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Enforcement of Mediated Settlement Agreements under the Singapore Convention and the UNCITRAL Model Law: An Argument for the Opt-In Model

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Introduction

The Singapore Convention (United Nations Convention on International Settlement Agreements Resulting from Mediation, hereafter referred to as "the Convention") was adopted in 2018.[2] In the same year, the UNCITRAL Model Law on International Commercial Conciliation (2002) (hereafter referred to as "the Model Law 2002") was amended with the addition of a new section on international settlement agreements and their enforcement (Section 3). With the amendment, it was renamed as The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (hereafter referred to as "the Model Law"). A bulk of the Convention's provisions found their way into the new section of the Model Law. This article will refer mostly to the Convention but the analysis will equally apply to the Model Law except otherwise noted.

The Convention is applicable to international commercial mediations (Article 1(1)). Its primary aim is to facilitate the enforcement of settlement agreements resulting from mediation (hereafter "MSAs" or "mediated settlement agreements"). The Convention obliges the contracting States to enforce MSAs under the conditions it lays down (Article 3(1)). Subject to certain grounds for the refusal to grant enforcement (Article 5), the Convention treats MSAs as directly enforceable like the judgments of domestic courts or arbitral awards subject to the New York Convention

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2 At the official signing ceremony on 7 August 2019, the Convention received signatures from 46 States. How many States will actually ratify it remains to be seen.

on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (hereafter "the New York Convention").

Outside the regime of the Convention, an MSA may only be relied on as a contract and accordingly may only be adduced as evidence. It is but one piece of evidence to help the plaintiff establish its claim. If the plaintiff obtains a favorable judgment, the latter will then be directly enforceable.

The Convention allows the parties to an MSA to opt out of its regime by so indicating in their MSA. This follows from Article 5(1)(d), which provides that the enforcement of an MSA may be refused if the enforcement is contrary to its terms. Unless the parties opt out, the Convention is applicable to all MSAs resulting from international commercial mediations. The Convention, however, permits the contracting States to elect to enter the reservation under Article 8(1)(b) in favor of the opt-in model by declaring that they will apply the Convention only to the extent that the parties to an MSA have agreed to its application. An MSA may only be enforced in the States that have made the reservation if the parties to the MSA have agreed to opt into the Convention's regime.

Unlike an international convention, the Model Law is only a model for domestic legislation. When the States implement it by domestic legislation, they may modify it as they like, although the recommended practice would be to avoid making extensive modifications. The Model Law expressly contemplates certain modifications, including a modification in favor of the opt-in model. Thus, its footnote 6 says that a State may consider enacting Section 3 to apply only where the parties to the MSA agreed to its application.

This article argues that the States ratifying the Convention[3] or implementing the Model Law should adopt the opt-in model.[4] We will

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3 The Convention scarcely offers any economic incentives for ratification. Since it facilitates the enforcement of MSAs in the contracting States, the assets situated in such States become exposed to seizure for execution. In any State, the companies and individuals of that State tend to own more assets there than do foreign companies and nationals. From this perspective, the Convention works to the detriment of the interest of the contracting States. The same might be said of the New York Convention, but the latter's option to require reciprocity, which a large number of contracting States have adopted by way of declaration under Article I(3), offers an alternative incentive. The Singapore Convention has no such built-in incentives. It relies on the States' good will to promote international mediation.

4 For the opposite view, see, e.g., O'Neill, "The new Singapore Convention: will it be the New York Convention for mediation?" (2018) (http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/); Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1)

start with an examination of some of the grounds for non-enforcement laid down in Article 5(1)(b)(i) and (ii), (c)(ii), (d) and (e) to reveal the difficulties and problems which may arise from their application. We will then note that there is a spectrum of sophistication for international commercial mediations and will consider how the Convention would look from the opposite ends of the spectrum.

Building on the preceding analysis, we will proceed to consider how the opt-out option will actually work and evaluate the opt-in model. Finding that the opt-out option does not adequately protect the interest of parties in some situations and that the opt-in model would operate well in all situations, we will conclude that the opt-in model should be adopted.

Article 5(1)(b)(ii), (c)(ii) and (d)

Under the Convention, the court before which the enforcement of an MSA is sought may refuse to grant the relief if the MSA is not binding according to its terms (Article 5(1)(b)(ii)) or the obligations in the MSA are not clear (Article 5(1)(c)(ii)) or granting relief would be contrary to the terms of the MSA (Article 5(1)(d)). Given that mediation is a process of self-determination, these provisions are of central importance. As will be examined below, they may not, however, be interpreted broadly enough to carve out all the MSAs that the party resisting enforcement did not expect or assume to be treated as directly enforceable.

Expectation or Assumption of the Parties

The direct enforcement under the Convention is a special treatment that would not result naturally from the fact that an MSA is a contract. Given that mediation is a process of self-determination, an MSA should be subject to the Convention only where both parties to it have an expectation or assumption that it should be given the special treatment.

It is not impossible for an MSA to state that it should be treated as directly enforceable. But in a vast majority of cases, an MSA will contain no statement as to whether it should be so treated. What is the intention of the parties then?

Unless being aided by competent lawyers, the parties engaged in a mediation may not have a good grasp of the difference between the direct

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(footnote 4 continued from previous page)
Pepperdine Dispute Resolution Law Journal 1, at p. 58. Mr. Schnabel proposed and negotiated this Convention on behalf of the United States but wrote this article in his personal capacity to express his personal view.

enforcement under the Convention and the effect of an MSA as a contract. Such parties may not have an expectation or assumption that their MSA should be treated as directly enforceable. Even where the parties are well informed, the examples below will demonstrate that the parties in many cases would not have such an expectation or assumption.

Many MSAs contain non-monetary obligations. While it is not impossible to directly enforce such obligations by way of specific performance, it may not be consistent with the parties' expectation or assumption because the monetary relief of damages is often more practicable than specific performance.[5]

The terms of MSAs resulting from commercial mediations are usually not as simple as saying that X shall pay Y a certain sum of money by a certain date. They are often complex and contain many conditional undertakings. As with any contract, the more complicated an MSA is, the harder it is to be directly enforced since more room is left for interpretations or contingencies. The parties to such an MSA may not have an expectation or assumption that it should be treated as directly enforceable.

The parties engaged in a mediation sometimes decide to cast aside their respective legal arguments and construct a future-oriented arrangement in furtherance of their wider interests. What they undertake to do is essentially the negotiation of a new contract of which an agreement to terminate the dispute forms part, possibly a small part. The parties to the resulting MSA may have no expectation or assumption that it should receive any different treatment from an ordinary contract.

Where the parties intend to design a framework for long-term relationships, they may use vague or nuanced languages in their MSA. Such an MSA may contain, for example, an agreement to agree, an undertaking to make best efforts, or an obligation to be performed in a reasonable manner or to the satisfaction of the other party. The parties using such languages may have no expectation or assumption that the MSA should be treated as directly enforceable. Rather, they may conclude an MSA in the spirit "any agreement is better than no agreement" as even such an MSA may turn out to work well.

Interpretation and Application

Where enforcement is sought of an MSA that the party resisting enforcement did not expect or assume to be treated as directly enforceable, that party may rely on sub-paragraphs (b)(ii), (c)(ii), or (d) of Article 5(1).

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5 In this connection, it is interesting to note that the primary remedy for breach of contract is the award of damages rather than the relief of specific performance in the legal systems of the common law tradition.

There is, however, a great deal of uncertainty over how the courts will interpret these grounds for non-enforcement. Take, for example, an MSA containing an agreement to agree, an undertaking to make best efforts, or an undertaking conditioned on a certain contingency. It is not certain whether such an MSA will be deemed to be binding under Article 5(1)(b)(ii). Nor is it certain whether obligations to be performed in a reasonable manner or to the satisfaction of the other party will be deemed to be clear under Article 5(1)(c)(ii).

The uncertainty over interpretation may work to the disadvantage of the party resisting enforcement because the Convention puts the burden of proof on that party.[6] Even if that party manages to discharge the burden of proof, the Convention allows the courts to enforce the MSA by discretion.[7]

The plight of the party resisting enforcement deepens if a narrow reading is given to these provisions. It has been suggested that the "according to its terms" restriction under Article 5(1)(b)(ii) should be read as meaning that a court may only look at what is explicitly stated within the four corners of the MSA;[8] that Article 5(1)(c)(ii) should be considered to apply only in what will be a fairly unlikely situation where the MSA is so confusing or ill-defined that the court could not confidently enforce it;[9] and that Article 5(1)(d) should be considered to apply only to the situations where enforcing an MSA would be directly inconsistent with its terms.[10]

If the courts take such a narrow reading, many of the MSAs that the party resisting enforcement did not expect or assume to be treated as directly enforceable may end up being so treated by the courts under the Convention.

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6 *See* the introduction of Article 5(1).

7 As indicated by the permissive word "may" in the introduction of Article 5(1). *See also* Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 42.

8 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 45.

9 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 48.

10 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 48.

Article 5(1)(b)(i)

Under the Convention, the court before which the enforcement of an MSA is sought may refuse to grant the relief if the MSA is null and void (Article 5(1)(b)(i)). As with any contract, an MSA may be null and void if the parties' consent to it is vitiated with mistake, misrepresentation, fraud, duress, coercion, undue influence, unconscionability, or the like.

As will be examined below, there is a great deal of uncertainty over how the courts will interpret this provision. A further problem with this provision is that it may undermine the confidentiality of mediation, as it would induce the party resisting enforcement to seek and obtain a court order compelling the mediator to testify as a witness.

Uncertainty over Interpretation

The interpretation of Article 5(1)(b)(i) involves uncertainty over (1) what law is applicable to determine the validity of an MSA and (2) how the applicable law will be interpreted.

The uncertainty may work to the disadvantage of the party resisting enforcement since the burden of proof lies with that party. It may also work to the detriment of the party seeking enforcement since it may generate ancillary disputes and make the process of enforcement more lengthy and costly.

Law Applicable to an MSA

The validity of an MSA, like any contract, must be determined by reference to the law applicable to it. The Convention provides that the applicable law is the law to which the parties have subjected the MSA (Article 5(1)(b)(i)). Thus, if an MSA contains a choice-of-law clause, it will be given effect. To this extent, the law applicable to an MSA is certain.

Where the parties have made no indication of the law to which they have subjected their MSA, its validity is to be determined by "the law deemed applicable" by the court before which enforcement is sought (Article 5(1)(b)(i)). The court will apply its own choice-of-law rules to determine what law is applicable. As an MSA is a contract, the court will apply the choice-of-law rules for contract regardless of whether the underlying dispute is contractual. There may, however, be uncertainty over how a given set of choice-of-law rules will be applied.

To begin with, since MSAs are not a major type of contract, it is unlikely that there exists a choice-of-law rule specifically tailored for

them. The Rome I Regulation,[11] for example, lists specific choice-of-law rules for certain types of contracts, such as contracts for the sale of goods and for the provision of services (Article 4(1)). The list does not contain MSAs. Under the Regulation, where the contract in question is not covered by the list, it is to be governed by the law of the country where the party required to effect the "characteristic performance of the contract" has his habitual residence (Article 4(2)). Since MSAs often contain mutual concessions, it may be unclear which performance is characteristic. For the cases where the applicable law cannot be determined pursuant to paragraphs 1 or 2 of Article 4, the Regulation provides for a fall-back rule, which says that the contract is to be governed by the law of the country with which it is most closely connected (Article 4(4)).

This rule, too, raises a difficult issue of interpretation, when applied to MSAs. While the evaluation of closeness depends on all the circumstances of the case, the places where the mediation was conducted or where the MSA was concluded would not be significant. The country whose law governs the underlying dispute would be a more significant factor but will not be determinative. While the illustration above is based on the Rome I Regulation, it is not difficult to imagine that other sets of choice-of-law rules would also involve uncertainty over how they are to be applied to MSAs.[12]

Interpretation of the Applicable Law

Even where the difficulty in ascertaining the applicable law is overcome, there may be uncertainty over how the applicable law is to be interpreted.

Under Japanese law, for example, the Civil Code provides that a contract in general is null and void for mistake under certain conditions (Article 95). This provision is also applicable to MSAs. With respect to a contract for settlement, in particular, the Civil Code provides that its terms override any contradicting pre-existing facts (Article 696). Exactly how these two provisions square with each other is a question of interpretation that involves some difficulty.

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11 Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

12 At an early stage of preparation for the Convention, the Working Group of the UNCITRAL noted uncertainty regarding the law applicable to MSAs ("Report on the work of sixty-third session" A/CN.9/861 (2015)). It doubted whether the place of mediation and the place of conclusion of the MSA would have any relevance to the determination of the law applicable to the MSA (paragraph 100) and noted that the law governing the underlying contract might be different from the law applicable to the MSA (paragraph 101).

In the United States, the contract law principles of many jurisdictions are not fit to take into account the impact of the third-party mediator on the meeting of minds of the two negotiating parties.[13] The same feature is presumably shared by a number of other legal systems. Such legal systems may not yield a clear answer to the validity of an MSA concluded in situations like the following scenario.

A hypothetical scenario: A mediation is conducted over the amount of damages owed by the respondent to the claimant. The claimant tells the mediator in a caucus that it is ready to settle at $50,000. At the same time, the claimant indicates a lower figure as its bottom line but askes the mediator to keep it secret from the respondent. Suspecting that the respondent will always try to settle for less than the figure conveyed from the claimant, the mediator tells the respondent in a caucus that the claimant will settle at $60,000. Hearing that figure, the respondent offers to settle at $50,000. The claimant accepts the offer and an MSA is accordingly concluded at $50,000.

Later, the respondent comes to suspect that the mediator may have manipulated figures in the caucus sessions. Forming the view that settlement at a lower figure may have been possible, the respondent refuses to honor the MSA. The claimant brings proceedings to enforce it under the Convention. The respondent resists enforcement, alleging that the MSA is null and void because his consent to $50,000 was vitiated by the mediator's manipulation.

Risk of Undermining the Confidentiality of Mediation

Since the party resisting enforcement has the burden of proof under the Convention, if the dispute turns on the facts, that party may seek a court order compelling the mediator to give testimony as a witness of the facts. Thus, for example, the respondent in the hypothetical scenario above may seek the mediator's testimony concerning the bottom line of the claimant, if it is a point of relevance under the law applicable to the MSA.

The mediator may resist being called as a witness by citing his duty of non-disclosure. That duty may be founded on a statute or a contract concluded with the parties. It is often a key to enhancing the chance of settlement as it enables each party to share candidly the facts, views, and sentiments with the mediator.[14] No similar feature exists in other procedures

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13 Anderson, "Supporting party autonomy in the enforcement of cross-border mediated settlement agreements: A brave new world or unchartered territory?" (2018) *Privatizing Dispute Resolution and Its Limits* 1 (https://ink.library.smu.edu.sg/sol_research/2909), paragraphs 35–39.

14 Mr Justice Briggs, "Mediation privilege?" (2009) 159 *New Law Journal* 550.

of dispute resolution like arbitration or litigation. The mediator's duty of non-disclosure is one dimension of the confidentiality of mediation, i.e., the confidentiality of information communicated in the course of mediation.[15]

It must be noted that the confidentiality of mediation is far from absolute. Whether, and in what circumstances, mediators are compelled to testify before a court are a matter of procedure and accordingly depends on the *lex fori* (the law of the forum). Thus, in the jurisdictions of the United States where the Uniform Mediation Act has been adopted,[16] mediators may decline to testify in proceedings to enforce an MSA.[17]

The Model Law, on the other hand, provides that the confidentiality of mediation is subject to an exception where disclosure is required for the purposes of enforcement of a settlement agreement.[18] A similar exception is provided in the EU Mediation Directive.[19] The rationale is the notion that where there is an allegation that fraud or duress vitiates an MSA, the need to ascertain the truth outweighs the need to uphold the confidentiality of mediation.

It has thus far not been a frequent occurrence for mediators to be compelled to appear in court as a witness.[20] It may be because where the plaintiff relies on an MSA merely as a contract, the goal is to substantiate its claim and the MSA is but one piece of evidence. Where the defendant alleges that the MSA is null and void, the plaintiff may not make it the focal point of dispute if other evidence supports its claim.

Where, on the other hand, the enforcement of an MSA is sought under the Convention, the validity of the MSA may become the focal point. Since the party resisting enforcement has the burden of proof, it would have no hesitation to seek a court order compelling the mediator with

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15 *See* Boulle, "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework" (2014) 7(1), *Contemporary Asia Arbitration Journal* 35, 63.

16 It is enacted in twelve States as of the time of writing (July 2019).

17 Uniform Mediation Act, Section 6(c). The parties are, on the other hand, compellable to provide evidence in certain circumstances: Uniform Mediation Act, Section 6(b)(2).

18 Model Law, Article 10.

19 Article 7(1)(b) of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. In the United Kingdom, this exception was implemented by Rule 78.26(3)(c) of the Civil Procedure Rules. For case law to a similar effect, *see*, e.g., *Unilever Plc* vs. *The Procter & Gamble Co.* [2000] 1 WLR 2536 and *Farm Assist Limited* vs. *The Secretary of State for the Environment, Food and Rural Affairs* (No. 2) [2009] EWHC 1102.

20 Lang, "Mediator — Subpoenaed?" (2012) (https://www.mediate.com/articles/LangM3.cfm), introduces an episode where the author was compelled to give evidence on the mediation process he had conducted as the mediator but notes that the experience was the first time in thirty years.

a view to obtaining testimony to support its allegation that the MSA is null and void. Consequently, in a greater number of cases, mediators will be compelled to appear in court as a witness. The confidentiality of mediation may thus be undermined.

Article 5(1)(e)

The court before which the enforcement of an MSA is sought may refuse to grant the relief where there was a serious breach by the mediator of standards applicable to the mediation, without which breach the party resisting enforcement would not have entered into the MSA. The standards of mediation may cover issues such as the independence and impartiality of the mediator, confidentiality, and fair treatment of the parties.[21]

As will be seen below, this provision is problematic. Firstly, whether it is needed is questionable. Secondly, there is a great deal of uncertainty over how the courts will interpret it. Thirdly, it may have deleterious effects on the important attributes of mediation: thus, it may breed "due process paranoia"; it incubates the risk of depriving mediation of diverse approaches; and it may undermine the confidentiality of mediation.

Need for this Provision

It is questionable whether Article 5(1)(e) is needed.[22] Unlike an arbitral award, which is binding on the parties irrespective of whether they like it, an MSA is a product of voluntary agreement of both parties who had the freedom to walk away at any time for whatever reasons. While the binding character of an arbitral award necessitates the *ex post* verification of due

21 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 51.

22 Anderson, "Supporting party autonomy in the enforcement of cross-border mediated settlement agreements: A brave new world or unchartered territory?" (2018) *Privatizing dispute resolution: trends and limits* 1 (https://ink.library.smu.edu.sg/sol_research/2909), at paragraphs 39–55, considers it apt and prudent for the Convention to include this grounds for non-enforcement because the current contract law of many jurisdictions in the United States is unfit to be applied to MSAs. Though this might be a good observation from the U.S. perspectives, the provisions of an international convention cannot be defended as compensating for the inadequacy of any particular legal system.

process,[23] the voluntary nature of an MSA may be considered to cure any deficiencies or inadequacies in the conduct of the procedure.

It is arguable that to treat an MSA as directly enforceable, it should in principle be enough if (A) neither parties' consent is vitiated,[24] (B) both parties intend it to be treated as directly enforceable, (C) it does not violate public policy and (D) the subject matter of the dispute is capable of settlement by mediation. Under Article 5 of the Convention, condition (A) is reflected in sub-paragraphs (a) to (d) of paragraph (1); condition (C) is reflected in paragraph (2)(a); and condition (D) is reflected in paragraph (2)(b). It is the position of this article that an opt-in agreement should be required, which would satisfy condition (B). Nothing in this paradigm of thinking, therefore, would require the additional ground for non-enforcement stipulated in Article 5(1)(e).[25]

In a majority of contracting States, the Convention will take effect without any implementing legislation. If, however, a State implements the Convention through legislation, it would do well to omit Article 5(1)(e). To do so would not constitute a violation of the Convention, since the word "may" in Article 5 may be interpreted as indicating that the refusal of enforcement under the stipulated grounds is permissive rather than mandatory.[26]

Uncertainty Over Interpretation

In General

There is a great deal of uncertainty over how the courts will interpret Article 5(1)(e). Specifically, the uncertainty concerns (1) what standards are applicable; (2) how the applicable standards will be interpreted; and (3) how causation may be established between the breach of the standards and the parties' decision to enter into the MSA.

As noted earlier, uncertainty over the interpretation of grounds for non-enforcement may work to the disadvantage of the party resisting

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23 *See* sub-paragraphs (b) and (d) of Article V(1) of the New York Convention.

24 An alternative model would be to introduce a scheme of *ex ante* accreditation of the mediator or mediation institution as a substitute for verifying the validity of an MSA. It would, however, not be possible for an international instrument like the Convention and the Model Law to rely on the accreditation scheme of any specific country. This model would not, therefore, be viable unless an internationally recognized accreditation scheme is firmly established.

25 The same may be said of Article 5(1)(f), which makes a failure to disclose information relating to a mediator's independence another ground for non-enforcement.

26 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 42.

enforcement since the burden of proof lies with that party. It may also work to the detriment of the party seeking enforcement since it may generate ancillary disputes[27] and make the process of enforcement more lengthy and costly.

Set of Standards Applicable to a Mediation

It has been suggested that a serious breach of the standards applicable to the mediation may only be relied upon to resist enforcement if there are in fact "applicable" standards.[28] While this interpretation would not be impossible, it is not obvious from the text of Article 5(1)(e), which may be read as presupposing that every mediation is subject to some standards.

The Convention makes no indication as to what specific set of standards is applicable. Since mediation is a consensual procedure, it would be safe to assume that where the parties choose a specific set of standards by which the mediator agrees to abide, the chosen set of standards will be applicable. The parties engaged in an *ad hoc* mediation may choose, for example, the UNCITRAL Conciliation Rules (1980). The parties engaged in an institutional mediation will be deemed to have chosen the mediation rules of the given institution, which may cover mediation standards.[29]

Where the parties have made no choice, it is not clear what specific set of standards is applicable. If the mediator is affiliated with a professional body that provides for an ethical code of conduct applicable to its members, would it be deemed to be the source of the standards applicable to the mediation? If all the sessions of the mediation are held in one place, would the law of that place be deemed to be the source of the applicable standards?[30] What if the mediation sessions occur in a number of places? These questions remain open.

The uncertainty over what specific set of standards is applicable exists partly because the concept of "seat of mediation" is not as well

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27 *See also* Maia, Mason, and Masucci, "The passage of a Convention on the enforcement of mediation settlements for cross-border commercial disputes" (2018) (https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=C1D7D436-D5B8-44DF-BBB9-0C399EE4A176), who observe that Article 5(1)(e) may become a future quagmire.

28 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 51.

29 For example, the CEDR Code of Conduct for Third Party Neutrals (2018).

30 If that legal system has adopted the Model Law or the Model Law 2002, these instruments will become the source of the mediation standards.

established[31] as that of "seat of arbitration". The absence of established practice of designating such a place is in fact cited as a reason for not using it as the basis for triggering the application of the Model Law 2002.[32] It has resulted in there being no objective way of determining when the Model Law is applicable.[33]

Interpretation of the Applicable Standards

Even where the difficulty in ascertaining the applicable set of standards is overcome, uncertainty over how the applicable standards are to be interpreted may remain.

The well-known sets of standards use broad expressions. Thus, for example, the Model Law speaks of "fair treatment of the parties",[34] the UNCITRAL Conciliation Rules speak of "independent and impartial manner" and "principles of objectivity, fairness and justice",[35] the European Code of Conduct for Mediators[36] speaks of acting "with impartiality",[37] and the Model Standards of Conduct for Mediators[38] speaks of "impartial manner".[39] With these broad expressions, they all seem to tolerate a wide range of mediator's conducts, embracing both the evaluative and facilitative approaches.

These sets of standards also allow a mediator to meet and communicate with each party separately.[40] It is indeed usual for a mediator to have separate meetings (caucus sessions) with each party.[41] This is a reflection of the difference between mediation and arbitration with respect to the conception of fairness. Since a mediator does not have to be impartial in

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31 The concept is, however, not unknown. *See*, e.g., Article 16 of the Swiss Rules of Commercial Mediation (2007).

32 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 30.

33 For critical observations, *see* Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th ed., 2019), at p. 567; and Van Ginkel, "The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal" (2004) 21(1) *Journal of International Arbitration* 1, 14.

34 Model Law, Article 7(3).

35 UNCITRAL Conciliation Rules (1980), Article 7.

36 Developed under the auspices of the European Union.

37 European Code of Conduct for Mediators (2004), Clause 2.2.

38 Adopted jointly by the American Arbitration Association and the Association for Conflict Resolution and approved by the American Bar Association.

39 Model Standards of Conduct for Mediators (2005), Standard II.B.

40 Article 8 of the Model Law; Article 9 of the UNCITRAL Conciliation Rules (1980); clause 3.1. of the European Code of Conduct for Mediators (2004); and Standard VI.A.3. of the Model Standards of Conduct for Mediators (2005).

41 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 57.

the same way as an arbitrator,[42] a mediator is not required to devote equal amount of time to caucus sessions with each party.[43]

These sets of standards, however, lack precision. If, for example, a mediator acts in the way described in the hypothetical scenario above, it is uncertain whether it would constitute a serious breach of the standards under any of these sets of standards.

How to Establish Causation

To resist the enforcement of an MSA under Article 5(1)(e), it is not enough to show a serious breach of the applicable standards but it is also necessary to prove that the party resisting enforcement would not have entered into the MSA without the breach.

It has been suggested that this proof of causation should be viewed as a high bar that may only be overcome in extraordinary circumstances.[44] It may, however, be wondered what the basis for this interpretation is. There is, in fact, no objective yardstick for establishing the causation. Unlike an arbitral award or a court judgment, which is produced through the application of law to the facts, an MSA is merely an agreement.

Whether or not to enter into an MSA can depend on a myriad of considerations. Whether the terms of the MSA truly reflect the strength of each party's legal positions will not always be decisive. Depending on the circumstances, a more significant factor may be whether the terms will promote wider interests of each party. An emotion, too, may play a part. The party resisting enforcement would not necessarily need to offer a rational law-based explanation for saying that, had it not been for a serious breach of the applicable standards, it would not have entered into the MSA. To prove that, it might just be sufficient in some situations to allude to the possibility of a change of mind.

For example, in the hypothetical scenario above, assuming that the mediator's conduct constitutes a serious breach of the applicable standards, if the respondent wants to prove that it would not have entered into the MSA had it not been for the breach, it might possibly be enough to

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42 *See* Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 50. The equal treatment of parties is a strict requirement in arbitration. See, e.g., Article 18 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

43 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 55.

44 Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, at p. 52.

say that if it had been informed that the claimant was ready to settle at $50,000, it would have been motivated to try to settle at a lower sum.

Risk of Breeding "Due Process Paranoia"

The possibility of review under Article 5(1)(e) may give the mediators concern that their conduct of mediation could be criticized later by the courts at the enforcement stage. The concern may be compounded by the uncertainty over how the courts will interpret this provision. Risk-averse mediators would be led to stay in the safe zone, confining themselves to take only conservative approaches.

The state of mind just described would be the mediation version of "due process paranoia", a phenomenon which is widely known in arbitration.[45] In arbitration, it is considered to be a cause for the prolongation of proceedings and the escalation of costs. The same problem would infest mediation if such paranoia sets in. Since the strength of mediation lies in its speed and cost-effectiveness, "due process paranoia" would be more damaging in mediation than in arbitration. Such paranoia could also diminish the prospect of settlement, since the mediator may be inhibited from trying out innovative steps that may be necessary to break a deadlock.

Risk of Depriving Mediation of a Diversity of Approaches

Once it is widely recognized that "due process paranoia" may be exacerbated by the uncertainty over how the applicable mediation standards will be interpreted, the framers of mediation standards may come under pressure to use more precise expressions to describe the required and permissible conduct of mediators. It could eventually lead to the convergence of mediation standards.[46] That would not be a salutary development because it would deprive mediation of diverse approaches.

The success of mediation often depends on the flexible use of diverse approaches since different approaches are effective in different circumstances. Thus, a bit of arm-twisting may facilitate a settlement and

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45 *See*, e.g., Queen Mary University of London, White & Case, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", at p. 10.

46 Anderson, "Supporting party autonomy in the enforcement of cross-border mediated settlement agreements: A brave new world or unchartered territory?" (2018) *Privatizing Dispute Resolution and its Limits,* paragraph 51, predicts that the Convention could provide momentum for mediation standards to converge (https://ink.library.smu.edu.sg/sol_research/2909).

so may a kind of manipulation as described in the hypothetical scenario above. There is even a research[47] concluding that "hostile mediators" can increase the likelihood of settlement.

Risk of Undermining the Confidentiality of Mediation

Since the party resisting enforcement has the burden of proof under the Convention, Article 5(1)(e) may induce that party to seek a court order compelling the mediator to testify how he conducted the mediation. Thus, for example, the respondent in the hypothetical scenario above may seek to uncover whether the mediator truthfully conveyed the figure he had heard in a caucus with the claimant. As mediators may be compelled to testify in court in a greater number of cases, the confidentiality of mediation may be undermined.

Spectrum of Sophistication

The Convention is only applicable to international commercial mediations.[48] Consumer or employment disputes, in particular, are excluded.[49] Many international commercial mediations are highly sophisticated, with both parties being aided by a competent team of lawyers and other experts. It should not, however, be forgotten that there are various shapes and sizes to international commercial mediations. Towards the other end of the spectrum, there are less sophisticated mediations, involving small businesses represented by inexperienced counsels. As explained below, the Convention would look very different from the opposite ends of the spectrum.

Thus, with the support of competent experts, the parties engaged in a highly sophisticated mediation are capable of crafting their MSA in legally tight terms. If they conclude such an MSA, they are likely to expect it to be treated as directly enforceable and would wish to avail themselves of the regime of the Convention. Depending on the circumstances, they are also capable of deliberately using ambiguous or nuanced terms with the contrary intention. On the other hand, the parties engaged in a less sophisticated mediation tend not to be so well advised of the legal niceties and accordingly are less likely to have an expectation or assumption that their MSA should be treated as directly enforceable.

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47 Zhang, Gino, and Norton "The Surprising Effectiveness of Hostile Mediators" (2017) 63(6) *Management Science*, at p. 1972.

48 Convention, Article 1(1).

49 Convention, Article 1(2).

Where an MSA results from a highly sophisticated mediation, the uncertainty over how the courts will interpret Article 5(1)(b)(i) may be abated. Being aided by skilled lawyers, the parties would be competent to draft an impeccable MSA with a full understanding of its implications. It would hardly be convincing for them to maintain that their consent to the MSA is vitiated. Where, on the other hand, the MSA results from a less sophisticated mediation, if the party resisting enforcement argues that its consent has been somehow vitiated, the argument cannot be dismissed as fanciful.

The parties engaged in a highly sophisticated mediation would be capable of taking steps to avert some of the difficulties or problems arising from the application of the Convention. Thus, they could mitigate the uncertainty over the interpretation of Article 5(1)(b)(i) by inserting an express choice-of-law clause in their MSAs. They could also commence their mediation with an agreement to a specific set of mediation standards with a view to alleviating the uncertainty over the interpretation of Article 5(1)(e). If they so wish, they could also agree, before or after reaching an MSA, to waive any violation of the applicable standards. The parties engaged in a less sophisticated mediation would not have the foresight to take such steps.

When evaluating the Convention, it is important to take into account the perspectives from both ends of the spectrum. With that in mind, we will now turn to consider how the opt-out option will actually work and evaluate the opt-in model.

Opt-Out Option

As mentioned earlier, the Convention effectively allows the parties to opt out of its regime by so indicating in their MSA under Article 5(1)(d). This opt-out option is largely unproblematic when viewed from the perspective of highly sophisticated mediations. As will be seen below, however, it will not adequately protect the interest of the parties who prefer to stay outside the Convention's regime but fail to procure the agreement of their counter party. Nor will it adequately protect the interest of the parties who are not well informed.

Party Who Fails to Procure Counter Party's Agreement to Opt Out

Since the intention to opt out must be indicated in an MSA, the opt-out option can only be taken by an agreement of both parties. This means that

even where one of the parties prefers to stay outside the regime of the Convention, it is applicable if the other party does not agree to opt out.

It seems contrary to the character of mediation as a process of self-determination that the regime of the Convention cannot be derogated from without the consent of both parties. The default position should be that an MSA only has the effect as an ordinary contract because that is the effect that the parties to any contract would expect. The direct enforcement under the Convention is a special treatment that would not result naturally from the fact that an MSA is a contract.

Parties Who Are Not Well Informed

The opt-out option does not adequately protect the interest of the parties who are not well informed. The idea of opting out of the Convention may not occur to such parties. Even if it does, they may not be able to make an informed decision to opt out by properly weighing up the benefit of the Convention against the difficulties and problems sketched out earlier in this article.

Thus, they may find themselves in the position of resisting enforcement without ever having contemplated that possibility or ever having been advised of the meaning of direct enforcement as distinguished from the normal effect of a contract. They may find themselves in the position of grappling with the uncertainty over how some of the grounds for non-enforcement may be interpreted without ever having expected the difficulty. And they may find themselves in the position of struggling to discharge the burden of proof without ever having anticipated that the burden will be imposed upon them.

Opt-In Model

As seen earlier, the contracting States may elect to enter the reservation under Article 8(1)(b) in favor of the opt-in model by declaring that they will apply the Convention only to the extent that the parties to an MSA have agreed to its application. The reservation may be entered into at the time of ratification or thereafter.

The opt-in model would obviously protect the interest of the parties who prefer to stay outside the Convention's regime. As seen below, it would also serve well the interest of the parties who wish to submit to the Convention's regime. Even in the situations where there are parties who fail to opt in, this model is defensible.

Parties Who Wish to Opt In

The opt-in model will serve well the interest of the parties who wish to submit to the regime of the Convention. As seen earlier, such parties are likely to be engaged in a highly sophisticated mediation. The opt-in model would not get in their way since concluding an agreement to opt in would only be a short step for them. Aided by competent lawyers, such parties should be able to opt in with a full appreciation of what the application of the Convention will entail.

Thus, they would be conscious that the uncertainty over how the courts may interpret some of the grounds for non-enforcement might generate ancillary disputes, making the process of enforcement lengthy and costly. They would also be aware that the confidentiality of mediation would not be absolute as they should be able to anticipate that the party resisting enforcement may seek and obtain a court order compelling the mediator to testify as a witness. They should also be able to embrace the possibility that the "due process paranoia" might set in, with the result that the mediator might shy away from taking anything but a conservative approach.

Parties Who Fail to Opt In

A party may fail to opt in if it is unaware of the need to opt in or if it cannot procure an agreement of the other party to opt in. The parties who fail to opt in will obviously miss out on the benefit of the Convention. It should not, however, be regarded as a sufficient or good reason to criticize the opt-in model.

In the first place, an MSA is not in as much need for direct enforcement as an arbitral award. Unlike an arbitral award, which is binding on the parties, an MSA is a product of a voluntary agreement of both parties. They will, therefore, usually honor it unless they come to regret the terms they have agreed to or they have signed it purely as a delaying tactic.

Secondly, the direct enforcement under the Convention is a special treatment given to the qualifying MSAs. It would be consistent with the character of mediation as a process of self-determination to require a fully informed consent from both parties as a condition for obtaining the special treatment.

Thirdly, the benefit of the Convention does not come free. As seen earlier in this article, there are a number of difficulties and problems that may arise from the application of the Convention. The Convention should, therefore, be applied only where both parties elect to submit to its regime with a full appreciation of its implications. It may accordingly be said that the opt-in model safeguards the interest of the parties who are unaware of

the need to opt in[50] as well as the interest of the parties who do not wish to submit to the Convention's regime.

Conclusion

The Convention aims to promote mediation by facilitating the enforcement of MSAs. The promotion of mediation is a worthy cause particularly today as arbitration has become slow and costly. Mediation can serve as a faster and less expensive alternative to arbitration.

The Convention is, however, not free from difficulties and problems. Thus, the provisions laying down the grounds for non-enforcement may not be interpreted broadly enough to carve out all the MSAs that the party resisting enforcement did not expect or assume to be treated as directly enforceable. There is a great deal of uncertainty over how the courts will interpret some of the provisions, which may work to the disadvantage or detriment of both parties. There is a danger that the application of some of the provisions may have the effect of undermining the important attributes of mediation such as confidentiality, the efficiency of procedure, and the diversity of approaches.

Given that the Convention offers benefit in the form of facilitating the enforcement of MSAs, but its application may also give rise to some difficulties and problems, it is important to ensure:

(1) Where both parties engaged in a mediation wish to avail themselves of the benefit of the Convention, they will do so with the full awareness of the difficulties and problems that may arise;
(2) Where either of the parties engaged in a mediation prefers to stay outside the Convention's regime, it will be able to do so, so that it will not, against its will, be put in the position of having to resist enforcement under the Convention; and
(3) Where either of the parties engaged in a mediation is not sufficiently well informed to properly weigh up the benefit against the difficulties and problems, it will be left outside the Convention, so that it will not be unwittingly put in the position of having to resist enforcement under the Convention.

The parties engaged in a highly sophisticated mediation will find themselves often in situation (1) but maybe sometimes in situation (2).

50 *See also* Deason, who stresses the need to protect parties with less sophisticated attorneys from unfair surprise, in "Agreements in International Commercial Mediation: A New Legal Framework", 22 *Disp. Resol. Mag*. 32, 36 (2015).

The parties engaged in a less sophisticated mediation may find themselves in situation (3).

The opt-out option available under Article 5(1)(d) will give rise to no difficulty in situation (1) since the parties in that situation would not wish to take that option. The opt-out option, however, does not adequately protect the interest of the parties in the situations (2) and (3).

On the other hand, the opt-in model, which the contracting States may adopt by entering into the reservation under Article 8(1)(b), would operate fine in all these situations. It is accordingly concluded that when States ratify the Convention, they should enter into the reservation in favor of the opt-in model. Likewise, when States implement the Model Law in their legal systems, they should modify it to adopt the opt-in model.