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Enforcement of international settlement agreements resulting from mediation under the Singapore convention – Private international law issues in perspective

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ENFORCEMENT OF INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION UNDER THE SINGAPORE CONVENTION

Private International Law Issues in Perspective

This article introduces the Singapore Convention on International Settlement Agreements Resulting from Mediation ("the Convention"). It discusses the enforcement of mediated settlement agreements under the Convention against the background of private international law. First, the Convention and its genesis are introduced. Second, the rationale and scope of the Convention are examined. Third, the Convention is placed in the context of private international law. Fourth, the requirements for enforcement of an international mediated settlement agreement ("IMSA") under the Convention are laid out. Fifth, the grounds for refusal of judicial enforcement of IMSAs are examined. The article ends with a conclusion and outlook.

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I. Introduction

1 The Singapore Convention on International Settlement Agreements Resulting from Mediation[1] ("Singapore Convention") is a welcome addition to the toolbox of mechanisms for the enforcement of cross-border dispute resolution outcomes. Many stakeholders in the cross-border mediation community have high hopes that the Singapore Convention would do for mediation what the Convention on the

1 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

Recognition and Enforcement of Arbitral Awards[2] ("New York Convention") has achieved for arbitration. The Singapore Convention aims at establishing regulatory robustness,[3] which is essential for elevating cross-border mediation to the role of a relevant player amongst the well-recognised and frequently utilised international dispute resolution forums such as litigation and arbitration.[4]

2 The genesis of the Singapore Convention can be attributed to a delegation from the US.[5] At the end of the 2014 United Nations Commission on International Trade Law ("UNCITRAL") Commission session, the delegation submitted a proposal[6] that UNCITRAL Working Group II (Dispute Settlement) ("WG II") should begin to examine how the attractiveness of mediation would be increased, if settlement agreements reached at the conclusion of a successful process could be enforceable *in an expedited manner* under some form of international-level treaty or instrument.[7] Consequently, in 2015, WG II commenced deliberations for the preparation of an instrument (or, possibly, instruments) which would provide a mechanism to enhance the enforcement of international commercial settlement agreements resulting from mediation (hereinafter referred to as international mediated settlement agreements or "IMSAs").

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2 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

3 On regulatory robustness, see generally Nadja Alexander, "Introducing Regulatory Robustness Ratings for Mediation Regimes in the EU" in *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes* (Nadja Alexander *et al* eds) (Wolters Kluwer, 2017).

4 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 38.

5 Hal Abramson, "New Singapore Convention on Cross-Border Mediated Settlements: Key Choices" in *Mediation in International Commercial and Investment Disputes* (Catharine Titi & Katia Fach-Gomez eds) (Oxford University Press, 2019, forthcoming) at pp 3–4 (draft version). On the decision-making process, see Stacie Strong, "The Role of Empirical Research and Dispute System Design in Proposing and Developing International Treaties: A Case Study of the Singapore Convention on Mediation" (2019) 20 Cardozo J Conflict Resol (forthcoming).

6 United Nations Commission on International Trade Law (hereinafter "UNCITRAL"), *Proposal by the Government of the United States of America: Future Work for Working Group II* (A/CN.9/822) (2 June 2014).

7 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1. Timothy Schnabel proposed and negotiated the forthcoming Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "Singapore Convention on Mediation") on behalf of the US.

3 In February 2018, during its 68th session in New York, WG II concluded its work, having come to a consensus on the drafting of two instruments: the Convention and the Model Law on International Commercial Mediation[8] embracing the principles found within the Convention. On 25 June 2018, UNCITRAL at its 51st session recommended that the final draft of the Convention be submitted to the United Nations ("UN") General Assembly for its consideration, and adopted the Model Law.[9] The UN General Assembly adopted the Convention on 20 December 2018, confirming that it shall be referred to as the "Singapore Convention on Mediation" and authorising that it be open for signature at a ceremony in Singapore on 7 August 2019.[10]

4 In this article, the authors examine the Singapore Convention on Mediation focusing on four themes. First, the rationale and scope of the Convention will be studied. Second, the application of the Convention will be considered against the background of private international law. Third, the requirements for enforcing IMSAs under the Convention will be investigated. Fourth, the circumstances under which judicial refusal of IMSA enforcement is permitted under the Convention will be determined.

II. Rationale

5 As an instrument that endeavours to provide a legal mechanism for the expedited enforcement of IMSAs across several jurisdictions, the Singapore Convention promotes conclusiveness of dispute resolution outcomes.[11] This fosters confidence in the mediation process in respect to cross-border commercial disputes. International commercial mediation becomes a more attractive and accessible forum of alternative

8 The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

9 *Report of the United Nations Commission on International Trade Law: Fifty-first Session* (A/73/17) (25 June–13 July 2018).

10 United Nations, "General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation", press release (UNIS/L/271) (21 December 2018) <www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html> (accessed 23 June 2019).

11 Shouyu Chong, "Conflict of Laws and Cross-border Commercial Mediation: Breaking New Ground with the Forthcoming United Nations Convention on International Settlement Agreements Resulting from Mediation through a Conflict of Laws Analysis of Its Grounds for Refusal to Enforce International Commercial Mediated Settlement Agreements" (2018) (unpublished directed research paper undertaken during LLM studies, National University of Singapore, archived at the C J Koh Law Library, National University of Singapore) at pp 6–7.

dispute resolution and is elevated to possess the same status as international commercial arbitration. Whilst many mediation providers across the world enthusiastically proclaim that IMSAs should enjoy high compliance rates,[12] lawyers and business people often remain cautious when deciding whether to proceed with international mediation at the occurrence of a dispute.[13] At least from the perspective of a "common law" lawyer, it is common practice[14] to first file a suit with the courts (or to initiate arbitration proceedings) and subsequently apply for a stay of proceedings in favour of mediation or out-of-court negotiations (sometimes upon recommendation of the court).[15] Only then will the parties proceed to the mediation table in an attempt to resolve their conflict.

12 Chang-fa Lo & Janice Lee, "A New Approach for the Settlement of Regional Disputes to Maintain Dynamic Stability – A Selective Elaboration of the Draft Agreement on the Establishment of the Asia-Pacific Regional Mediation Organisation" (2018) 13 *Asian Journal of WTO & International Health Law and Policy* 27 at 40–41: "[T]he chances of the parties reneging on their obligations and not performing according to the agreed terms and conditions [of the mediated settlement agreement] is limited". Nolan-Haley shares similar sentiments, in Jacqueline M Nolan-Haley, "Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent" (2013) 5 *Yearbook on Arbitration and Mediation* 152 at 158–159. Also consider Klaus J Hopt & Felix Steffek, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford University Press, 2013) at pp 105–106; Craig A McEwen & Richard J Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent" (1981) 18 *Law & Society Review* 11; and Lucy Reed, "*Ultima Thule*: Prospects for International Commercial Mediation", NUS Centre for International Law Working Paper 19/03 (unpublished) (January 2019) at p 18 <https://www.ssrn.com/abstract=3339788> (accessed 23 June 2019).

13 Consider the concern raised by American practitioners observed by Stacie Strong, who noted that, at least from the American perspective, "voluntary compliance with settlement agreements is declining, thereby increasing the need for legal enforcement mechanisms [for mediated settlement agreements in court]": Stacie Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 74(4) Wash and Lee L Rev 1973 at 2014; see also Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'" (2012) 17 Harv Negot L Rev 61 at 88–89.

14 Anecdotally, some "common law" lawyers would go further to consider this *good* practice.

15 For a recent example in Singapore, peruse the precedent of *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414. The case involved a winding-up petition of a company run by brothers who had fallen out with each other. Whilst a first round of mediation ordered by a judge held between April and May 2015 to resolve their differences failed and the High Court (court of first instance) of Singapore ordered for the winding-up of the company, a second round of mediation ordered by the Singapore Court of Appeal held in December 2015 yielded a settlement agreement. Unfortunately, the settlement agreement was dishonoured, and the parties involved eventually sued each other in 2018 for damages arising from the breach of the settlement agreement. This was the subject matter of the judgment.

6 Several reasons for this practice can be identified. From the point of view of a practitioner unfamiliar with mediation, the obligations enshrined in IMSAs may appear to be inconsistently enforced in different jurisdictions when they are subject to challenges in court.[16] This leads to unpredictability and uncertainty in dispute resolution outcomes. Without an expedited enforcement mechanism, IMSAs are ordinarily enforced as legally binding contracts with an international character.[17] The IMSA may have a procedural element in addition to its substantive contractual content if litigation or enforcement issues are covered.[18] As such, IMSAs are subject to the relevant, but potentially idiosyncratic, mandatory rules and vitiating factors of the forum (for example, undue influence, unconscionability and illegality) administered in light of the private international law rules of the enforcing jurisdiction. This may prove costly for parties when disputes are concluded by settlement agreement through mediation, as further legal advice may be required at the jurisdiction(s) to which the IMSA will be taken to be enforced.

7 If an IMSA is brought to Singapore, which is a common law jurisdiction, for enforcement, courts are usually reluctant to order specific performance of contractual obligations if they are of the opinion that awarding damages would sufficiently compensate the innocent party to a dishonoured IMSA.[19] There is also precedent from the

16 At least in the US, challenges in court to enforceability of settlement agreements have been very common: see James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 47–48; and James R Coben & Peter N Thompson, "Mediation Litigation Trends: 1999–2007" (2007) 1 *World Arbitration & Mediation Review* 395.

17 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Wolters Kluwer, 2009) at p 328.

18 Felix Steffek, "Internationales Recht" in *Recht der Alternativen Konfliktlösung* (Reinhard Greger, Hannes Unberath & Felix Steffek eds) (CH Beck, 2nd Ed, 2016) at F 40.

19 See *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [52]–[53]; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 23.067–23.154; and Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 6th Ed, 2018) at p 546 *ff*. This is because "[t]he court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice": *Wilson v Northampton and Banbury Junction Rly Co* (1874) 9 Ch App 279 at 284, *per* Lord Selborne. See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [156]: the Singapore Court of Appeal opined that non-compliance of a settlement agreement, which was subsequently recorded as a consent order by the High Court, "had the effect of *prospectively* terminating the parties' agreement and releasing the parties from *future* obligations" [emphasis in original]. As such, the Court of Appeal awarded compensatory damages to the innocent parties in view of the breach of settlement agreement: see *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655.

Singapore courts to grant equitable relief to parties from having to fulfil some of their contractual obligations. The rule against "penalty" clauses serves as an illustration,[20] where an expressed secondary obligation for one party to the IMSA to pay another a sum of money in the event of a breach of its terms may not inevitably be enforced if the courts opine that the said payment clause amounts to a "penalty".[21] If, on the other hand, an IMSA is brought to Germany, which is a civil law jurisdiction, for enforcement, specific performance is the default position.[22] Under German law, the enforcement of penalty clauses may also be restricted. However, these restrictions are not identical with the principles applying to penalty clauses under English and Singapore case law.[23]

8 Hence, to promote the conclusiveness of dispute resolution outcomes arising from cross-border commercial mediation, the Singapore Convention is desirable, as it endeavours to converge the functions of IMSAs with arbitral awards, galvanising its enforceability uniformly across signatory states.[24] This appears to reflect the sentiment of practitioners and other members of international business and legal communities who participated in a 2014 study to examine the desirability of such a Convention when it was but a proposal: 74% of respondents polled expressed the belief that a multilateral convention establishing a cross-border enforcement mechanism for IMSAs would

20 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 ("*Dunlop Pneumatic Tyre*"); the ratio of *Dunlop Pneumatic Tyre* represents the position in Singapore law (*Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732); see also Goh Yihan & Yip Man, "English Reformulation of the Penalty Rule – Relevance in Singapore? *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172; [2015] 3 WLR 1373" (2017) 29 SAcLJ 257, though it may be modified in light of the UK Supreme Court decision of *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172; [2015] 3 WLR 1373 by a Court of Appeal ruling in the near future.

21 It is impliedly assumed in this illustration that the choice of law of the international mediated settlement agreement ("IMSA") points to Singapore law. See *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] 3 SLR 663 at [165] for the current position taken by the Singapore High Court. For completeness, obligations to pay a sum of money upon a breach of the IMSA, to transfer property either for nothing or at undervalue, as well as to pay a sum of money to the other party to the IMSA as a deposit (which may be forfeited upon its breach) could be construed as secondary obligations susceptible to relief: Goh Yihan & Yip Man, "English Reformulation of the Penalty Rule – Relevance in Singapore? *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172; [2015] 3 WLR 1373" (2017) 29 SAcLJ 257 at 263, para 12.

22 See Felix Steffek, "Internationales Recht" in *Recht der Alternativen Konfliktlösung* (Reinhard Greger, Hannes Unberath & Felix Steffek eds) (CH Beck, 2nd Ed, 2016) at F 55 *ff*.

23 See §§ 339 *ff* of the German Civil Code (*Bürgerliches Gesetzbuch*) and § 348 of the German Commercial Code (*Handelsgesetzbuch*).

24 See Art 4 of the Singapore Convention on Mediation, which sets out the requirements for reliance on mediated settlement agreements.

encourage parties to resort to mediation services more frequently.[25] At least in Singapore, specific performance of clearly defined obligations established in an IMSA would seem to be available to parties, if enforcement were to be sought under the Convention. Enforceability of IMSAs in the courts of signatory states under the Convention may only be challenged under some circumscribed conditions found in Art 5,[26] resulting in a more predictable and certain enforcement regime.

9 Further, the Convention promotes a consensual and non-legalistic method of resolving disputes, embracing the intangible elements of business relationships – such as notions of respect, reputation and contextual sensitivity to business cultures – so as to secure continuity of co-operation, which may produce further economic benefits for society. In contrast with the adjudicative forums of dispute resolution such as arbitration and litigation, mediation is a harmonious alternative. It affords parties with an appreciably more informal and fluid setting for dispute resolution to take place, making room for them to consider extra-legal considerations which could truly yield the point in contention.[27] Addressing the relevant elements at mediation with nuance, discretion and sensitivity – in contrast with proceeding with a large team of expensive high-profile lawyers to battle tooth-and-nail with each other to the bitter end at litigation or arbitration – can produce further economic benefits for society, in the form of productivity from continued business ties and reduced opportunity costs.

10 It is apt to conclude this part with the observation that through the provision of a robust enforcement mechanism, the Singapore Convention incidentally promotes mediation as a desirable and, at many times, appropriate *alternative* to international arbitration and litigation. From the economic point of view of a consumer in the market for dispute resolution services, parties will enjoy cost-saving and qualitative benefits, for they are provided with access to a bigger platter of options

25 Stacie Strong, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" University of Missouri School of Law Legal Studies Research Paper No 2014-28 (2014) at p 45 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302> (accessed 23 June 2019).

26 Article 5 of the Singapore Convention on Mediation contains the grounds for refusing to grant enforcement relief to parties that wish to enforce international mediated settlement agreements under the Convention's expedited enforcement mechanism.

27 Carrie Menkel-Meadow, "The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation" in *Essays on Mediation – Dealing with Disputes in the 21st Century* (Ian Macduff ed) (Wolters Kluwer, 2016) at p 31.

to choose from. It is possible for them to better tailor how they wish to proceed to resolve their disputes.

III. Scope of the Convention

11 This part first examines the kinds of IMSAs which fall within the reach of the Convention. Second, it discerns the forms of IMSAs which have been expressly excluded from its reach, including those which may be enforced under other treaties. Finally, it examines the possibility of reservations made by signatory states.

A. Reach of the Convention

(1) Introduction

12 According to Art 1(1), the Singapore Convention applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute. In this part, the authors will establish the meaning of "international", "commercial" and "mediation". The essentials of the "in writing" requirement will be investigated below,[28] where the formalities required for enforceable IMSAs under the Convention are laid out.

(2) International

13 Article 1(1) of the Convention provides a functional elucidation as to what forms of settlement agreements are "international":

> (a) At least two parties to the settlement agreement have their places of business in different States; or
>
> (b) The State in which the parties to the settlement agreement have their places of business is different from either:
>
> > (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
> >
> > (ii) The State with which the subject matter of the settlement agreement is most closely connected.

14 If a party has more than one place of business, the relevant place of business – according to Art 2(1)(a) – is that which has the closest relationship to the dispute resolved by the "settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement". If a

28 See paras 37–41 below.

party does not have a place of business, reference is to be made to the party's habitual residence under Art 2(1)(b).

15 The drafters of the Convention have prescribed a functional definition of "international" disputes, since in practice there is no concept of a "seat" of mediation.[29] In contrast, the "seat" of an international arbitration would allow for the internationality of a *foreign* arbitral award to be determined: Art I of the New York Convention provides that it "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State [that is, the "seat"] *other than the State where the recognition and enforcement of such awards are sought*" [emphasis added].[30] Without a discernible "seat" of mediation, there is no meaningful comparator against which a mediated settlement agreement may be deemed "foreign" (and thus, "international").[31] The provision of a definition of "international" in the Convention is essential as it overcomes this rudimentary issue, in line with the norm amongst mediation practitioners who have traditionally referred to mediated settlement agreements as of either an "international" or "domestic" character.[32]

(3) Commercial

16 Whilst Art 1(1) of the Singapore Convention restricts its scope to "commercial" disputes, what constitutes a "commercial" dispute is not defined anywhere within the Convention. However, it has been generally defined with the assistance of illustrations provided in footnote 1 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,[33] which was drafted alongside the Convention:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency;

29 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 39–40.

30 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (hereinafter "New York Convention") Art 1.

31 Shouyu Chong & Nadja Alexander, "Singapore Convention Series: Why Is There No Seat of Arbitration?" *Kluwer Mediation Blog* (1 February 2019).

32 See generally *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes* (Nadja Alexander *et al* eds) (Wolters Kluwer, 2017).

33 GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

> factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

The scope of the Convention is limited to "commercial" disputes, for the drafters affiliated with UNCITRAL (that is, WG II) are conventionally empowered by such a circumscribed mandate. The drafters are mindful of avoiding any conflict with domestic public policies, which could arise if the Convention were designed to address non-commercial matters. Such conflict is less likely to occur if the Convention were architectured to regulate transactions exclusively in the business realm. Hence, consumer disputes "for personal, family or household purposes" and those involving "family, inheritance or employment law" are excluded from the scope of the Convention under Art 1(2).

(4) Mediation

17 "Mediation" is broadly established under Art 2(3) of the Singapore Convention to be:

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

It is noteworthy that most private international law conventions avoid providing with watertight clarity definitions of the institution which they govern,[34] for *omnis definitio in jure periculosa est*.[35] This raises the concern that providing watertight definitions of meaning of words in legislative or conventional texts could unduly fetter its administration. A broad functional definition[36] is useful to inform administrators of the

34 Michele Graziadei, "Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular Regard to the Italian Experience" in *Re-imagining the Trust – Trusts in Civil Law* (Lionel Smith ed) (Cambridge University Press, 2012) at p 45. For instance, the United Nations Convention on Contracts for the International Sale of Goods (11 April 1980; entry into force 1 January 1988) does not provide a definition of what constitutes a "sale" under the Convention; and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (29 May 1993; entry into force 1 May 1995) does not provide a definition of what constitutes "adoption" under the Convention.

35 In English, these words mean: "Every definition in law is perilous."

36 The definition is functional as "the provision looks to the nature of the dispute resolution process rather than the label, so that parties need not [pedantically] use the term mediation for the Convention to apply": Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation –

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Convention, as well as parties relying on it, that a diversity of facilitative and advisory mediation processes would be covered, to the exclusion of determinative processes such as arbitration and adjudication.[37]

18 The application of the Convention in practice will show whether the definition of mediation in Art 2(3) is too broad. The definitional elements of amicable settlement, assistance of third person(s) and no authority to impose a solution may be invoked for procedures that are usually distinguished from mediation.[38] To give some examples, conciliation and ombud proceedings would commonly comply with this definition (except in those cases where they are unilaterally binding). Both are procedures where the parties attempt an amicable solution with the assistance of a third person without decision-making powers. The same is true for neutral evaluation, mini-trial and expert opinion.[39] Should the courts wish to narrow the scope of application, then they could require a qualified procedural involvement of the third person. This would exclude mechanisms such as an expert opinion where a third party essentially provides the parties with information, but usually does not engage in a procedure aiming at amicable solution.

19 Similarly, questions will be raised whether the functional definitions provided for "mediation" and "the mediator" in the Convention embrace technological innovations in dispute resolution. An example is the provision of dispute resolution services with the assistance of artificial intelligence algorithms.[40] The definition of "the mediator" may be understood with some nuance to accommodate

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Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 41.

37 Take, for example, the adjudication regime administered by the Singapore Mediation Centre governed by the relevant Singapore Building and Construction Industry Security of Payment legislation and rules: see Singapore Mediation Centre, "Adjudication" <www.mediation.com.sg/business-services/adjudication/> (accessed 23 June 2019).

38 For functional definitions of common dispute resolution mechanisms, see Felix Steffek, "Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics" in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Felix Steffek *et al* eds) (Hart Publishing, 2013) at pp 36–43.

39 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 41: "As a result, processes such as neutral evaluation and mini-trial conceivably would fall within the definition of mediation."

40 For an overview of the capabilities of artificial intelligence in dispute resolution see Ludwig Bull & Felix Steffek, "Die Entschlüsselung rechtlicher Konflikte: Der Einsatz künstlicher Intelligenz zur Ermittlung von Entscheidungsfaktoren der Konfliktlösung" (2018) 21 *Zeitschrift für Konfliktmanagement* 165.

technological innovations, especially if one accepts the possibility of granting legal personality to artificial intelligence software systems.[41]

B. Exclusions

20 The Singapore Convention embraces both institutional and *ad hoc* mediation, so long as the subject matter of the mediation is of an international and commercial nature and not excluded by Art 1(2) or 1(3). First, as mentioned earlier, consumer disputes "for personal, family or household purposes" and those involving "family, inheritance or employment law" are excluded from the scope of the Convention under Art 1(2).

21 Second, according to Art 1(3), the Convention expressly excludes IMSAs that:

> (a) have been approved by a court or have been concluded in the course of court proceedings;
>
> (b) are enforceable as a judgment in the state of that court; or
>
> (c) have been recorded and are enforceable as an arbitral award.

These exclusions must be understood in light of one of the Convention's aims to serve as a gap filler in the cross-border enforcement of IMSAs.[42] For instance, IMSAs may arise from court or arbitral proceedings and may be recorded as a judicial settlement under the Hague Convention of 30 June 2005 on Choice of Court Agreements[43] ("HCCCA") or as an arbitral consent award enforceable under the New York Convention.[44]

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41 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 41, citing Paulius Čerka, Jurgita Grigienė & Gintarė Sirbikytė, "Is It Possible to Grant Legal Personality to Artificial Intelligence Software Systems?" (2017) 33 CL&SR 685.

42 Nadja Alexander & Shouyu Chong, "The New UN Convention on Mediation (aka the 'Singapore Convention') – Why It's Important for Hong Kong" (2019) *Hong Kong Lawyer* 26 at 28.

43 See Hague Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 12.

44 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp 3021–3027; see also Art 30 of the UNCITRAL Model Law on International Commercial Arbitration (A/40/17, Annex I; A/61/17, Annex I) (21 June 1985; amended 7 July 2006). Readers should note that in order for arbitral consent awards derived as a result of mediation to be enforceable under the New York Convention:

> … [a]n arbitral tribunal [must have] the authority to make [the] consent award [which accrues] only if the parties commenced an arbitration regarding

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22 The exclusions made by Art 1(3) of the Convention deconflicts the administration of the Convention with the above-mentioned international instruments. Essentially, the Convention will serve to enforce IMSAs which cannot be enforced under the HCCCA or the New York Convention. An example is an out-of-court settlement agreement that is not brought back before a sitting judge in a state court for judicial approval with the aim of enforcement under the HCCCA. As a result, this agreement is ineligible for such enforcement as it is not a "judgment" or "judicial settlement".[45]

23 Article 7 of the Convention preserves the signatory states' subsisting obligations to other treaties when it comes to the relevant rights associated with settlement agreements. For instance, where there are subsisting bilateral or multilateral arrangements governing how settlement agreements arising from investor–State disputes may be enforced, the Singapore Convention will be administered in a manner which does not cause any interference with those subsisting obligations, but only to such an extent where the relevant laws would permit.[46]

C. Possible reservations

24 The Singapore Convention provides for the possibility of only two reservations.[47] The first allows a signatory State to exclude transactions to which it is a party, or to which any governmental agency or any person acting on behalf of a governmental agency is a party.[48] The second allows signatory states to reverse the default application of the Convention by providing an opt-in regime instead. This means that obligations under the Convention would only apply in that State if the parties to an IMSA have agreed for the Convention to apply. Interestingly, both reservations contain dynamic language ("to the extent"). This means that signatory states can choose which of the three

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an actual dispute. The authority to make a consent award does not extend to cases where the parties settle a dispute and then subsequently commence an arbitration solely for the purpose of recording the settlement as a consent award.

See Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3023.

45 Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (by Trevor Hartley & Masato Dogauchi) at paras 206–209.

46 Article 7 of the Singapore Convention on Mediation reads:

> This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

47 Singapore Convention on Mediation Arts 8(1)–8(2).

48 Singapore Convention on Mediation Art 8(1)(a).

types of entities (State, agencies, persons acting on behalf of agencies) will benefit from the first reservation. As regards the second reservation, the dynamic wording means that parties can opt into the Convention by degree and not just all-or-nothing.

25 The following considerations may apply when potential signatory states decide for themselves if they should lodge a reservation (particularly, the second reservation) when they sign on to the Singapore Convention. On the one hand, a reservation which grants parties the freedom to opt for the Convention's application would give effect to party autonomy. The success rate for mediation in some jurisdictions may hinge on having the freedom for commercial parties at mediation to pick and choose their desired cross-border enforcement mechanism (that is, whether the Singapore Convention or a more familiar and subsisting legal framework for enforcement should apply). It is advised, however, that states investigate empirically, for example, through industry and public consultations, if this would hold true for their jurisdiction before making the reservation.

26 On the other hand, providing that the Convention would apply only if parties expressly agree that it should in their IMSA could engender a bias for maintaining the status quo.[49] Parties might resist modifying the status quo of the Convention's non-application by simply not taking the additional step of inserting an opt-in clause in their IMSA and agreeing to its application. To counteract the status quo bias, mediators possessed with the knowledge that parties intend to take their IMSA into an opt-in jurisdiction for enforcement should advise parties accordingly, and alert them to the availability for expedited enforcement under the Convention. It remains to be seen if this is an effective strategy to promote the Convention's use, or if there are other compelling means or regulatory mechanisms to encourage mediators to provide information to mediating parties about enforcement under the Singapore Convention.

IV. The Singapore Convention and private international law: An overview

27 The study of private international law presents and addresses three main problems in cross-border disputes.[50] First, it provides conflict

49 Eunice Chua, "The Singapore Convention on Mediation: A Brighter Future for Asian Dispute Resolution" (2019) *Asian Journal of International Law* (forthcoming) at 5–6 and 9.

50 *Cheshire, North & Fawcett: Private International Law* (Paul Torremans *et al* gen eds) (Oxford University Press, 15th Ed, 2017) at p 3; *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds)

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rules for stakeholders (for example, courts, arbitrators, mediators, lawyers and parties) to discern how forums seize jurisdiction over disputes. Second, it provides conflict rules for stakeholders to discern the choice of law governing disputes. Third, it provides conflict rules for stakeholders when parties seek to get dispute resolution outcomes (for example, foreign court judgments, foreign arbitral awards and IMSAs) recognised and enforced across borders.

28 The jurisdictional implications of the Singapore Convention are minimal, as it does not determine the forum competent for enforcing mediation agreements. It has no effect on how courts and arbitral tribunals seize jurisdiction over cross-border disputes. However, the Singapore Convention will change the way IMSAs are recognised and enforced. According to Art 3(1), each signatory State shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Hence, just as how the New York Convention has taken away the need for "double *exequatur*" in the cross-border enforcement process of arbitral awards when it came into force in 1958, the Singapore Convention will have the same effect on IMSAs.[51] Both instruments expand the number (and nature) of legal instruments susceptible to recognition and enforcement under private international law rules.[52]

29 Finally, questions as to choice of law may be relevant to the process of seeking recognition and enforcement of IMSAs under the Convention, particularly when the carefully circumscribed Art 5 defences against such recognition and enforcement are raised. The Convention is examined in light of these private international law issues below.[53]

V. Jurisdiction

30 In a 2014 study on the use and perception of cross-border commercial mediation, 75% of respondents thought that an

(Sweet & Maxwell, 15th Ed, 2012) at para 1-003; John McMillan & Nicolas Constable, "Private International Law" in *International Commercial Law – Law and Practice* (Petra Butler ed) (Oxford University Press, forthcoming); Peter Stone, *EU Private International Law* (Edward Elgar Publishing, 3rd Ed, 2014) at p 3.

51 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 13.

52 See Lucy Reed, "*Ultima Thule*: Prospects for International Commercial Mediation" NUS Centre for International Law Working Paper 19/03 (unpublished) (January 2019) at pp 12–13 <https://www.ssrn.com/abstract=3339788> (accessed 23 June 2019).

53 See paras 30–75 below.

international treaty which would provide a mechanism for the enforcement of mediation agreements as well as the recognition and enforcement of IMSAs would be desirable.[54] However, WG II in the drafting process of the Singapore Convention deliberately left out provisions for the enforcement of mediation agreements, emphasising that mediation is a flexible alternative dispute resolution process, and parties may address matters which may not be expressly or implicitly envisaged by the mediation agreement.[55] It was thought that imposing convention obligations on the enforcement of mediation agreements would engender uncertainty, as it would be difficult (and antithetical to the mediation process) to define with bright red lines the scope of the dispute covered by such an agreement.

31 In any case, matters as to jurisdiction of a mediation "forum" are currently left to be governed by the rules or laws regulating mediation practice subsisting in each individual State. In certain instances, the mediation option is treated as a condition precedent, before parties may proceed to resolve their disputes by an adjudicative process at a court or in arbitration. For instance, in France, the courts have taken the view that mediation agreements are *prima facie* enforceable,[56] and parties are bound to proceed to mediation as such before exploring other options to dispute resolution such as litigation. In Germany, an appropriately drafted[57] mediation agreement is generally binding on parties and claims in court may not be brought before an agreed mediation session

54 Stacie Strong, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" University of Missouri School of Law Legal Studies Research Paper No 2014-28 at p 46 (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302> (accessed 23 June 2019). The survey presents detailed data on 34 different questions from 221 respondents from across the world.

55 The United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), *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) (2015) at para 69.

56 Katrin Deckert, "Mediation in Frankreich" in *Mediation – Rechtstatsachen, Rechtsvergliech, Regelungen* (Klaus J Hopt & Felix Steffek eds) (Mohr Siebeck, 2008) at p 196; Nadja Alexander, *International and Comparative Mediation – Legal Perspectives* (Wolters Kluwer, 2009) at pp 174–175.

57 Note that § 307 of the German Civil Code (*Bürgerliches Gesetzbuch*) could render mediation clauses null and void "where the clause does not sufficiently clarify that mediation is a non-binding procedure and may be broken off at every stage of the negotiations": Peter Tochtermann, "Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads" in *Mediation – Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford University Press, 2013) at p 550.

has been carried out.[58] In the UK,[59] Hong Kong[60] and Singapore,[61] instructive case precedents from the respective common law jurisdictions show that mediation agreements must be meticulously drafted. Otherwise it is likely that they would be rendered by the courts as unenforceable for uncertainty.[62]

VI. Enforcement and recognition of IMSAs

32 The Singapore Convention will change the recognition and enforcement of dispute resolution outcomes. Article 3 of the Convention provides:

> (1) Each party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.
>
> (2) If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Obviously, signatory states must give effect to the mechanisms in Art 3. However, they are at liberty to adapt their individual laws and rules of procedure to comply with the Art 3 recognition and enforcement mechanism,[63] so long as they abide by the necessary conditions

58 Reinhard Greger, "Recht der alternativen Konfliktlösung" in *Recht der Alternativen Konfliktlösung* (Reinhard Greger, Hannes Unberath & Felix Steffek eds) (CH Beck, 2nd Ed, 2016) at D 158; Peter Tochtermann, "Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads" in *Mediation – Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford University Press, 2013) at p 549.

59 *Wah (aka Alan Tang) v Grant Thornton International Ltd* [2012] EWHC 3198, especially at [59]–[60].

60 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKEC 258 at [29].

61 *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [54].

62 *Cf Scandinavian Trading Tank v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 at 540.

63 A discussion of how signatory states may do so necessitates consideration of how treaty obligations signed at a diplomatic level are recognised as a law of the State: *cf* Chao Hick Tin, "Early Forays in International Law" in *Singapore and International Law – The Early Years: Essays in Memory of S. Tiwari* (Kevin Y L Tan ed) (Centre for International Law, 2009). As the authors are confined to a word limit, they are unable to discuss in detail on this issue. Further, one would need to appreciate the differences between a monistic and dualistic interpretation of treaty obligations at the state level: see Martin Dixon, Robert McCorquodale &

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established by the Convention in relation to scope (as discussed above), form and evidence (this will be discussed later in this part when Art 4 is addressed). It should be noted that the application of the Convention does not require that other states involved have also signed on to it.[64]

33 On plain reading, it appears that Art 3(1) provides for an enforcement mechanism for IMSAs, whilst Art 3(2) provides for a recognition mechanism. However, as IMSAs are not procured from an adjudicative (or determinative) forum, it is difficult to reconcile at the theoretical level on what basis IMSAs may be "recognised" by courts in the private international law sense. The concept of "recognition" in private international law engenders a consideration of overlapping principles broadly falling under the concept of *res judicata*:[65] such as cause of action estoppel,[66] issue estoppel[67] and the *Henderson v Henderson*[68] estoppel (the last is only available in common law traditions).

34 In the drafting stages, representatives from the European Union ("EU") vehemently opposed including the term "recognition" (understood in the private international law sense) in Art 3, as in their opinion, *res judicata* should theoretically apply to matters stemming from acts of state (such as court judgments).[69] Fortunately,

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Sarah Williams, *Cases & Materials on International Law* (Oxford University Press, 6th Ed, 2016) at pp 103–105.

64 Hal Abramson, "New Singapore Convention on Cross-Border Mediated Settlements: Key Choices" in *Mediation in International Commercial and Investment Disputes* (Catharine Titi & Katia Fach-Gomez eds) (Oxford University Press, forthcoming, 2019) at p 18 (draft version).

65 Dorcas Quek Anderson, "Issue Estoppel Created by Consent Judgments: Dissonance between the Principles Underlying Settlements and Court Decisions" [2017] SingJLS 100 at 101.

66 See *Thoday v Thoday* [1964] 1 All ER 341 at 197, *per* Lord Diplock.

67 See *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15].

68 *Henderson v Henderson* [1843–1860] All ER Rep 378; [1843] 3 Hare 100 at 115.

69 See, *eg*, intervention of the European Union, in Audio Recording: United Nations Commission on International Trade Law, Working Group II (Arbitration and Conciliation) 64th Session (4 February 2016) at 10:00–13:00 <http://www.uncitral.org/uncitral/audio/meetings.jsp> (accessed 23 June 2019); this was also reported by Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 35 *ff*. This concern may not be apparent to lawyers who practice law under the common law tradition, as it is possible to justify the consequences of "recognition" of a dispute resolution outcome arising from of mediation as a means to avoid abuse of the court's process: *Chan Gek Yong v Violet Netto* [2018] SGHC 208. In civilian law traditions, "recognition" of dispute resolution outcomes is tied tightly to the principle of *res judicata excluding* the *Henderson v Henderson* estoppel, and any concerns arising from re-litigation to abuse court processes are tenuous and marginalised.

a compromise was reached by the drafters to reflect the functional description of "recognition" in Art 3(2) without explicitly referring to it as such, avoiding irreconcilability of possibly conflicting interpretations of private international law "recognition" under local conditions. In any case, the Singapore Convention has broken new ground, as a new form of dispute resolution outcome, derived from a non-adjudicative process, may be "recognised" and enforced in private international law: that is, an international settlement agreement arising from mediation.

35 For illustration, it is useful to apply the metaphors of "sword" and "shield" to explain the operation of Arts 3(1) and 3(2).[70] The enforcement mechanism of Art 3(1) allows the IMSA to be used as a "sword" in the courts of signatory states. Parties may initiate proceedings to enforce the contractual obligations enshrined within the said IMSA against each other. Enforcement would normally be granted by the courts if the necessary conditions established by the Convention in relation to scope, form and evidence are fulfilled and the parties cannot prove the existence of one or more Art 5 grounds for refusal.[71]

36 The recognition mechanism of Art 3(2) allows the IMSA to be used as a "shield" in the courts of signatory states. Parties may "invoke the settlement agreement" as a defence and in dismissal (or striking out) proceedings to show in court that they have "already resolved" issues that are being raised for a second time in court at mediation, which was concluded through the signing of a written IMSA. Similarly, recognition in this form would normally be granted by the courts unless the requirements in relation to scope, form and evidence are not fulfilled, or the parties may prove that one or more Art 5 grounds for refusal exists.

VII. Requirements for enforcement

37 At this juncture, it is appropriate to investigate the necessary conditions established by the Convention in relation to scope, form and evidence (mostly encapsulated in Art 4). Then the Art 5 grounds will be introduced, which the parties may prove to a court in a signatory State in order to negate the recognition and enforcement mechanism of Art 3. For convenience, the authors will refer to the recognition and enforcement mechanism of the Convention collectively as one of

70 *Cf* Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 35 *ff*.

71 It should be noted that the ability for courts of signatory states to review the obligations enshrined within the international mediated settlement agreements are strictly and exhaustively confined to those found in Art 5 of the Singapore Convention on Mediation. This will be explained at paras 42–61 below.

enforcement, to avoid repetition of the terms of art. Whatever applies to enforcement of IMSAs should also apply to its recognition.

38 If parties wish to enforce an IMSA which falls within the scope described above[72] in accordance with the Singapore Convention, they must simply fulfil the following conditions according to Art 4 of the Convention:

> (a) produce the *written*[73] IMSA in the court of a signatory State; and
>
> (b) provide evidence that the IMSA has arisen from a mediation[74] process.

The written requirement is fulfilled "if its content is recorded in any form … [including] an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference".[75]

39 The precise form requirements are minimal and are explained by Art 4 of the Convention. The written IMSA produced shall be signed by the parties.[76] Article 4(2) of the Convention, which is generally derived from Art 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts,[77] provides that electronic signatures that may suitably be "used to identify the parties or the mediator and to indicate [their] intention in respect of the information contained in the [relevant] electronic communication" will suffice.[78] As the written and signature requirements may be fulfilled by suitable electronic communications, the Singapore Convention accommodates IMSAs arising from online dispute resolution forums, which may be administered using various channels of electronic communication (for example, online conference calls, instant text messaging and online dispute resolution platforms which may or may not be run by artificial intelligence algorithms).

40 Nevertheless, parties must provide the enforcing courts with the necessary evidence proving that the IMSA has in fact arisen from mediation.[79] Those IMSAs procured outside of a mediation forum are not amenable to enforcement under the Convention. To prove that

72 For example, the dispute must be a "commercial" and "international" one.
73 Singapore Convention on Mediation Arts 1(1) and 2(2).
74 As defined in Art 2(3) of the Singapore Convention on Mediation.
75 Singapore Convention on Mediation Art 2(2).
76 Singapore Convention on Mediation Art 4(1)(a).
77 23 November 2005; entry into force 1 March 2013.
78 Singapore Convention on Mediation Art 4(2)(a).
79 Singapore Convention on Mediation Art 4(1)(b).

mediation has taken place, parties may provide the court with an IMSA endorsed with the mediator's signature,[80] a document signed by the mediator affirming that mediation has taken place leading to the conclusion of the IMSA,[81] or an attestation by the relevant dispute resolution service provider administering the mediation.[82] Furthermore, Art 4(1)(b)(iv) is a "catch-all" provision that grants the competent authority of the signatory State some autonomy to decide what proof may be furnished to show that the IMSA sought to be enforced had in fact arisen from mediation.[83] It is suggested that a mediation agreement for the matter provides such proof.[84] Under Art 4(4) of the Convention competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

41 Aside from these conditions, there are no other formalities such as notarisation, requirements to use locally licensed mediators or the like. Signatory states may not impose further requirements.[85] However, even if the Art 4 conditions may be fulfilled, the courts of signatory states possess the discretion to refuse enforcement of IMSAs if an aggrieved party can prove one or more of the Art 5 grounds for refusal from enforcement relief.

VIII. Grounds for refusal of enforcement

A. Overview

42 Article 5 of the Convention defines exhaustively the grounds for refusal of enforcement of IMSAs which have satisfied the Art 4 conditions.[86] Article 5(1), which provides that the "competent

80 Singapore Convention on Mediation Art 4(1)(b)(i).
81 Singapore Convention on Mediation Art 4(1)(b)(ii).
82 Singapore Convention on Mediation Art 4(1)(b)(iii).
83 Singapore Convention on Mediation Art 4(1)(b)(iv); Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 44.
84 See United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), *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) (2015) at para 68.
85 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 33.
86 See paras 37–41 above. Eunice Chua, "The Singapore Convention on Mediation: A Brighter Future for Asian Dispute Resolution" (2019) *Asian Journal of International Law* (forthcoming) at 7.

authority … where relief is sought under article 4 *may* refuse to grant relief" [emphasis added] if any of the Art 5(1) grounds are proven, seems to provide the courts of signatory states with some residual discretion to nonetheless enforce the IMSA.[87] Article 5(2) makes similar provisions.[88]

43 An area for further research could lie in respect to examining the nature of the residual discretion which a court of a signatory State may possess to enforce an IMSA even though one of the grounds for refusal under Art 5 of the Convention is proved. Some guidance may be taken from the literature in international arbitration.[89] Hill has astutely observed that in arbitration, such a discretion is likely administered within narrow circumstances:[90]

> As a general rule, if a defence to enforcement … is established, enforcement will be (and should be) refused. [However, to] this general principle, there is a limited number of exceptions …, which are based on intelligible legal principles, rather than the court's perception of what would be fair in all the circumstances.

Whilst the debate on the extent of the discretion possessed by the competent authority remains a live one, it is not within the scope of this article. As the body of precedents and examples of IMSA enforcement (or challenges to its enforcement) under the Singapore Convention grow subsequent to its signing in Singapore in August 2019, it is hoped that a thorough investigation of the nature of such judicial discretion will be engaged in future.

44 Article 5 may be divided into four broad categories: grounds for refusal tied to (a) the law of obligations; (b) mediator (mis)conduct; (c) public policy; and (d) subject matters not amenable to mediation.

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87 Consider by close analogy the position in international commercial arbitration *vis-à-vis* the recognition and enforcement of international arbitral awards under the New York Convention: Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 26-68. Article 5(2) of the Singapore Convention on Mediation similarly provides.

88 It is worth noting that Art 5(1) of the Singapore Convention on Mediation requires parties to furnish proof to the relevant competent authority that one or more grounds for refusal under that provision may exist, whilst Art 5(2) provides that the relevant competent authority may under its own authority and volition find that such grounds for refusal under that provision may exist, without – technically – first having parties to furnish such proof.

89 See Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 26-68.

90 Jonathan Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958" (2016) 36 OxJLS 304 at 333.

They will each be examined in turn. It shall also be proposed that there is one further "implied" ground for refusal of enforcement, stemming from the administration of Art 6 of the Convention.

B. Grounds for refusal based on the law of obligations

45 Article 5(1) of the Convention contains seven grounds for refusal of enforcement of IMSAs based on the law of obligations. An IMSA may be refused enforcement by the courts of signatory states if:

> (a) a party to it was under some incapacity at its conclusion;[91]
>
> (b) it is null and void, inoperative or incapable of being performed under the applicable law;[92]
>
> (c) it is not binding, or is not final, according to its terms;[93]
>
> (d) it has been subsequently modified;[94]
>
> (e) the obligations in it have been performed;[95]
>
> (f) the obligations in it are not clear or comprehensible;[96] or
>
> (g) granting relief would be contrary to the terms of the settlement agreement.[97]

These grounds for refusal will be explained briefly in turn.

46 First, in respect to the incapacity of parties to the IMSA, the provision applies to both natural and legal persons. "Incapacity" is a term of art which cannot be understood in isolation. It is challenging to approach the concept of "incapacity" from an autonomous perspective, because there are fundamental differences in its concept from within civil and common law traditions.[98] Hence, in order to meaningfully examine this ground of refusal, one must first identify the governing law

91 Singapore Convention on Mediation Art 5(1)(a).
92 Singapore Convention on Mediation Art 5(1)(b)(i).
93 Singapore Convention on Mediation Art 5(1)(b)(ii).
94 Singapore Convention on Mediation Art 5(1)(b)(iii).
95 Singapore Convention on Mediation Art 5(1)(c)(i).
96 Singapore Convention on Mediation Art 5(1)(c)(ii).
97 Singapore Convention on Mediation Art 5(1)(d).
98 For instance, the capacity of natural persons in civil law jurisdictions is generally governed by the law of their nationality, while the capacity of natural persons in common law jurisdictions is governed by the law of their domicile: Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp 3489–3490.

of the IMSA: how this is done will be analysed below,[99] which investigates the choice of law issues that may arise under the Singapore Convention. Nevertheless, from a general understanding of the concept, this provision is relevant for consideration when parties involved in the conclusion of the IMSA are minors, natural persons with intellectual disabilities or deficits, or legal persons not validly represented.

47 Second, the defence available when the IMSA is null and void, inoperative or incapable of being performed under the applicable law may be further elucidated in three separate parts. IMSAs that are "null and void" are defective at the point in time when they are concluded; defects which arise subsequently should not render the IMSA "null and void".[100] Rather, IMSAs that are "inoperative" are ineffective because of circumstances transpiring at or after the moment of their conclusion.[101] IMSAs that are "incapable of being performed" are (or become) impossible to execute or enforce, perhaps owing to supervening occurrences transpiring after its conclusion,[102] or poor drafting.[103] The

99 See paras 64–67 below.

100 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 45. See also George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 23.

101 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 45. See also George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 23.

102 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 45. Also see George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 24.

103 See Aldo Frignani, "Interpretation and Application of the New York Convention in Italy" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 568: an interesting example was reported in this publication, where a party from Italy and one from Syria agreed that "any dispute arising … shall be settled by a sole arbitrator …. [T]he arbitrator shall be an expert in Swiss law and in the production of Arabic bread". However,

(*cont'd on the next page*)

considerations that arise after the applicable law (that is, choice of law) has been determined shall be left to a discussion below.[104]

48 Third, IMSAs which are not binding, or are not final, according to their terms may be refused enforcement. These IMSAs would have incorporated terms and conditions which provide expressly or impliedly that they have no final or binding effect.[105]

49 Fourth, if some of the terms of an IMSA have been validly modified (according to the relevant governing law of the transaction), the original settlement agreement will be rendered ineffectual, owing to the conclusion of a varied subsequent agreement. This means that only the varied subsequent IMSA may be enforced; hence, it follows that the original IMSA must be refused enforcement.

50 Fifth, if the obligations in an IMSA have been performed (according to the relevant governing law of the transaction), it follows that courts must refuse enforcement of that IMSA as those obligations have been discharged by performance. This prevents parties from making doubled claims.

51 Sixth, if the obligations contained in an IMSA are not drafted in a clear or comprehensible fashion, courts may refuse to enforce it. It bears emphasis that meticulous drafting is necessary. Obviously, key terms and obligations (such as price to be paid, or consideration amounts due from one party to another in exchange for carefully or specifically defined performances due) must be elucidated with care and sufficiency. The drafters of an IMSA should spell out the precise actions required or expected of parties, especially when the obligations derived from a compromise at mediation do not involve the payment of money. For instance, if a party to a mediation has agreed to apologise to another, the terms of the IMSA could be worded as such:

> Timothy Pte Ltd shall publish the following words, 'We unconditionally and sincerely express our deepest apologies to Bergeling AB and their associates for any embarrassment resulting from the words our employees have caused to be published on the *FunTube*, which is a popular video sharing site, and on their behalf offer to rescind those embarrassing statements made', on the front

this agreement was determined by courts to be incapable of being performed for no arbitrator satisfying both conditions could be identified.

104 See paras 68–71 below.

105 See Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 45, on this and the subsequent observations in the main text at paras 49–57 below.

> pages of the relevant local newspapers, *The Fun Times* and *The Cheerful Nightly*, and on their social media platforms (such as *FunBook* and *Fun-gram*), as a form of apology to Bergeling AB, in return for Bergeling AB's application to discontinue Suit No XYZ/2019 and Suit No ABC/2019.

To conclude a mediation by getting parties to agree to simplistically worded terms (*eg*, that "Timothy Pte Ltd shall apologise to Bergeling AB") might risk producing an IMSA too unclear for enforcement.

52 Seventh, an IMSA may be refused enforcement if granting relief would be contrary to its terms. For instance, when conditions precedent or conditions subsequent contained in an IMSA have not been fulfilled, courts of signatory states may refuse its enforcement, for the obligations in it do not accrue at the instance when enforcement is being sought.[106] This provision also provides the parties with the possibility to opt out of the application of the Singapore Convention entirely.[107] This ground for refusal of enforcement also gives effect to *force majeure* clauses: if a contractually anticipated supervening event transpires and the terms of the IMSA have provided for a discharge of obligations accordingly, a court in a signatory State may refuse its enforcement because it would be contrary to its terms to do so.

C. Grounds for refusal based on mediator (mis)conduct

53 Article 5(1) of the Convention contains two further grounds for refusal of enforcement of IMSAs, which are tied to mediator conduct. The court of the signatory State may first refuse enforcement of an IMSA where 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*" [emphasis added].[108] Parties seeking to avoid enforcement under the Convention must demonstrate that an *egregious* breach of mediator standards had occurred when the IMSA put into question was concluded at the end of a mediation, with reference to the proper standards by which the mediator must abide when facilitating the mediation. Additionally,

106 United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (A/CN.9/934) (New York, 5–9 February 2018) at para 57.

107 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 Pepp Disp Resol LJ 1 at 56 *ff*; Hal Abramson, "New Singapore Convention on Cross-Border Mediated Settlements: Key Choices" in *Mediation in International Commercial and Investment Disputes* (Catharine Titi & Katia Fach-Gomez eds) (Oxford University Press, forthcoming, 2019) at p 14 (draft version).

108 Singapore Convention on Mediation Art 5(1)(e).

parties must demonstrate that it was *that breach* which *caused* parties to have concluded the IMSA in question. The element of causation is crucial in the administration of this ground for refusal of enforcement.

54 The second ground for refusal tied to mediator conduct is essentially a specific example of the first: the court of the signatory State may refuse enforcement of an IMSA where:[109]

> … [t]here 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. [emphasis added]

Similarly, the element of causation is crucial in the administration of this ground for refusal of enforcement, which is tied to mediator conduct. Parties seeking to avoid enforcement under this provision in the Convention must demonstrate with justifiable evidence that the mediator's misconduct is one associated with his or her capability to be impartial or independent at the mediation table. If this can be proven, parties must additionally show that they were under undue influence,[110] or some other material form of pressure or predisposition (for instance, if there was a misrepresentation of the terms contained in the IMSA or an unconscionable[111] exertion swaying its outcome), stemming from that mediator's misconduct to accept the IMSA on its terms without further independent contemplation.

D. Grounds for refusal based on public policy

55 Article 5(2)(a) of the Convention provides that the competent signatory state authority may refuse to enforce IMSAs which are "contrary to the public policy" of the State where enforcement is sought. It should be stressed that the public policy defence administered at the enforcement stage of a cross-border dispute resolution outcome ought to be considered in light of prevailing private international law principles, which envisage a scrutiny of *both* domestic and international elements.[112] Whilst the domestic public policy of the State in which

109 Singapore Convention on Mediation Art 5(1)(f).

110 *Cf Chan Gek Yong v Violet Netto* [2018] SGHC 208.

111 See *BOM v BOK* [2019] 1 SLR 349 at [142] *ff* for a recent pronouncement by the Singapore Court of Appeal on what qualities of unconscionable action exerted by stakeholders to a contract during the process of contract formation may result in an avoidance of contractual obligations.

112 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams*

(*cont'd on the next page*)

enforcement is sought should be given due regard, it must be considered "in a manner that is consistent, insofar as possible, with the objectives of the Convention and the public policies and interests of other Contracting States".[113] Thus, it is submitted that the courts of signatory states should apply their discretion when administering this ground for refusal, to nevertheless permit enforcement of IMSAs even if they run afoul of some domestic public policies, unless there are exceptional circumstances.[114] After all, it is trite that the public policy exception in the enforcement context of cross-border dispute resolution outcomes functions as an "escape mechanism".[115]

56 An illustration of an exceptional circumstance where a court may refuse the enforcement of an IMSA based on public policy grounds is provided by the recent case of *Daiichi Sankyo Co Ltd v Malvinder Mohan Singh*[116] decided in the High Court of New Delhi in 2018. The New Delhi High Court had refused to enforce an international arbitral award on public policy grounds, because that award had bound young children (aged between eight and 12 when the arbitration was

tijdschrisft voor Mediation en conflictmanagement 37 at 48; *cf* Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3652.

113 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3655; although taken out of context (*ie*, Born's words refer to the New York Convention), the phrasing of the words applies with equal logical force to the Singapore Convention on Mediation as well. See *Renusagar Power Co Ltd v General Electric Co* [1994] AIR 860 at [63].

114 See Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3659. Consider, however, the Chinese case of *USA Prods v Women Travel* [1997] SPC 35 (Chinese Zuigao Fayuan), where the court denied the recognition of an arbitral award under the public policy limb of the New York Convention because the contract in dispute was one for the performance of heavy metal music, which was repugnant to Chinese domestic public policy. Also consider *Telnikoff v Matusevitch* 347 Md 561 (Md Ct App, 1997), where a Maryland Court of Appeal denied the recognition of an English judgment which awarded damages for defamation, as it thought that the English defamation laws were contrary to a domestic public policy which protects free speech as enshrined in the Constitution of the United States. The courts in these cases have adopted parochial views of public policy when recognising and enforcing foreign judgments and arbitral awards, and it is hoped that they would not be followed in the context of enforcement of international mediated settlement agreements under the Singapore Convention on Mediation.

115 Consider *IPCO Nigeria Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 at [13], where in the context of refusing to enforce arbitral awards under the New York Convention by reason of the relevant public policy exception, Gross J warned that:

> … considerations of public policy, if relied upon to resist enforcement of an [arbitral] award, should be approached with extreme caution … [the public policy exception] was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards.

116 *Daiichi Sankyo Co Ltd v Malvinder Mohan Singh* (2016) OMP(EFA) (Comm) 6/2016.

conducted) to be jointly and severally liable to compensate losses amounting to *more than S$700m*.[117] The rendering of such an enormous amount of damages against minors would have been offensive according to the public policies of both domestic and international levels. It is submitted that similar considerations would apply when courts in India are presented with IMSAs that bind young children for enforcement under the Convention.

E. Grounds for refusal based on subject matters not amenable to mediation

57 Article 5(2)(b) of the Singapore Convention provides that the courts of a signatory State may refuse to enforce an IMSA if the "subject matter of the dispute is not capable of settlement by mediation under the law of that [State]". It is difficult to investigate this ground for refusal in isolation of the questions that arise in respect to the governing law of the IMSA, which will be discussed in some detail below.[118] Parties seeking to avoid enforcement under this provision in the Convention must demonstrate that the subject matter of the dispute resolved by the IMSA is not susceptible to mediation under the relevant governing law. For instance, according to South Korean law, some intellectual property disputes are not capable of settlement at mediation, as it is the orthodox view that such disputes fall within the exclusive jurisdiction of the competent dispute resolution authorities under the Korean Intellectual Property Office.[119]

F. Implied ground of refusal: Effect of Art 6?

58 Article 6 of the Convention specifically addresses parallel proceedings. In particular, it provides for the scenario where an IMSA is brought into a signatory State for enforcement, but a party to the IMSA

117 For a deeper perusal of the facts of this curious case, readers may also want to read the Singapore judgment of *BAZ v BBA* [2018] SGHC 275, which ruled on an application to set aside the arbitral award discussed (*ie*, indeed the seat of this arbitration was in Singapore). Unusually, the enforcement proceedings in India had materialised before setting aside proceedings in Singapore was fully litigated. Had the verdict of the Singapore proceedings been delivered before the Indian proceedings were completed, the issue on refusal of enforcement of the foreign award against the children based on public policy grounds at the New Delhi High Court would have been rendered moot, because the Singapore High Court ruled to set aside the award against the children on its own public policy grounds.

118 See paras 74–75 below.

119 See Gyooho Lee, Keon-Hyung Ahn & Hacques de Werra, "Euro-Korean Perspectives on the Use of Arbitration and ADR Mechanisms for Solving Intellectual Property Disputes" (2014) 30 Arb Int'l 91 at 104.

challenges its enforceability in another signatory State by possibly[120] invoking the Art 5 grounds for refusal of enforcement. Where a challenge is mounted in one jurisdiction, the courts of the other signatory states may administer Art 6 of the Convention to adjourn their enforcement proceedings. It is not apparent from plain reading of the Convention what the further practical effects of Art 6 are. What are the follow-up powers which the adjourning court(s) may possess, once the challenge mounted in the other jurisdiction is indeed successful?

59 Article VI of the New York Convention, which is similarly worded in comparison with Art 6 of the Singapore Convention, facilitates the administration of Art V(1)(e) of the New York Convention, which provides specifically that a court may refuse recognition and enforcement of a foreign arbitral award if it "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country". There is, however, no evident equivalent principle in the Singapore Convention, as it does not provide for the setting aside of IMSAs in the first place. Moreover, Art 5 does not articulate a ground of refusal of enforcement on the basis that the IMSA sought to be enforced has been successfully challenged in another signatory State. Hence, it is worth considering the true effect of Art 6. Does it lead to an implied ground for refusal of enforcement outside the scope of Art 5? Or is the provision merely limited to providing the authority where relief is sought with a right to adjourn its decision?

60 It is submitted that Art 6 creates an implied ground for refusal of enforcement, but confined to IMSAs which have been refused enforcement on grounds tied to the law of obligations and mediator misconduct.[121] Consequently, Art 6 does not create a ground of refusal based on public policy or a subject matter not amenable to mediation.[122] This is because the legal test to determine if these two latter grounds for refusal are available remain unique to each signatory State.[123] For instance, it is technically possible for an IMSA to be enforced in one State, but for the courts of another to refuse enforcement within its jurisdiction on public policy grounds. The published WG II reports can be understood to suggest that the intended function of Art 6 of the

120 There is also a possibility that the challenge could be founded upon a non-fulfilment of Art 4 formalities, but such a challenge could be rare, given the minimal formal requirements established by Art 4 of the Singapore Convention on Mediation, as explained at paras 38–41 above.

121 *Cf BAZ v BBA* [2018] SGHC 275 at [50]–[52].

122 Shouyu Chong & Nadja Alexander, "An Implied Ground for Refusal to Enforce IMSAs under the Singapore Convention on Mediation: The Effect of Article 6" *Kluwer Mediation Blog* (17 February 2019).

123 *Cf BAZ v BBA* [2018] SGHC 275 at [50].

Convention would be similar to Art VI of the New York Convention.[124] This supports the argument for (limited) implied grounds of refusal. Hence, a charitable approach ought to be adopted when discerning the purpose and effect of Art 6.

61 The implied grounds of refusal based on Art 6 can also be buttressed upon the private international law principles of recognition of foreign judgments (that is, one which determines finally and conclusively if an IMSA may be refused enforcement in that jurisdiction). The adjourning State would give effect to the second signatory State court's judgment ruling on the specific issue of how the said IMSA may be refused enforcement under Art 5 grounds. Although it may be normal for some jurisdictions[125] in respect to recognising foreign court judgments to require parties to sue afresh in relation to the matters adjudged, the courts of signatory states are, arguably, nonetheless obliged under their Convention obligations to recognise a *specific* judgment of the court which first determines if an IMSA may be refused enforcement.

IX. Choice of law

A. Overview

62 To complete our report of where the Singapore Convention sits in light of private international law, it is imperative to shed light on some of the novel choice of law issues which arise as a consequence of the Convention's introduction. These issues are confined to the enforcement stage of IMSAs, and more precisely at the point when the courts or other competent authorities of signatory states are asked to consider administering the Art 5 grounds for refusal. To recall, Art 5

124 United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-eighth Session* (New York, 5–9 February 2018) (A/CN.9/934) (2018) at para 68.

125 According to Briggs, the Netherlands is one of such jurisdictions; see Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 LQR 87 at 89, fn 18. In Asia, it is reported that the courts of Thailand also would require parties to sue afresh: Poomintr Sooksripaisarnkit, "Country Report: Kingdom of Thailand" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 21; however, the report on Thailand may be cast in doubt as it did not consider recent judicial precedents (such as Supreme Court decision No 6565/2544 (2001 AD)), which have ruled that Thai courts may recognise and enforce foreign judgments under specified conditions: see Tosaporn Leepuengtham, "Cross-border Enforcement of IP Rights in Thailand" in *Research Handbook on Cross-border Enforcement of Intellectual Property* (Paul Torremans ed) (Elgar, 2014) at pp 105–106.

may be divided into four broad categories: grounds for refusal based on (a) the law of obligations; (b) mediator misconduct; (c) public policy; and (d) subject matters not amenable to mediation. They will each be examined in turn.

B. Grounds for refusal based on the law of obligations

63 Due to space constraints, only the choice of law issues arising from these Art 5(1) grounds for refusal may be examined, where:

> (a) a party to it was under some incapacity at its conclusion;[126] and
>
> (b) it is null and void, inoperative or incapable of being performed under the applicable law.[127]

(1) Incapacity

64 Article 5(1)(a) of the Singapore Convention is modelled after Art V(1)(a) of the New York Convention, but omits the choice of law provision (that is, the words "under the law applicable to them").[128] Having done so, it seems on a superficial level that the drafters of the Convention may have intended for incapacity, as a term of art, to be understood from an autonomous perspective. However, as mentioned earlier in this article, this seems very unlikely. This is because there are fundamental differences between the way courts from the civil and common law traditions conceive of incapacity.[129] Hence, a more nuanced interpretation of the drafters' intention is desired. In particular, it is possible to treat the deliberate omission as advocating for the courts of signatory states to administer a more expansive choice of law principle when a party pleads that the IMSA sought to be enforced is affected by incapacity.

65 One approach is the application of Gary Born's "validation principle", which is a modern choice of law concept postulating that parties, by virtue of their willing participation in international commerce, must be taken to have desired their contractual arrangements in respect to all issues of dispute resolution to be

126 Singapore Convention on Mediation Art 5(1)(a).

127 Singapore Convention on Mediation Art 5(1)(b)(i).

128 United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session* (Vienna, 12–23 September 2016) (A/CN.9/896) (2016) at para 85.

129 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp 3489–3490.

performed to their best effect.[130] Hence, "in a transaction affecting States A and B, with an arbitral seat in State C, the parties' capacity to enter into an arbitration agreement should be upheld where any of the laws of States A, B or C would reach this result".[131] This would be one possibility to pave the way for a pro-enforcement bias.

66 Alternatively, the courts might apply *renvoi* to determine if parties indeed have capacity when concluding an IMSA. Hence, if Party X (who is 19 years old) concludes an IMSA in and under the governing law of State A (where the age of majority is 21) but seeks its enforcement with the assistance of the Singapore Convention in his country of ordinary residence, State B (where the age of majority is 18), the courts in State B might administer *renvoi* to find that Party X has capacity to conclude the IMSA, if the private international law rules of State A determine the capacity of a person by reference to the laws of his State of residence.

67 The administration of the "validation principle" and *renvoi* have not received overwhelming judicial support at this point in time.[132] The "pro-enforcement bias" seems to encounter reluctance in practice, whilst the theory behind *renvoi* is so complex that it receives little support for fear of confusion. It remains to be seen if the courts in the future would apply these choice of law techniques when evaluating if an IMSA should be refused enforcement under the Convention owing to the incapacity of one or more parties.

(2) Null and void, inoperative or incapable of being performed

68 On the other hand, Art 5(1)(b)(i) of the Singapore Convention is modelled after Art II(3) of the New York Convention, but with the addition of a choice of law provision (that is, the words "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"). Hence, it is clearly incumbent on the court of the signatory State when enforcing an IMSA to determine its proper law before proceeding to decide if it is null and void, inoperative or incapable of being performed.

130 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3490.

131 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3490.

132 The Singapore High Court has recently rejected the applicability of the "validation principle" in Singapore arbitration law: *BNA v BNB* [2019] SGHC 142 at [52]–[66], *per* Vinodh Coomaraswamy J. *Renvoi* has also not received overwhelming support because its administration is difficult to grasp: see David Alexander Hughes, "The Insolubility of '*Renvoi*' and Its Consequences" (2010) 6 *Journal of Private International Law* 195.

69 Having determined the proper law governing the IMSA, the court may proceed to evaluate if it is "null and void" under that governing law. The IMSA may be deemed null and void if it were founded upon a deficient or defective agreement (or consent) between parties. Defences falling under the law of obligations which may be relevant for the court's consideration are misrepresentation, fraud, duress, undue influence or unconscionability.[133]

70 The court may also proceed to evaluate if the IMSA is "incapable of being performed" under the determined governing law. This would involve an examination of the provisions under the governing law for treatment of cases involving contractual impossibility, frustration or other supervening events occurring after contract formation.[134]

71 However, the application of the governing law might be less straightforward for the court if it is asked to determine if the IMSA is "inoperative". This is a legal term of art that is not as clearly defined in the contract laws of Gallic, Germanic and common law legal traditions.[135] The courts might react by administering the defence taking an autonomous approach. As reported earlier, IMSAs which are found to be "inoperative" are those that are ineffective because of circumstances transpiring at or after the moment of its conclusion. This could occur owing to poorly drafted IMSAs which contain inherently contradictory or self-defeating clauses that intrinsically cancel out the obligations found within, rendering it sterile of any effect to begin

133 George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 23.

134 George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 24.

135 George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 23; and consider Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Oxford University Press, 3rd Ed, 1998) at pp 323–469.

with.[136] Alternatively, an IMSA may be inoperable because of a subsequent agreement to waive all rights to pursue remedies under it.[137]

C. Grounds for refusal based on mediator misconduct

72 In respect to the two grounds for refusal tied to mediator conduct in the Convention discussed earlier, choice of law considerations may arise when the specific ground (that is, the second ground, Art 5(1)(f)) is administered by the courts of the signatory State. The court may need to make a determination of the governing law of the IMSA, prior to making a determination as to whether (in addition to proving egregious mediator misconduct flowing from a failure to disclose conflicts of interest) the party pleading for the court to refuse its enforcement had entered into the agreement under undue influence. However, parties pleading for the court to refuse the enforcement of IMSAs under this ground may also show more generally that the mediator misconduct had left a "material impact" on them, such that they would not have entered into that agreement had there been proper disclosure. In doing so, it may also be necessary for the courts to make a determination of the governing law of the IMSA to determine whether there was a material impact.

D. Grounds for refusal based on public policy

73 Just as it was analysed and reported earlier in this article, the public policy defence (Art 5(2)(a)) administered at the enforcement stage of a cross-border dispute resolution outcome ought to engage a scrutiny of *both* domestic and international elements.[138] The courts of

136 George A Bermann, "Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts" in *Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of the New York Convention by National Courts* (George A Bermann ed) (Springer, 2017) at p 24.

137 Consider *Apple & Eve LLC v Yantai N Andre Juice Co* 610 F Supp 2d 226 (ED NY, 2009).

138 See Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 48 and Shouyu Chong, "Conflict of Laws and Cross-border Commercial Mediation: Breaking New Ground with the United Nations Convention on International Settlement Agreements Resulting from Mediation through a Conflict of Laws Analysis of Its Grounds for Refusal to Enforce International Commercial Mediated Settlement Agreements" (2018) (unpublished directed research paper undertaken during LLM studies, National University of Singapore, archived at the C J Koh Law Library, National University of Singapore) at pp 26–29 <https://scholarbank.nus.edu.sg/handle/10635/145198> (accessed 23 June 2019).

(*cont'd on the next page*)

signatory states should apply due discretion when administering this ground for refusal, and nevertheless grant enforcement of IMSAs under the Convention even if they run incongruent with some domestic public policies, unless exceptional circumstances dictate otherwise.[139]

E. Grounds for refusal based on subject matters not amenable to mediation

74 As mentioned earlier in this article, parties that endeavour to plead to the court of a signatory State that an IMSA should be refused enforcement on grounds that its subject matter is not amenable to mediation (Art 5(2)(b)) must first refer to the law of the enforcing State for guidance.[140] However, as this is also another exceptional "escape mechanism" defence similar to the public policy defence,[141] the enforcing court should apply a rather restrictive approach when applying this ground for refusal.

75 Hence, whilst the enforcing court may initially make reference to its law when ascertaining if the IMSA sought to be enforced addresses a subject matter which is amenable to mediation, the competent authority ought to also appraise the degree to which the subject matter resolved at mediation has a sufficient nexus to its forum, before categorically declaring that its domestic rules must apply *vis-à-vis* the IMSA.[142] It has been convincingly argued in the context of international commercial arbitration that courts should avoid parochialism when administering the "subject matter" defence.[143] This means that the courts should instead assess and evaluate the availability of the defence in respect to the law of closest connection to the dispute resolved at mediation when deciding if an IMSA should indeed be refused

Also consider Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3652.

139 See Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3659.

140 To reiterate, Art 5(2)(b) of the Singapore Convention on Mediation provides that the competent authority may refuse to enforce international mediated settlement agreements if the "subject matter of the dispute is not capable of settlement by mediation under the law of that [State]".

141 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 49.

142 Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore" (2018) 22(4) *Nederlands-Vlaams tijdschrisft voor Mediation en conflictmanagement* 37 at 49.

143 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 3702.

enforcement on grounds that its subject matter is not amenable to mediation.[144]

X. Conclusion and outlook

76 The authors have examined how the Singapore Convention gives rise to the recognition and enforcement of IMSAs, as well as the choice of law and private international law considerations which arise therein. Some analogies in principle have been drawn from the recognition and enforcement practice under the New York Convention in this commentary. Given the fledgling state of the Singapore Convention, following in the footsteps of an already established institution allows to benefit from established solutions and also ensures consistency across dispute resolution mechanisms. It is expected that once the Singapore Convention becomes more established, authorities, scholars and practitioners will create a genuine and elaborate body of principles and rules for the enforcement of IMSAs, which is a new kind of legal instrument.

77 For potential signatory states, a number of questions arise beyond the general decision whether or not to join the Singapore Convention. The first set of questions concerns the exercise of reservations offered by the Convention.[145] Should the State, its agencies and their representatives participate? Should the parties be required to actively agree to the application of the Convention in order to benefit from it? The second set of questions is more complex. Which new rules and principles are required locally in order to enforce IMSAs under the Convention? The Convention provides general principles. In particular, signatory states shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention according to Art 3(1). Parties may also invoke settlement agreements to claim that a discrete issue was already resolved by these agreements under Art 3(2). Again, this shall be administered in accordance with the signatory State's rules of procedure and under the conditions in the Convention. As a consequence, potential signatories

144 Take the hypothetical scenario where under the laws of Country X, commercial tax disputes are subject matters incapable of settlement at mediation. The forum of Country X is presented with an international mediated settlement agreement that was concluded in Country Y, of which the choice of law for that settlement points to the laws of Country Z (noting that under the rules of Y and Z tax disputes are susceptible to mediation). If the mediated dispute has *no substantive connection* to Country X, the courts of Country X should not refuse relief, and follow their convention obligations to enforce dispute resolution outcomes (*cf* Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp 606 and 3700).

145 See paras 24–26 above.

must consider whether their rules of procedure applicable to the enforcement of international settlement agreements need updating. This reform process needs to reflect local particularities and the obligations laid down in the Convention.

78 In Singapore, implementing the Singapore Convention could be straightforward.[146] The formalities and scope of the Convention may be brought into Singapore law by an adoption of the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. If one were to fall back on the established mechanisms, then enforcement of IMSAs might be given effect by the Singapore courts as a consent order. Consent orders may also engender recognition under the common law, and parties may be estopped from litigating discrete issues already settled by the recorded IMSA.[147] However, the signing of the Singapore Convention will present a good opportunity to consider other ways to enforce IMSAs in Singapore, in addition to or in substitution of consent orders.

79 In a civil law jurisdiction such as Germany, which, in addition, is a member state of the EU, somewhat different considerations apply. All EU member states have implemented the Mediation Directive[148] and, consequently, provide users with – at least – a basic framework for mediation. As regards enforcing IMSAs from other EU member states, a number of EU instruments are applicable and remain relevant under Art 7 of the Singapore Convention.[149] The same applies as regards IMSAs from jurisdictions beyond the EU if international treaties such as the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[150] are relevant. The enforcement of IMSAs that fall under neither EU law nor

146 Also see Schnabel's proposals in respect to its ratification in the US in Timothy Schnabel, "Implementation of the Singapore Convention: Federalism, Self-Execution and Private Law Treaties" (2019) Am Rev Int'l Arb (forthcoming).

147 In the eyes of the Singapore courts, it would be an abuse of court process to litigate issues already settled by mediation, articulated in an international mediated settlement agreement, which was subsequently recorded as a consent order: Dorcas Quek Anderson, "Issue Estoppel Created by Consent Judgments: Dissonance between the Principles Underlying Settlements and Court Decisions" [2017] SingJLS 100. Also see Nadja Alexander & Shouyu Chong, "Singapore Case Note: Interpretation of MSAs and Inadmissibility of Evidence from Mediation" *Kluwer Mediation Blog* (17 March 2019).

148 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters at pp 3–8.

149 On the following see Felix Steffek, "Internationales Recht" in *Recht der Alternativen Konfliktlösung* (Reinhard Greger, Hannes Unberath & Felix Steffek eds) (CH Beck, 2nd Ed, 2016) at F 55 *ff*.

150 30 October 2007; entry into force 1 January 2010.

international treaties, however, is less straightforward. Hence, if jurisdictions such as Germany sign on to the Singapore Convention, a discussion is to be had – as in Singapore – on how to integrate IMSAs into the existing rules of enforcement.

80 Overall, the Singapore Convention is a welcome addition and offers an opportunity to strengthen the international dimension of mediation. From the perspective of private international law, the Convention challenges some established principles of international enforcement. Whilst this challenge might create some unease, it provides the stakeholders of cross-border dispute resolution with an incredibly valuable occasion to rethink the possibilities of international dispute resolution.