934, 19 February 2018, at 10 para 59.
[40] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 16 para 87; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-seventh session (Vienna, 2-6 October 2017),* UN Doc A/CN.9/929, 11 October 2017, at 15 para 96.

21. Finally, a few grounds in the convention relate to the diverse types of obligations that could be inserted into an MSA. Some obligations could be reciprocal or conditional upon the fulfilment of other terms of the settlement. Additionally, the obligation may not have arisen because of the other party's breach of different obligation.[41] After intense rounds of discussion, the Working Group arrived at provisions referring to obligations being non-binding, modified subsequently, unclear in its terms, having already been performed or being contrary to the terms of the agreement (including conditional or reciprocal terms).[42] The Working Group acknowledged the potential overlap between these grounds and the public policy defences in article 5(2).[43]

22. As evident from the Working Group's intense deliberations, art 5 of the Convention represents a delicate compromise over the competing values and assumptions concerning the nature of party autonomy within mediation.[44] Even as the international community strives to create a simple mechanism to readily recognise the exercise of autonomy within MSAs, there were divided views on the parameters of such autonomy. Deeper questions arose in relation to what party autonomy entails, as well as the appropriate restrictions to be imposed on party autonomy. The next section explores the former issue.

IV. Which understanding of party autonomy within mediation prevails?

23. A summary enforcement process has to address the issues of when party autonomy has not been undermined when arriving at a settlement. Underlying this issue is the much deeper question of what party autonomy within mediation entails. However, the diverse understanding of this concept across different legal traditions has posed no small difficulty to the courts' enforcement of MSAs. The Working Group's discussions on these issues belie unresolved uncertainties over the contours of party autonomy.

a. Party autonomy in mediation

24. It is first necessary to discuss how party autonomy has been understood within mediation practice. The modern mediation movement in many jurisdictions grew out of the emphasis on party autonomy or self-determination, and the continuing allure of mediation is linked to this quality. It is this particular feature of mediation that has distinguished mediation from a trial, making the former an '"alternative" dispute resolution process that is known to allow parties greater participation in the outcome of their dispute.

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[41] *Supra* note 27, at 17-18 paras 92-98; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session (New York, 1-5 February 2016),* UN Doc A/CN.9/867, at 26 paras 161-162.
[42] *Supra* note 20, at 9-10 paras 54-57.
[43] *Supra* note 20, at 9-10 paras 56 and 65; UNCITRAL, *International commercial mediation: draft convention on international settlement agreements resulting from mediation, Note from Secretariat for the Commission's fifty-first session (New York, 25 June – 13 July 2018),* 2 March 2019, UN Doc A/CN.9/942, at 11 para 17 (noting that the Working Group had a shared understanding that there might be overlap among the grounds provided and that competent authorities should take this into account when interpreting the various grounds).
[44] Deason, *supra* note 12, at 585 (commenting that there are important values at stake underpinning the deeply divided views on the issue of summary enforcement of MSAs).

25. Mediation regulatory standards and ethical codes across jurisdictions have described this concept in varying terms. The USA Uniform Mediation Act refers to the mediator "facilitat[ing] communication and negotiation between parties to assist them in reaching a *voluntary agreement* regarding their dispute".[45] Australia's National Mediation Accreditation Standards similarly highlights the parties' integral role in decision-making, stating that the participants, with the mediator's support and assistance, "identify, clarify and explore interests, issues and underlying needs,… consider their alternatives,… negotiate with each other; and *reach and make their own decisions*".[46] The Model Law's definition of mediation, which the Convention has followed, identifies what the mediator cannot do – impose a solution on the parties.[47] Other terms that have emerged to elaborate on the concept include knowing or informed consent,[48] promoting the parties' self-determination,[49] ensuring that parties have adequate opportunity to be involved in the process,[50] helping the parties reach a voluntary and uncoerced decision[51] and the mediator refraining from determining the outcome of the dispute.[52] Certain codes of conduct and standards have also pointed out the need to be sensitive to power imbalances that potentially affect the degree of autonomy being exercised.[53]

26. In sum, the mediator assists the disputants in making their own decisions through various techniques, such as facilitating communication, crystallising the underlying issues and helping the parties to develop options. The mediator is not supposed to impose a solution on them or exert coercion; instead, the outcome hinges on the parties themselves agreeing on a solution.

b. Determining when party autonomy has been compromised

27. The perennial challenge facing the courts is determining when personal autonomy has been compromised such that the MSA should not be given legal effect. Party autonomy may appear to be a malleable concept because of the fluid nature of mediation. In contrast to arbitration and a court trial, mediation does not involve discrete procedural rules, but is regulated by broad principles such as the promotion of self-determination and maintaining

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[45] USA Uniform Law Commission, *Uniform Mediation Act 2003*, section 2(1) <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act>.

[46] Australia Mediator Standards Board, *National Mediator Accreditation Standards July 2015*, <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf> section 2.2.

[47] UNCITRAL Model Law on International Commercial Conciliation, GA Res 57/18, adopted at 57th Session (24 January 2003) article 1(3).

[48] European Code of Conduct for Mediators para 3.3 (stating that the mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement).

[49] *Supra* note 46 section 2.2.

[50] *Supra* note 48 para 3.2.

[51] American Bar Association, American Arbitration Association and Association for Conflict Resolution, *Model Standards of Conduct for Mediators*, Standard IA 2005 ("A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes the free and informed choices as to process and outcome").

[52] *Id,* standard 2.2.

[53] See for e.g. Australia Mediator Accreditation Standards, *supra* note 46, section 6, International Mediation Institute, *Code of Professional Conduct* para 4.3.2 (calling for mediators to withdraw from an unconscionable outcome reflecting one party's exploitation of an existing power imbalance).

mediator impartiality. It is thus no easy task to determine the threshold for the breach of party autonomy through the mediator's coercive behaviour.

28. The difficulty of this task is accentuated by the complexity and nuances of mediation techniques. Parties going through the mediation process often have to reflect on and challenge their existing assumptions, through the mediator's assistance. Regardless of the varying styles of mediation, it is not uncommon for a mediator to help each party to seriously consider the validity of the other party's perspective, and to honestly evaluate the benefits or disadvantages of a failure to settle, a mediation technique known as "reality testing".[54] The experience may at times be slightly unsettling to the parties, but does this unease necessarily result in a compromise of party autonomy? In a similar vein, there has been substantial academic discussion on more "evaluative" mediation techniques including making suggestions on how to settle or giving an opinion on the merits of the parties' legal positions. A recent report by the American Bar Association on mediator techniques reviewed previous empirical studies and summarized the cumulative effect of certain interventions. It noted that the technique of offering recommendations and opinions was shown to have both positive and negative effects on the parties' satisfaction with the mediation. Likewise, studies examining the mediator's pressing or directive style (involving exerting some pressure on parties) were inconclusive on the impact of parties' satisfaction rates; some studies found no effect on the parties' perceptions while others found an association with more negative views of the mediator. [55] The diversity of findings underscores the considerable difficulty the courts face in assessing with precision when party autonomy has been compromised.

29. How then can a multilateral convention articulate the elusive test to determine when an MSA does not properly reflect the parties' exercise of self-determination? The dynamic nature of mediation seems to clash with the certainty and objectivity the courts require when deciding whether to enforce an MSA. There seems to be a glaring dissonance between the values underlying litigation and mediation in this regard.

c. Party autonomy as embodied in contract law?

30. In discussing the proper ambit of party autonomy, the Working Group recognised that the New York Convention did not offer a complete analogy. While certain grounds for refusing enforcement like public policy may be transposed to the mediation context, defences concerning notice of appointment of arbitrator or the composition of the arbitral tribunal are

[54] American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (June 12, 2017) at 15, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf.

[55] American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (June 12, 2017) at 26, 15, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf.

hardly suitable for a process premised on reaching a consensual outcome.[56] As such, the Working Group naturally had to turn to consider the existing legal frameworks used by the courts to deal with MSAs.

31. One of the common approaches in domestic law is to treat an MSA as any other agreement analysed by the courts through the lenses of contract law. Contractual formation principles—including offer and acceptance, consideration and certainty of terms—have been utilised to decide whether the parties have arrived at a contractual agreement to settle their dispute. The vitiating factors in contract law, such as misrepresentation, mistake and duress, are also relied on in deciding whether the agreement is void or voidable. Common law jurisdictions including USA, England, Australia and Singapore rely predominantly on this framework. Other civil law legal systems such as Germany and Italy also regard mediated agreements as contracts and subject to the general contractual rules.[57]

32. The predominant contract law framework is alluded to in art 5(1)(b) of the Convention – the MSA being "null and void, inoperative or incapable of being performed" under the law parties have subjected the mediation to. This wording broadly refers to the various defences of vitiating factors in contractual jurisprudence. Its language is similar to Art II(3) of the New York Convention concerning the validity of an agreement to arbitrate. (Sept 2015 para 92) There are other provisions relating to contractual formation, including whether there are binding terms, whether the terms were clear and whether enforcement would be contrary to the contract.[58]

33. The Convention's heavy reliance on contract law begs the question of whether the contractual framework is a suitable fit for MSAs. Some commentators like Robert Burns have endorsed the use of contract law because its flexible and varied doctrines allow the court to properly analyse an agreement in the context of a relationship or a promise made between the parties.[59] Others have pointed out that the application of contractual principles to the mediation process has created intractable difficulties.[60]

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[56] *Supra* note 25, at 17 para 90 (Working Group noting that due process in conciliation could not be equated to that in judicial or arbitral proceeding as its outcome was an agreement and not a binding decision imposed by a third party). *See also* Ellen Deason, *Agreements in International Commercial Mediation: A New Legal Framework,* 22 Disp. Resol. Mag. 32 (2015), at 35 (noting that some grounds in the New York Convention are simply not relevant to mediation, such as those concerning the composition of the arbitral tribunal and the scope of its authorities, while others are directly applicable and yet others need to be modified).

[57] UNCITRAL, *Settlement of commercial disputes: Compilation of comments by Governments*, UN Doc A/CN.9/WG.II/WP.196/Add. 1, at 2 (Italy stating that certain agreements arising from mediation under Decree No. 28 can be enforcement by presenting it to court or having lawyers certify the agreement, while other settlement agreements are treated by the law as contracts); UNCITRAL, *Settlement of commercial disputes: Compilation of comments by Governments*, UN Doc A/CN.9/846, at 16 (Germany stating that agreements resulting from mediation are regarded as contract, and an action can be brought in court requesting compliance with the contract).

[58] *Supra* note 25, at 17 paras 96-97 (the Working Group noting that the possible categories of defences related to the genuineness of the settlement agreement, the readiness or validity of the agreement to be enforcement, public policy and where the subject matter was not capable of being enforced at the place of enforcement).

[59] Robert Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity,* 2 Ohio St. J. on Disp. Resol. 93 (1986-87), at 105.

[60] Peter Thompson, "Enforcing Rights Generated in Court-Connected Mediation—Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2003-2004) 19 Ohio

34. Fundamentally, the jurisprudential underpinnings of contract law are not fully aligned with mediation values. In this respect, the author has argued elsewhere that a contractual relationship is largely premised on the presence of *mutual assent*, leading to an agreement between the parties.[61] Once such an agreement is established, the parties have mutual obligations based on promises made that have been relied on. No obligation can be validly imposed when the parties have not assented to certain terms and were thus not *ad idem*.[62] By comparison, the concept of self-determination within mediation is much wider than that of mutual assent in the contractual framework. While the focus in contract law is on finding consent in relation to the meeting of minds, mediation emphasises *the individual exercise of each party's autonomy* in arriving at the agreement. The hallmark of a well-conducted mediation is each party feeling satisfied that they have been assisted to make their own decision.[63]

35. This subtle yet crucial difference in the understanding of party autonomy may not have been fully grasped by many courts when deciding whether to enforce a mediated settlement, resulting in the courts imposing an unrealistically high threshold in assessing party autonomy. Coben and Thompson, when surveying US court decisions, noted that defences to oppose enforcement of MSAs rarely succeeded. The traditional standard for factors like duress and misrepresentation was usually hard to fulfil in a mediation context, and the courts appeared to be "willing to tolerate a broad range of adversarial tactics…in the mediation process".[64] By way of illustration, the California court in *Olam v Congress Mortgage Company*[65] did not find undue influence in a mediation in which a 65-year old woman went through a mediation stretching from the morning to one am, and it was not disputed that the party suffered from high blood pressure, intestinal pain and headaches at times. While the magistrate acknowledged that the situation was inherently stressful, he found the party's allegations of acute distress unreliable, and also concluded that the facts fell short as a matter of law of establishing undue susceptibility that was needed to establish undue influence according to California law.[66] In

St J Disp Resol 509 at 524, stating that "[a]pplying contract formation principles developed in the context of adversarial, arms-length bargaining to the consensual mediation process creates some difficulty for the courts".

[61] Dorcas Quek Anderson, *Litigating Over Mediation: How Should the Courts Enforce Mediated Settlement Agreements,* (2015) Singapore Journal of Legal Studies 105.

[62] The same query into the meeting of minds is seen in civil law traditions. It is well settled that a contract requires an offer and acceptance under German contract law, though good faith is an additional requirement under the German Civil Code (Burgerliches Gesetzbuch; BGB), section 242. See Manfred Pieck, *A study of the Significant Aspects of German Contract Law* Annual Survey of International & Comparative Law: Vol. 3: Iss. 1(1996), Article 7.

[63] See for instance Australia Mediator Accreditation Standards, *supra* note 46, at paragraph 7.4 (calling for mediators to support participants to reach agreements "freely, voluntarily, without undue influence and on the basis of informed consent".

[64] James Coben and Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation,* 99(43) Harvard Negot. L. Rev. 43 (2006), at 81. *See also* Edna Sussman, *A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony,* IBA Mediation Committee Newsletter 32 (April 2006), at 32 and 34 (noting that the courts generally apply contract law with little regard to the special nature of negotiations within the mediation context, and the courts usually have rejected attempts to defeat settlement agreements based on duress and coercion exerted by the mediator).

[65] 68 F Supp 2d 1110 (ND Cal Dist Ct 1999).

[66] *Id* at 1144-1146.

another decision by the Oklahoma Court of Appeal, *Vela v Hope Lumber & Supply Co*,[67] the plaintiff alleged that she was under economic duress because her attorney had allowed the mediator to "bully" her.[68] She claimed that the mediator had warned her about liability for insurance fraud and she had cried for an hour without the mediator offering her a tissue. The court of appeal agreed with the lower court that there was no basis for the plaintiff's speculation of conspiracies and threats, deciding that it was clear that she had freely signed the agreement with understanding of the implications of the settlement.

36. Elaborating further, Thomson has argued that the traditional contractual defences were developed within the framework of adversarial and arms-length negotiations, and the court only intervened in the face of clearly unfair tactics. He asserted that adjustments had to be made to the law to take into account the reality of the pressures faced by the parties in the mediation process.[69] Furthermore, Nancy Welsh pointed out that the traditional contractual principles are premised on a manifestation of assent and cannot be easily adapted to the mediation process that is premised on self-determination. For example, while the parties in mediation should make decisions free from pressure and coercion, "traditional contract analysis tolerates a fair amount of 'bargaining pressure'"[70] before the courts decline to enforce an apparent agreement. Welsh has further suggested the modification of the presumption that everyone has a free will to enter mediated agreements. She proposed that a party should only need to show a "probable cause standard"[71] for coercion and evidence of the mediator's negative evaluation or strong support for a particular way of settling, and the burden of proof should then pass to the mediator to prove no coercive conduct on his part.[72]

37. There is yet another significant difference btween contract law and the mediation context. Contract law is premised on a *bilateral framework*, focusing on finding a meeting of minds only between the parties who are negotiating. The actions of other external parties are seldom taken into account, save perhaps in relation to events that may have frustrated a contract. This bilateral framework does not take into account the potential impact of the third party mediator. Any threat or coercion in contractual defences must emanate only from the other contracting party, not the mediator. Thomson reasoned in relation to US contract law that "a mediator may threaten improperly or manipulate a party's interests… yet there is no relief under traditional principles of duress unless the adverse party can be tied to the misconduct."[73]

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[67] 966 P 2d 1196 (Okla Ct Civ App Div 1 1998).
[68] *Id* at 1198.
[69] *Supra* note 60, at 524 and 563.
[70] *Supra* note 60, at 531.
[71] Nancy A Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2001) 6 Harv Negot L Rev 1, at 83.
[72] *Id*.
[73] Thompson, *supra* note 60 at 533. In the US, if the wrongful threat amounting to duress comes from a third party, the agreement is not voidable if the other party to the transaction acted in good faith, had no reason to know of the coercive threats, and gave value to, or relied materially on the transaction. See USA *Restatement (Second) of Contracts* § 175(2) (1981). The US court in *Olam, supra* note 65 at 1144, evaluated the plaintiff's allegations generally to ascertain whether she was rendered "unduly susceptible by physical and emotional distress", this being one element to be proved for undue influence under Californian law. The court also went on to state that the plaintiff would fail as she had never contended that the mediator was the source of the undue pressure, and

38. The court in a Florida case faced a dilemma because of this inherent constraint in the law. In *Vitakis-Valchine v Valchine*,[74] a dispute between a divorcing couple over the disposition of frozen embryos, the wife alleged that the mediator told her that the judge would order the embryos to be destroyed, and had at one point told her that he would report to the trial judge that the settlement failed because of her. The court acknowledged the constraints of existing law disallowing duress due to actions of a third party. Nonetheless, the court held that it could invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediated settlement that was obtained through violation of the judicially prescribed mediation procedures. This decision underscores the severe limitations in using contractual analysis alone to assess whether a party validly exercised autonomy in arriving at a MSA.

39. The dissonance between the contractual framework and the mediation context potentially leads to uncertainty in how individual states will apply article 5(1)(a)(i) to decide when the MSA is null, void or inoperative. This provision obliges the enforcing state to apply the law the parties chose for their mediation or, in the absence of such choice, the law determined by the relevant conflict of law principles. The huge question is whether the domestic courts will apply the relevant contractual law very strictly, using a high threshold to evaluate parties as if they were involved in arms-length adversarial bargaining. Such an approach will fail to provide a robust mechanism that generally gives weight only MSAs resulting from the genuine exercise of party autonomy. This is a difficulty which the Convention cannot resolve in the absence of any drastic changes made to domestic contractual regimes when analysing MSAs. The Convention's success will therefore depend on the states applying contractual principles flexibly, taking into consideration the inherent nuances and dynamics within mediation that distinguish it from adversarial bargaining. The existing contractual principles in most jurisdictions should be able to be adapted to MSAs, as long as the courts have a sound understanding of how the mediation process works.

40. Furthermore, issues about party autonomy and mediation practice are probably most effectively addressed not with legislative instruments that are invariably blunt tools, but with more holistic measures such as increasing the awareness of mediation, reaching greater convergence on professionalisation, training of international mediators and how autonomy is to be protected. In this connection, it was rightly observed during some Working Group discussions that the multilateral instruments had to be complemented with an update of the UNCITRAL Conciliation Rules (1980) to strengthen due process aspects in mediation and provide guidance on the expected conduct of mediators, as well as the preparation of notes to guide practitioners.[75] It was also argued that the question of enforcement would seldom arise as mediations conducted with respect for the parties' autonomy usually led to high compliance

the existing law did not allow any such relief even though the mediator was indeed the source. On the facts, the defendants were also not found to have put any pressure on the plaintiff.

[74] 793 So 2d 1094 (Fla Dist Ct App 2001).

[75] *Supra* note 18, at 21 para 150.

rates.[76] The focus should thus remain on training mediators to conduct the process well to achieve high perceptions of mediation success and voluntary compliance with the agreements. Article 5 is ultimately a safety valve to deal with instances when autonomy is compromised, but ideally one that is not frequently utilized. It is a good sign that the Working Group has framed the grounds as broadly as possible. As Deason observed, "The full panoply of contract defences could create a procedure just as onerous as ordinary contract enforcement actions and invite delaying litigation."[77] Protecting the process of consent to settlement while avoiding opportunities for disruptive litigation will require the Working Group to strike a delicate balance".

41. Additionally, the limited scope of the Convention is likely to reduce the likelihood of coercion. As set out in art 1(2), the Convention does not apply to family or consumer matters, situations when power imbalances are more likely to exist. It also does not apply to court-connected mediation, where it is more likely for parties to be overwhelmed by the court's authority. In this respect, it should be noted that the above US commentators' views were made in relation to an increasing number of complaints of cocercion within court mediation. International commercial mediations are unlikely to have similar pitfalls as court mediation. It is also common practice in commercial mediations to have legal representation to protect parties against any pressure exerted by the mediator. Hence, the assumption of arms-length negotiations within contract law may not be too far from the reality in cross-border commercial mediations. The dissonance between contract law and MSAs may not be very pronounced as long as the courts in contracting states apply legal principles with greater sensitivity to the mediation context.

42. Nonetheless, article 5(1)(b)(i) is still limited in dealing with alleged coercion by the mediator. The bilateral constraints of contract law in most jursidictions render it difficult to argue that defences like duress and undue influence are fulfilled in such circumstances. It was thus prudent that the Working Group did not limit the grounds of non-enforcement only to a contractual framework. Articles 5(1)(e) and (f) provide additional grounds for non-enforcement that are much wider than contractual law, and it is to this area that the paper now turns.

d. Party autonomy according to mediation standards?

43. Although contract law appears to be the predominant approach to give weight to party autonomy, the Working Group discussions indicate a preference for a broader framework relating to fairness and due process. This position was probably influenced by the focus of the New York Convention's defences on the lack of due process. The current Model Law on Conciliation also obliges the mediator to maintain "fair treatment" of the parties, and refers to common mediation standards such as independence, impartiality and the mediator's obligation

[76] *Supra* note 14, at 8 para 33 ("It was stated that very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement.")
[77] Deason, *supra* note 56, at 36.

to disclose any conflict of interests.[78] Some delegates in the Working Group thus proposed that the mediator's non-compliance with mediation standards of conduct should taint the mediation process and form a basis for non-enforcement.[79] Such an approach would help underscore the importance of compliance with due process within mediation and protect the parties.[80] In response, some delegates stressed the centrality of party autonomy within mediation. Since the parties were free to withdraw from the process at any time, the misconduct of the mediator should not have an impact on the enforcement of the settlement terms. Furthermore, including an additional ground based on mediator misconduct ran contrary to the Guide to Enactment and Use of the Model Law on Conciliation, which states that "a failure to disclose facts that might give rise to justifiable doubts [about the mediator's impartiality] does not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law".[81] There was also the concern that these additional grounds for non-enforcement would undermine the utility of the Convention as they could be subjectively interpreted and lead to ancillary disputes that would unnecessarily protract the enforcement process.[82]

44. As explained in the earlier overview, the Working Group eventually agreed to add two grounds of non-relief – one relating to a serious breach of standards applicable to the mediator, and the other relating to the mediator's failure to disclose information that was likely to raise doubts about the mediator's impartiality.[83] The latter ground was included because not all mediation standards would contain an obligation to disclose information impinging on mediator impartiality. However, to ensure that these grounds were sufficiently objective and would not inadvertently lead to non-enforcement on very diverse reasons the Working Group decided that enforcement would be denied only if the "party would not have entered into the settlement agreement".[84] A high threshold was further created by emphasizing the need for a "serious breach" of mediation standards, and a failure to disclose information that "had a material impact or undue influence on a party".

45. Significantly, the decision to include these two separate defences has led to the validity of an MSA being associated more with the mediator's conduct than the exercise of party autonomy. Admittedly, there is substantial overlap between the two grounds, as a mediator's breach of standards could also undermine the parties' self-determination. It was thus argued

[78] Articles 6(3), 5(4) and 5(5).
[79] *Supra* note 41, at 27 para 171.
[80] *Supra* note 27, at 19 para 104; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 8 para 42 (Working Group noting that including grounds based on fair treatment would contribute to ensuring that the process leading to a settlement agreement was conducted in an appropriate manner, provide a review mechanism by a court or an enforcing authority through which the parties could be protected, and highlight the importance of ethics and conduct of conciliators).
[81] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 8 para 49.
[82] *Id* at 8 para 50.
[83] *Supra* note 27, at 19 paras 108-109.
[84] *Supra* note 27, at 19 para 107; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-sixth session (Vienna, 3-21 July 2017),* UN Doc A/CN.9/901, 16 February 2017, at 16 paras 84, 87.

within the Working Group that the elements in these two grounds would be covered in art 5(1(c) referring to the MSA being void or voidable.[85] By way of illustration, the International Mediation Institute's Code of Conduct cautions its mediator against any misconduct that may compromise the reaching of an agreement of the parties' own volition.[86] A mediator who strongly pressurizes parties to accept a suggested result will be breaching this principle and directly impinging on the party's exercise of autonomy in arriving at an agreement.

46. Despite the overlap, there are other principles within mediation standards that have a more tenuous connection with party autonomy. Article 5(5) of Model Law obliges a mediator to disclose circumstances that raise doubts about his independence. However, there may well be parties who do not object to a mediator having closer connections with one party. Their autonomy in entering the MSA may not necessarily be compromised because of the lack of mediator independence. In the same vein, a mediator may reveal what one party shared in confidence to the other party. Again, this failure to observe strict confidentiality may not directly impinge on the parties' willingness to settle. Hence, the validity of an MSA is not only connected to factors closely connected with party autonomy (contractual defences rendering an agreement void). It also includes due process and fair treatment, principles which have a wider ambit than party autonomy.

47. This shift in focus could be attributable to the increasing emphasis on due process in many international enforcement instruments. The cross-border recognition of both arbitral awards and judgments is presently constrained by circumstances that breach due process.[87] It is therefore unsurprising that the international enforcement of MSAs also gives deference to due process and fairness. Against the backdrop of the increasing emphasis on due process, it is highly unlikely for cross-border MSAs to be evaluated against the benchmark of unfettered party autonomy.

e. The future of party autonomy in international mediations

48. Arguably, the above developments signify an important evolution in the concept of party autonomy itself. The contractual framework to evaluating MSAs is a largely party-centric approach, focusing on circumstances such as fraud and undue influence that would have undermined the parties' voluntariness in arriving at the settlement. In sharp contrast, the grounds connected to mediation standards redirect the focus to a more objective appraisal of the mediator's conduct. The current wording of the grounds treads a fine balance by requiring a connection between any breach of standards with the party's voluntariness in decision-making. Notwithstanding the careful efforts to strictly limit the application of the new grounds, it is suggested that there is a discernible shift of focus in evaluating party autonomy within

[85] *Supra* note 81, at 8 para 46.
[86] *Supra* note 53, at para 4.2.3.
[87] See for instance article 5 of the Hague Convention on Reciprocal Recognition of judgment (referring to grounds related to due process such as no opportunity to fairly present one's case), and article V(1)(b) of the New York Convention allowing non-recognition due to a person not being given proper notice of the arbitrator's appointment or being unable to present his case).

mediation – from a party-centric to a more objective basis pegged to mediation standards and principles.

49. This change in the concept of party autonomy could have significant ramifications on the future development of international mediation. First, the presence of articles 5(1)(c) and (d) helps to disentangle the enforcement of MSAs from the constraints of domestic contract law. As was argued above, the contractual framework premised on mutual assent in a bilateral context has been the predominant approach in most jurisdictions to give legal effect to MSAs. Articles 5(1)(a) and (b) broadly incorporate this widespread perspective into the ground for non-enforcement. Accordingly, these provisions suffer from the impediments faced by the contractual framework in taking full account of the exercise of party autonomy within mediation, including the tendency to neglect the influence of mediator on a party's consent, and the likelihood of imposing an unrealistically high threshold before affirming the presence of undue influence or duress. More importantly, certain defences in domestic contractual regimes cannot be relied on if the source of illegitimate pressure emanates from the mediator instead of the opposing parties. Under the current convention, a party facing these difficulties posed by the inherent constraints of contractual law conceivably has the option to rely on a breach of mediation standards or a failure to disclose information relating to mediator independence. Hence, the current imperfect fit of contract law for the mediation context could be ameliorated.

50. On a related point, the dissociation of the enforcement of MSAs from a contractual regime could augur well for the development of more robust mediation standards. During the early Working Group discussions, some asserted that it was too premature to devise a multilateral convention because mediation has yet to be well developed across different states.[88] Admittedly, there are uneven levels of sophistication in promulgating mediation standards and legislation. Nonetheless, the prominence of mediation standards in the grounds for non-enforcement could provide an impetus to individual states to reflect on and eventually develop domestic mediation guidelines and ethical rules.

51. Even now, there is considerable confluence of mediation principles contained in the existing codes of conduct. For example, the European Code of Conduct for Mediation and the IMI Code of Conduct refer to fairly uncontroversial mediation concepts including impartiality and fairness of the process, principles that have been articulated in the Model Law on Conciliation.[89] In more advanced mediation regimes, there has been in-depth discussion on other issues apart from the party autonomy in mediation. There is academic discourse in Australia and USA about how procedural justice based on parties' perceptions of fairness is properly achieved within mediation and how this concept can be translated to discrete ethical principles for mediation. In this regard, the Model Law on Conciliation recommends that the

[88] *Supra* note 14, at 4 para 19.
[89] European Code of Conduct for Mediators, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf , at paras 2.1 (independence), 2.2 (impartiality) and 3.2 (fairness of the process); International Mediation Institute Code of Professional Conduct, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf at paras 3 (impartiality) and 4;2 (fairness and integrity).

mediator gives "fair treatment" to the parties. Many aspects concerning perceptions of fairness correspond with ethical principles for mediation, like even-handed treatment (corresponding with mediator impartiality or neutrality) and giving parties voice or opportunity to express their opinions (corresponding with party autonomy or self-determination). The relationship between parties' perception of fairness and the mediator's conduct is therefore a crucial area to study in order to guide mediators. Hence, the Convention could provide momentum for mediation standards to spread and converge, as well as for greater consideration of the more complex ethical conundrums arising in mediation. Indeed, it is a positive development to shift the focus from generic contractual principles to mediation-specific concepts that are better customized to fit the mediation process.

52. Third, there is likely to be diverse views on when serious breaches of mediation standards or failure of disclosure will have a material impact on the party, "without which breach the party would not have entered into the settlement agreement" under art 5((1)(e). The state considering enforcement will have to interpret the standards applicable to the particular mediator or mediation. However, mediation standards are elucidated in general terms, and there is yet to be substantial domestic jurisprudence to elaborate on these standards. Unlike proceedings when evidence of foreign law can be given, there is sparse evidence of how mediation standards should be interpreted.

53. Furthermore, there is a plurality of mediation models and standards. Laurence Boulle wrote that the notions of independence, neutrality and the principle of self-determination "are regarded as axiomatic to mediation systems in many western contexts" but these concepts "can be alien and inappropriate in some mediation contexts, both traditional and contemporary, in Africa, Asia, Australia and the Pacific".[90] Accordingly, it is not inconceivable for the relevant state to be influenced by its particular level of mediation experience when interpreting the relevant mediation standards. Consider for instance an MSA that is governed by the USA model mediation rules but is sought to be enforced in country X that does not have established mediation standards and is not particularly strict about having neutral and independent mediators. It is unlikely that the court in country X will find that a failure to disclose a connection with one of the parties is an egregious omission that has a material impact on the parties' acceptance of the settlement under article 5(1)(e).

54. However, the challenge posed by a diversity of standards is not unique to the understanding of mediation standards. This is a constant challenge faced in harmonization efforts, and when foreign law is applied in private international disputes. The impetus towards more cross-jurisdictional exchange of ideas on mediation standards could in time resolve the innate difficulty in applying standards that are alien to one's state. Although there could be greater convergence of guidelines, there is the concurrent need for enforcing states to be sensitive to the differing standards. To facilitate greater understanding of how different

[90] Boulle, *supra* note 3, at 52; see also Joel Lee, *Culture and Its Importance in Mediation* 16 Pepp. Disp. Resol. L.J. 317 (2016).

mediation standards are to be properly interpreted, it will be beneficial for mediation codes of conduct to be accompanied by explanatory notes or commentaries.[91] There are both domestic and international mediation bodies that have the capability to do this. It will also be in the interest of each mediation organisation to do so to ensure that their standards are implemented across states.

55. In sum, the UNCITRAL discussions have provided an opportunity for the concept of party autonomy in mediation to be refined and understood more accurately. Individual states have heavily relied on contract law to deal with MSAs. While some legal systems take the view that an MSA is akin to any contractual agreement, there are clearly defining features within mediation that set it apart from bilateral contracts and call for more customized treatment of MSAs. However, the contractual framework has not fully taken into account the unique characteristics of the mediation process, including the influence of the mediator on the exercise of autonomy. It is thus apt that the Convention's grounds for non-enforcement are no longer limited to the contractual framework but have now included mediation standards that have been specifically devised to protect party autonomy within the mediation process. While mediation standards are evolving and differ from state to state, the international focus on these standards arguably provides an impetus for greater harmonization, and for party autonomy to be understood in light of the mediation ethical principles.

V. Is the exercise of party autonomy substantially fettered by public policy?

56. Yet another difficulty posed to supporting party autonomy arises from the tension between respecting individual autonomy and giving weight to the enforcing state's public policies. Article 5(2) mirrors the two grounds for non-recognition in the New York Convention – a conflict with the state's public policies, and the subject matter being not capable of settlement by mediation (instead of arbitration). Both grounds broadly allow the enforcing state to decline giving effect to the parties' intended terms because it deems their agreement to be inconsistent with its public policies.

57. The exercise of party autonomy has not been unfettered even in general contract law. In many areas of law, the parties' consensual agreement is not automatically sanctioned as the court has the duty to ensure that the rights of parties have been properly protected through their agreement. This is the case in Singapore for the division of matrimonial assets, maintenance of children,[92] custody of children,[93] guardianship of infants when the welfare of the child is paramount[94] and settlement of personal injury claims involving a person lacking capacity or

[91] See for instance American Bar Association, *Reporters' Notes on the US Model Standards of Conduct for Mediators* (2005), https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporternotes.authcheckdam.pdf; and Tania Sourdin, Australia National Mediator Standards: Commentary on Approval Standards (September 2007) https://bond.edu.au/files/15/Commentary.

[92] Singapore *Women's Charter* (Cap 353, 2009 Rev Ed Sing), section 73.

[93] *Id*, section 129.

[94] Singapore *Guardianship of Infants Act* (Cap 122, 1985 Rev Ed Sing), section 3 .

under disability.[95] The list could be widened to include situations when the agreement infringes certain laws, is illegal, appears unfair against an employee, or simply undermines public policy. Although the parties may have ostensibly exercised their right of self-determination and want their private agreement to be made final, the courts have to balance their private concerns with external policy considerations. The scope of the Convention has been narrowly limited to commercial disputes, thus minimising the potential of the disputants' rights being infringed due to power asymmetry. However, there remains the issue of how readily enforcing states will decide that their policies take precedence over party autonomy within mediation. Furthermore, will there be considerable uncertainty due to differing levels of scrutiny of MSAs?

58. The Working Group pointed out that the standard for the defences in the convention should be comparable to those in the New York Convention and the Model Law on Arbitration.[96] Hence, it is most likely that contracting states will be guided by the existing arbitration jurisprudence when interpreting the two grounds in art 5(2). Similar to the New York Convention, these defences could be considered by the state on its own intiative even if not raised by the parties.[97] In elaboration, the Working Group noted that it was up to the relevant state to decide what constituted public policy.[98] Public policy could cover both procedural and substantive aspects, and include matters relating to national security or national interest.[99]

a. Art 5(2)(a): When will granting relief be contrary to public policy of the contracting state?

59. Public policy has been interpreted narrowly by most courts in relation to the New York Convention. Given that party self-determination is exercised to a greater extent in mediation than arbitration, it is most likely that public policy will also be narrowly circumscribed by the courts when deciding on the enforcement of MSAs. The UNCITRAL discussions leading to the New York Convention reflect a preference for the narrowest interpretation of public policy. A few delegates proposed including the term "fundamental principles of law" together with "public policy" for art 5(2)(b). However the former term was eventually excluded because it was not uniformly used in other countries. Nevertheless, this discussion underscores the intention to ascribe a generally narrow meaning to public policy so as not to defeat the purpose of the New York Convention of upholding arbitral awards.

60. Several court decisions have applied this narrow construction of public policy in relation to this defence. In the oft-cited USA decision of *Parsons & Whittemore,* the Second Circuit of the Court of Appeals stressed that the "[e]nforcement of foreign arbitral awards may be denied

[95] Singapore *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), Order 76 rules 10 and 11.
[96] *Supra* note 27, at 7 para 34; *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-seventh session (Vienna, 2-6 October 2017),* UN Doc A/CN.9/929, 11 October 2017, at 16 para 100.
[97] *Supra* note 27, at 8 para 41.
[98] *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-seventh session (Vienna, 2-6 October 2017),* UN Doc A/CN.9/929, 11 October 2017, at 16 para 100; *supra* note 18, at 11 para 67.
[99] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session (New York, 1-5 February 2016),* UN Doc A/CN.9/867, at 25 para 155; *supra* note 18, at 11 para 67.

on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice."[100] The court thus rejected the American respondent's argument that its actions in instructing US nationals not to work in Egypt was dictated by the severance of diplomatic ties between the two countries and supported by US public policy. The court pointed out that public policy defence should not be a "circumscribed public policy doctrine", and should not be interpreted as a "parochial device protective of national political interest." Similarly, the Court of Appeal of England and Wales stated that considerations of public policy in this defence "should be approached with extreme caution", limiting it to instances when "the enforcement of the award would be clearly injurious to the public good or, possibly, enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[101] The Singapore Courts have adopted the same approach, stating that this defence has a "high threshold", being relevant only when enforcement will offend "basic notions of justice and morality" or be tainted by illegality and fraud such that it is "injurious to the public good".[102]

61. There have been a few ways in which the courts have applied the narrow meaning of public policy. First, although the relevant public policy is that of the contracting state, it has been increasingly common to interpret such policy to be international or transnational public policy as opposed to domestic policy. The International Law Association proposed that international standards be used, including fundamental principles of justice or morality, rules designed to serve the essential political, social or economic interests of the state and the duty of a state to respect its international obligations to other states or organisations.[103] A few states have articulated this high threshold, including the Court of Appeal of Paris that defined international public policy public policy as "the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character".[104] One commentator has thus remarked that article V(2), which could have theoretically opened the floodgates has diminished in importance, and that "the prevailing view is that foreign awards are subject to the enforcement state's international public policy which is narrower than that of national public policy".[105]

[100] *Parsons & Whitemore Overseas v. Société Générale de L'Industrie du Papier (KTA)*, Court of Appeals, Second Circuit, United States of America, 508 F.2d 969, 974 (1974).
[101] *Deutsche Schachtbau-und Tie ohrgesellscha m.b.H. v. Shell International Petroleum Co. Ltd*, Court of Appeal, England and Wales, 24 March 1987, [1990] 1 A.C. 295.
[102] *AJU v AJT* [2011] SGCA 41, paras 28-37.
[103] International Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration chaired by Professor Pierre Mayer, recommendation 1 (b): "Such exceptional circumstances [to refuse recognition and enforcement of the award] may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy."
[104] *Agence pour la sécurité de la navigation aérienne en A ique et à Madagascar v. M. N'DOYE Issakha*, Court of Appeal of Paris, France, 16 October 1997. See also *GH (case III ZR 269/88, decided 1990),* YCA XVII (1992), 503 (at 505) (Federal Supreme Court, Germany), where the court emphasised that Article V(2) requires violation of international public policy.
[105] Herbert Kronke, "Introduction: The New York Convention Fifty Years On: Overview and Assessment" in Herbert Kronke, Patricia Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010), at 16-17.

62. Second, many states have applied procedural public policy strictly. It has been very rare for courts to decline enforcement on such grounds. The defence was successful only when there is a severe breach of due process, including the right to be heard and the need for arbitral tribunal to give reasons.[106] However, such breaches did not automatically lead to non-enforcement. The courts usually require some causal nexus between this breach and the outcome of the arbitration.[107] A Quebec Court of Appeal thus decided that the tribunal's lack of reasons only constituted a violation of policy if the parties had agreed that the award must contain reasons.[108] Not every type of procedural irregularity will readily be deemed to breach public policy. In sum, the courts have been consistently reluctant to interpret the public policy defence in the New York Convention expansively. The UNCITRAL secretariat noted the rare areas of non-enforcement of awards: being contrary to the national interests of the state; core constitutional values like separation of powers; mandatory rules in key areas such as competition law, consumer protection and foreign exchange regulation; and reasonable standards of interest payable.[109] The same narrow stance in keeping with the Convention's overall purpose will probably be adopted in deciding on enforcement of MSAs.

63. However, there remains some uncertainty about the specific matters that each state will deem contrary to fundamental principles of morality and justice. Where the arbitral awards have infringed mandatory national laws, states have differed in their analysis of whether public policy has been compromised. Some European courts have refused to enforce awards breaching their competition law, but the same position has not been adopted in the US courts.[110] Likewise, differing opinions have been reached when a party's ability to fulfil the obligation in the award is affected by a state's export restrictions. A Delhi High Court decided that an award of damages for non-delivery of coal infringed public policy because of domestic export restrictions on coal that prohibited the delivery. By contrast, an Alberta Court did not consider an award against an government-owned Indonesian company to be contrary to public policy simply because it was subject to a presidential decree prohibiting its performance.[111] Hence,

[106] UNCITRAL Secretariat, *Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2016 ed), at paras 36-37.
[107] Dirk Otto and Omaia Elwan, "Article V(2)", in Herbert Kronke , Patricia Nacimiento , et al. (eds*), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010), at p. 388, referring to *OLG Karlsruhe*, unpublished decision of Nov 29, 2002 (Sch01/02) (Karlsruhe Court of Appeal, Germany), and *BGH, NJW 2007, 772=YCAXXXII* (2007), 328 (Federal Supreme Court, Germany), overturning a decision of the Karlsruhe Court of Appeal.
[108] *Smart Systems Technologies Inc. (US) v. Domotique Secant Inc. (Canada)* (Court of Appeal Quebec 2008), in Yearbook Commercial Arbitration XXXIII (2008) (Canada no. 25), at 464– 472.
[109] *Supra* note 106, at para 32.
[110] *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECRI-3055=EuZW1999,565 (decided 1999) = YCA XXIVa (1999), 629 (Court of Justice of the European Communities) (deciding that an arbitral award violating article 81 of the Treaty establishing the European Community would not be enforced); compared to Baxter International Inc v Abbott Laboratories, 315F.3d 829 decided 2003)= YCA XVIII (2003), 1154 (at 1157–1159) (US Court of Appeals for the 7th Circuit, US) (refusing to re-examine the respondent's allegation that the award created an antitrust violation, holding that its only task was to ensure that the tribunal took cognizance of the antitrust claims and decided them).
[111] *Smita Conductors Ltd v Euro Alloys Ltd* (decided 1996), YCAXXVII (2002),482 (Supreme Court, India); contrasted with *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [2004] A.J. No. 1440 (decided 2004) = YCA XXX (2005), 488 (Alberta Court of Queens Bench, Canada). See Dirk Otto and Omaia Elwan, "Article V(2)", in Herbert Kronke , Patricia Nacimiento , et al. (eds*), Recognition and*

there will invariably be uneven and evolving standards used by states when asserting their sovereignty over domestic laws that impinge on significant national or economic interests. To that extent MSAs suffer the same limitation imposed on arbitral awards – the inherent diversity of views on significant public policies.

64. Moreover, it remains to be seen whether the courts will apply art 5(2)(a) differently from the New York Convention because of the consensual nature of a mediated settlement. On one hand, it is arguable that the unique feature of mutual agreement within mediation sets it apart from arbitration, and provides greater reason to uphold party autonomy within MSAs in most circumstances and interpret the defence of public policy more stringently. On the other hand, some states could take the position that the greater latitude for parties to decide on their mediated agreement necessitates the courts' exercise of greater care in ensuring that autonomy is exercised consistent with public policy.

65. It is suggested that the former approach is more consonant with the overall purpose and tenor of the Convention. The primary aim of this Convention is to give effect to the exercise of autonomy within the mediation context, thereby levelling the relative standings between mediation and arbitration. A double-pronged approach is utilised in supporting autonomy, one of which involves ensuring that autonomy has not been undermined during mediation. The defences analysed earlier relate to this aspect. Notably, the concept of party autonomy is prominent even in respect of the defence of serious breach of mediation standards; the defence is only effective if the breach is sufficiently serious so as to impinge on the party's autonomy. The other aspect to the dual approach entails setting proper limits to the exercise of autonomy. Given the overwhelming emphasis on party autonomy in the earlier defences, there is compelling reason to ensure that the defence of public policy is applied with similar consideration for party autonomy. In other words, autonomy should not be readily breached apart from a breach of very fundamental policies. Hence, similar standards should be used to evaluate both arbitral awards and MSAs, in order to effectively provide comparable status to both dispute resolution processes.

b. Art 5(2)(b): when will a matter be considered incapable of settlement by mediation?

66. This ground for denial of relief is related to the concept of arbitrability of disputes, in terms of whether the state mandates certain matters to be within the exclusive purview of the courts. As with the public policy defence, the principle of arbitrability involves the clash of the "contractual and jurisdictional nature of international commercial arbitration".[112] As some commentators noted, arbitrability "determines the point at which the exercise of contractual

Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, (Kluwer Law International 2010), at p. 386.

[112] Loukas A Mistelis, "Arbitrability – International and Comparative Perspectives. Is Arbitrability a National or an International Law Issue?", in Loukas A Mistelis and Stavros L Brekoulakis, *Arbitrability; International and Comparative Perspectives* (Wolters Kluwer, 2009) at pg 3 paras 1-6.

freedom ends and the public mission of adjudication begins".[113] Hence, this ground for non-enforcement also restricts party autonomy by delineating the types of disputes in which private resolution is permitted.

67. Once again, there has been only a small number of matters in domestic arbitration legislation that have been deemed non-arbitrable. Party autonomy is usually respected in the ambit of arbitrability. Moreover, many of these matters, such as employment, labour, family and consumer disputes, do not fall under the ambit of the Convention that applies only to commercial disputes. It is also widely agreed in many states that disputes arising from a commercial dispute are arbitrable. It has been observed that the number of non-arbitrable matters are likely to be small due to the trend of encouraging the saving of costs through the private resolution of disputes.[114] Accordingly, it is highly likely that only matters involving disputants with unequal bargaining power will be deemed incapable of settlement by mediation. There are likely to be very few such situations within commercial disputes.

VI. Conclusion

68. Party autonomy within mediation is a different creature from autonomy in adjudicative processes like arbitration. The disputants exercise their self-determination and choice in how the process unfolds, and in deciding on the substantive terms of agreement. Domestic and international mediation standards including impartiality and fair treatment have evolved to ensure that the mediator properly supports party autonomy. Yet the mediation process is inherently fluid and amenable to different models and variations. Such diversity has also translated to varying interpretations of mediation standards.

69. The intense discussions on the Convention reflect the challenges arising from the different views of party autonomy. The informal process of mediation requires the formal court system to give weight to the exercise of party autonomy whilst respecting the consensual and flexible nature of mediation. Guidance has to be given in the Convention on the minimal standards of party autonomy and the limits imposed on it. However, arbitration instruments do not provide a complete analogy as autonomy in this process is more restricted, and the process is ultimately an adjudicatory, not a consensual, one. In addition, the usual contractual framework with its bilateral basis does not seem adequate.

70. This article has proposed a dissociation of the concept of party autonomy from contract law, and the development of customized mediation principles that elaborate on when autonomy is breached by unacceptable mediator conduct. Although mediation standards may be

[113] T Carbonneau & F Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability,* 2 Tul. Int'l & Comp L (1997) 193, 194.
[114] "Request for the Recognition and Enforcement of an Arbitral Award", *in ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011) p. 105.

susceptible to varying interpretations, article 5 evidently requires a serious and material breach of mediation standards before enforcement of the MSA is denied. It is therefore crucial to develop robust standards grounded on party autonomy, and also extending beyond party autonomy to include principles like fair treatment. It has also been suggested that the Convention provides a much-needed impetus to reach greater convergence on domestic and international mediation guidelines. These developments will provide guidance for the courts' application of the Convention.

71. The contours of party autonomy are also constrained by the public policy of the contracting state. There could be uncertainty as to how readily public policy will take precedence over the MSA. Nevertheless, the public policy defence in the Convention is likely to be applied similarly to the corresponding defence in the New York Convention for arbitration. This article has suggested that a similar benchmark is necessary in order to truly accord equal status to mediation and arbitration as legitimate dispute resolution processes. A high threshold should therefore be used before public policy is invoked as a ground to decline enforcement of an MSA. Furthermore, the matters deemed to be incapable of settlement via mediation and reserved for court adjudication should be very limited, given the legal representation that most disputants in commercial disputes would have and the absence of severe power imbalances.

72. The Convention represents a promising sea change in the standing of international mediation. Its current wording has sought to strike a delicate balance between the desire for objective standards and the need to respect the flexible nature of mediation as well as the presence of varying standards. It has also provided grounds for parties to be protected without encouraging excessive scrutiny that readily disregards the exercise of their autonomy in reaching an agreement. Finally, it has signaled that public policy should constrain the exercise of autonomy narrowly, similar to how arbitral awards have been analysed. Much of the future of this Convention hinges on the degree of international support it receives. It is hoped that the future ratification of the Convention will take place hand in hand with refinement of mediation standards, leading to greater clarity in the practice of mediation.