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The Singapore Convention is Live, and Multilateralism, Alive! ♠

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I. INTRODUCTION

In the same year of claims and consternation that multilateralism may be dead,[1] the text of a multilateral treaty was finalised (alongside an amended model law) and adopted by the United Nations General Assembly.[2] This new treaty—the United Nations Convention on International Settlement Agreements Resulting from Mediation, which will also be known as the Singapore Convention on Mediation (hereinafter "the Singapore Convention")[3]—will provide for the ability to enforce and invoke international mediated settlement agreements reached to resolve commercial disputes. When UNCITRAL finalised its work on the Singapore Convention and the amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (hereinafter "the Model Law") during the 51st Commission session in June 2018, the negotiators musically announced, through a song, composed to the tune of *Home on the Range*, that "The Singapore Convention is live." Indeed, the Singapore Convention will not only "go live" on 7 August 2019, when it opens for signature in Singapore, but its negotiation and adoption demonstrated that multilateralism is still very much alive.

♠ The views expressed herein are the views of the author and do not necessarily represent the views of the Government of Singapore. Please note that at the time of this writing, the signing ceremony was some months away.

[1] *See, e.g.*, Meetings Coverage, Security Council, *Rising Nationalism Threatens Multilateralism's 70-Year 'Proven Track Record' of Saving Lives, Preventing Wars, Secretary-General Tells Security Council*, U.N. Meetings Coverage, SC/13570 (Nov. 9, 2018); Andreas Michaelis, Farewell to Multilateralism? Building a Strong Europe for a Strong World Order, Remarks at Singapore Institute of International Affairs' Seminar on "The EU and ASEAN in Uncertain Times: Integration, Tensions, and Trade" (Sept. 13, 2018) (transcript available online at http://www.siiaonline.org/the-eu-and-asean-in-uncertain-times-farewell-to-multilateralism/).

[2] G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018) [hereinafter G.A. Res. 73/198]. With respect to the Model Law, *see* G. A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law (Dec. 20, 2018).

[3] G.A. Res. 73/198, OP3.

The Singapore Convention was inspired by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention").[4] The Singapore Convention will be to mediated settlement agreements what the New York Convention is to arbitral awards. The Singapore Convention recognises that, with a mediated process, the settlement agreement is not a mere contract, and can therefore be recognised and enforced (or enforced and invoked) in its own right, so long as the requirements of the Singapore Convention are met.[5]

The Singapore Convention applies to (i) international, (ii) commercial, (iii) settlement agreements, (iv) resulting from mediation.[6]

An "international" settlement agreement is identified in relation to the places of business of the parties to the settlement agreement.[7] The Convention does not apply to consumer disputes,

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

[5] The Singapore Convention does not use the term "recognition." This is because of the different understandings over what "recognition" means. As such, it was decided that the Convention would instead describe the legal effects of "recognition." The terms "enforce" and "invoke" are intended to encapsulate how a mediated settlement agreement can be used as a "sword" as well as a "shield." *See* UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, September 12–23, 2016)*, U.N. Doc. A/CN.9/896, at 15 (Sept. 30, 2016) [hereinafter UNCITRAL WG II September 2016 Report]; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, February 1–5, 2016)*, U.N. Doc. A/CN.9/867, at 23 (Feb. 10, 2016) [hereinafter UNCITRAL WG II February 2016 Report]; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, September 7–11, 2015)*, U.N. Doc. A/CN.9/861, at 14 (Sept. 17, 2015) [hereinafter UNCITRAL WG II September 2015 Report]. *See also* Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 35–42 (2019) (more generally, this article provides a superb explanation of the key provisions of the Convention, drawing in great detail from the records of the negotiations and from the author's key role in the negotiations).

[6] Singapore Convention on Mediation art. 1(1). In this chapter, the term "mediation" is used with the intention that it be understood the same way as the term "conciliation" as used in the context of UNCITRAL's earlier work on conciliation. In the early stages of the discussions, a view was expressed that the work of UNCITRAL in this area should refer to "mediation" instead of "conciliation." This was on the basis that "mediation" was the more widely used term. There was some hesitation to do this, even towards the end of the negotiations. It was recognised that these terms had been historically used in the relevant UNCITRAL texts. To address the concern that there be an inadvertent substantive change in meaning, the text accompanying the Convention will explain the historical developments of the terminology in the UNCITRAL texts and emphasise that the term "mediation" is "intended to cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used." *See* UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, October 2–6, 2017)*, U.N. Doc. A/CN.9/929, at 16 (Oct. 11, 2017) [hereinafter UNCITRAL WG II October 2017 Report]; UNCITRAL WG II February 2016 Report, *supra* note 5, at 19.

[7] Singapore Convention on Mediation art. 1(1).

or to agreements relating to consumer disputes or to family, inheritance, or employment law.[8] Unlike the Model Law, the Convention does not address itself to agreements to mediate, recognising that such agreements are not exclusive in nature unlike arbitration agreements[9] and that there may not always be such an agreement concluded by the disputing parties as a basis for the mediation process.[10] In order to avoid overlaps (and gaps) with existing and future Conventions which apply to arbitral awards and judgments—including the Convention on Choice of Court Agreements,[11] the anticipated judgments convention being negotiated at the Hague Conference, and the New York Convention—the Singapore Convention does not apply to all settlement agreements. It does not apply to settlement agreements approved by a court or concluded before a court in the course of proceedings and which are enforceable as a judgment. It also does not apply to settlement agreements which are recorded and enforceable as an arbitral award.[12]

This Chapter will explore the multilateral process and context which led to the development of the Singapore Convention as well as the amended Model Law. This Chapter will then examine how, as a product of multilateral consensus, the Singapore Convention responds to the diverse legal traditions and legal realities by being a treaty with requirements that are simple, easy to use, and accommodate the flexibilities inherent in mediation.

II. THE MULTILATERAL PROCESS

The Singapore Convention was developed through a multilateral process, and was developed by consensus. Multilateral consensus is a hallmark of the UNCITRAL tradition. UNCITRAL conducts processes that ensure that it is well-placed to identify common ground for the building of harmonised approaches and legal responses to a variety of issues in international trade law.[13] Foremost of these are its convening power, which ensures input from different legal cultures and traditions as well as the relevant expertise.[14] Its consensus-based decision-making enables the identification of points of convergence for viable options for harmonisation.

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[8] Singapore Convention on Mediation art. 1(2).

[9] UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, February 2–6, 2015)*, U.N. Doc. A/CN.9/832, at 7 (Feb. 11, 2015) [hereinafter UNCITRAL WG II February 2015 Report].

[10] UNCITRAL WG II October 2017 Report, *supra* note 6, at 7; UNCITRAL WG II September 2015 Report, *supra* note 5, at 6, 13.

[11] Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

[12] Singapore Convention on Mediation art. 1(3).

[13] *See generally* UNCITRAL, *Note by the Secretariat, UNCITRAL rules of procedure and methods of work*, U.N. Doc. A/CN.9/638 (Oct. 17, 2007), and its addenda 1 through 6.

[14] *See, e.g.*, UNCITRAL, A GUIDE TO UNICTRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 2 (2013) ("Members of UNCITRAL are selected from

These factors converged in the negotiations that led to the adoption of the Singapore Convention and the amended Model Law. UNCITRAL's convening power ensured that we typically had at least a hundred delegations present at our meetings, with technical experts hailing from backgrounds in fields such as government, the judiciary, arbitration, mediation, business, and academia.[15] The rich and varied experience that representatives brought to the meetings ensured that the UNCITRAL deliberations were rigorous and robust.[16] That said, the road did not run smoothly. Not that this was a surprise.

The task of tackling an international mechanism for the enforcement of mediated settlement agreements was one that had been taken up by UNCITRAL in the course of its work on the 2002 UNCITRAL Model Law on International Commercial Conciliation.[17] The Model Law identified "the smallest common denominator between the various legal systems" for how to address the enforcement of conciliated settlement agreements.[18] The result was to leave the question to individual States that chose to enact the Model Law.[19] In other words, no real agreement could be reached at the time.[20]

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among States Members of the United Nations and represent legal traditions and levels of economic development").

[15] For example, the sixty-sixth session of the UNCITRAL Working Group II (Dispute Settlement), that met from February 6–10, 2017 in New York, was attended by sixty State delegations, two observer delegations, and forty-one intergovernmental and non-governmental organisations. *See* UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, February 6–10, 2017*), U.N. Doc. A/CN.9/901, at 3 (Feb. 16, 2017) [hereinafter UNCITRAL WG II February 2017 Report].

[16] S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495, 511, 512, 518 (2016) (noting how "[t]he high proportion of arbitration experts in Working Group II is troubling" but that "[i]f the mediation community can provide experts in arbitration with a sufficiently compelling account of the need for and benefits of a new treaty in this area of law, the two groups' combined opinion will be difficult for state actors to resist").

[17] G.A. Res. 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (Jan. 24, 2003).

[18] UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-fifth session (Vienna, November 19–30, 2001)*, U.N. Doc. A/CN.9/506 (Dec. 21, 2001).

[19] Article 14 of the UNCITRAL Model Law on International Commercial Conciliation states: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

[20] This fate is shared. *See* Nadja Alexander, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 301 (2009) (noting that the Model Law and EU Mediation Directive, which Alexander describes as "the primary international legal instruments on mediation", "both fall short of establishing uniform standards in relation to the enforceability of mediated agreements"). *See also* Edna Sussman, *The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements*, ICC DISP. RESOL. BULL., Nov. 2018, at 43–44.

It was almost 15 years later, in 2014, that UNCITRAL was brought back to the question, owing to a proposal from the U.S. delegation, led by Timothy Schnabel.[21] However, the differences in views in 2002 over the possibility of an international mechanism for enforcement continued to persist in 2014.[22] That we were able to reach a consensus outcome on a Convention and amendments to the Model Law is a testament to the negotiators (and members of the UNCITRAL Secretariat) who worked tirelessly—come hell or high water; or perhaps more aptly, come hail or snowy weather[23]—to appreciate each other's positions and interests, so that various understandings could be reached and necessary compromises could be made. A number of these negotiators are represented as authors in this volume on the Singapore Convention.

III. THE CONVENTION IN CONTEXT

The benefits of mediation as a form of alternative dispute resolution are well-known, and are also appropriately acknowledged in the preambular paragraphs of the Singapore Convention.[24] In gist, mediation offers the promise of cost-effective and time-effective dispute resolution, which translates into savings for commercial parties as well as by States. It allows parties to shape the way their disputes are resolved in a way that suits them and their needs. This better enables disputing parties to preserve their commercial relationship.

However, the lack of a cross-border mechanism for giving legal effect to international mediated settlement agreements has been said to be a major obstacle to the use of mediation to

[21] UNCITRAL, *Note by the Secretariat, Planned and possible future work—Part III, Proposal by the Government of the United States of America: future work for Working Group II*, U.N. Doc. A/CN.9/822 (June 2, 2014).

[22] Schnabel, *supra* note 5, at 5; Natalie Y. Morris-Sharma, *The Changing Landscape of Arbitration: UNCITRAL's Work On The Enforcement Of Conciliated Settlement Agreements*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 123, 126–30 (2018).

[23] This is in reference to the blizzard which led to meetings being cancelled on the Thursday of the Working Group's sixty-sixth session in New York in February 2017. This threatened the momentum of the negotiations. However, pursuant to an invitation to all delegations to meet informally at a location off-site, interested delegations were able to continue their discussions. This enabled a number of key understandings to be reached. The five-issue packaged deal that emerged from the sixty-sixth session enabled a breakthrough on a number of difficult issues in the negotiations.

[24] For instance, the third preambular paragraph states: "*Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."

resolve disputes.[25] Without a cross-border mechanism, in short, there would be less certainty.[26] In Carrie Menkel-Meadow's recent Singapore Mediation Lecture in 2017, she had identified mediation's lack of an equivalent to the New York Convention as "one of the very big problems for mediation."[27] An IMI survey conducted in October and November 2014 found that 92.9% of those surveyed would be either much more likely or probably more likely to mediate a dispute with a party from another country if they knew that their country had ratified a United Nations convention on the enforcement of mediated settlements.[28] In another survey, the results of which were shared with the Working Group, 74% of respondents indicated that they thought an international convention concerning the enforcement of settlement agreements would encourage mediation and conciliation.[29] Both of these studies are discussed in this Singapore Convention Reference Book.

Against this backdrop, by offering a cross-border mechanism for giving legal effect to international mediated settlement agreements, the Singapore Convention underscores the importance (and legitimacy) of mediation as a form of dispute resolution, and removes a significant barrier to the use of mediation for resolving disputes.[30] As stated in an open letter to the United States' Secretary of State Michael Pompeo, a number of business associations explained that the Singapore Convention will help "mitigate risk when entering into a commercial relationship with businesses in foreign markets and [raise] the standards of fair trade globally."[31]

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[25] Though by no means the only obstacle. Other reasons for the low uptake of international commercial mediation include a lack of sensitivity to legal and cultural differences and the lack of a track record for businesses to trust. In this regard, *see* Lucy Reed, Ultima Thule: Prospects for International Commercial Mediation, Keynote Address at the Inaugural Schiefelbein Global Dispute Resolution Conference (Jan. 18, 2019), *video available online at* https://www.indisputably.org/?p=13752.

[26] UNCITRAL WG II February 2015 Report, *supra* note 9, at 5–6. *See also* UNCITRAL WG II September 2016 Report, *supra* note 5, at 24.

[27] Carrie Menkel-Meadow, *Mediation 3.0: Merging the Old and the New*, ASIAN J. ON MEDIATION 1, 7 (2018).

[28] International Mediation Institute, *IMI survey results overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements*, INTERNATIONAL MEDIATION INSTITUTE (2014), https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/. The Working Group was informed of this survey in UNCITRAL, *Note by the Secretariat, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation*, U.N. Doc. A/CN.9/WG.II/WP.187, at 6 (Nov. 27, 2014) [hereinafter UNCITRAL WP 187].

[29] S.I. 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* 45 (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, 2014). The Working Group was similarly informed of this survey in UNCITRAL WP 187, *supra* note 28, at 6.

[30] UNCITRAL WG II September 2016 Report, *supra* note 5, at 24.

[31] The open letter to United States' Secretary of State Michael Pompeo, dated November 6, 2018, expressed strong support for the United States signing and ratifying the Singapore Convention. It was signed by the Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for International Business. It is

Notwithstanding that UNCITRAL did manage to finalise the Singapore Convention, the outcome of a multilateral treaty was never certain.

There was a chicken-and-egg conundrum that bedevilled the negotiations. In the different states, there was not the same level of experience with mediation as there was with other methods of dispute resolution such as litigation and arbitration.[32] Did this mitigate in favour of those who were calling for a cross-border mechanism of recognition and enforcement for mediated settlement agreements? [33] Or did this mitigate in favour of those who advised caution in the choice of harmonization instrument by suggesting that the time was not yet ripe for the development of an international convention on enforcement?[34]

Every time the Working Group met, we would tackle these questions. Each time a decision on the form of the instrument would be postponed. A suggestion to consider preparing two separate but parallel instruments was made when the Working Group convened in September 2016.[35] It was said that the model legislative provisions could support states that are only ready for domestic implementation of an enforcement process, and a Convention would be available for states ready to join an international treaty.[36] But then there was the question of whether to do so simultaneously, or if not then which instrument should be developed first.[37]

The decision on the form of the instrument to be developed was taken only at the Working Group's meeting in February 2017,[38] as part of the five-issue packaged deal or "compromise proposal" reached during that session.[39]

In an unprecedented step, the decision was made to develop the Singapore Convention in parallel with an amended Model Law. The decision was reached "in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions."[40]

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available online at https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SingaporeConventiononMediation_11.6.18.pdf.

[32] UNCITRAL WG II September 2016 Report, *supra* note 5, at 24; UNCITRAL WG II February 2015 Report, *supra* note 9, at 6.

[33] UNCITRAL WG II September 2015 Report, *supra* note 5, at 19–20.

[34] UNCITRAL WG II February 2015 Report, *supra* note 9, at 9–11. *See also* UNCITRAL WG II September 2016 Report, *supra* note 5, at 24–25.

[35] UNCITRAL WG II September 2016 Report, *supra* note 5, at 25, 36–37.

[36] *Id.* at 24.

[37] *Id.* at 36–37.

[38] UNCITRAL WG II February 2017 Report, *supra* note 15, at 17.

[39] UNCITRAL WG II February 2017 Report, *supra* note 15, at 10–11.

[40] UNCITRAL WG II February 2017 Report, *supra* note 15, at 17.

IV. A PRODUCT OF CONSENSUS

As a product of multilateral consensus, the Singapore Convention responds to the diverse legal traditions and legal realities in the practice of mediation and relevant to the legal effects of mediated settlement agreements. The product? A treaty with requirements that are simple, easy to use, and accommodates the flexibilities inherent in mediation.[41] Three aspects of the Singapore Convention, amongst others, illustrate these key features: (i) the definition of "mediation"; (ii) the form requirements for evidence that a settlement agreement resulted from mediation; and (iii) the grounds for refusal.

A. *The Definition of "Mediation"*

The Convention defines "mediation" broadly. Under the Convention, "mediation" is defined to refer to instances where the disputing parties sought to reach an amicable settlement with the assistance of a third party who lacked the authority to impose a solution at the time of the mediation.[42] This broad definition was adopted in recognition of mediation as a flexible process, and the different techniques that are used in mediations.[43] It is intended to include mediations administered by, or undertaken under, the auspices of an institution.[44]

It also acknowledges the practice of combined dispute resolution processes. The phrase "at the time of mediation" does not appear in the text of the Convention, as it was seen as unnecessary. Nevertheless, the understanding is that the lack of authority to impose a solution is confined to the time of the mediation. In this way, the Convention recognises hybrid processes such as med-arb.[45]

Further, there is no limitation on the types of remedies that can be reflected in the settlement agreement. It can include monetary or non-monetary elements. This shows appreciation that, in a mediation, disputing parties are able to design a settlement that responds to their needs, and that

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[41] In the early part of the negotiations, it was suggested that the aim of UNCITRAL's work should be to provide "a simple mechanism" to enforce settlement agreements. Such a mechanism should preserve the flexibility of the mediation process. *See* UNCITRAL WG II February 2015 Report, *supra* note 9, at 6.

[42] Singapore Convention on Mediation art. 2(3) states: ""Mediation" means 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."

[43] *See, e.g.*, UNCITRAL WG II February 2016 Report, *supra* note 5, at 18–19. For an elaboration of the different models of and variations in mediation, see Laurence Boulle, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35, 48–56 (2014).

[44] UNCITRAL WG II February 2016 Report, *supra* note 5, at 19.

[45] UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018)*, U.N. Doc. A/CN.9/934, at 6 (Feb. 19, 2018).

takes a holistic view of the interests of the parties and their commercial relationship. Such a settlement often extends beyond pure monetary relief.[46]

B. *The Form Requirements*

In terms of the form requirements in the Convention, these have been tailored, without being overly prescriptive, to accommodate how mediation is practised internationally.[47]

There is a limited, exhaustive list of form requirements in the Convention. The only form requirements are that: (i) the settlement agreement be in writing; (ii) the settlement agreement be signed by the disputing parties (an exchange of emails could meet the requirements); (iii) there must be evidence that the settlement agreement resulted from mediation.[48]

Evidence that the settlement agreement resulted from mediation could be in the form of the mediator's signature on the settlement agreement, or an attestation in a separate document by the mediator or administering institution that mediation had occurred.[49] When the Convention was being negotiated, it was recognised that it would be incongruous with some legal cultures and practices to have certain requirements, such as the mediator signing the settlement agreement as the only acceptable proof.[50] This is why the types of proof required under the Convention is reflected in an illustrative list, rather than an exhaustive one or one that establishes relative priorities between the different requirements.[51]

C. *The Grounds of Refusal*

The grounds for a court to refuse the recognition or enforcement of a mediated settlement agreement are limited to those set out in the Convention, and are tailored to the practice of mediation.[52]

The grounds retain the relevant elements of the formal and mechanistic nature of the New York Convention, whilst responding to the difficulties posed when disputing parties seek to leverage the New York Convention to recognise and enforce their settlement agreements. For

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[46] UNCITRAL WG II September 2015 Report, *supra* note 5, at 10.

[47] UNCITRAL WG II September 2015 Report, *supra* note 5, at 12–13.

[48] Singapore Convention on Mediation art. 4(1).

[49] *Id.*

[50] UNCITRAL WG II September 2016 Report, *supra* note 5, at 13; UNCITRAL WG II September 2015 Report, *supra* note 5, at 11.

[51] It was the intention of the negotiators that Article 4(1)(b) of the Singapore Convention on Mediation be an "illustrative and non-hierarchical list" of means to evidence that a settlement agreement resulted from mediation. *See* UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, February 5–9, 2018)*, U.N. Doc. A/CN.9/934, at 7 (Feb. 19, 2018). *See also* UNCITRAL WG II October 2017 Report, *supra* note 6, at 9–10.

[52] Singapore Convention on Mediation art. 5.

example, when disputing parties attempt to translate the grounds of refusal in the New York Convention to the mediation context, such as excess authority in Article V(1)(c) of the New York Convention and procedural irregularities in Article V(1)(d),[53] it becomes clear that "the fundamental characters and processes of mediation and arbitration are different."[54] The grounds for refusal do not translate directly or transfer easily from the arbitration context to the mediation context.[55] Bearing this in mind, one can appreciate why these grounds for refusal, otherwise found in the New York Convention, are not found in the Singapore Convention on Mediation.

At the same time, there are grounds for refusal that have drawn inspiration from the regime of the New York Convention, as the negotiators assessed what would be appropriate to consider in the context of mediated settlement agreements. For instance, there are grounds of refusal in the Singapore Convention such as where there is incapacity of a party to the settlement agreement, which was inspired by Article V(1)(a) of the New York Convention;[56] and if the settlement agreement is null and void, for instance because of fraud, misrepresentation, and mistake, for which inspiration was drawn from Article II(3) of the New York Convention.[57] Like Article V(2) of the New York Convention, enforcement can be refused on grounds of public policy or if the subject matter was not capable of settlement by mediation, and these grounds can be raised *sua sponte* by a court before which relief is being sought.[58]

Additionally, there are grounds of refusal specific to mediator misconduct.[59] Such misconduct must have a causal effect on the disputing party entering into the settlement agreement, and includes misconduct such as a serious breach of applicable standards or a failure to disclose. It is up to the competent authority to determine the applicable standards, whether they be the applicable law governing the mediation or codes of conduct. Competent authorities can seek guidance from the illustrative list of examples in the text accompanying the Convention.[60] Initially, there were suggestions that the refusal grounds also address issues of fairness and

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[53] The negotiators specifically discussed whether or not to include a provision in the instrument along the lines of Article V(1)(d) of the New York Convention. *See* UNCITRAL WG II February 2016 Report, *supra* note 5, at 27–28. It was highlighted that mediation is a voluntary process from which the disputing parties may withdraw at any time and pursuant to which a settlement cannot be imposed on the disputing parties.

[54] Morris-Sharma, *supra* note 22, at 136–37.

[55] Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions And Directions for Future Research*, 7 CONTEMP. ASIA ARB. J. 87, 98 (2014).

[56] Singapore Convention on Mediation art. 5(1)(a).

[57] Singapore Convention on Mediation art. 5(1)(b)(i). *See also* UNCITRAL WG II September 2016 Report, *supra* note 5, at 18.

[58] Singapore Convention on Mediation art. 5(2).

[59] Singapore Convention on Mediation arts. 5(1)(e) & 5(1)(f).

[60] UNCITRAL WG II February 2017 Report, *supra* note 15, at 16. Dorcas Quek Anderson, *Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?*, *in* PRIVATIZING DISPUTE RESOLUTION AND ITS LIMITS (studies of the Max Planck Institute Luxembourg Summer School for International, European, and Regulatory Procedural Law) (Loic Cadiet & Burkhard Hess eds., forthcoming 2019).

impartiality, but those grounds were seen by some as not necessary and by others as not aligned with the realities of mediation practice.[61]

V. CONCLUSION

From our whirlwind tour of the Convention—of the scope of application, form requirements, and grounds for refusal—one can appreciate that an international mechanism has been designed to facilitate the efficient circulation of mediated settlement agreements without overly burdensome requirements. The Singapore Convention will offer certainty of reliance on mediated settlement agreements before Parties' domestic courts, while preserving the flexible nature of mediation. Efforts were made to ensure that the Convention accommodates different legal traditions. There is also an accompanying Model Law to accommodate the different levels of experience with mediation in different jurisdictions.

After revisiting the multilateral process and context that led to the development of the Singapore Convention and the amended Model Law, we see how multilateralism is still alive. But it takes work. Multilateral consensus does not come easy. The UNCITRAL process benefitted from having committed experts in the room, who were ready to engage constructively, so that creative compromises could be fashioned. Some of these compromises were part of the five-issue package referred to above, but there were many others along the way. There were earnest conversations and hardnosed discussions. The work of the UNCITRAL Secretariat was of immense value. Everyone brought something to the table, and left as friends, with mutual respect and newfound understandings between and amongst them.

Of course, the take up rate of the Singapore Convention will define its utility. Yet, in many ways, the Singapore Convention is already an important statement in favour of rules-based multilateralism.[62]

[61] Schnabel, *supra* note 5, at 50–51.

[62] For example, in a joint statement issued during an official visit by Chinese Premier Li Keqiang to Singapore in November 2018, it states (at paragraph 14): "Both sides reaffirmed their shared commitment to rules-based multilateralism, support for the purposes and principles of the United Nations Charter, adherence to international law, and would continue to maintain close communication and cooperation at the United Nations and other multilateral organisations. In this vein, both countries agreed that instruments such as the United Nations Convention on Mediation are important to the multilateral rules-based order and will consider signing it." *See Full Text: Joint statement between Chinese, Singaporean governments*, XINHUA (Nov. 15, 2018), www.xinhuanet.com/english/2018-11/15/c_129994460.htm.