An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore*

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Background to the Singapore Convention on Mediation

At the 51st Session of the United Nations (UN) Commission on International Trade Law (UNCITRAL) on 25 June 2018, the final draft of the Convention on the Enforcement of International Settlement Agreements[1] (the 'Convention') was recommended for submission to the UN General Assembly for its consideration, and the corresponding Model Law[2] was adopted. A resolution to name the Convention the 'Singapore Convention on Mediation' was also approved. This concluded three years of vigorous debate in UNCITRAL Working Group II (Dispute Settlement) with participation by 85 Member States and 35 international governmental and non-governmental organisations.[3] The UN General Assembly has adopted the Convention on 20 December 2018.[4] The Convention will come into force once it is ratified by at least three Member States.[5] A signing ceremony for this first UN Convention on mediation is anticipated to take place in Singapore in August 2019.[6]

The choice to move ahead with the drafting and finalisation of two instruments on cross-border commercial mediation rather than one (i.e., they could have either produced a Convention or Model Law) is a tribute to the resolve and innovation of the members of UNCITRAL Working Group II (the 'Working Group') who, at a critical moment during the years of negotiations, pressed on despite a raging snowstorm closing down the UN headquarters in New York. Recalling this pivotal moment, Head of the Singapore delegation to the Working Group, Ms. Sharon Ong, reflected on how delegates crammed into a room in a New York law firm for the day to allow negotiations to continue, 'On that day we resolved a lot

* The authors are grateful to Ms. Sharon Ong for her insightful comments on a previous version of this paper. All errors remain of the authors.

1 The United Nations Convention on International Settlement Agreements Resulting from Mediation ('The Singapore Convention').

2 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).

3 D. Masucci, 'Singapore Mediation Convention' (International Mediation Institute), accessed 25 November 2018, www.imimediation.org/2018/06/27/singapore-mediation-convention.

4 'Press Release: General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation' (UNIS/L/271) (21 December 2018), accessed 12 January 2019, www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html.

5 'The Singapore Mediation Convention: An Overview', accessed 25 November 2019, www.globalpound.org/2018/07/12/the-singapore-mediation-convention-an-overview.

6 See Article 11 of the Singapore Convention.

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of issues that had been sticking points for many years. We all just came with a spirit of cooperation …'.[7]

Many in the international mediation community including mediators, lawyers and repeat corporate users are pinning their hopes on these instruments – the Convention, in particular – to do for mediation what the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the 'New York Convention') is said to have done for arbitration: to lend mediation the regulatory robustness necessary to become recognised as a major international dispute resolution process in its own right. This reflects the findings of a 2014 survey amongst members of the international business and legal communities, where 74% of respondents indicated that they believed a multi-lateral treaty providing for the international enforcement of *settlement* agreements arising out of international commercial mediation would increase the number of such mediations in their home jurisdictions.[8]

In this article we examine the key features of the Convention. Additionally, we also discuss what is not in it, namely provisions for the enforcement of *mediation agreements* (as distinct from *mediated settlement agreements*).

Key features of the Convention

In this section, we will briefly introduce the main provisions of the Convention and address the following questions:

a Which forms of mediated settlement agreements fall within the scope of the Convention?
b How does enforcement operate under the Convention?
c When can a court refuse to enforce an iMSA?
d Can a Contracting Party (e.g., State) to the Convention declare any reservations?

Which forms of mediated settlement agreements fall within the scope of the Convention?

This question will be addressed in two parts. First, we will examine the scope of the Convention in relation to international agreements resulting from mediation, referred to as international mediated settlement agreements or 'iMSAs' in this article. Secondly, we will consider the types of iMSAs that have been expressly excluded by the Convention.

7 Gwyneth Teo, 'UN mediation treaty to be signed in and named after Singapore in 2019', ChannelNewsAsia, 23 July 2018, accessed 25 November 2018, www.channelnewsasia.com/news/singapore/un-mediation-treaty-to-be-signed-in-and-named-after-singapore-10554862.

8 S. 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 (2014), University of Missouri School of Law Legal Studies Research Paper No. 2014-28, accessed 25 November 2018, available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302, at p. 45.

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The Convention's scope encompasses international settlement agreements resulting from mediation[9] that have been concluded in writing[10] by parties to resolve a commercial dispute.[11] A careful consideration of the key terms, 'international', 'commercial' and 'mediation' is essential. The 'in writing' requirement is considered in the next section in relation to form requirements for iMSAs.

The application of the Convention is limited to mediated settlement agreements with an *international* character reflecting UNCITRAL's mandate which has a cross-border focus and the Commission's desire not to interfere in the domestic law of enacting states.[12] Article 1(1) generally defines what constitutes an international dispute, where:

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.[13]

There is a need to define what constitutes an international dispute in the Convention, owing to the fact that there is no concept of a seat of mediation, in the

9 See Article 1(a)-(b) of the Singapore Convention.
10 See Article 1 of the Singapore Convention.
11 *Ibid*.
12 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, The United Nations Commission on International Trade Law – Working Group II (Dispute Settlement), 63rd session (Vienna, 7-11 September 2015), 861st Meeting, A/CN.9/861 (2015), accessed 25 March 2018, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/065/85/PDF/V1506585.pdf?OpenElement, at [36]-[39].
13 Article 1(1) of the Singapore Convention.

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sense that there is a seat of arbitration.[14] Whilst the internationality of a *foreign* judgment or arbitral award enforced under the Hague Convention of 30 June 2005 on Choice of Court Agreements ('HCCCA') and 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards respectively is obvious on the face of it,[15] the internationality of a mediated settlement agreement must be defined because it is a non-starter to describe that agreement as 'foreign' for there is no such concept of a seat in mediation:[16] there would be nothing upon which the mediated settlement agreement may be compared as 'foreign' in respect to. Hence it is only meaningful to refer to mediated settlement agreements as of 'international' character, in contrast to those of 'domestic' character (which fall outside of the Article 1(1) definition).

The restriction of the application of the Convention to commercial disputes is the result of two factors, namely that commercial matters have been the traditional mandate of UNCITRAL, and that non-commercial matters are more likely to clash with public policies specific to legal cultures and national circumstances. The term 'commercial' is not defined in the Convention, but it has been defined in footnote 1 of the Model Law – this definition may be useful for countries without a discrete body of commercial law:

14 As an aside, one should note that the relevance of the seat is fundamental in international arbitration because it is crucial in the determination of whether the award sought to be enforced is a foreign or domestic award (see Article I of the New York Convention). Secondly, it is commonly understood that the courts of the seat of arbitration have been traditionally entrusted with the powers by the drafters of the New York Convention through Article V(1)(e) of the Convention to engage in a principal review of awards made by the tribunal (see N. Darwazeh, Article V(1)(e), in: H. Kronke et al. (eds.), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Alphen aan den Rijn: Kluwer Law International, 2010, at p. 327; for further information on how the seat of arbitration is determined and a perusal of the function of courts at the seat, see A.J. Bělohlávek, Seat of Arbitration and Supporting and Supervising Function of Courts, CYArb – Czech (& Central European) Yearbook of Arbitration, in: A. Bělohlávek & N. Rozehnalova [eds.], JurisNet LLC., Huntington, NY, 2015, Vol. V, p. 21-48)) before it is taken abroad for enforcement. It is usual for the courts at the seat to examine whether rules of natural justice have been breached by the arbitral tribunal during the determinative process and set it aside if any breach has occurred: for instance, the court may examine whether the parties have been sufficiently appraised of the justifications by arbitrators when rendering their award (see TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972, at [99]). It follows that there is simply no need to discern the seat of mediation as it is not a determinative process as is arbitration: the nature of the natural justice considerations is fundamentally different, because in mediation, parties are not compelled to arrive at their dispute resolution outcome. Accordingly, the power of the competent authority of the signatory State to refuse to enforce an iMSA based on the fairness of the mediation process resulting in an iMSA is strictly confined to cases where mediator misconduct is so egregious that it materially influences parties to enter into it inadvertently (see Article 5(e)-(f) of the Singapore Convention).

15 Take, for example, Article I of the New York Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards that provides, 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State [i.e., the 'seat'] *other than the State where the recognition and enforcement of such awards are sought …*' (with emphasis added).

16 *Supra* note 12, at [35].

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> '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; 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.'[17]

Consistently with the focus on 'commercial', disputes such as consumer disputes 'for personal, family or household purposes', and matters in relation to 'family, inheritance or employment law' are expressly excluded by Article 1(2).
'Mediation' is defined broadly by Article 2 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'.[18] The Convention adapts the definition of 'conciliation' found in Article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation (2002) into one for 'mediation'. As such it covers both facilitative and advisory dispute resolution processes, but not determinative systems such as arbitration. Such a broad definition recognises the diversity of mediation practice internationally. Notably, the provision looks to the nature of the dispute resolution process rather than the label, so that parties need not use the term mediation for the Convention to apply. As a result, processes such as neutral evaluation and mini-trial conceivably would fall within the definition of mediation. In future, as and when technology advances in such a sophisticated manner that artificial intelligence algorithms could be administered and function to provide mediation services, it is hoped that the definition provided of 'the mediator' would be shaped accordingly with some nuance to accommodate such innovations, especially if we begin to accept the possibility of granting legal personality to artificial intelligence software systems.[19]

The Convention aims to fill a gap in the cross-border enforcement of iMSAs and to this end features the following notable exclusions. It expressly excludes settlement agreements which:

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.[20]

17 See Footnote 1 of the UNCITRAL Model Law, *supra* note 2.
18 Article 2(3) of the Singapore Convention.
19 See P. Čerka, J. Grigienė & G. Sirbikytė, Is it possible to grant legal personality to artificial intelligence software systems?' Computer Law & Security Review 33 (2017), p. 685.
20 Article 1(3) of the Singapore Convention.

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The reason for the carve out provisions is to deconflict the administration of the Convention with other prevalent international instruments, such as the New York Convention and the HCCCA, which already contain mechanisms that specifically govern the enforcement of those aforementioned forms of settlement agreements.[21] In this regard, the purpose of the Convention is akin to a 'gap-filler'. It focuses on circumstances where those other instruments are inapplicable: for instance, where out-of-court settlements are not taken back into the courtroom for judicial approval with the object of enforcement under the HCCCA, and consequently do not qualify as a 'judgment' for the basis of such enforcement. Nonetheless, its main focus is in relation to enforcing iMSAs that result from commercial mediation processes, whether institutional or ad hoc in nature, provided the resulting iMSAs are not internationally enforceable under the alternative aforementioned mechanisms.

How does enforcement operate under the Convention?

Here we examine the enforcement mechanism of the Convention, as well as the formal and evidentiary requirements to enforce an iMSA. It should first be noted that the Convention provides flexibility and autonomy to the contracting States to adhere with their Convention obligations by not prescribing a specific mode of enforcement.[22] Signatory States may determine their own rules of procedure in relation to enforcement provided they comply with the conditions laid down in the Convention in relation to scope (as set out above), form and evidence (analyzed below).[23]

It is useful to consider the operation of the enforcement mechanism under the Convention by using the metaphors of a sword and shield.[24] Article 3(1) makes clear that the enforcement mechanism can operate as a sword in the sense that parties may commence proceedings to enforce obligations encapsulated within a settlement agreement against each other, if the conditions set out in the Convention are met and no grounds for refusal under Article 5 exist. Conversely, according to Article 3(2), parties may use an iMSA as a shield in the sense that courts of signatory States shall effectively 'recognise' the issues resolved by parties at medi-

21 Consider, for instance, Article 12 of The Hague Convention of 30 June 2005 on Choice of Court Agreements. Additionally, it should be noted that the applicability of the Singapore Convention must also be de-conflicted with the forthcoming Draft Convention of the Special Commission on the Recognition and Enforcement of Foreign Judgements, which is at the moment of publication of this article currently in its drafting stages under the purview of the Hague Conference on Private International Law (see F.J. Garcimartín Alférez and G. Saumier, Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments 24-29 May 2018, Judgments Convention: Revised Preliminary Explanatory Report [May 2018]).

22 See Article 3 of the Singapore Convention.

23 For the applicable conditions, see Articles 1, 2 and 4 of the Singapore Convention.

24 The metaphor was used by Schnabel in T. Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (September 18, 2018), accessed 29 November 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527, at p. 27-32.

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ation reflected in their concluded written iMSA and dismiss (or strike out) those issues 'already resolved' if they were raised for a second time in court.[25]
Although the Convention does not expressly mention the term 'recognition' in relation to iMSAs in the same way as the New York Convention refers to the recognition of foreign arbitral awards, Article 3(2) describes functionally the aspects of recognition. This carefully-drafted wording reflects the debate within the Working Group as to how the term 'recognition' might impact civil procedural rules in certain jurisdictions (particularly those from a non-common law provenance) and whether other terms such as 'binding' might be more appropriate.[26] Instead of remaining deadlocked on terminology, the Working Group chose to describe what they intended, rather than rely on labels taken from the realm of private international law which might be interpreted differently in different legal systems.
Parties seeking to enforce an iMSA under the Convention are simply required to do the following:

a Produce the *written* iMSA itself; and
b Show evidence that it was procured as a result of a mediation process.

The specific form requirements for enforceable iMSAs are minimal under the Convention. The iMSA is to be in writing[27] and signed by the parties.[28] There are no other formalities such as notarisation, requirements to use locally-licensed mediators or the like. The 'in writing' requirement for an iMSA 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'.[29] Consequently, this expands the possibility of disputes settled through various online dispute resolution methods administered through different channels of electronic communication (including text messaging, online conference calls and dedicated online dispute resolution platforms[30]) to be amenable to enforcement under the Convention, so long as the parties are able to conclude their iMSA by endorsing it with a recognised electronic signature,[31] and providing the enforcement authority with evidence that the iMSA was a result of mediation.[32]

25 This also assumes if the conditions set out in the Convention are met and no grounds for refusal under Article 5 can be proven.
26 *Supra* note 24, at p. 29-32.
27 *Supra* note 10.
28 Article 4(1)(a) of the Singapore Convention.
29 Article 2(2) of the Singapore Convention.
30 Consider as an example the e-negotiation and e-mediation services available under the recently-constituted Singapore Employment Claims Tribunals online filing module; whilst it is acknowledged that employment law claims are excluded under the Singapore Convention's scope, the electronic platform tools may be transferable in future to resolving small-scale cross-border commercial disputes. See J. Seow, New Employment Claims Tribunals portal allows users to have disputes mediated online, The Straits Times, 4 January 2019, accessed 17 January 2019, www.straitstimes.com/singapore/new-employment-claims-tribunals-portal-allows-users-to-have-disputes-mediated-online.
31 Article 4(1)(a) read with Article 4(2) of the Singapore Convention.
32 Article 4(1)(b) of the Singapore Convention.

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It should be emphasised that as the Convention does not apply to settlement agreements negotiated outside of a mediation process, although this point was extensively debated in the Working Group. For this reason parties seeking to enforce an iMSA are additionally required to produce evidence that the settlement resulted from mediation.[33] To show evidence that the settlement resulted from mediation, parties *may* produce a mediation agreement,[34] the mediator's signature on the settlement agreement, a separate document signed by the mediator confirming that mediation was carried out in respect to the settlement agreement concerned or an official attestation by the institution or dispute resolution service provider administering the mediation.[35] Additionally, there is a 'catch-all' provision which leaves the competent authority of the signatory State with the autonomy to decide what other forms of evidence is acceptable as proof that the iMSA sought to be enforced resulted from mediation.[36]

When can a court refuse to enforce an iMSA?

Article 5 of the Convention sets out exhaustively the possible exceptions to enforcement of iMSAs which otherwise satisfy the Article 4 requirements. The relevant competent authority of a signatory nation *may*[37] refuse to grant enforcement relief if one of these grounds is proved. The grounds for relief can be examined in four categories: contract-related grounds of refusal, mediator-related grounds of refusal, public policy justifications and where the subject matter is not capable of settlement by mediation. Of all the Articles in the Convention, Article 5 was subject to the most heated debate and took the most time to reach consensus. The following introduction to the various grounds of refusal and accompanying remarks cannot do justice to the rich complexity of Article 5. At the same time, we hope that our observations offer impulses for further research and discussion.

Contract-related grounds of refusal

First, the contract-related grounds of refusal contained in Article 5(1) are briefly presented in the table below. They include:

33 *Ibid.*

34 *Supra* note 12, at [68].

35 Article 4(1)(b)(i)-(iii) of the Singapore Convention.

36 Article 4(1)(b)(iv) of the Singapore Convention.

37 It is in theory within the prerogative of the competent authority to exercise its discretion and, nevertheless, enforce the iMSA even if one or more of the Article 5 grounds were proved. As to theories behind how such discretion may be exercised, see J. Hill, The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958, Oxford Journal of Legal Studies 36 (2016), p. 304.

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	Grounds of refusal	Remarks
1.	Incapacity of a party to the settlement[a]	Consider the implications of the different civil law/common law approaches: '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'.[b]
2.	Settlement agreement is null and void, inoperative or incapable of being performed under the applicable law[c]	Settlement agreements which are 'null and void' comprise iMSAs which are defective from the starting point of its formation.[d] Settlement agreements which are 'inoperative' comprise iMSAs which become ineffective owing to circumstances occurring at or after the point of its formation.[e] Settlement agreements which are 'incapable of being performed' comprise iMSAs which are impossible to execute or enforce, possibly as a result of supervening events taking place *after* the point of its formation.[f]
3.	Settlement agreement is not binding, or is not final, according to its terms[g]	Settlement agreements which are 'not binding, or [are] not final, according to [their] terms' comprise iMSAs which contain terms and conditions that elucidate or indicate – expressly or impliedly – that they are actually not final and/or binding.[h]
4.	Settlement agreement has been subsequently modified[i]	Settlement agreements which have 'been subsequently modified' comprise iMSAs which are rendered ineffectual because of the conclusion of other settlement agreements *after* the initial point of formation, specifically to modify the terms of the former agreement.[j]
5.	Obligations in the settlement agreement have been performed[k]	This embraces iMSAs of which the obligations contained therein have already been discharged by performance according to the proper law governing it.[l]
6.	Obligations in the settlement agreement are not clear or comprehensible[m]	This embraces iMSAs which are poorly drafted or drafted with insufficient meticulousness and elucidation, leaving key obligations or terms (e.g., price paid, or consideration amounts due from one party to the other) insufficiently defined.[n] Drafters of iMSAs should especially note that if, for instance, a party to the mediation has agreed to apologise to the other party, the obligations reflected in the written settlement agreement should be worded *precisely* to the approximate effect that 'Party A shall publish [x] words in the [y] local newspaper and on their social media platforms, such as [z], as a form of apology to Party B, in return for Party B's promise to discontinue [zz] proceedings'. To simplistically write that 'Party A shall apologise to Party B' would likely be too unclear for enforcement to be possible.

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	Grounds of refusal	Remarks
7.	Granting relief would be contrary to the terms of the settlement agreement[o]	This ground for refusal of enforcement applies when condition precedents or condition subsequents encapsulated within iMSAs have not been fulfilled, such that the obligations under the said iMSAs do not accrue at the point of seeking enforcement;[p] it also embraces *force majeure* clauses, where upon the occurrence of such anticipated supervening events, the terms of the iMSA would provide for a discharge of obligations, and thus enforcement of the iMSA would be said to be 'contrary to [its] terms'. It is further submitted that this ground of refusal should *not* embrace terms which circumscribe the number of jurisdictions where the said iMSA may be enforced (e.g., 'It is agreed that this iMSA shall not be enforceable in Country X and Y'). Indulging too generously in the interpretation of Article 5(1)(d) promotes an abuse of process, enabling recalcitrant parties to the iMSA to thwart its enforcement (and also trivialise the entire Convention's enforcement mechanism) by transferring its assets into the jurisdiction expressly circumscribed from enforcement, *subsequent* to its conclusion.[q]

[a] Article 5(1)(a) of the Singapore Convention.
[b] G. Born, International Commercial Arbitration (2nd ed.), Alphen aan den Rijn: Kluwer Law International, 2014, at p. 3489-3490. This should apply by analogy to capacity issues in relation to iMSAs, even though Born discusses this in relation to the formation of arbitration agreements.
[c] Article 5(1)(b)(i) of the Singapore Convention.
[d] S. 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, unpublished LL.M thesis, National University of Singapore, 2018, archived at the C.J. Koh Law Library, National University of Singapore), accessed 20 November 2018, https://scholarbank.nus.edu.sg/handle/10635/145198, at p. 18.
[e] *Ibid*., p. 19.
[f] *Ibid*.
[g] Article 5(1)(b)(ii) of the Singapore Convention.
[h] *Supra* note d, at p. 21.
[i] Article 5(1)(b)(iii) of the Singapore Convention.
[j] *Supra* note d, at p. 23.
[k] Article 5(1)(c)(i) of the Singapore Convention.
[l] *Supra* note d, at p. 20.
[m] Article 5(1)(c)(ii) of the Singapore Convention.
[n] *Supra* note d, at p. 23-24.
[o] Article 5(1)(d) of the Singapore Convention.
[p] Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session, The United Nations Commission on International Trade Law – Working Group II (Dispute Settlement), 68th session (New York, 5-9 February 2018), 934th Meeting, A/CN.9/934 (2018), accessed on 1 August 2018, http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/934&Lang=E, at [57].
[q] It is submitted that this indulgent interpretation could lead to the creation of one of those unwelcome and 'inadvertently introduce[d] defences not contemplated' by the drafters of the Convention, which could affect the effectiveness of the Convention: see *ibid*, at 98.

Mediator-related grounds of refusal

Next, two mediator-related grounds of refusal are also found in Article 5(1). First, the relevant court (competent authority of a signatory State) may choose to not enforce an iMSA where there was 'a serious breach by the mediator of standards

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applicable to the mediator or the mediation *without which breach that party would not have entered into the settlement agreement*'.[38] Not only must there be a breach of mediator standards *so egregious* according to the proper standards of which the mediator must be compliant when conducting mediation (e.g., a mediator who is susceptible to the 'Code of Conduct for Mediators'[39] under the Singapore Law Society's Mediation Scheme must abide dutifully by that code of conduct), that breach must *cause* parties to enter into a settlement agreement.

The second mediator-related ground of refusal is a specific example falling within the scope of the first ground: where '[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'.[40] As with the first ground, the mediator misconduct must *cause* the parties to enter into a settlement agreement in order for this ground of refusal to be available for parties to plead relief from enforcement. Specifically, the mediator's misconduct must be one in relation to his or her ability to be impartial or independent at the mediation table; where real and credible doubts of this can be shown, parties seeking relief from enforcement must *additionally* demonstrate that they were subject to undue influence[41] to accept the terms of the iMSA, or that there was some other material influence flowing from that specific mediator misconduct, such as a misrepresentation as to the terms of the iMSA, or an unconscionable[42] action swaying the outcome of the iMSA.

38 Article 5(1)(e), with emphasis in italics added. Note that this aligns with Articles 6(4), 6(5) and 7(3) of the 2018 Model Law on International Commercial Mediation.

39 See generally, The Law Society of Singapore, Mediation Scheme Handbook (2017), accessed 25 October 2018, https://www.lawsociety.org.sg/Portals/0/ForThePublic/PDF/LSMS%20Handbook.pdf.

40 Article 5(1)(f), with emphasis in italics added. Note that this aligns with Articles 6(4), 6(5) and 7(3) of the 2018 Model Law on International Commercial Mediation.

41 See generally Chan Gek Yong v Violet Netto (practising as L F Violet Netto) and another and another matter [2018] SGHC 208, where a party to a mediated settlement agreement attempted to challenge its validity owing to duress, some of which was allegedly attributed from the mediators; also see, for a case summary, N. Alexander & S. Chong, Singapore Case Note: What happens when a party to an MSA has a change of heart?, Kluwer Mediation Blog (17 October 2018), accessed 25 November 2018, http://mediationblog.kluwerarbitration.com/2018/10/17/singapore-case-note-happens-party-msa-change-heart/.

42 The definition of unconscionable action by parties to a contract during the process of contract formation which may result in the avoidance of some contractual obligations has been clarified in the Singapore Court of Appeal recently in BOM v BOK [2018] SGCA 83: see paragraph [142] et seq. An instance of an unconscionable action which may vitiate contractual obligations may be illustrated by the facts in BOM v BOK [2018] SGCA 83: where a wife takes advantage of the immense grief suffered by her estranged husband, whose mother had passed away suddenly and violently in a murder, to compel him to sign away *the entirety* of his multi-million dollar inheritance and put it on trust in favor of their infant child, this could be viewed by the Singapore courts as an unconscionable action which engenders vitiation of contractual obligations tainted by the wife's conduct.

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Public policy as a ground of refusal

Thirdly, pursuant to Article 5(2)(a), a court (competent authority) may refuse to enforce an iMSA that is 'contrary to the public policy'[43] of the State in which enforcement is sought. It should be duly noted that the public policy exception must be read in the context of the prevailing private international law rules, which contemplates a consideration of *both* domestic and international principles:[44] The domestic public policy of the State in which enforcement is sought 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'.[45] Consequently, the competent enforcing authority should only under *highly exceptional circumstances* refuse to enforce iMSAs by reason of public policy,[46] as it is trite that in the realm of private international law, the public policy exception functions as an 'escape mechanism'.[47]

It is useful to consider an example: The High Court of New Delhi[48] has recently exercised its discretion on public policy grounds to refuse to enforce an international arbitral award, which bound young children (who were between the ages of 8 and 12 years old when the arbitration was conducted) to be jointly and severally liable to pay the equivalent of *more than € 460 million* in damages awarded by an arbitral tribunal seated in Singapore.[49] Similar considerations are likely to apply when iMSAs binding young children are sought to be enforced under the Convention.

43 Article 5(2)(a) of the Singapore Convention.

44 *Supra* note 41 at p. 26-29. Also consider Born, *supra* note 39, at p. 3652.

45 *Supra* note 39, p. 3655; although taken out of context (i.e., Born's words refer to the New York Convention), the phrasing of the words apply with equal logical force to the Singapore Convention as well. See also Renusagar Power Co. Ltd v General Electric Co [1994] AIR 860, at [63].

46 *Supra* note 41, at p. 3659; see also T.M. Yeo, Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments, Singapore Year Book of International Law 9 (2005), p. 133. The Singapore Court of Appeal has described exceptional circumstances as those which would 'shock the conscience' or be 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public', or violate 'the forum's most basic notion of morality and justice' (PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597 at [59]).

47 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.'

48 Daiichi Sankyo Company Limited v Malvinder Mohan Singh and ors. (2016) O.M.P.(EFA) (Comm.) 6/2016.

49 Also see BAZ v BBA and others and other matters [2018] SGHC 257, especially at [169] et seq, for a deeper perusal of the facts of this case. Here, the Singapore High Court ruled on an application to set aside the arbitral award. Curiously (and unusually so), the judgment of the New Delhi enforcement proceedings, which were concurrently initiated with the setting aside proceedings in Singapore, was delivered first, before the setting aside proceedings were concluded. If the Singapore judgment had been delivered before the New Delhi proceedings were concluded, the public policy issue raised in the New Delhi court may be rendered moot, as the Singapore High Court ruled to set aside the award against the children for public policy reasons.

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Subject matter of the dispute is not capable of settlement by mediation

Fourthly, pursuant to Article 5(2)(b), the competent authority may refuse to enforce iMSAs if the 'subject matter of the dispute is not capable of settlement by mediation under the law of that [State]'.[50] Here, even though the choice of law provided by the Article appears to trigger the *lex fori* of the competent authority, the court must interpret it with similar private international law considerations as the 'public policy' exception just as it has been analysed in the previous paragraph, for this is another exceptional 'escape mechanism' defence.[51] Whilst the enforcing court may consider under its own domestic rules that some subject matter areas are not susceptible to mediation (for instance some jurisdictions may consider tax disputes in the commercial setting as not capable of being susceptible to mediation), they ought to also consider the extent to which the subject matter has a sufficient nexus to the forum before bluntly imposing its domestic rules unto the iMSA.[52] In private international law disputes, Born has persuasively argued with the support of precedents (albeit in the context of international commercial arbitration, but this may be justifiably analogised to the international commercial mediation context) that the courts should as far as possible not practice parochialism in respect to the 'subject matter' exception, but consider the law of closest-connection to the dispute when enforcing dispute resolution outcomes stemming from convention obligations.[53]

Reflections on Article 5

In closing the discussion on Article 5, we offer two observations: first in relation to the discretion of the competent authority and second, in relation to the possibility of a further implied ground of refusal.

As previously indicated, the relevant competent authority of a signatory nation *may* refuse to grant enforcement relief if one of the grounds for refusal under Article 5 is proved. In other words, the competent authority of a signatory nation possesses residual discretion to enforce iMSAs even if one or more of the grounds for refusal under Article 5 is proved. This wording appears to be drawn from the New York Convention on arbitration and reflects the stance taken in international commercial arbitration.[54] Following the conventional practice in arbitration, it is likely that such discretion is to be exercised within narrow circumstances. Hill has eloquently proposed, albeit in the arbitration context, that '[a]s a general rule, if a defence to enforcement … is established, enforcement will be

50 Article 5(2)(b) of the Singapore Convention.

51 *Supra* note 41, at p. 29-30.

52 *Ibid*.

53 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 iMSA 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 connection* whatsoever to Country X, the courts of Country X should not refuse relief owing to their convention obligations to enforce dispute resolution outcomes – see Born, *supra* note 39, at p. 606 and 3700.

54 See J. Lew, L. Mistelis & S. Kröll, Comparative International Commercial Arbitration, The Hague: Kluwer Law International, 2003, at p. 26-68.

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(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'.[55] There is fertile ground for deeper investigation (going beyond the analogy with arbitration) into the exercise of judicial discretion in relation to applications to enforce iMSAs under the Convention, as more examples of iMSA enforcement (or challenges to its enforcement) under the Convention are reported in the years after it is signed in Singapore.

In relation to the grounds of refusal to enforce an iMSA set out in Article 5, it is understood that they are intended to be exhaustive. However, it is conceivable that this position may be challenged if we scrutinise Article 6,[56] which provides that the relevant competent authority of a signatory State may adjourn enforcement proceedings if the same iMSA were to be brought to another signatory State for enforcement *and* parties challenge its enforceability by seeking to prove an Article 5 ground for refusal of enforcement in the latter jurisdiction. Can the former competent authority refuse enforcement of the iMSA on the basis of the second jurisdiction's competent authority's refusal? There may be a case for such a refusal, if we consider the principle of recognition of foreign judgments in private international law: i.e., the former court may recognise the latter's judgment in respect to the Article 5 question under its private international law rules, and administer the Convention accordingly. If refusal is possible, there could be an unspoken ground of refusal not articulated by the drafting of Article 5 of the Convention which necessitates further examination.

Can a Contracting Party (e.g., State) to the Convention declare any reservations?

The Convention expressly provides for two reservations.[57] The first reservation permits signatory nations to provide that the Convention does not apply to their government or government agencies.[58] The second reservation permits signatory nations to reverse the default application of the Convention unto parties in respect to iMSAs which they have endorsed, by allowing the provision for an opt-in regime instead.[59] Consequently, if a signatory State makes the second reservation, obligations under the Convention would not apply in that State unless parties to an iMSA have expressly agreed that the Convention would apply as such, and thereby 'opted-in' to its regime. Therefore, a signatory State could significantly limit the application of the Convention by declaring the second reservation, because mediating parties are unlikely to modify the status quo of non-

55 J. Hill, The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958, Oxford Journal of Legal Studies 36 (2016), p. 304-333, at p. 333.

56 Article 6 of the Singapore Convention specifically addresses parallel enforcement proceedings.

57 See Article 8(2) of the Singapore Convention.

58 Article 8(1)(a) of the Singapore Convention.

59 Article 8(1)(b) of the Singapore Convention.

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application by taking the additional step to opt in to a new, untried and untested legal framework.[60]

An issue not addressed by the Convention and Model Law: Mediation agreements

In this section we highlight an item conspicuously not addressed by the Convention: the provisions for the enforcement of mediation agreements.[61]
Mediation agreements are contractual referrals to mediation. They function as triggers to initiate a mediation process and may take the form of dispute resolution clauses in commercial and other contracts between the parties (mediation clauses); alternatively they can be drafted as free-standing agreements (mediation agreements).[62] Generally mediation clauses regulate the manner in which all future disputes arising out of subsisting obligations are to be managed, but they may also deal with specific disputes only. Cross-border mediation clauses may include information about the way the mediation is to be conducted, how the mediator is to be appointed, the venue, costs and fees, the state or national law to be applied, the impact of mediation on litigation limitation periods and the language to be used. Agreements to enter into a mediation process (mediation agreements) can also be concluded between parties after a dispute has arisen. Post-dispute agreements typically define the specific dispute to be mediated and may take the form of an appointment contract between mediator and parties.

Enforcing mediation agreements
Strong's 2014 survey on the use and perception of international commercial mediation has been previously cited in relation to its findings relevant to the enforceability of iMSAs. The same study also canvassed views on agreements to enter into mediation (i.e., mediation clauses and mediation agreements which are signed prior to the parties entering into the mediation process itself). The research concluded that 68% of respondents considered that an international treaty on the international enforcement of *mediation agreements* in relation to cross-border commercial disputes would increase the number of such mediations in their home jurisdictions.[63] Further, 75% of respondents supported an international treaty which would deal with the enforcement of *mediation agreements* (at the beginning stage of mediation) *and iMSAs* (at the end stage of mediation) in relation to cross-border commercial disputes.[64]

60 On the status quo bias, see N. Alexander, Nudging users towards cross-border mediation: Is it really about harmonised enforcement regulation? (unpublished conference paper), at p. 4.
61 Mediation agreements may also be referred to as agreements to mediate.
62 See N. Alexander, International and Comparative Mediation – Legal Perspectives, Austin: Wolters Kluwer Law & Business / Alphen aan den Rijn: Kluwer Law International, 2009, at p. 171-174.
63 *Supra* note 8 at p. 41.
64 *Ibid.,* p. 46. The survey presents detailed data on 34 different questions from 221 respondents from across the world.

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Yet a key difference between the Convention and the New York Convention lies in the fact that the latter contains a provision[65] which binds the courts of contracting States to enforce written arbitration agreements,[66] whereas the Convention contains no corresponding provision in relation to mediation agreements. Therefore, in international arbitration, State courts bound by the New York Convention are obliged to refer disputes covered by an arbitration agreement to an arbitral tribunal, usually by staying judicial proceedings in favor of arbitration. As such, so long as parties to an arbitration clause have shown a *clear intention to resolve any dispute by arbitration*, a court in a contracting State of the New York Convention is generally bound to enforce that arbitration agreement,[67] even if it may be a 'bare arbitration clause'[68] (i.e., a clause which merely expresses an agreement of parties to proceed to arbitration for dispute resolution, but *does not* designate a seat of arbitration, nor refer to any procedural rules, nor provide for a governing law, nor designate the number of arbitrators, nor specify the mechanism for constituting the arbitral tribunal).[69]

The Working Group considered regulating the enforcement of mediation agreements in the Convention, but eventually they decided against doing so. In its deliberations on this point, the Working Group considered various factors. It discussed the diverse ways in which mediation processes are triggered – not only by mediation agreements but also by court referrals and mandatory statutory provisions.[70] Importantly, it highlighted that mediation processes differed from arbitration procedures in that mediation, as a flexible alternative dispute resolution process, might address – and consequently, settlement agreements might resolve – matters not expressly or impliedly contemplated by a mediation agreement.[71] In other words, the scope of issues dealt with in a mediation process is not limited by the terms of a mediation clause that triggers it; this also applies to other non-contractual referral mechanisms such as court referrals. Another relevant consideration was the fact that requiring parties to engage in a collaborative process (mediation) whether by means of mandatory court or legislative referral or by requiring compliance with the terms of a mediation clause in a commercial contract remains controversial in certain jurisdictions.[72] As a result, the Working Group maintained its focus on iMSAs and left the enforceability of mediation

65 Article II of the New York Convention.

66 The arbitration agreement must be acknowledged and endorsed by signature of the parties bound by it. Alternatively, the arbitration agreement could be 'contained in an exchange of letters or telegrams' (Article 2.2 of the New York Convention).

67 KVC Rice Intertrade Co Ltd v Asian mineral Resources Pte Ltd [2017] SGHC 32, especially at [29] et seq.

68 For an example of a 'bare arbitration clause', see *ibid*. at [7]. Reproduced, the arbitration clause, the validity of which is the subject matter of the dispute in the precedent, reads (and *without any further detail*): 'The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules.'

69 *Ibid*.

70 *Supra* note 12, at [68].

71 *Ibid*., at [69].

72 *Supra* note 79, at p. 176-181.

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clauses and agreements to the applicable law – for now at least. It is noteworthy that delegates considered such clauses and agreements could be submitted as part of the evidence tendered to prove that an iMSA had resulted from a mediation process (see Article 4 of the Convention discussed above).[73]

What are implications of not regulating mediation clauses and agreement uniformly under the Convention? Without an enforcement mechanism embedded in the Convention, the enforcement of clauses to resolve disputes by mediation is likely to be substantially more complex than arbitration clauses. Different jurisdictions practice different standards when enforcing mediation clauses as the following examples illustrate.

In France, the courts take the view that mediation clauses are legally binding and prima facie enforceable.[74] Alexander has observed that mediation clauses 'are covered by contract law principles according to Article 1134 of the French Civil Procedure Code … and the duties contained in them are legally binding on the parties; in other words they are imbued with *force obligatoire*'.[75]

However, in other civil law jurisdictions, uncertainty and controversy surrounds the enforceability of mediation clauses and agreements. By way of example, Tochtermann has reported that in Germany, whilst mediation clauses '[d]epending on its particular wording, … may be binding on the parties in the sense that a claim may not be brought before a mediation session has been conducted',[76] § 307 of the *Bürgerliches Gesetzbuch* ('BGB') 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'.[77] In contrast, Lenz and Risak report of judicial ambivalence towards mediation clauses in Austria:[78]

> '[P]arties to mediation clauses cannot *prima facie* enforce [mediation clauses], i.e., have a court order issued to the other party to require it to attend a mediation meeting.[79] If parties file for court proceedings without adhering to the contractual obligation to mediate the acceptability of such a claim is disputed in the literature. Some argue that the adherence to mediation clauses cannot

73 *Supra* note 12, at [68].

74 K. Deckert, Mediation in Frankreich, in: K.J. Hopt & F. Steffek (eds.), Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen, Tübingen: Mohr Siebeck, 2008, at p. 196; also see *supra* note 79, at p. 174-175.

75 Alexander, *supra* note 79, at p. 174-175.

76 P. Tochtermann, Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads, in: K.J. Hopt & F. Steffek (eds.), Mediation – Principles and Regulation in Comparative Perspective, Oxford: Oxford University Press, 2013, at p. 549.

77 *Ibid*. p. 550.

78 C. Lenz & M. Risak, Austria, in: N. Alexander, S. Walsh & M. Svatos, EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes, Alphen aan den Rijn: Kluwer Law International, 2017, at p. 42.

79 M. Roth & D. Gherdane, Mediation in Austria: The European Pioneer in Mediation Law and Practice, in: Hopt & Steffek (eds.), Mediation – Principles and Regulation in Comparative Perspective. Oxford: Oxford University Press, 2013), at p. 267.

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be seen as a pre-condition to a court procedure.[80] Conversely, others hold that mediation clauses constitute a valid temporary waiver of the right to file a claim and … the court should stay the proceedings. The latter option is preferable [in the opinion of the authors] as mediation clauses thereby at least have some legal effect.'

In the United Kingdom, Hong Kong, Singapore and other jurisdictions with a common law tradition, judicial precedents have established that mediation clauses should be meticulously drafted so that it may not be rendered unenforceable for uncertainty.[81] In *Wah v Grant Thornton*,[82] Justice Hildyard of the English High Court (Chancery Division) laid down three characteristics for an adequately-drafted mediation clause, namely that the provision be:

a a sufficiently certain and unequivocal commitment to commence a process;
b from which may be discerned what steps each party is required to take to put the process in place; and which is
c sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.[83]

A similar approach has been evident in Hong Kong, where Rogers V.P. of the Court of Appeal opined that mediation agreements should be precisely worded to define the specific steps which must be taken in order for the mediation process to take place when the dispute resolution clause is triggered.[84] It could be implied from His Honour's judgment that at the minimum, reference to a group of mediators, alternative dispute resolution service providers, or a set of formalised mediation procedures[85] should be specified in the mediation clause, for the mere reference of submission to 'Third Party Mediation procedure' is too ambiguous for the courts to enforce.[86] Including a 'timetable specifying when various steps [of the mediation process] must be taken' would also assist with the precision of the mediation agreement.[87] It is noteworthy that these cases were decided before the introduction of the Hong Kong Mediation Ordinance, which applies to 'mediation conducted under an *agreement to mediate*' [emphasis added]. It remains to be seen

80 G. Hopf, Erfahrungen mit dem österreichischen Mediationsgesetz, in: W. Posch, W. Schleifer & S. Ferz (eds.), Konfliktlösung im Konsens, Graz: Leykam, 2010, at p. 84.
81 It is trite in English law that contractual clauses should hold some degree of certainty, such that it may not be avoided for uncertainty: see generally, Scandinavian Trading Tank v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] QB 529, at p. 540.
82 Wah (aka Alan Tang) and another v Grant Thornton International Ltd and others [2012] EWHC 3198.
83 *Ibid*. at [59]-[60]; see also Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638, at [35].
84 Hyundai Engineering and Construction Co Ltd v Vigour Ltd [2005] HKEC 258, at [29].
85 Rogers V.P. considered the English case of Cable & Wireless Plc. v IBM UK Ltd. [2002] EWHC 2059.
86 *Supra* note 101, at [29]-[30].
87 *Ibid*., at [30].

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the extent to which the legislation influences how courts interpret and enforce mediation agreements since the enactment of this legislation.

In 2017 Singapore introduced comprehensive legislation on mediation[88] containing provisions similar to those in Hong Kong. In the Singapore Mediation Act, however, the term 'mediation agreement' rather than 'agreement to mediate' is used.[89] Similar to Hong Kong, the Singapore precedents[90] on the enforceability on mediation agreements predates the legislation and it is likely that the Singapore courts will take a more lenient approach in relation to the interpretation and enforcement of mediation agreements.[91] Pre-Mediation Act, the position taken by the Singapore Court of Appeal seemed to take a similar – if not, a slightly more charitable[92] – approach to the Hong Kong cases previously cited.[93] By way of example, the Singapore Court of Appeal has indicated that mediation clauses should be worded clearly, and establish in definitive and mandatory fashion (and with sufficient specificity) the personnel who are required to attend the dispute resolution process and the purpose of each meeting at different stages of the process.[94]

These illustrations from civil and common law jurisdictions highlight the potential legal minefield of international enforcement of mediation clauses and agreements. States signing on to the Convention possessed with the expectation that the Convention will boost the use of cross-border mediation to resolve international commercial disputes would benefit from additionally considering how to regulate the front-end of mediation processes (mediation agreements and clauses) with clarity and robustness so that mediation clauses and agreements can be recognised and enforced internationally. To this end, guidelines and rules as to requirements for the drafting of mediation clauses would be helpful. These can be developed through a variety of regulatory mechanisms, including non-legislative

88 Singapore Mediation Act 2017 (No. 1 of 2017).

89 See s 8 of the Singapore Mediation Act 2017 (No. 1 of 2017). By and large, the terms 'mediation agreement' and 'agreement to mediate' are used interchangeably in international mediation circles.

90 See International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2014] 1 SLR 130.

91 Quek Anderson has opined that the Singapore Mediation Act 2017 (No. 1 of 2017) 'has given the court the statutory power to grant a stay of proceedings pending mediation, thus granting mediation the same standing as arbitration' (D.Q. Anderson, Comment: A Coming of Age for Mediation in Singapore? Mediation Act 2016, Singapore Academy of Law Journal 29 [2017], p. 275, at [46]). However, if we are to adopt a conservative perspective, the state of Singapore law will certainly not become apparent until the Singapore High Court or Court of Appeal rules definitively on the interpretation of s 8 of the Singapore Mediation Act, in light of the common law requirements elucidated in International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2014] 1 SLR 130.

92 Anderson, see supra note 108, at [45].

93 For avoidance of doubt, it is acknowledged that the leading precedent in Singapore does not refer to the Hong Kong precedent of Hyundai Engineering.

94 *Supra* note 107, at [54].

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codes, model mediation agreements[95] as well as (reciprocal) legislation. Finally, it would be useful for future revisions of the Model Law on International Commercial Mediation to consider models for recognising and regulating mediation clauses and agreements.

Conclusion

The Singapore Convention on Mediation is a game changer. As the first UN treaty on mediation, it effectively introduces a new type of enforceable legal instrument, which is the result of a private commercial transaction – the international mediated settlement agreement – into international law. As indicated at the start of this article, various stakeholders have high hopes for the impact of this Convention in relation to the development of international commercial mediation practice. These hopes are justified but they should not be pinned on the Convention alone. As with the New York Convention on arbitration in relation to institutional international arbitration, the Convention extends an invitation to signatory States to revisit their regulatory and institutional frameworks for (international) commercial mediation with a view to developing their capacity for this well-known alternative dispute resolution forum. The combination of robust regulatory and institutional frameworks in domestic jurisdictions, on one hand, coupled with the international regulatory framework promised by the Convention, on the other, is likely to encourage strong growth in the practice of international commercial mediation and provision of cross-border alternative dispute resolution services.

95 Take for example, the model mediation clause offered by the Singapore International Mediation Centre (SIMC) is as such:
'**For use before a dispute arises**:
All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be first referred to mediation in Singapore in accordance with the Mediation Rules of the Singapore International Mediation Centre for the time being in force.
For use after a dispute has arisen:
All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, may, notwithstanding the commencement of any other proceedings, be referred to mediation in Singapore in accordance with the Mediation Rules of the Singapore International Mediation Centre for the time being in force.' (SIMC Mediation Clause, accessed 25 November 2018, http://simc.com.sg/simc-mediation-clause/.)

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