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The Singapore Convention on Mediation: Supplying the missing piece of the puzzle for dispute resolution

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I. Introduction

1. In late 2018, the United Nations General Assembly passed a resolution to adopt the UN Convention on International Settlement Agreements Resulting from Mediation and to make corresponding amendments to the Model Law on International Commercial Conciliation.[1] This development is the culmination of several years of work by the UN Commission on International Trade Law ("UNCITRAL") to create a multilateral instrument providing for the cross-border enforcement of mediated settlement agreements. The convention was named the Singapore Convention on Mediation ("Singapore Convention") when it was signed by 46 countries on 7 August 2019.[2] Six additional countries have recently signed the convention, bringing the total number of signatories to 52. Having been ratified by three countries, the convention will take effect on 12 September 2020.[3]

2. The Singapore Convention is meant to achieve for mediation what the New York Convention has done for international arbitration. The widespread support of the New York Convention – starting from 10 states in 1958 and increasing to the current number of 161 states – attests to the popularity of arbitration as a mode of dispute resolution. By comparison, the high level of preliminary support for the Singapore Convention – including Malaysia and 19 other Asian countries – within merely a few months attests to the common sentiment across the globe on the need for a uniform enforcement regime for mediation. More importantly, it reflects the substantial growth and increasing awareness of mediation that have fuelled international efforts to develop a harmonised legal framework to support agreements resulting

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[1] United Nations, "Resolution Adopted by the General Assembly on 20 December 2018" (A/Res.73/198) <https://undocs.org/en/A/RES/73/198> (accessed 16 December 2019); UNCITRAL, "Report of the United Nations Commission on International Trade Law, fifty-first session (25 June to 13 July 2018)", paragraphs 14-49, <https://undocs.org/en/A/73/17%20> (accessed 16 December 2019). The Singapore Convention still requires the ratification by three signatory states before coming into force.

[2] Singapore Convention on Mediation, <https://www.singaporeconvention.org> (accessed 16 December 2019); see also Singapore Ministry of Law, "46 States Signed New International Treaty on Mediation" (7 August 2019), <https://www.singaporeconvention.org/news-7aug-signing-ceremony.html> (accessed 16 December 2019).

[3] As of 14 March 2020, Singapore, Fiji and Qatar have ratified the Singapore Convention. The convention will come into force on 12 September 2020, six months after the third country Qatar's ratification. See United Nations Information Service, "The United Nations Convention on International Settlement Agreements Resulting from Mediation will enter into force following ratification by Singapore, Fiji and Qatar" (13 March 2020) <http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl293.html>; "The Singapore Convention on Mediation draws closer to entry into force with ratifications by Singapore and Fiji" (26 February 2020) <http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl292.html> (accessed 13 March 2020);

from mediation. In sum, the Singapore Convention supplies a critical missing piece of the puzzle in the international dispute resolution landscape.[4]

3. The future success of the Singapore Convention is highly dependent on the sound application of its provisions by the courts in signatory states that is informed by an accurate understanding of the mediation process. This article thus discusses the fundamental role to be played by the courts in supporting and regulating mediated settlement agreements under the Singapore Convention. Part II examines the symbiotic relationship that has existed between the courts and mediation prior to the Singapore Convention. Although mediation is distinctive from litigation, both processes have been increasingly perceived as co-equal and complementary modes of dispute resolution within the justice system. However, the conventional method of enforcing mediated settlement agreements in the courts has proved inadequate because of the costs of litigation. Part III discusses the limitations of relying on litigation to support mediated settlement agreements, and other reasons that prompted international efforts to create a cross-border enforcement regime. It also analyses the carefully crafted scope of the Singapore Convention, noting the efforts to ensure that the final instrument accommodated the diversity and flexibility of mediation practices. The final section discusses how the provisions of the convention – particularly the grounds for non-enforcement in Article 5 – have been drafted to be consonant with both the unique characteristics of the mediation process and the need for mediation to comply with due process and public policy concerns. It is argued that the Singapore Convention has struck a delicate balance between interests arising from the interface between mediation and the courts. It is vital that the courts in signatory states are also cognisant of these interests, so as to apply the Singapore Convention accurately and to maintain the complementary relationship between the courts and the mediation process.

II. Mediation and the Courts

4. The concept of mediation is not new to the courts. Lord Bingham remarked that "the law loves compromise".[5] The courts have been accustomed to giving judicial force to privately negotiated settlements by granting consent judgments and using contractual principles to determine the existence of negotiated agreements. When examining negotiations, the courts have also recognised the need to respect the confidentiality of settlement discussions. Hence, the "without prejudice" rule has been devised to ensure that statements or documents used in the course of negotiation for settlement purposes are inadmissible as evidence.[6] These well-

[4] See Singapore Ministry of Law, "Singapore and Fiji are the First Two Countries to Deposit the Instrument of Ratification of the Singapore Convention on Mediation" (26 February 2020), <https://www.mlaw.gov.sg/news/press-releases/singapore-and-fiji-are-the-first-two-countries-to-deposit-the-instrument-of-ratification-of-the-singapore-convention-on-mediation> (last accessed 13 March 2020), where Senior Minister of State for Law described the convention as the missing third piece in international commercial dispute resolution.

[5] Lord Bingham in his foreword to the 4th edition (1996) of *The Law and Practice of Compromise* by David Foskett Q.C.

[6] *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 at [5].

established principles have also been used to deal with litigation involving mediation. The English decision in *Brown v Rice*[7] is a case in point. The court relied on the contractual offer and acceptance principles to find that an agreement had been reached after the formal mediation process despite the absence of a written settlement agreement.

5. With the growing institutionalisation of the mediation profession in many countries, the question arises as to whether common law principles suffice for the courts to support and regulate mediated settlement agreements. To address this issue, it is first necessary to examine the nature of the mediation process.

The distinctive characteristics of the mediation process

6. Mediation is a rather different creature from arbitration, litigation and negotiation. Commonly described as facilitated negotiation, the mediation process is meant to assist the parties to reach a voluntary agreement on how to resolve their dispute.[8] Unlike negotiation, a third party is involved in the mediation discussions. However, in contrast to a judge or an arbitrator, the mediator does not perform a decision-making function. Instead, the mediator helps the parties make their own decisions through a range of techniques, including facilitating communication, crystallising the underlying issues and helping the parties develop options.[9] Reflecting this common understanding of mediation, the Singapore Convention has defined mediation as a process in which "parties attempt to reach an amicable settlement of their dispute with the assistance of a third person…lacking the authority to impose a solution upon the parties".[10]

7. The distinctive characteristic of mediation is thus the parties' right of self-determination. The modern mediation movement in many jurisdictions grew out of such an emphasis, and the continuing attraction of mediation is also linked to this quality. It is this particular feature of mediation that has preserved the marked difference between mediation and adjudication, making the former an "alternative" dispute resolution process that is known to allow parties greater participation in the outcome of their dispute.

8. The basis for the mediation outcome also vastly differs from adjudication via a trial or arbitration. The mediation outcome is measured not by substantive fairness according to

[7] [2007] All ER (D) 252 (Mar).
[8] See for example Uniform Law Commission, *Uniform Mediation Act 2003*, USA, s 2(1); Australia Mediator Standards Board, *National Mediator Accreditation Practice Standards* (July 2015) s 2.2.
[9] See for example s 2.2 of Australia Mediator Standards Board, *National Mediator Accreditation Practice Standards* (July 2015), describing how the mediator helps the parties explore interests, generate options and consider their alternatives; and s 3(1) of Singapore's Mediation Act 2017 (No 1 of 2017), describing the mediator assisting the parties to identify the issues in dispute, explore and generate options, communicate with one another and voluntarily reach an agreement.
[10] Article 2(3) of Singapore Convention on Mediation, <https://www.singaporeconvention.org> Incidentally, this definition was first utilised in 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).

existing legal principles, but by the parties' private considerations. A Singapore decision articulated it this way,[11]

> Privately settled terms in respect of the ancillary matters in a divorce *may not always appear to be fair.* But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement.
> [emphasis added]

9. This particular characteristic of mediation may, at first blush, seem perplexing, as it seems inconceivable for any dispute resolution process to neglect the law. Nevertheless, while the primary basis for the parties' decision within mediation may not necessarily be legal principles, this does not necessarily mean that the relevant law is not considered during the mediation. It is common in any mediation for all the parties to consider and evaluate the relative strengths of their legal positions, as well as the practical implications of proceeding with litigation. In negotiation terminology, this entails considering one's "alternatives" – what will happen in the event that a settlement is not arrived at.[12] Nonetheless, while the parties may be aware of what they are potentially entitled to at a trial, they may eventually agree on a settlement differing from this outcome because of other more important concerns, such as the need to preserve a relationship or to avoid incurring additional litigation expenses.

10. Another unique feature of the mediation process is its confidential nature. The mediation process takes the parties' discussion out of public scrutiny, enabling them to negotiate freely without their statements being construed as evidence for or against them. The attraction of mediation in this regard lies in minimising publicity of the dispute. In this respect, mediation is akin to negotiation and hence the courts have used the "without prejudice" rule to deal with both processes.

11. Finally, as in other dispute resolution processes, mediation is meant to bring about finality for the parties, with no further litigation concerning the settled issues. In this regard, the Singapore Court of Appeal in *Gay Choon Ing Loh Sze Ti Terence Peter* stressed that "[o]nce an agreement has been established…that concludes the matter".[13] In the same vein, the Singapore High Court in *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd* elaborated that a compromise puts an end to the parties' dispute as the compromise agreement "essentially takes over as the basis of the parties' legal and contractual relationship", such that parties are not allowed to re-open prior issues.[14]

[11] *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 at [5].
[12] See generally Roger Fisher and William Ury, *Getting to Yes: How to Negotiate Agreement Without Giving in* (Penguin Books, USA, 1991).
[13] [2009] 2 SLR(R) 332 at [54].
[14] [2010] 2 SLR 758 at [58].

The symbiotic relationship between mediation and the courts

12. Although mediation is known to be an out-of-court process, it cannot be given recognition apart from the courts. It has been observed that the legitimacy of mediation "requires the use of the very litigation system which the parties eschewed in the first place".[15] Conversely, the courts have acknowledged the significance of mediation because of the role it plays in reducing the cost of litigation, and its ability to provide a broader range of outcomes than formal adjudication. Hence, mediation and the courts have a symbiotic relationship because of their respective need for the other.

13. Furthermore, mediation and litigation have been increasingly perceived as co-equal dispute resolution processes, with each playing an equally legitimate role in advancing access to justice. Lord Justice Neuberger aptly described the complementary roles of mediation and litigation this way:

> "The central role is that of formal adjudication by the courts administering equity and law. That lies at the heart of our civil justice system; without it doing so we have no framework for securing the enforcement of rights and the rule of law. Neither arbitration nor ADR, as beneficial as they are, can provide that framework. Supplementary and complementary roles are played by those two dimensions of justice. They too can secure justice for individuals through the resolution of disputes. But they do so because they exist within the framework of law and its enforcement by formal adjudication. Without formal adjudication they would be mere epiphenomena."[16]

14. Similarly, this author has suggested elsewhere that the courts' interaction with the parties in many jurisdictions has been shifting from that of a detached adjudicator to a more proactive problem-solver, offering a range of dispute resolution processes to fit the exact contours of the dispute. Accordingly, the courts should recognise the coequality of both consensual and adjudicatory processes within the justice system.[17]

15. Notably, mediation has played an increasingly significant role in the justice system because it has been recognised that access to justice must take into account the rising costs of litigation. In the UK, proportionality of costs is a foundational principle in the civil justice landscape.[18] Lord Dyson stressed in this respect that no one piece of litigation should be permitted to "utilise more of the court's resources than is proportionate, taking account the needs of other litigants".[19] Singapore's Chief Justice Menon also called for the

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[15] Laurence Boulle, "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework" (2014) 7 *Contemporary Asia Arbitration Journal* 35, 58.

[16] Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", the Fourth Keating Lecture, Lincoln's Inn, 19 May 2010, para 43.

[17] Jean-Francois Roberge and Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) 19 *Cardozo Journal of Conflict Resolution* 613, 621-624.

[18] See r 1.1(1) of the Civil Procedural Rules (CPR) that underscored the importance of exercising firm judicial control over proceedings to "deal with cases justly and at proportionate cost".

[19] Lord Dyson MR, "The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme", speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013. See also Andrew Higgins & Adrian Zuckerman, "Lord Justice Briggs' 'SWOT' Analysis Underlines

conceptualisation of rule of law to be broadened to recognise the importance of ensuring access to justice. CJ Menon suggested the adoption of a user-centric approach focusing on affordability, efficiency, accessibility, flexibility, effectiveness, proportionality and peacebuilding.[20]

16. In summary, mediation and adjudication have a complementary relationship within the justice system. At the same time, they are distinctive processes, and their differences have to be preserved within the justice system. Turning then to the issue of mediated settlement agreements ("MSAs"), the central question facing the courts is how to enforce these agreements in a way that respects the unique qualities of the mediation process. A secondary question, which was alluded to above, is whether the existing common law principles are adequate to facilitate the enforcement of MSAs. As will be evident from the sections below, both questions have been addressed by the Singapore Convention.

III. Creating a multilateral instrument for the enforcement of cross-border mediated settlement agreements

The need for the convention

17. Common law countries have been accustomed to using well-established contractual and evidential principles to determine the existence of MSAs and to enforce them. However, it has been increasingly acknowledged that this conventional method of enforcing settlement agreements has caused the parties substantial inconvenience. First, additional expense is needed to commence a legal action and prove the existence of a contract. Second, where there are disputes concerning the existence of a contract and its terms, mediation confidentiality is likely to be compromised as the court is likely to make an exception to the "without prejudice" rule and examine the parties' mediation communications as evidence. The rule itself lacks certainty because of the expanding number of exceptions to the rule. The court in *Unilever plc v The Procter & Gamble Co* set up nine exceptions, and the English Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* added two other exceptions.[21] Lord Neuberger, when commenting on the exceptions in a later decision, stated that it was

English Law's Troubled Relationship with Proportionate Costs", (2017) 35(1) C.J.Q. 1, 10 (arguing that the system should define proportionate cost by reference to the value of the rights in issue, and then reduce the amount of process and costs needed to resolve them).

[20] Chief Justice Sundaresh Menon, Keynote Lecture delivered at the Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, "Technology and the Changing Face of Justice" (14 November 2019), <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/ncmg---keynote-lecture.pdf>, [56]-[58]; Chief Justice Sundaresh Menon, Law Society Mediation Forum, "Mediation and the Rule of Law" (10 March 2017): <https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20- %20Mediation%20and %20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20- %20090317).pdf> (accessed 16 December 2019)

[21] [2000] 1 WLR 2436; and [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011.

inappropriate to create further exceptions in order to preserve legal and practical certainty.[22] Criticising the current state of the without prejudice rule, Briggs LJ noted that if mediation confidentiality is protected only by the rule, mediation will lose one of its main attractions as a dispute resolution process.[23]

18. It is therefore unsurprising that many jurisdictions have introduced ways to bypass the uncertain litigation process in order to enforce an MSA. A wide variety of enforcement mechanisms have been created, ranging from allowing MSAs to be enforced as court orders or arbitral awards, to the introduction of hybrid processes such as "med-arb" or "arb-med-arb" to convert MSAs into arbitral awards.[24] Nonetheless, while these innovations may plug the gap for the enforcement of domestic MSAs, they are less effective for the enforcement of *cross-border* MSAs. The mechanisms are ultimately constrained by the availability of the New York Convention or international enforcement of judgement mechanisms such as the future Judgments Projects of the Hague Conference on Private International Law in the relevant country where enforcement is sought. This is a highly dissatisfactory state of affairs for the growing international mediation landscape.

19. The Singapore Convention finds its genesis in the growing desire to deal with the lacuna in the international enforcement mechanism for mediation. The previous Model Law on International Commercial Conciliation merely stated that a mediated settlement agreement should be "binding and enforceable", but left the specific method of enforcement to be determined by individual states.[25] A proposal was thus made to UNCITRAL in 2014 to address this glaring gap.[26] When commencing its work to agree on a suitable drafted multilateral treaty, the UNCITRAL Working Group on Dispute Settlement ("Working Group") noted that mediation could be lagging behind arbitration due to the absence of a harmonised framework to enforce international mediated settlement agreements.[27] Reference was made to several

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[22] *Ofulue v Bossert* [2009] 2 All ER (D) 119 at [98]. See also Dorcas Quek Anderson, "Piercing the Veil of Confidentiality in Mediation to Ensure Good Faith Participation" (2019) 31 *Singapore Academy of Law Journal* 713, 716-721.

[23] Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 506, 507.

[24] Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" (2015) *Transnational Dispute Management* 6, 6-7; Ellen Deason, "Procedural Rules for Complementary Systems of Litigation and Mediation" (2004-2005) 80 *Notre Dame Law Review* 553, 588. See also Eunice Chua, "Enforcement of International Mediated Settlement Agreements Without the Singapore Convention" (2019) 31 *Singapore Academy of Law Journal* 572.

[25] 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].").

[26] UNCITRAL, "Planned and possible future work – Part III, Proposal by the Government of the United States of America: Future work for Working Group II" (2 June 2014) UN Doc A/CN.9/822; UNCITRAL, UN Doc A/CN.9/832.

[27] 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), 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 that the preparation of a convention would itself encourage the use of conciliation).

studies reflecting the global sentiment that the absence of an enforcement regime impeded the growth of mediation, and that the creation of an international instrument would encourage greater use of mediation for cross-border disputes.[28] An international enforcement regime would thus put mediation on equal standing with arbitration in terms of competitive advantages.

20. The large number of signatories to the Singapore Convention attests to the widespread acknowledgement that the instrument supplies the missing piece for the international dispute resolution enforcement regime. It reflects the recognition of mediation as a co-equal mode of dispute resolution alongside well-established processes such as arbitration. It is noteworthy that the preliminary support for the Singapore Convention is overwhelmingly greater than the 10 signatories to the New York Convention when the latter was first open for signing in 1958.[29] The widespread ratification of the latter convention by 161 countries bodes well for the future of the Singapore Convention.

The carefully crafted scope of the Singapore Convention

Commercial mediations

21. The Singapore Convention applies only to commercial mediations. Although the term "commercial" has not been expressly defined, Article 1(2) clarifies that the convention does not apply to conflicts relating to family, inheritance or employment law, or consumer disputes.[30] The Singapore Convention further excludes MSAs arising from court proceedings or recorded as arbitral awards, so as to avoid overlaps with the Hague Conference instruments and the international arbitral enforcement regime.[31]

International mediations

22. In addition, the Singapore Convention only deals with international disputes. An "international" MSA entails parties having their places of business or habitual residence in

[28] S.I. Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Washington and Lee Law Review 1973, 2055, finding that 74% respondents thought an international instrument akin to the New York Convention would encourage the use of mediation; see also International Mediation Institute, "How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" (2014), <https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements> (accessed 16 December 2019), showing that 90% of respondents agreed that the absence of any kind of international enforcement mechanism for international mediated settlement agreements presented a major impediment or was at least one deterring factor to the growth of mediation as a mechanism for resolving cross-border disputes.

[29] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Contracting States <http://www.newyorkconvention.org/countries> (accessed 16 December 2019).

[30] Singapore Convention on Mediation, Text of Convention, < https://www.singaporeconvention.org/convention-text.html> (accessed 16 December 2019).

[31] Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 *Pepperdine Dispute Resolution Law Journal,* 25 (referring to the intervention of European Union at the 64th Session on 2 February 2016).

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. [32]

Settlement agreements that result from mediation

23. The convention applies to settlement agreements "resulting from mediation": Article 1(1). Article 2(3) has defined mediation broadly, focusing on two distinctive qualities – the mediator's lack of authority to impose a solution on the parties, and the reaching of an amicable settlement. Furthermore, the Singapore Convention accommodates the diversity of mediation practices by clarifying that what properly constitutes as mediation does not depend on the expression used by the parties or the basis upon which the process is carried out. Accordingly, the Singapore Convention potentially applies to a wide range of mediations, including those conducted by trained professionals under the auspices of established mediation institutions, as well as mediations that take place on a more informal basis.

The legal effect of MSAs

24. There was some initial disagreement within the working group on whether the terms "recognition" and "enforcement", which were used in the New York Convention, should also be used in the Singapore Convention.[33] The term "enforcement" was relatively uncontroversial, referring primarily to using the MSA affirmatively as a sword. Article 3(1) thus obliges the signatory states to "enforce a settlement agreement in accordance with its rules of procedure".

25. By contrast, the term "recognition" was a more divisive issue. Some delegates argued that the term "recognition" was only appropriate for acts of states and not private agreements. On the other hand, other delegates asserted that the concept of recognition was crucial so that an MSA could be validly used as a defence in court proceedings.[34] Article 3(2) eventually described the effects of recognition while avoiding the express use of the term. The MSA can be invoked "in order to prove that the matter has already been resolved".

26. It should be noted that the convention has not intervened in procedural aspects of individual states' domestic enforcement legislation. It merely provides a simple mechanism allowing a party to seek enforcement in a contracting state. Once the court grants approval for enforcement under the Singapore Convention, it will effect enforcement according to its procedural rules.

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[32] Articles 3(1) and 3(2)(b), Singapore Convention on Mediation, <https://www.singaporeconvention.org/convention-text.html> (accessed 16 December 2019).

[33] Khory McCormick and Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation" (2019) 31 *Singapore Academy of Law Journal* 520, 533-534.

[34] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), pp 14-15.

Declarations that may be made by the signatory states

27. An unusual feature of the Singapore Convention relates to the declarations that states are permitted to make under article 8. Although the convention will generally apply to all MSAs, signatory states are given the option to apply the convention only to the extent that the parties to the MSA have agreed to its application.[35] The availability of such a declaration was meant to facilitate widespread participation in the convention, while also respecting some countries' views that the consensual nature of mediation required parties to expressly "opt in" to the enforcement regime.[36]

28. Furthermore, states may declare that the convention does not apply to MSAs to which the state or any governmental agency is party to: article 8(1)(a). This gives states flexibility if they have concerns about situations in which a mediated settlement is signed by a person or agency authorised by its domestic law.[37]

IV. Creating an enforcement regime that respects the unique qualities of the mediation process

29. The relatively swift process of creating the Singapore Convention tends to overlook the significant challenges faced by the Working Group in balancing numerous interests. Several commentaries have described how there was an impasse amongst delegates till a breakthrough in February 2017, when a five-issue compromise agreement was reached to strike a balance between the different concerns while achieving a harmonised approach to the enforcement of MSAs. Much has been written on the multiple interests that had to be taken into account.[38] This section will focus primarily on the following two areas of tension:

(i) Maintaining the informality of mediation versus preventing abuse of the enforcement mechanism
(ii) Ensuring due process and fair outcomes in mediation as opposed to excessive intervention in mediations

[35] Schnabel, note 30, 43 (commenting that states can choose to apply the Singapore Convention on an opt-in basis).
[36] Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" 2019) 31 *Singapore Academy of Law Journal* 487, 510.
[37] Schnabel, note 30, 57.
[38] See Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 *Singapore Academy of Law Journal* 487; Natalie Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123; Khory McCormick and Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation" (2019) 31 *Singapore Academy of Law Journal* 520; Schnabel, note 30; Tim Schnabel, "Implementation of the Singapore Convention: Federalism, Self-execution, and Private Law Treaties" (forthcoming in American Review of International Arbitration, 2019).

Maintaining the informality of mediation versus preventing abuse of the enforcement mechanism

30. The Singapore Convention has imposed minimal formality requirements in order to keep the enforcement mechanism as simple as possible while also preventing abuse.[39] The relevant party only has to show a written MSA that has been signed by the parties, and evidence that the MSA resulted from mediation. The latter could take the form of the mediator's signature on the MSA, any other document confirming mediation, or an attestation by the body administering the mediation.[40] It was decided that there would be no additional requirement of a review mechanism in the state where the MSA was arrived.[41] The practical realities of using electronic communications to conclude an MSA were also acknowledged in article 1(2).[42]

31. In addition, the convention does not require an earlier agreement to mediate, unlike the strict requirement for an arbitration agreement in the New York Convention. This approach implies that there is no equivalent concept of *competence-competence* which involves establishing the preliminary jurisdiction of a mediation in the international enforcement regime. The state where mediation takes place also has no role in reviewing the jurisdiction of the mediation.

32. Following from the above, there is no concept of the "seat" of mediation in the Singapore Convention. An arbitration is usually governed by the law of the seat of arbitration, and the parties may rely on the state to support the arbitral process. The New York Convention has maintained this link, having referred to the "law of the country where the arbitration took place". The New York Convention thus applies to foreign arbitrations taking place in a state different from the state of enforcement.[43] By contrast, the parties in a cross-border mediation may not necessarily choose a particular location for a mediation because they desire its laws to govern the mediation. Furthermore, an international mediation may involve numerous jurisdictions, making it impossible to affirmatively identify a "seat" of mediation.[44] In this regard, Schnabel observed that "the scope of the convention could not be delineated by referring to whether

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[39] 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, 13.
[40] Article 4(1)(b) of Singapore Convention on Mediation, <https://www.singaporeconvention.org/convention-text.html> (accessed 16 December 2019).
[41] 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, 15-16; Natalie Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123, 130.
[42] Article 4(1)(a) of Singapore Convention on Mediation, < https://www.singaporeconvention.org/convention-text.html> (accessed 16 December 2019); Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" 2019) 31 *Singapore Academy of Law Journal* 487, 499, referring to UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), p 10–11; UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-fourth Session" (New York, 1–5 February 2016) (A/CN.9/867) (10 February 2016), p 21; and UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 12.
[43] *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015), pp 179-182.
[44] Schnabel, note 30, 21.

relief is sought in a jurisdiction other than the mediated settlement's state of origin, as no particular state of origin is designated".[45]

Ensuring due process and fair outcomes in mediation as opposed to excessive intervention in mediations

33. Despite the minimal formality requirements, the Singapore Convention has introduced robust ways to regulate MSAs. This approach is in keeping with the complementary relationship between mediation and the courts, in which the courts only enforce agreements that respect due process and public policy. The Working Group faced the challenge of creating grounds of non-enforcement that were not excessively burdensome and intrusive, thus undermining the overall goal of creating an enforcement mechanism that was sufficiently flexible.[46] At the same time, any enforcement mechanism would not be complete without clear grounds for non-enforcement relating to due process. Article 5 was eventually drafted to introduce the following grounds of non-enforcement of MSAs:

> 1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:
> (a) A party to the settlement agreement was under some incapacity;
> (b) The settlement agreement sought to be relied upon:
> (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;
> (ii) Is not binding, or is not final, according to its terms; or
> (iii) Has been subsequently modified;
> (c) The obligations in the settlement agreement:
> (i) Have been performed; or
> (ii) Are not clear or comprehensible;
> (d) Granting relief would be contrary to the terms of the settlement agreement;
> (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
> (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.
> 2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:
> (a) Granting relief would be contrary to the public policy of that Party; or

[45] Ibid.
[46] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), p 17.

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

34. The above grounds for refusing enforcement broadly relate to the following categories:
(i) the parties (1(a));
(ii) the MSA (1(b), (c) and (d));
(iii) the mediator's conduct and the mediation process (1(e) and (f)); and
(iv) the enforcing state's policies and mandatory laws (2(a) and (b)).[47]

These categories will be analysed in turn below.

The Parties

35. Article 5(1)(a) relating to the party's lack of capacity is identical to article V(1)(a) of the New York Convention that refers to the legal ability of a party to enter into an agreement on its own behalf.[48] Factors such as a party lacking mental capacity or a party being a minor will be relevant. It has been noted that this ground is unlikely to be commonly relied on as the parties in international commercial mediations are likely to be represented by lawyers.[49]

The Mediated Settlement Agreement as a Contract

36. One of the common approaches in domestic law is to treat an MSA as a contract. 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 the USA, England, Australia and Singapore rely predominantly on this framework. Other civil law legal systems such as Germany and Italy also regard domestic MSAs as contracts and subject to the general contractual principles.[50]

37. The contractual framework is alluded to in the Convention's provisions relating to:

[47] UNCITRAL, "Note by Secretariat for the 65th Session" (30 June 2016), UN Doc A/CN.9/WG.II/WP.198, p 11.
[48] See Ignacio Suarez Anzorena, "The Incapacity Defence Under the New York Convention" in E. Gaillard and D. Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) 615, 621; UNCITRAL Secretariat, "Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2016 ed), 135.
[49] Schnabel note 30, 51.
[50] UNCITRAL, "Settlement of commercial disputes: Compilation of comments by Governments" (25 January 2016) UN Doc A/CN.9/WG.II/WP.196/Add. 1, 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" (27 March 2015) UN Doc A/CN.9/846. 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).

(i) whether the MSA is "null and void, inoperative or incapable of being performed under the law parties have validly subjected [the mediation] or…under the law deemed applicable by the competent authority": article 5(b)(i).
(ii) whether there are binding and final terms: article 5(b)(ii);
(iii) whether the terms were clear or comprehensible: article 5(c)(ii);
(iv) whether enforcement would be contrary to the contract: articles 5(d);[51] and
(v) whether the obligations in the MSA have been performed (article 5(c)(i)), or have been subsequently modified (article 5(b)(iii)).

38. With regard to ground (i), the Working Group drew inspiration from articles II(3) and V(1)(a) of the New York Convention concerning when arbitration agreements would be deprived of legal effect.[52] These relevant provisions in the New York Convention relate to the preliminary determination of arbitral jurisdiction rather than the substantive grounds for non-enforcement of the arbitral award. Nevertheless, the courts have analysed arbitration agreements like any contractual agreement.[53] Most domestic laws relied on will largely apply contractual defences such as fraud and duress, albeit with variations across jurisdictions. The Working Group thought that this "generic nature" of analysing arbitration agreements, which has been interpreted by several jurisdictions in a harmonised fashion, could be relied on to determine whether there was a valid MSA.[54]

39. The contractual characteristics of the arbitration agreement have effectively been transplanted into the Singapore Convention to form substantial grounds of non-enforcement for the MSA. The contractual legal framework is appropriate because of the integral role of self-determination in the mediation process. As explained in section II, the hallmark of mediation is the parties' freedom to arrive at a consensual decision. Accordingly, any undue influence or other type of contractual defence exerted by the mediator or the opposing party will undermine the party's autonomy in arriving at the MSA and should not be countenanced.

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[51] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), 18 (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).

[52] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), 17; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), 18.

[53] Franco Ferrari and Friedrich Rosenfeld, "Limitations to Party Autonomy in International Arbitration" (forthcoming 2018), referring in footnote 22 to S. J. Ware, "Employment Arbitration and Consent" (1996) *Hofstra Law Review* 25,112, stating that 'the problem of determining consent in arbitration law is merely an application of that problem in contract law'; and S. J. Ware, "Arbitration and Unconscionability After Doctor's Associates" (1996) *Wake Forest Law Review*, 31,1001, 1006.

[54] UNCITRAL Commission, "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, p 11.

40. It should be noted that the court's analysis of the contractual validity of the MSA should be based on the "law to which the parties have validly subjected it, or…the law deemed applicable". The parties' choice of law for the mediation should be respected. Alternatively, the enforcing state's conflict-of-laws rules ought to be used to determine the applicable contractual law to be used.[55]

41. Ground (ii) relating to whether the terms are binding requires the courts to consider the parties' intentions as reflected in the written MSA. The parallel ground in article V(1)(e) of the New York Convention allows for non-recognition when the award has yet to become binding or has been set aside or suspended by a competent authority. The deliberate inclusion of the words "according to its terms" in the Singapore Convention clarifies that the court has to refer closely to the terms of the MSA, and no other extrinsic materials, to ascertain whether the parties intended the settlement to be final.[56] Hence, it is clear that the court should not adopt some countries' approaches of analysing the parallel provision in the New York Convention according to the availability of appellate review of the arbitral award at the seat of arbitration.[57]

42. Similarly, grounds (iii), (iv) and (v) refer to specific instances of respecting the parties' intentions in the MSA. The parties' intentions must have been reflected clearly and in a comprehensible way. This allows the court to refuse enforcement of MSAs that are manifestly confusing and ill-defined such that the competent authority is unable to decipher the relief to be given.[58] Furthermore, the state may refuse to give relief to any term that seems to be contrary to the parties' agreement in the MSA. Such circumstances may include the parties' stipulation of the fulfilment of certain conditions before the relevant obligation arises, or the parties' agreement to limitations to their ability to seek relief.[59] Finally, the grounds referring to the obligations in the MSA being subsequently modified or having been already performed also oblige the court to interpret the MSA according to the parties' intentions. Cumulatively, these grounds attest to the centrality of party autonomy in mediation.

The mediator's conduct and the mediation process

43. The most distinctive ground of non-enforcement probably relates to articles 5(1)(e) and (f). There were strong views within the Working Group that professional mediation ethical rules apart from party autonomy – including neutrality and equal treatment of parties – should

[55] Schnabel, note 30, 45; Shoyu Chong and Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspectives" (2019) 31 *Singapore Academy of Law Journal* 448, 480-481.
[56] Schnabel, note 30, 36.
[57] Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016), pp 406-407, referring to *Societe Nationale d'Operations Petrolieres de la Cote d'Ivore Holding v Keen Lloyd Res Ltd,* XXIX YB Comm Arb 776 (2004) (Hong Kong Court First Instance 2001) (holding that an award is binding if it is no longer open to an appeal on the merits); and *Inter-Arab Inv Guarantee Corp v Banque Arabe et Intertionale d'Investissements* XXII YB Comm Arb 643 (Brussels Court of Appeal) (1997) (that relied on the parties' arbitration agreement that provided that the award was binding).
[58] Schnabel, note 30, 37.
[59] Schnabel, note 30, 38.

be endorsed as due process principles within mediation.[60] The discussions thus focused heavily on the types 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.[61] 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".[62] The former ground was eventually articulated as a serious breach of "standards applicable to the mediator or mediation" in article 5(1)(e), while the latter was encapsulated as a failure to "disclose…circumstances that raise justifiable doubts as to the mediator's impartiality or independence" in article 5(1)(f).[63]

44. The applicable mediation standards in article 5(1)(e) refer to the relevant legislation governing the mediation or professional codes of mediation conduct.[64] This could take the form of an internal code of conduct created by a mediation organisation (such as the Centre for Effective Dispute Resolution[65]), or standards associated with mediation accreditation bodies (such as the International Mediation Institute[66]). There are also country-specific mediation standards that the mediator may be obliged to adhere to. The EU, Australia, Hong Kong and Singapore have formulated such codes of conduct for their mediators.[67] The Working Group 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.[68] It has been suggested that to the extent that no such binding standards applied to the mediator or the

[60] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, 7–11 September 2015) (A/CN.9/861) (17 September 2015), p 17.
[61] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 20.
[62]UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), pp 19-20; UNCITRAL Commission, "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, p 5.
[63] UNCITRAL Commission, "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, p 5; UNCITRAL, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5-9 February 2018)' (19 February 2018) UN Doc A/CN.9/934, 10.
[64] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), p 16.
[65] Centre for Effective Dispute Resolution (CEDR), "Code of Conduct for Third Party Neutrals", <https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/11/Code-of-Conduct-for-Third-Party-Neutrals.pdf> (accessed 16 December 2019).
[66] International Mediation Institution, "Code of Professional Conduct", <https://www.imimediation.org/practitioners/code-professional-conduct/> (accessed 16 December 2019).
[67] EU, "European Code of Conduct for Mediators", Australia National Mediator Accreditation Standards; Hong Kong Mediation Code <http://www.hkmaal.org.hk/en/HongKongMediationCode.php>; Singapore International Mediation Institute, Code of Professional Conduct for SIMI Mediators <http://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct> (accessed 16 December 2019).
[68] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), p 16; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2-6 October 2017)" (11 October 2017) UN Doc A/CN.9/929, pp 15-16.

mediation at the time of the mediation, the competent authority cannot deny relief based on reference to best practices or requirements in other jurisdictions.[69]

45. The related ground of article 5(1)(f) arose out of the discussions within the Working Group to introduce consistency between the Singapore Convention and the Model Law on Conciliation concerning fair treatment as well as a failure to disclose circumstances impinging on the mediator's impartiality.[70] Some delegates pointed out that disclosure requirements were common in relevant applicable mediation standards and domestic mediation legislation,[71] whereas others noted that mediators in some jurisdictions are not obliged to make similar disclosures as arbitrators.[72] It was eventually agreed that this ground would be introduced, subject to the high threshold described below. In addition, it was clarified that the ground would not apply if the undisclosed circumstances were known by the relevant party.[73] This ground effectively highlights a specific instance of due process principles in mediation, which may or may not be present in the relevant mediation standards.[74] As Schnabel observed, it "creates an autonomous standard that can be relied upon regardless of whether any 'applicable' standards [under article 5(1)(e)] required disclosures".

46. Notably, there are two aspects that circumscribe the application of article 5(1)(e) and (f). First, the party arguing for non-enforcement must fulfil a very high threshold for mediator misconduct. The breach of mediation standards must be "serious", while the mediator's failure to disclose circumstances must raise "justifiable doubts" concerning the mediator's impartiality. Second, there must be a strong causative link between the breaches and the parties' consent in entering the MSA. Under both article 5(1)(e) and (f), it has to be apparent that the disputing parties would have withheld their consent to the MSA and "not entered into" the MSA because of the mediator's misconduct. These two requirements were introduced by the Working Group in order to balance the need for due process in the mediation process with the risk of subjective interpretation of mediation standards that would undermine the utility of the Singapore Convention.[75]

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[69] Schnabel, note 30, 52.
[70] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 19; Articles 5(4), 5(5) and 6(3) of the Model Law on Conciliation for International Conciliation.
[71] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), p 15.
[72] Schnabel, note 30, 53; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), p 14.
[73] Schnabel note 30, 53.
[74] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), p 16.
[75] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 19; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, 6-10 February 2017) (A/CN.9/901) (16 February 2017), 8 (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).

47. In practice, the grounds of non-enforcement relating to the MSA and the mediator's misconduct have to be evaluated with reference to evidence concerning mediation communications. While such communications are usually inadmissible because of the "without prejudice" rule, the common law clearly allows exceptions in the circumstances listed below that mirror the above grounds for non-enforcement in the Singapore Convention:

(i) evidence of settlement, where there is an issue as to whether an agreement has been concluded;
(ii) where evidence of the negotiations is admissible to show that an apparent agreement should be set aside on the ground of misrepresentation, fraud or undue influence;[76] and
(iii) where there is a dispute as to the interpretation of the settlement.[77]

The enforcing state's policies and mandatory laws

48. The grounds for non-enforcement in the preceding section relate to due process and how the mediation was conducted. The grounds in article 5(2) relate to the courts' control over the content of the mediated settlement agreement. This article 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. 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.[78] Hence, it is most likely that contracting states will be guided by the existing arbitration jurisprudence when interpreting article 5(2). Similar to the New York Convention, these defences could be considered by the court on its own intiative even if not raised by the parties.[79]

49. With regard to article 5(2)(a), the Working Group noted that it was up to the relevant enforcing state to decide what constituted public policy.[80] Public policy could cover both procedural and substantive aspects, and include matters relating to national security or national

[76] *Unilever plc v The Procter & Gamble Co* ("*Unilever*") [2000] 1 WLR 2436 at 2444–2445;

[77] This is one of two new exceptions added in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*, [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011.

[78] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 7; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Seventh Session" (Vienna, 2-6 October 2017) (A/CN.9/929) (11 October 2017), p 16.

[79] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, 12–23 September 2016) (A/CN.9/896) (30 September 2016), p 8.

[80] UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Seventh Session" (Vienna, 2-6 October 2017) (A/CN.9/929) (11 October 2017), p 16.

interest.[81] Public policy has been interpreted narrowly by most courts in relation to the New York Convention. For instance, the UK Court of Appeal 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".[82] 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 applying article 5(2)(a). This author has also argued elsewhere that a narrow interpretation of public policy will be consonant with the overall purpose of the Singapore Convention to level the relative standings between mediation and arbitration. Similar standards should be used to in applying the grounds for non-enforcement for both arbitral awards and MSAs, so as to effectively confer comparable standing to both dispute resolution processes.[83]

50. Article 5(2)(b) 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. There has been a small number of matters in domestic arbitration legislation that have been deemed non-arbitrable. It has been observed that the small number of non-arbitrable matters are likely due to the trend of encouraging the saving of costs through the private resolution of disputes.[84] It is probable that the same approach in deciding which cases are arbitrable in the enforcing state will be adopted in determining which cases may not be mediated. Furthermore, many of the non-arbitrable matters, such as employment, labour, family and consumer disputes, do not fall under the ambit of the Singapore Convention that applies only to commercial disputes. It is likely that only matters involving disputants with severely unequal bargaining power will be deemed incapable of settlement by mediation. There are likely to be very few such situations within commercial disputes.

V. Conclusion

51. The Singapore Convention marks a milestone in the growth of mediation and the legitimate place it takes within the justice system. The symbiotic relationship between the courts and the mediation process in many jurisdictions has now been acknowledged and strengthened. At the same time, the convention has resolved the previous challenges involved

[81]UNCITRAL, "Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2-6 October 2017)" (11 October 2017) UN Doc A/CN.9/929, p 16.
[82] *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.
[83] Dorcas Quek Anderson, "Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?" in Burkhard Hess & Loic Cadiet (eds), *Privatizing Dispute Resolution and Its Limits* (Nomos, Max Planck Institute of Procedural Law, 2019).
[84] "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) 105.

in enforcing a mediated settlement agreement with the courts' assistance. While the final instrument has created a stand-alone enforcement regime for international commercial mediations that has bypassed the need to litigate or arbitrate, the convention requires the future support of the courts in signatory countries in order to be truly successful and to bring its intended result to fruition.

52. It is therefore crucial for the courts to attain a sound understanding of the underlying concerns and interests that were delicately balanced in this instrument. In applying the grounds of non-enforcement in article 5, the courts should balance the need to subject MSAs to public policy and due process standards, and the equally important need not to intervene excessively with the parties' exercise of autonomy and confidential discussions. A large part of the court's regulation of MSAs entails protecting the party's exercise of autonomy. As such, the contractual framework is likely to be used to ensure that the MSA has not been arrived at through undue influence, duress or any other contractual defence that has undermined the parties' consent. There should also be awareness that the relevant mediation standards used to appraise the MSA under article 5(1)(e) are not necessarily found within the enforcing state's mediation tradition, but are the standards that the parties have intended to apply to the mediation or mediator. Furthermore, the enforcing state should not impose its own mediation formality requirements on the relevant MSA, for the Singapore Convention has required very minimal formalities for the MSA as a prerequisite to enforcement. Finally, the courts may make reference to the general approach in applying the New York Convention when deciding whether the content of the MSA has breached the enforcing state's public policies or involves an area that is not capable of settlement by mediation. To respect the parties' autonomy in arriving at the most suitable settlement meeting their interests, the courts should only disallow the enforcement of settlement terms that breach very well-established policies.

53. The Singapore Convention has underscored as well as clarified the role of mediation in the international and domestic dispute resolution landscapes. As mediation takes on a more prominent role alongside litigation and arbitration, it is hoped that its distinctive characteristics are preserved and respected by the courts in their future enforcement of MSAs.

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